

## A CLOSER LOOK INSIDE APPELLATE COURTS

Bernard E. Nodzon, Jr.<sup>†</sup>

*Inside Appellate Courts, The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals.* By Jonathan Matthew Cohen. *University of Michigan Press*, 2002. 231 pages. \$55.00.

### I. INTRODUCTION

One of the hot topics in legal scholarship over the past ten years surrounds the changes in the United States Courts of Appeals. Commentators have written extensively about the growing caseloads of the courts.<sup>1</sup> They have also analyzed the increasingly important role clerks play in the judicial process.<sup>2</sup> In the end, most commentators suggest grand changes for the courts.<sup>3</sup> They claim the federal appellate process no longer serves justice and hence needs an overhaul. Some have called for a national court of appeals,<sup>4</sup> while others suggest splitting the Ninth Circuit and adding more judges to the appellate system.<sup>5</sup>

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† Law Clerk to the Hon. Donald P. Lay, United States Court of Appeals for the Eighth Circuit. B.A., University of St. Thomas, *summa cum laude*; J.D., William Mitchell College of Law, *summa cum laude*.

1. Roger J. Miner, *Book Review, Richard A. Posner, The Federal Courts: Challenge and Reform*, 46 CATH. U. L. REV. 1189, 1189 (1997) (calling the increasing caseload a crisis that has “adverse effect on the quality of justice”); Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 211 (1994) (reviewing the current case crisis in the courts of appeals).

2. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 104-11 (noting the increased reliance upon clerks and stating that delegating work to clerks negatively impacts judicial opinions); Nadine J. Wichern, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621, 628-32 (1999) (reviewing the evolution of the judicial clerk).

3. *See, e.g.*, Parker & Hagin, *supra* note 1, at 212-13 (calling for major structural changes to the federal courts).

4. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 45 (1996) (advocating for a restructuring of the federal judicial system in light of the growing caseload).

5. *See* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1607-09 (2000) (reviewing the proposals for splitting the circuits); COMMISSION ON

A new book by Jonathan Matthew Cohen, *INSIDE APPELLATE COURTS*, analyzes the courts of appeals in a different way. Instead of focusing on the perceived problems and then suggesting major solutions, Cohen embarks on an empirical study of the organizational structure of the courts. He aims to demystify the courts' organizational character, showing the reader how the organizational structure of the courts affects the final disposition of a case. From this, he makes specific conclusions about the state of the courts and ultimately concludes that the current structure of the courts allows the judges to produce high quality justice.

For his book, Cohen "gained unprecedented access to the inner workings" of the courts.<sup>6</sup> He collected data through interviews with judges, law clerks, and judges' assistants on three U.S. Courts of Appeals. He also spent approximately 2,000 hours observing the inner-workings of these courts.<sup>7</sup> Cohen had access to the courts at every level and even served as a law clerk for an anonymous judge on the Ninth Circuit.<sup>8</sup> With such extensive research, Cohen was able to test his conclusions and support his assertions about the courts.

Like other commentaries, Cohen addresses the problems of a growing caseload and increased reliance upon judicial clerks. His analysis, however, does not end by suggesting a massive overhaul of the courts. Instead, Cohen devises a more subtle solution. He claims that the organizational character of the courts will enable judges to adapt to the caseload crisis.<sup>9</sup> Even though judges may no longer resemble the historical ideal of an isolated decision-maker, these changes do not reduce the quality of justice.<sup>10</sup> In fact, these gradual reforms are exactly what the courts need, according to Cohen. His research appears to support this conclusion.

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STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: FINAL REPORT 47 (1998) (suggesting Congress should split the Ninth Circuit in subdivisions).

6. JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 16 (Univ. of Michigan Press 2002).

7. *Id.* at 18.

