

Inside Appellate Courts

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The Impact of Court Organization
on Judicial Decision Making in the
United States Courts of Appeals

Jonathan Matthew Cohen

Ann Arbor

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To my parents, Avrum and Susan Cohen, whose intellectual curiosity helped to inspire this book and whose constant love and support have inspired far more than they can know

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|| Preface and Acknowledgments

The story of the U.S. Courts of Appeals in the late twentieth century is the story of an organization in flux. Traditionally, as Justice Benjamin Cardozo long-ago described,¹ judicial decision making has been viewed as an isolated, lonely occupation. In that view, a judge renders decisions only after pouring over legal tomes in a sagelike attempt to discover the law. However, under the burden of a perceived crisis caused by overwhelming caseload pressure and rapidly increasing organizational complexity and growth, this traditional role of the appellate judge faces a terrible challenge. How can a system constitutionally constructed to favor individual, solitary, and sagelike decision making continue to increase its productivity to accommodate more cases in less time?

How courts have answered that challenge has become one of the most significant and persistent questions regarding the administration of justice in the United States.² Yet the ways that the courts have responded to that challenge, as well as the success of those responses, remain veiled in ignorance and mystery. It is well established that the American judiciary now has more judges with larger staffs than at any time in history. And it is commonly accepted that changes in the size and scope of the judiciary have negatively affected the vitality and collegiality of the courts. With the caseload albatross hanging from their necks,

1. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); see also Owen Fiss, *The Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442, 1442 (1983).

2. See, e.g., William L. Reynolds & William M. Richman, *Justice and More Judges*, 15 *J.L. & POL.* 559 (1999); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996); Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 *WISC. L. REV.* 11 (1996); WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* (1990); Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 *U. FLA. L. REV.* 225 (1985) (summarizing proposals for changing the courts of appeals to accommodate an increased caseload); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

judges are now perceived as unable to live up to the image of Justice Cardozo's mythic lone judicial sage. In spite of these perceptions, however, there have been few empirical studies of courts and no comprehensive empirical studies of the U.S. Courts of Appeals. Accordingly, no one knows how the changing face of the judiciary has affected the ways that judges make their decisions and the quality of those decisions. Nevertheless, through this veil of ignorance, politicians, pundits, and scholars continue to suggest radical changes to the judicial system without fully understanding the potentially serious effects of such changes.

This book employs an organizational-behavior perspective to explain empirically how changes such as the increasing caseload burden, the increasing reliance of judges on their law clerks and other staff, and the courts' increasing organizational complexity have affected the ways that judges make decisions. As Professor Owen Fiss of Yale Law School has observed, "an account of the judiciary, such as Cardozo's, that focuses exclusively on the agony of a lonely, isolated judge seems somewhat dated. Today the judiciary must be seen as a large scale, complex organization."³ This book seeks to show how the way that a court functions as an organization affects its ability to accommodate its increasing workload.

This book begins with the simple observation that judges on the courts of appeals make decisions in groups. That observation suggests that judges are affected by the same social factors that affect any group in decision making. That simple observation throws into doubt the purely rational, individualistic nature of the judicial process assumed by social scientists and legal philosophers alike. It throws into doubt the assumption that appellate judges ever could make their decisions in the solitary ivory tower of intellectualism assumed by Cardozo's myth.

Two important facts flavor this relatively simple starting point. First, social scientific studies of the courts are rare and relatively primitive. Only a single book approaches the courts as a complex organization, and it focuses exclusively on the U.S. District Courts, in which the dynamic of the decision-making process significantly differs because judges do not decide cases in groups.⁴ There only are a small number of discussions of the internal functioning of the appellate courts, almost all of them written by single judges or former law clerks without the benefit of empirical research. Indeed, as J. Woodford Howard has claimed, "Circuit judges are surprisingly unaware of the practices of their fellows across the country."⁵ I have found that circuit judges are surprisingly unaware of the practices of their brethren even within their circuits.

3. Fiss, *supra* note 1, at 1442.

4. See Heydebrand & Seron, *supra* note 2; see also Evan H. Caminker, *Sincere and Strategic Voting Norms in Multimember Courts*, 97 U. MICH. L. REV. 2297, 2298 (1999) (emphasizing effects of group decision making on judicial product).

5. J. Woodford Howard, *Decision-Making Procedures in U.S. Courts of Appeals for the 2d and 5th Circuits*, Research Report Number 1, Federal Judicial Center (1973).

Second, the interaction within a small group of judges is only the tip of the iceberg. In fact, appellate judges ordinarily make their decisions not only in panels consisting of groups of judges but also in groups within their chambers, including law clerks and other staff. Moreover, as has recently been the subject of some controversy,⁶ a judge's law clerks interact with clerks from other chambers. That observation is little more than a rediscovery of Justice Lewis Powell's observation that an appellate court is akin to a group of "small independent law firms" in that each judge's chambers contains a judge who acts as a senior attorney and delegates tasks to law clerks who act as his associates.⁷ But that is not all. Significant to the judicial organization are the central staff members, the court clerks, the circuit executive, and numerous other support staff members. The courts of appeals act far more like an organization than even Justice Powell had suggested.

Central to the organization of the appellate courts, therefore, is the balance between the autonomy of the individual judges and the high degree of interdependence that forces judges and their staffs to compromise and communicate in a manner unknown in the district courts. In that critical way, the courts' organizational structure resembles ordinary large multidivisional corporations, and that organizational structure is entirely foreign to Cardozo's concept of the lonely, isolated, solitary judge.

This book applies the analogy between courts of appeals and typical multidivisional organizations to explore the significance of the tension between the autonomy of the independent appellate judges and the task interdependence of judges on collegial appellate courts. That tension is complicated because, unlike large multidivisional corporations, the appellate courts lack any central administrative office to coordinate the interaction among the disparate chambers. Accordingly, the question at the heart of this book is how that balance is maintained in the absence of a central administrative office.

This book answers that question by observing that even as the unique organizational morphology of the court creates the critical tension between autonomy and interdependence, organizational features of the appellate courts serve

6. See, e.g., Nadine J. Wichern, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621 (1999); EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998); see also Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to our Understanding of Law Clerks at the U.S. Supreme Court*, 25 L. & SOC. INQUIRY 185 (2000).

7. Lewis Powell, *What the Justices Are Saying . . .*, 62 A.B.A. J. 1454, 1454 (1976) ("The Court does have strong institutional characteristics, but it is perhaps one of the last citadels of jealously preserved individualism. To be sure, we sit together for the arguments and during the long Friday conferences when votes are taken. But for the most part, perhaps as much as 90 per cent of our total time, we function as *nine small, independent law firms*. I emphasize the words *small* and *independent*" [first emphasis added, second and third emphases in original]).

to maintain an effective balance between those characteristics. This work posits that diverse elements, including formal, structural, and institutional aspects, have enabled the court to navigate the treacherous convergence of the court's discrepant organizational characteristics. The balance among these elements can serve as a natural safeguard against the malevolent effects of the court's changing environment and caseload. A radical change in the courts' organizational structure has the potential to disrupt this fine balance and cause more harm than good. Accordingly, this book concludes that the best defense against those malevolent effects is to preserve a balance by allowing the courts themselves to implement slow evolutionary changes.

This book would not have been completed without the support and assistance of many individuals, foremost among them the members of my family. My parents, to whom this work is dedicated, have provided moral, emotional, and financial support throughout the research and writing of this book. My wife, Jodi Birk Cohen, has been a stalwart source of support without which this book never could have been completed. I also would like to express my deep gratitude to my brother, Jordan Cohen, for the many fruitful conversations that clarified and refined my thinking.

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