FUNCTIONAL DECENTRALIZATION IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

by

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I. THE COURTS OF APPEALS: THEIR ROLE IN THE STUDY OF JUDICIAL BEHAVIOR

Within the American judicial system the Supreme Court is a major decision-making body. As such, it has been the focal point of studies in judicial process and judicial behavior.[1] Students in these areas have concentrated for the most part on three aspects of judicial decision-making. One area of concentration has been the kinds of cases which reach the Supreme Court for decision.[2] Another area has been the behavior and backgrounds of the justices of the Court.[3]

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[1]For an excellent discussion on the role of the Supreme Court in national policy-making, see "The Role of the Supreme Court Symposium" in the Journal of Public Law, VI, no. 2, (Fall, 1957), pp. 277-508, especially Robert A. Dahl, "Decision-Making in a Democracy, The Role of the Supreme Court as a National Policy Maker," pp. 279-295.

[2]Joseph Tanenhaus, et al., "The Supreme Court's Certiorari Jurisdiction: Cue Theory" in Judicial Decision-Making, ed. by Glendon Schubert (Glencoe: The Free Press, 1963), pp. 111-132.

[3]This area of study has by far been the area of greatest concentration in studies of the Supreme Court. C. Herman Pritchett did the first behavioral study on the justices of the Supreme Court in The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947 (New York: MacMillan Press, 1948). With this work, Pritchett began the concentrated research in judicial behavior and introduced the technique of bloc analysis as a method of study. John R. Schmidhauser published a small but very important work on the Supreme Court which attempted to determine the factors influencing the decisions of the Court including the social and political backgrounds of the justices. The Supreme Court: Its Politics, Personalities and Procedures (New York: Holt, Rinehart and Winston, 1960).

The third area of study has been the policy-making decisions of the Supreme Court.[4]

The emphasis upon the Supreme Court has resulted in the neglect of the role which the lower federal courts, the federal district courts and the courts of appeals, play in judicial decision-making and the creation of national policy.[5] As a result of this neglect, a void exists in the theoretical propositions concerning the behavior of these courts.

The importance of the courts of appeals is due primarily to the functions of these courts in the judicial process. The courts of appeals occupy the intermediate level in the federal judicial hierarchy. In this position, they have become widely recognized as a court of last resort for many cases in the federal appellate process.

Since 1960, the Supreme Court increasingly relied upon the courts of appeals and the district courts to implement national policy. This reliance has expanded the role and increased the importance of the lower federal judiciary in the judicial decision-making process. For example, the case of Baker v. Carr,[6] involving a question of reapportioning the Tennessee state legislature, signaled the beginning

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[4]This area of study has traditionally been the province of lawyers and legal analysts. One of the best known works in this area is Anthony Lewis' Gideon's Trumpet (New York: Random House, Inc., 1964).

[5]This emphasis upon the Supreme Court has not been without its critics. Jerome Frank was among the first in Courts on Trial (New York: Atheneum Press, 1949), pp. 221-227.

[6]Baker v. Carr 369 U.S. 186 (1962).

of a major expansion of the activities of these courts. In its decision, the Supreme Court ruled that questions on apportionment of state legislatures were justiciable in the federal courts. More important, however, as far as this study is concerned, was the Supreme Court's determination that it would be the federal district courts which would possess original jurisdiction over such questions.[7] Supplemental to this jurisdiction came the power to review and approve all redistricting plans for court ordered reapportionment. The Supreme Court issued a policy guideline (malapportioned state legislatures violate the equal protection clause of the 14th Amendment)[8] and then delegated the authority and power to implement this guideline to the federal district courts. Since this case, questions of malapportionment have been decided, not in the Supreme Court, but in the federal district courts and the courts of appeals.

A more recent example of the expanding role which the district courts and courts of appeals play in the creation and implementation of national policy is the issue of school busing. The Supreme Court determined initially that the busing of school children is one of many acceptable methods of achieving racial balance in the schools.[9]

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[7] Ibid.

[8] Baker v Carr, p. 189.

[9] Swann v Charlotte-Mecklenburg Board of Education 402 U.S. 1 (1971).

But, since this decision was made the important battles have been fought in the federal district courts[10] and the courts of appeals.[11]

The importance of the lower federal courts has not been fully recognized by political scientists in part because of the adherence within the discipline to two similar models of the federal judiciary.[12] While neither of these models has been formalized, one or the other has been implicitly assumed by most students of the judicial processes. The first (and most traditional) is the hierarchial model in which the Supreme Court is at the apex of the judicial hierarchy and is the sole body capable of making policy. Implicit in this model is the assumption that the rules and precedents contained in Supreme Court decisions are mechanically applied by the lower courts to cases which come before them.[13]

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[10] Bradley v School Board of Richmond 338 F. Supp. 67 (1972).

[11] Vaughns v Board of Education of Prince Georges County 468 F. 2d 894 (1972).

