

BOOK REVIEWS

A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM.

By Deborah J. Barrow[†] & Thomas G. Walker.[‡]
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Reviewed by Burke Marshall*

During the two decades following *Brown v. Board of Education*,¹ the trial and appellate judges of the old Fifth Circuit, which comprised Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas, had the major share of the responsibility for implementing *Brown* in the former Confederate states. Judges from other circuits, notably the Fourth (Maryland, Virginia, North Carolina, and South Carolina) and to some extent the Sixth, Eighth, and Tenth Circuits, were of course also involved in the litigation. But most of the attention and the resulting literature² has focused on the old Fifth Circuit. In part, this publicity resulted because the circuit was composed of the states that were the sites of many of the confrontational aspects of school desegregation, voting rights, and public accommodations disputes. These disputes attracted the priorities of the civil rights movement and the Department of Justice, and created drama particularly in Alabama (Birmingham, Montgomery,

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1. 347 U.S. 483 (1954).

2. See generally, e.g., J. BASS, UNLIKELY HEROES (1981); J. PELTASON, FIFTY-EIGHT LONELY MEN (1971); F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978); Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963). On Judge Frank Johnson, see R. KENNEDY, JUDGE FRANK M. JOHNSON, JR. (1978), and T. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981). There is, unfortunately, no bibliography in the Barrow and Walker book being reviewed, but there is a list of persons interviewed for the book, which includes, it should be disclosed, the author of this review. D. BARROW & T. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 265-67 (1988).

Selma, Tuscaloosa), Mississippi (Greenwood, McComb, Oxford, Philadelphia), and Louisiana (Baton Rouge, New Orleans). Some of the attention that the old Fifth Circuit received, however, is attributable to the heroic stature³ of its dominant judges: Circuit Judges John R. Brown of Texas, Richard T. Rives of Alabama, Elbert P. Tuttle of Georgia, and John Minor Wisdom of Louisiana, as well as District Judges Frank M. Johnson of the Middle District of Alabama,⁴ and J. Skelly Wright of the Eastern District of Louisiana (in the New Orleans school suit).

These men and *Brown's* impact on the old Fifth Circuit are the background for *A Court Divided*, a book by political scientists Deborah J. Barrow and Thomas G. Walker about the division of the old circuit into the new Fifth and Eleventh Circuits. The split finally occurred in 1980 after more than fifteen years of judicial and congressional squabbling. It resulted, in part, from the old Fifth Circuit's administrative problems, many of which were attributable to the surge in civil rights activities in the 1960s. That movement increased the court's workload in section 1983, voting rights, and other rights-based cases in ways that cannot be measured statistically; the time that appellate judges put into the supervision of these cases went far beyond the proportion that the cases represented of the old Fifth Circuit's total caseload.⁵

The division of the Fifth Circuit also stemmed from the problem of appellate supervision of district court judges who were unwilling to respond fully and quickly to the demands of *Brown*. This problem led to deep divisiveness within the circuit. Some of the disagreements were caused by the refusal of at least one circuit judge to accept *Brown's* dictates;⁶ some by more principled disagreement over the court's activist role in, for example, issuing its own injunctions.⁷

The selection of judges in lower court civil rights cases was another point of contention. These cases often required three-judge panels, which normally included two appellate judges.

3. The adjective "heroic" is taken from the title of the Bass book. J. BASS, *supra* note 2. But it is well deserved. All six of the judges received threats, were socially ostracized by former friends and colleagues, and were often reviled in the press. The actions of Judges Rives and Johnson, at least, were the cause of attacks on their families.

4. See generally the biographies of Judge Johnson, *supra* note 2.

5. D. BARROW & T. WALKER, *supra* note 2, at 122, 124-25.

6. An example is Judge Cameron's public quarrel with Judges Brown, Rives, Tuttle, and Wisdom. *Id.* at 56-60.

7. An example would be the case, probably, with Judge Griffin Bell. *Id.* at 28.

The appellate judge selection process prompted Judge Cameron to charge Judges Brown and Tuttle with panel stacking⁸ because they had failed to assign him to any panels in Mississippi, contrary to custom,⁹ and because they deliberately did not assign Judges Bell or Gewin to any civil rights matters during and for some time after the pendency of those judges' recess appointments.¹⁰ As the book frequently points out, the Fifth Circuit's focus on civil rights also had sustained political effects on proposals for splitting the circuit in two. For years, civil rights groups concentrated their political strength on keeping together the judges whom Judge Cameron scathingly called "the four"¹¹—Judges Brown, Rives, Tuttle, and Wisdom—despite overwhelming evidence of the circuit's intractable administrative and workload difficulties.

