

## BOOK REVIEW

THE POLITICS OF FEDERAL COURTS. BY RICHARD J. RICHARDSON & KENNETH N. VINES. Boston: Little, Brown & Co., 1970. Pp. xi, 180. \$3.50 paperbound.

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*The Politics of Federal Courts*<sup>1</sup> presents an uncommon approach to current paperbacks in public law in at least two respects. First, it is not an edited reader, but contains a considerable amount of original analysis. Second, it has relatively little to say about the United States Supreme Court. Although the latter may seem heretical to some, the late Judge Jerome Frank would undoubtedly have been pleased with this lack of total dedication to what he termed "the upper court myth."<sup>2</sup> Instead, the authors choose to center their inquiry on Frank's "centers of courthouse government"<sup>3</sup>: the trial courts and the circuit courts of appeal. As political scientists, Richardson and Vines take a social-scientific (as opposed to a narrowly legalistic) approach to their work. Such an approach ought to be of interest to academics of all disciplines teaching courses dealing with legal-judicial processes, as well as to those teachers interested in the way social scientists approach and deal with legal institutions and processes.

One of the most important features of this book (which it shares in some ways with many other recent books dealing with the federal courts authored by political scientists), and one which constitutes the essence of its social-scientific approach, is its attempt to provide a conceptual framework or "theory" to structure and interpret its contents. A point of major difference from many other works, especially the edited "readers" that attempt (often less than successfully) to impose a theoretical structure upon independently executed studies, is that this theory not only serves a sufficiently useful purpose to justify its inclusion in the book, but also constitutes a central part of it. In each phase

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<sup>1</sup> R. RICHARDSON & K. VINES, *THE POLITICS OF FEDERAL COURTS* (1970).

<sup>2</sup> J. FRANK, *COURTS ON TRIAL* 222 (1949).

<sup>3</sup> *Id.* 1.

of the book the authors are mindful of their initial theoretical propositions, and their substantive discussions are informed, wherever possible, with the results of their own data analysis.

Although the need for theory has long been recognized by social scientists as essential to the development of a science of judicial behavior, what has frequently been characterized as "theory" has too often failed to perform one of the principal purposes of theorizing: to guide or inform the research to which it is tied. A good number of the studies of judicial behavior undertaken during the past decade or two by political scientists, particularly those dealing with appellate courts, have been essentially examples of legal realism combined with modern and sophisticated statistical techniques.<sup>4</sup> The latter is what has often been characterized as "theory." *The Politics of Federal Courts* is unique, however, in that the authors explicitly present their "theory" before going on to demonstrate how the variables that it identifies as relevant to judicial decisionmaking actually affect decisions. The data analysis is basically illustrative; it is interestingly done and serves its purpose well.

The model or theory is developed in chapter 1 into a flow chart-like diagram of the judicial system, which is suggestive of the organization and content of the remainder of the book.<sup>5</sup> This introductory chapter is followed by an interesting and unusual discussion of the historical development of the federal court system. Curiously, this treatment lacks any real discussion of the "Judges Bill" of 1925, despite the authors' acknowledgement that it was "[a] most important modification in the post-1891 period . . ."<sup>6</sup> Topics covered in successive chapters include judicial constituencies, judicial selection,<sup>7</sup> and decisionmaking in both the district courts and the courts of appeal. Also examined is the relationship between the lower courts and the Supreme Court. In this analysis the authors present a valuable discussion of the "hierarchical" and "bureaucratic" theories of the federal court system. Here they bring to bear their data on decisionmaking and demonstrate how this information reflects on both theories. The book ends with an effective and well-done set of conclusions which are drawn from the discussions in the preceding chapters. Thus, the book constitutes a broadly-conceived analysis of the political aspects of the lower federal courts.

The concept of constituency, the subject of the third chapter, is difficult to apply to the judicial structure. As Richardson and Vines

<sup>4</sup> E.g., C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* (1963); *JUDICIAL BEHAVIOR* (G. Schubert ed. 1964); G. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959).

<sup>5</sup> R. RICHARDSON & K. VINES, *supra* note 1, at 12 (figure 1).

<sup>6</sup> *Id.* 32.