8. Cohen keeps all of his communications and observations anonymous. He never reveals the names of the judges. This, of course, differs from Edward Lazarus's *CLOSED CHAMBERS: THE RISE FALL AND FUTURE OF THE MODERN SUPREME COURT*, and Bob Woodward and Scott Armstrong's *THE BRETHERN: INSIDE THE SUPREME COURT*. Both of those texts were composed without authorization from the judges and caused a flurry of controversy.

9. COHEN, *supra* note 6, at 218.

10. *Id.*

## II. ANALYSIS OF INSIDE APPELLATE COURTS

Cohen begins by constructing the organizational model of the appellate courts. He describes the courts as multidivisional organizations. This means that each court divides itself into autonomous subdivisions that work interdependently to create the judicial product.<sup>11</sup> Cohen identifies three central subdivisions: the individual judge; the panel of judges voting on the outcome of the case; and the chambers of each individual judge. All three of these levels balance together to produce the decisions and opinions of the courts of appeals.<sup>12</sup>

Within this organizational structure, Cohen notes that there are built-in features that help maintain high quality justice.<sup>13</sup> These features consist of formal rules, structural rules, and cultural norms. The formal rules are rules judges use when deciding a case.<sup>14</sup> *Stare decisis*, for instance, requires that the judges obey past precedent when rendering an opinion. The structural rules set the court's agenda by determining the panel of judges to hear the case and the judges who will write the opinion.<sup>15</sup> The cultural norms provide guidelines for communication amongst judges.<sup>16</sup> Judges, for instance, may not speak to each other about a case prior to oral argument.

This organizational structure, according to Cohen, allows the courts to withstand environmental changes, like the growing case crisis.<sup>17</sup> Judges are able to adapt to environmental changes by making only slight, evolutionary alterations in their behavior. Further, this organizational structure provides safeguards against a deterioration in judicial product. Cohen says that the model "suggests that the federal courts' slow evolution has enabled them to continue to produce a similar quality of justice without sacrificing the ideals that have characterized the appellate process throughout the courts' long history."<sup>18</sup> Accordingly, Cohen believes that the current organizational structure of the courts should remain intact. Only minor changes to the courts' form and

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11. *Id.* at 37.

12. *Id.* at 30.

13. *Id.* at 34.

14. *Id.* at 39.

15. *Id.* at 213.

16. *Id.* at 215.

17. *Id.* at 219.

18. *Id.* at 218.

structure should be implemented. For Cohen, “the courts can best be served by slowly adopting relatively small changes.”<sup>19</sup> This, according to Cohen, will be the best way to ensure the courts sustain quality results.

Cohen’s ultimate conclusion seems to be that the courts of appeals are not in as much trouble as some commentators would have us believe.<sup>20</sup> He’s right. Certainly, the courts have changed over the years. Nevertheless, the changes have not deteriorated the quality of justice and have in many respects increased the efficiency and productivity of the courts. The Ninth Circuit, for instance, has instituted a pooling system.<sup>21</sup> Under this system, judges share the bench memoranda of their clerks. Instead of each chambers preparing separate memoranda for each case, only one chamber produces the memorandum and sends it to the other judges.

The pooling system has come under fire. Critics claim the system allows judges to rely too heavily upon the opinions and research of clerks. They also claim that delegation of work allows judges to be intellectually lazy. Cohen, however, reports that many judges find the system has increased their efficiency.<sup>22</sup> Judges no longer have to duplicate the initial preparation of each case. Further, the pooling system allows the judges to read an additional viewpoint on the case. As one judge notes, “I . . . send the bench memo out to the other judges . . . figuring they are entitled to a fresh look at the work of the law clerk.”<sup>23</sup> Indeed, with this system, judges are able to focus their time on the substance of the case, thereby helping the circuit efficiently administer justice.

The Ninth Circuit also utilizes the mini *en banc* procedure. Under a normal *en banc* proceeding, the entire group of active judges rehear a case. A mini *en banc* hearing only requires a majority of the judges to rehear the case. As the circuits continue to expand in the face of a growing caseload, this procedure makes it easier for judges to rehear cases.<sup>24</sup> Requiring the entire circuit to attend the rehearing creates problems of coordinating judges’ schedules and wasting judicial resources. For the Ninth Circuit, this procedure is increasingly important because twenty-eight active

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19. *Id.* at 221.