Each of "the four" played a role in the process of splitting the circuit; one of them, Judge Wisdom, is an especially major figure in *A Court Divided*. Judge Tuttle, the court's chief judge during the 1960s, opposed splitting the Fifth Circuit, but conscientiously played his role as coordinator of the views of the circuit's Judicial Council throughout the period.¹² Judge Rives, who was also opposed to the division,¹³ took senior status early, and although still very influential with Alabama's senators (as was his linear successor, Judge Robert Vance), was not active. Judge Brown succeeded Judge Tuttle as chief judge¹⁴ and finally subdued his personal opposition to the division in face of the circuit's workload statistics and the views of his colleagues.¹⁵ The parts that "the four" played in the story are on and off the stage, cluttered with endless detail of who said what to whom in what meeting, and what letters were for or against some particular initiative. The minutiae will be of little interest to anyone but

8. *Id.* at 55-56, 59.

9. *See id.* at 56. There was good reason to exclude Judge Cameron from panels that heard civil rights cases because of his obvious and outspoken antipathy to the *Brown* line of cases and to its implications for the social and political structure of the society he knew. Consider, for example, his behavior in the litigation leading to the entry of James Meredith, a black student, into the University of Mississippi at Oxford in 1962. The matter is briefly described in note 22 of my review of the J. Bass book, *supra* note 2. *See* Marshall, *Southern Judges in the Desegregation Struggle*, 95 HARV. L. REV. 1509, 1513 n.22 (1982).

10. D. BARROW & T. WALKER, *supra* note 2, at 59.

11. *Id.* at 57.

12. *Id.* at 67, 80, 82-83.

13. *Id.* at 75-77.

14. *Id.* at 141.

15. *Id.* at 236.

the participants, except for the appearances of John Minor Wisdom, an extraordinarily gifted lawyer and judge. Opposed to the split to the end,¹⁶ he demonstrated his flair for colorful rhetoric and language both in his judicial work and in his extracurricular letters. An excerpt from a letter dated September 20, 1973 to some former clerks, who were then working as congressional aides, illustrates:

In my opinion, this is an Eastland-engineered maneuver: the political decision has already been made that the Fifth and Ninth Circuits should be divided promptly. The hearings were designed as window-dressing. . . . I am about the only judge on our Court who is still actively fighting against splitting the Fifth. Ainsworth would settle for any division of the circuit that would not allow Louisiana to be overwhelmed by Texas. And, of course, he has the pragmatic approach of an experienced politician. "Buster" has been all wind, no fury, and collapsed like a pricked balloon at the Commission's last hearing . . . where our friend . . . Judge Mushroom worked on him the night before.¹⁷

A principal source of divisiveness over the proposed division of the Fifth Circuit (and therefore a weapon in the hands of opponents of any split, such as Judge Wisdom) was disagreement about the fate of Mississippi. Senator Eastland of Mississippi, then chairman of the Senate Judiciary Committee, wanted Mississippi to stay with Georgia, Alabama, and Florida in a four-two split.¹⁸ Such a division was unacceptable to the judges of the western states, including Judge Brown, other Texas judges, and Judge Wisdom, who thought it the worst of all possible outcomes.¹⁹ Nevertheless a four-two split was a condition for congressional approval of a circuit division, so long as Senator Eastland remained on Capitol Hill, as he did until the 1979 session.

16. *Id.*

17. *Id.* at 168 (ellipses in original). The Ainsworth referred to is Judge Robert A. Ainsworth, Jr. of Louisiana, a distinguished and respected judge on the Fifth Circuit since 1961, who had an extensive background in Louisiana politics. By 1972, Judge Ainsworth's position on the proposed split of the circuit was indeed as described by Judge Wisdom. "Buster" and "Judge Mushroom" are not identified in the Barrow-Walker book, but internal and external evidence identifies them respectively as Judge John R. Brown of Texas, who was Chief Judge of the Fifth Circuit following Judge Tuttle, and Judge Griffin B. Bell of Georgia, who was Attorney General of the United States at the time the division of the circuit was accomplished by Congress in 1980.

18. *Id.* at 170.

19. *Id.* at 77-79.