<sup>7</sup> This chapter concludes on a note of overstatement when it characterizes the influence of senatorial courtesy as "an absolute veto at the minimum to an absolute choice at the maximum . . . ." *Id.* 69.

use it, it implies what might otherwise be termed "geographical jurisdiction"—that is, the idea that the district courts all function within geographically-defined areas, and therefore serve different groups of people. Several notions are derived by the authors from this concept. One is that judges, like other political actors, are influenced in their official behavior by factors external to the legal system, most notably public opinion. District judges in the South, for example, have different problems in handling civil rights cases than those in the North because the attitudes and values of Southern political culture and Southern institutions are different from those of the North. The same point could perhaps be illustrated by the urban/non-urban dichotomy, which could occur within a single geographical area. In such a case, the precise lines drawn for a single judicial district, or for divisions within a district, could considerably alter the character of the district's constituency.<sup>8</sup>

The argument has been made that districts of equal population that do not have equal numbers of judges may constitute a variant of the legislative malapportionment problem. This would be particularly true where such interdistrict inequality resulted in inequalities of access to courts because of greater delays from burdensome caseloads. Although the authors present only an abbreviated discussion of this issue,<sup>9</sup> it is nonetheless worthy of comment. The malapportionment argument seems to be premised upon the notion of courts as representative institutions. Such a position might be tenable in a system in which judges are elected (such as exists in many of the states) since the notion of dilution of power (debasement of the vote) would in that case be significant. This would be especially true in states in which the members of a collegial court are elected from distinguishable districts. But the idea that courts are representative institutions simply because they are a part of the political process is a proposition that destroys any meaning for the concept of representation, at least outside the context of an electoral system. Indeed, if such a concept were accepted, it would be difficult to conceive of any governmental institution which would not be properly characterized as "representative" and so be subject to the rules that the apportionment cases have developed.<sup>10</sup>

In any case, comparative aggregate data on caseload per judge or population per judge by district is not necessarily instructive in terms of equal access, due process, or equal protection. It is, for example, entirely conceivable for a federal judge to be burdened considerably by a small number of cases if they happen to involve problems like the

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<sup>8</sup> A subsequent chapter on decisionmaking in the district courts illustrates the impact of districts (constituencies) on decisions by using original data on civil liberties and labor cases. See *id.* 80-112.

<sup>9</sup> *Id.* 43-45.

<sup>10</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

supervision of a large firm in bankruptcy. The suggestion is not that an equal protection or due process argument (depending upon whether one is dealing with state or federal courts) could not feasibly be made by one denied access to the courts. The point is, simply, that such a claim can be made without any need to analogize it to the apportionment cases, thereby avoiding uniformity at the price of distortion. Unequal access is a wrong serious enough to be attacked on its own. The issue is not so much one of comparative equality in terms of population per judge, as it is one of comparative adequacy of access to the judicial process, a principle not necessarily related to population. The hierarchically arranged federal court system (and most state systems as well) with its expanding base of constituency further weakens the malapportionment analogy. The Supreme Court has a national constituency as well as the "final word" on any case it chooses to decide. One then has, at least theoretically, a final decisionmaker with a single "constituency"—the entire population.

Finally, some discussion of every court's most stable constituency and its effects on decisionmaking would have been welcome. Even if individual litigants, rather than the population as a whole, are considered as the constituencies of the federal courts, one is still dealing with a highly fluid group. It is probably correct to assume that relatively few litigants have anything approaching a sustained interest in the local federal court system, though there are some (those in the business community, for example) who might. One group which surely has a strong interest, is relatively stable, and probably does function as a powerful reference group (as well as a constituency) for lower federal judges, is the local bar. The fact that Richardson and Vines do not discuss the local bar in this context is not, however, particularly surprising when one considers the limited nature of the literature (at least in the social sciences) that in some way attempts to link the decisionmaking of judges with the characteristics of the bar.<sup>11</sup> There are, to be sure, many studies of the organized bar, but most of them are concerned with its sociological features rather than its influence on judicial decisionmaking.<sup>12</sup> In general, political scientists have tended to ignore the potentially great influence of lawyers on decisionmaking in the courts, both as advocates and as reference groups.

Richardson and Vines have produced an unusual book. It provides enough basic information on the federal judicial system to initiate the beginning student, yet commands the interest of the advanced student and the legal professional. It takes an approach that com-

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<sup>11</sup> *E.g.*, S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* 113-24 (1969).

<sup>12</sup> *See, e.g.*, J. CARLIN, *LAWYERS' ETHICS* (1966); J. GROSSMAN, *LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION* (1965); C. HORSKY, *THE WASHINGTON LAWYER* (1952).

bines several areas of concern into a unified presentation: a theory to provide the initial propositions; data appropriate for testing them; an analysis to perform this function; and, finally, an interpretation of the results.