20. *Id.* at 219.

21. *Id.* at 94.

22. *Id.* at 94.

23. *Id.* at 97.

24. *Id.* at 182.

judges sit on the court. Cohen quotes one judge as saying: “I think if we had to have twenty-eight judges sit on every en banc case . . . we would not be effective. We could not use it often enough to correct the inevitable conflicts that arise.”<sup>25</sup> Indeed, the judges have accepted the mini en banc procedure as a necessary change and find it helps manage the appellate process without a major overhaul.

Another subtle change in the courts is that many circuits are producing more unpublished opinions. Scholars have criticized this practice as a way for judges to avoid the task of justifying their decisions. Cohen, however, shows there are more subtle reasons for not publishing opinions. Publishing numerous decisions on the same topic could clutter the case law.<sup>26</sup> A practitioner could become confused after seeing a wealth of cases using slightly revised language to state the same rule.<sup>27</sup> Further, limiting publication of opinions allows judges to focus on cases that merit greater attention. Cohen notes that in the circuits that produce a greater percentage of unpublished cases, the judges write a greater number of dissents.<sup>28</sup> Seemingly, the judges put more thought into the cases and produce high quality opinions when they do not spend time publishing insignificant opinions. Indeed, the increase in unpublished decisions seems to have helped judges sustain the quality of their work in the face of a greater caseload.

In the end, these subtle changes do not appear to have threatened the quality of justice. Certainly, the image of a circuit judge has changed over the years. We can no longer view the judge as an isolated sage writing and rendering opinions without the help of third parties. The organizational system of the circuits and the burden of an increasingly large caseload simply won’t allow that. Instead, scholars and politicians must patiently accept Cohen’s argument: drastic changes will not help the appellate system. Such changes may only serve to disrupt an organizational structure that appears to be able to withstand continued changes in the legal environment.

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25. *Id.* at 183.

26. *Id.* at 75.

27. *Id.*

28. *Id.*

### III. CONCLUSION

In the end, Cohen's evidence supports his conclusion that the courts of appeals should not be redesigned. Splitting the Ninth Circuit or adding a national court of appeals would likely cause unknown problems for the courts. Countless judges concur. Cohen notes that Judge Browning, the chief judge of the Ninth Circuit, has said that the risks are too great to adopt revolutionary changes.<sup>29</sup> Judge Browning says:

The Ninth Circuit is the only remaining laboratory in which to test whether the values of a large circuit can be preserved. If we fail, there is no alternative to fragmentation of the circuits, centralization of administrative authority in Washington, increased conflict in circuit decisions, a growing burden on the Supreme Court, and creation of a fourth tier of appellate review in the federal system. If we succeed, no further division of circuits will be necessary.<sup>30</sup>

It's quotes like these that make Cohen's book so compelling. His extensive excerpts from his interviews with the judges give the reader a sense of what the judges actually say about the issues. For instance, when asked about the potential problems associated with having visiting judges hear cases on the circuit courts, one judge said:

Many [visiting judges] are district judges who don't involve themselves intentionally in the work of the circuit. They just sit because they are asked to sit, and they expect the work will be done by the sitting circuit judges. They don't really contribute much. But on the other hand, there are some judges that are of a contrary mind. They do actively participate in the affairs of the court. But I don't see any choice. We must borrow judges in order to dispose of our work.<sup>31</sup>

These quotes reveal that most judges identify many of the same problems as the commentators, but the judges, like Cohen, are not so quick to call for major revisions to the courts. The judges' quotes give rational support for the Cohen's main argument and give the reader a closer look inside the appellate

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29. *Id.* at 221.

30. *Id.*

31. *Id.* at 192.

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courts. For this reason, Cohen's book is a welcome addition to the scholarship surrounding the courts of appeals.