By letter dated May 5, 1980, after Judge Wisdom had taken senior status, the twenty-four judges of the Fifth Circuit recorded their unanimous agreement on the Mississippi issue and petitioned Congress to split the circuit.²⁰ The Mississippi judges, including the influential Charles Clark (now chief judge of the present Fifth Circuit), and former Governor and Chief Judge James P. Coleman, conceded, agreeing to a three-three split, with Mississippi going with the western states across the Mississippi River. The reason for the judges' unanimous agreement, apparently, was not just caseload, an issue they never squarely faced, nor political pressures from Congress or elsewhere. The impetus for the split was rather the chaos of the en banc hearings and decisions in twelve cases presented in January 1980.²¹ One case had, in addition to the majority opinion, a two-person concurrence, a second seven-person concurrence, an opinion joined by eleven persons concurring in part and dissenting in part, and an eight-person dissent.²² Another case resulted in a twelve to twelve split on the first vote.²³ To hear oral argument, according to Barrow and Walker, the twenty-four judges

20. For a reproduction of the letter, see *id.* at 152.

21. *Id.* at 230-33. The book identifies only 3 of the 12 cases by name: *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981), *cert. granted sub nom. Ledbetter v. Jones*, 452 U.S. 959 (1981), *cert. dismissed*, 453 U.S. 950 (1981), *overruled by International Woodworkers v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986), *aff'd sub nom. Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); and *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981). In a 1983 interview, Judge Gerald B. Tjoflat of Florida, who was elevated to the old Fifth Circuit in 1975, described another aspect of the problem of the number of judges on the circuit in this way:

One of the biggest problems facing the federal judiciary is the instability of the rule of law that results when we create great numbers of additional judgeships. The more judges we create at the appellate level, the larger we make courts of appeals, the more unstable the law becomes. If you have three judges on a court of appeals, the law is stable. It is stable for litigants, lawyers, and district judges. The outcome of a suit, should one be filed, is predictable. When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did in the old Fifth, that one panel cannot overrule another, a court of twenty-six will still produce irreconcilable statements of the law.

2 ALMANAC OF THE FEDERAL JUDICIARY, 11th Circuit, at 4 (1988) (quoting THE THIRD BRANCH, Apr. 1983, at 1, 3-4).

22. D. BARROW & T. WALKER, *supra* note 2, at 232.

23. *Id.* at 231.

were "perched" (to use Judge Coleman's word) on a two-tiered bench especially built for the occasion.²⁴ The resulting conferences must unavoidably have been a nightmare fantasy of organizational behavior.

The Ninth Circuit, whose size and caseload problems are similar to the old Fifth Circuit's, has handled the en banc problem by internal administrative divisions within the circuit. Hence the judges of that circuit have never petitioned Congress, as the old Fifth did after its January 1980 traumas,²⁵ to enact a division. Thus, in their book, Barrow and Walker as political scientists were unable to develop a political theory for handling the trial and appellate court workload in the federal system, an acute unresolved problem, or even for the future division of the judicial districts and circuits into administratively manageable segments; they had only the story of a case study of the Fifth Circuit itself. That factor seriously diminishes the usefulness of the book for scholars and others interested in judicial management and in the relationship between Congress and an article III court on this subject. The reader is left only with the story, which is an interesting one because of the particular color of the Fifth Circuit and the presence on it of judges like John Minor Wisdom, but which is nevertheless a story of cumulative detail rather than mounting excitement.

The authors are aware of this drawback, and attempt to meet and remedy it in their last chapter entitled "Cooperative Oversight and the Principles of Judicial Politics."²⁶ The trouble with this chapter is that the authors do not have much in the way of underlying data and theory from which to generalize and categorize. The consequences for judicial reform are nil because of the failure of the federal judges and the Congress to pay any attention to the causes of the burgeoning caseload. The increase in caseload has been caused by the many additional tasks that Congress assigned to the federal judiciary through new legislation,²⁷ not by the geographic administrative arrangements for those tasks. The "cooperative oversight" concept, complete with a flow chart,²⁸ is simply a term applied because Congress has the responsibility under article III for those administrative

24. *Id.*

25. *Id.* at 236.

26. *Id.* at 246-63.

27. *Id.* at 247.

28. *Id.* at 250.

arrangements, and must consider the views and experience of the judges involved when arriving at decisions concerning them. The factors within the concept, such as “congressional disinterest,”²⁹ “accommodationist politics”³⁰ (that is, the judges accommodating each others’ points of view in order to render at least near-unanimous recommendations, as in the case of the May 5, 1980 letter), “agenda access”³¹ (that is, overcoming congressional disinterest), and “judicial lobbying”³² on these matters all seem to me fairly self-evident. Nevertheless, there is a dearth of political science or other literature, much less a case study, of which I am aware on implementation of congressional power to ordain and establish the lower federal courts. The Barrow-Walker effort should therefore be welcomed as a start with the hope that there is more to come.

29. *Id.* at 252-54.

30. *Id.* at 254-56.

31. *Id.* at 256-57.

32. *Id.* at 257-62.