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BOOK REVIEW

How Federal Judicial Administration Came To Be the Way It Is

THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION. By Peter Graham Fish. Princeton, New Jersey: Princeton University Press, 1973. Pp. xiv, 528. \$20.00.

Differences about how the business of federal circuit and district courts should be administered—as distinguished from how their cases should be decided—down through the years have presented a persistent conflict between an ideal of national uniformity and an effort to maintain local control over administrative details. In one sense this has been a contest between reformers who have sought increased efficiency in federal judicial administration and local judges whose rallying cry was judicial independence and whose personal interest was in continuing to run things as they were accustomed within their own little domains. Occasionally patronage was involved. This did not mean, however, that the locally preferred procedures were always inefficient—sometimes they worked better in a particular district or circuit than proposed reforms would have. Still, more often than not they were less efficient. Apart from that, the lack of uniformity created difficulties for lawyers handling cases outside their own districts or circuits and for judges deciding appeals. Only the local bar and bench, acquainted with its own peculiarities, profited from the diversity.

The origins of administrative diversity are easy to understand. After United States Supreme Court Justices ceased riding circuit, there was no unifying force in the federal system. Each of the courts was left largely to its own devices. Congressional enactments dealt with few aspects of administration, and the Supreme Court did not concern itself with such matters. Thus, isolated judges developed their own rules for their courts. Once established, the local rules gave rise to vested interests, and staff members, assuming that the rules were based on law, would have been surprised to learn that the same rules were not in force in every other federal court.

It was well into the twentieth century before serious efforts were made to improve judicial administration in the United States. Dean

Roscoe Pound's famous 1906 St. Paul address¹ called attention to the problems. Herbert Harley, founder of the American Judicature Society, and a few other dedicated jurists persisted, always against heavy odds, in preaching the doctrine that justice is illusory unless efficiently administered. Chief Justice Taft knew from his executive experience the importance of organizational techniques and tried to introduce some of them in the judiciary. Yet Taft was so involved in influencing the selection of new judges that he had little time for reform of judicial administration except as it might be lobbied through Congress. Not until Warren Burger's day did another Chief Justice treat administration as a matter of major importance.² In the states, however, others had taken up the burden. Foremost among these was Arthur T. Vanderbilt,³ who as Chief Justice of New Jersey gave that state the best administered system of justice in America. Indeed Vanderbilt, together with John J. Parker of North Carolina and Harold M. Stephens of the District of Columbia, constituted the forefront of the small group of jurists that beginning in the 1930's was pressing with slow success for better judicial administration in the federal courts.

The story of that slow, limited advance is the theme of Professor Fish's book. The author is the Director of Graduate Studies in the Department of Political Science at Duke University and is a long-time student of the federal judicial system. Starting with Taft in 1922, the book presents a factual account of how some measure of administrative control has been gradually achieved in the federal district and circuit courts, always over vigorous opposition, and often with only half-hearted support from the judges who did not actively oppose it.⁴ The author had access to a wealth of original source material, including the letters and private papers of a score or more of Supreme Court Justices and circuit court judges, interviews with others, and minutes of meetings. He tells a detailed and

1. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 20 J. AM. JUD. Soc'y 178 (1937).

2. Chief Justice Hughes was interested in improved administration, but his reaction and that of his colleagues to the Roosevelt court-packing plan in the 1930's made him extremely wary of any suggestion that involved greater centralization of the federal judicial organization.

3. Associate Justice William J. Brennan, Jr., came up through the New Jersey court system as a protégé of Vanderbilt and carried forward the same interest in good administration but had less opportunity to further the cause.

4. The opening sentence in the book is: "From its inception, the hallmarks of the federal judiciary's administrative system have been independence, decentralization, and individualism." Of these, the prime virtue asserted was "independence," and, to use a frontier phrase, some of the judges were "as independent as a hog on ice."

sometimes repetitious story, seldom interrupted by his value judgments or critical analysis. Only in the brief final chapter does the author bring forth his own views, which are strongly sympathetic with the reformers' efforts to bring administrative order into the system. Thus the reader gets from the book a thoroughly documented record of the reform movement, telling who proposed and who opposed at each short step⁵ along the way.

Briefly summarized, the steps were the establishment in 1922 of the national Judicial Conference, which met annually and originally was made up of the senior judge from each circuit with the Chief Justice of the Supreme Court presiding; the gradual development and expansion of Circuit Conferences, with membership limited to the circuit judges but with guests invited, meeting usually once a year both for social purposes and to discuss circuit business; the 1939 creation of the Circuit Councils consisting of the circuit judges and acting, within each circuit, as the supervisory agency having some responsibility for the administration of the circuit and district courts; the formation in 1939 of the Administrative Office of the Federal Courts with gradually increasing responsibility for the housekeeping and management of the system; and finally, the initiation in 1967 of the Federal Judicial Center⁶ as a research and public relations arm for the whole federal judicial system. Major changes as time went on were the 1958 law providing that chief judges of the circuit courts could not hold that office beyond age 70, thus limiting the national Judicial Conference to somewhat younger judges, the gradual increase of membership to include some district and special court judges, and the slow expansion of the administrative rule-making authority of the Conference. Yet the task of reform has only begun. The author quotes former Senator Joseph D. Tydings, Jr.⁷

5. One judge who for a time was remarkably active in both proposing and opposing various measures was Martin T. Manton, then Chief Judge of the Second Circuit. His activity of course ended when he was convicted of receiving bribes in return for his judgments. See J. BORKIN, *THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS* 23-93 (1962). Manton's successor as Chief Judge of the Second Circuit was the wise and incorruptible Learned Hand, who in contrast had very little interest in administrative matters. He was inclined to let administrative problems solve themselves whenever possible.

6. A current study, FEDERAL JUDICIAL CENTER, *COMPARATIVE REPORT ON INTERNAL OPERATING PROCEDURES OF UNITED STATES COURTS OF APPEALS* (1973), shows a wide variety of administrative practices.

The National Center for State Courts was later created to serve similar state purposes, and the 2 agencies have been collaborating closely. The Advisory Council for Appellate Justice, a nonofficial body, is sponsored by the National Center but is working with both agencies.

7. Until his retirement, Tydings was chairman of the Senate Subcommittee on Im-

as saying in 1969: "Our courts are administered today in essentially the same way that they were two centuries ago." There still is no truly national system of federal courts. And although the circuits now have administrative directors to take care of judicial house-keeping chores, the chief judges of the several circuits, who are the circuits' chief administrative officers, are still designated solely on the basis of seniority rather than administrative experience or ability.

One of the most persistent and troublesome problems for the federal judiciary has been the removal, or relieving, of incompetent or misbehaving judges. Short of a criminal conviction, sanctions against misconduct are practically unavailable. Impeachment is no longer a realistic remedy. Moreover, it is unclear whether the Judicial Councils, which are the only agencies supposedly having supervisory authority in the circuits, can relieve a judge of his judicial duties.⁸ In fact, according to Professor Fish, Judicial Councils, which lack the power of subpoena, are characterized by their "passivity, not activity." The "coercive instruments" that they possess consist of "consultation, reasoned arguments and persuasion, and publicity, but not penal sanctions." With good and honorable judges, these are sufficient. For 99 judges out of one hundred no other sanctions are needed. But the hundredth judge is still there, and he is the one about whose misdeeds the public learns and whose evil reputation blackens public esteem for the whole judiciary. The national Judicial Conference's prompt adoption of rigorous financial reporting standards in 1969—after the Abe Fortas affair—and its subsequent adoption of the American Bar Association's new Standards of Judicial Conduct are obvious manifestations of federal judicial integrity. They give assurance that federal judges as a group adhere to ethical standards far higher than those that prevail among the general citizenry. But the fact remains that there is no efficient administrative machinery for dealing with the rare but notorious miscreant who flouts the standards.

The other major administrative problem in the federal judicial system derives also from the local orientation of many of the judges and courts. Some districts have much heavier dockets and longer trial delays than others, and the appellate loads in the circuits are also uneven. In addition, the geography of the circuits is based

provements in the Judicial Machinery. He is now a member of the American Bar Association Committee on Coordination of Federal Judicial Improvements.

8. See *Chandler v. Judicial Council*, 398 U.S. 74 (1969).

largely on historical accident. There is machinery for reassigning judges from their home districts or circuits to others where help is needed, but it is a slow and cumbersome process that helps in a small way, especially in emergencies, but does not meet the whole system's needs. Moreover, reassignments under the present system depend largely upon the convenience and preferences of the individual judge; there is no coordinator with authority to reassign judges from low-docket areas to courts in which their services would be more useful. Many judges would vigorously oppose any such centralized assignment power, since they prefer to stay in their own bailiwicks except for occasional temporary reassignments to interesting spots that afford something of a vacation aspect. Thus the only ultimate solution is for federal judges to be regarded as members of a national court system rather than as the heads of many small, local courts.

Two other recent developments also emphasize the necessity for unification of the federal court system. Both arise from the vast increase in case filings and from the resulting increase in appeals. One is the inability of the United States Supreme Court to give adequate attention to all appeals from the circuit courts and state supreme courts. This problem gave rise to the controversial proposal of a mini-supreme court to assume part of the load.⁹ The other development is the unfortunate increase in intercircuit conflicts,¹⁰ which leave unresolved contradictory applications of federal law. Judge Shirley Hufstedler's proposal¹¹ for a "central," or national, division of the United States Court of Appeals appears to be a possible basis for a politically acceptable solution of the problem posed by these two developments. It must be noted that Professor Fish's study stops short of presenting the mass of current discussion on these developments. The need for unification of the sprawling system is evident, however, from the administrative history that he recounts.

9. This was part of the so-called "Freund Report." See *Creation of New National Court of Appeals Is Proposed by Blue-Ribbon Study Group*, 59 A.B.A.J. 139 (1973); Freund, *Why We Need the National Court of Appeals*, *id.* at 247; Gressman, *The National Court of Appeals: A Dissent*, *id.* at 253.

10. Even intracircuit conflicts present a problem. These arise from the decisions of different 3-judge panels within a circuit. Resolution of intracircuit conflicts by en banc hearings becomes increasingly burdensome and wasteful of judicial time as the number of judges in a circuit increases along with the increase in the number of appeals.

11. See Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971). Judge Hufstedler's proposals have been substantially refined since her 1971 statement and are now being presented through the Advisory Council for Appellate Justice.

Many of the administrative ills of the federal judicial system spring from the vagaries of federal jurisdiction.¹² Professor Fish's book, quite properly, does not discuss them. These aspects of the federal courts' administrative problems are not of the judges' own making, and they must be dealt with by the Congress that established the variant areas of jurisdiction in the first place. Yet the courts cannot, by pointing to their jurisdictional difficulties, evade responsibility for the other ills that grew out of their own independence and individualistic decentralization.

The Circuit Councils cannot adequately supervise the district courts. The Circuit Conferences serve a useful function, though they vary in quality and have little control over administrative matters. The national Judicial Conference is not ideally constituted, in terms of membership criteria, to serve as the judiciary's legislative body. Beyond that, its legislative powers are limited, and its executive functioning is feeble and uncertain. The administrative offices at both the national and circuit levels do a good housekeeping job, but that is about as far as they are authorized to go. Furthermore, federal judges should not be forced to lobby in Congress for their appropriations or for desired changes, wise or unwise, in laws governing the jurisdiction and administration of their courts. Yet as the Fish study demonstrates federal judges have often done so in the past. Less of this occurs today than formerly, but even a little is too much.

The thesis of the Fish book, somewhat incidentally avowed, is that "politics" has much to do, presumably too much to do, with federal judicial administration. The historical information that makes up the bulk of the book amply documents the thesis. We are told only what has happened in the past, not what the answers should be. Yet it is clear that answers must be devised. That is where this scholarly study leaves us.

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12. See generally H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973). This book, written by one of the most knowledgeable judges on the United States Court of Appeals bench, is thoughtfully reviewed by Judge Gibbons of the Third Circuit Court of Appeals in 48 N.Y.U.L. REV. 564 (1973).

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