[12] Published work on the Circuit Courts of Appeals by political scientists is limited. Three of the best of the very few are Sheldon Goldman "Conflict and Consensus in the United States Courts of Appeals," Wisconsin Law Review MCMLXVIII, no. 2, (1968), pp. 461-482; Sheldon Goldman "Voting Behavior in the United States Courts of Appeals: 1961-1964," American Political Science Review, LX, no. 2, (June, 1966), pp. 374-383; and Kenneth Vines "The Role of the Circuit Courts of Appeals in the Federal Judicial Process," Midwest Journal of Political Science, VII, no. 4, (November, 1963), pp. 305-319.

[13] Kenneth Vines discusses the role of the hierarchial model and its effects upon studies of judicial behavior in "Role of the Circuit Courts." He cites the following as chief proponents of the Hierarchial model: Alpheus Mason and W. M. Beaney American Constitutional Law (New York: Prentice Hall, 1954), Carl Brent Swisher American Constitutional Development (New York: Houghton-Mifflin,

The second model is based upon the assumption that the relationship between the Supreme Court and the lower courts is analagous to the relationship between the President and the administrative bureaucracy. In this model, the Supreme Court issues guidelines on policy. It leaves to the lower courts the responsibility for implementing the guidelines in much the same manner as the administrative bureaucracy is charged with the implementation of executive policies.[14]

The role defined for the lower and intermediate federal courts by these models is a very limited one. Neither model assumes that the lower courts are allowed latitude in the implementation of Supreme Court policies. Nevertheless, it is always possible for the lower courts to exercise discretionary power even to the point that policy guidelines may be virtually unrecognizable in application. Since neither model accounts for discretionary power in the lower courts, studies of the activities of these courts are necessary for the development of a full understanding of the judicial system.

One area of the judicial process in which the courts of appeals possess relatively little discretionary power is in the selection and

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1943), and Wallace Mendelson, The Constitution and the Supreme Court (New York: Dodd-Mead, 1959).

[14]Walter Murphy, "Chief Justice Taft and the Lower Court Bureaucracy," Journal of Politics, XXIV, no. 3, (August, 1962), pp. 453-476, and "Lower Court Checks on Supreme Court Power," American Political Science Review, LIII, no. 4, (December, 1959), pp. 1017-1031.

determination of cases they will hear. The authorizing legislation for the courts of appeals makes it virtually mandatory that they hear all cases submitted to them in proper form.[15] In contrast, the Supreme Court has almost complete discretionary power to determine the cases which it will accept for hearing.[16] Thus for most cases in the judicial hierarchy access to the Supreme Court in appellate proceedings is quite limited. Because of this fact, the decision-making process consists primarily of two steps: initial trial and decision in a federal district court and then appeal to a court of appeals where final decision is made.[17]

As a court of last resort in the appellate process, the courts of appeals have become targets of criticism by proponents of judicial reform. They charge that several of the procedures followed by these courts are not only detrimental to the efficient administration of justice, but that they also violate certain constitutional guarantees. The primary criticism has been that of excessive delay in the hearing and disposition of criminal and civil appeals.

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[15]U.S.C. Appendix "Federal Rules of Appellate Procedure," Title II, Rules 3, 4.

[16]This aspect of Supreme Court decision-making was studied by Joseph Tanenhaus, et al., op. cit.

[17]This two-step decision-making process with the Court of Appeals serving as the court of last resort has been favored by many distinguished justices, most notably Felix Frankfurther. Glendon Schubert, Judicial Policy-Making (Chicago: Scott, Foresman, 1965) p. 91.

The efficient dispatch of criminal appeals in Great Britain contrasts greatly with the resolution of similar appeals in the United States.[18] Delays in case resolution are prevalent at all levels, particularly at the appellate level. In 1971, the federal district courts and courts of appeals had a combined median time interval of 21.0 months in civil actions and 19.7 months in criminal actions for disposition of cases through the two-step decision-making process.[19] For the courts of appeals alone, the median time for the disposition of any case was 7.6 months.[20]

The cause of this delay is twofold: the first is the very nature of the rules for appeal in the federal judiciary. The rules of appellate procedure allow for a maximum of 154 days without extensions from the date of judgement in the district court until the case must be presented to the court of appeals for decision.[21] The second cause

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[18]Delmar Karlen, Geoffrey Sawyer and Edward M. Wise, Anglo-American Criminal Justice (Oxford: University Press, 1967).

[19]Annual Report of the Director of the Administrative Office of the United States Courts 1971, Table B5, p. 251.

[20]Ibid., Table B4, p. 251.

[21]This subject has generated considerable concern in the nation's legal circles. Further reference can be made to: Griffin B. Bell, "Toward a More Efficient Federal Appeals System," Judicature, LIV, no. 6, (January, 1971), pp. 237-244; Albert V. Bryan, "For Swifter Criminal Appeal," Washington and Lee Law Review, XXV, no. 2, (Fall, 1968), pp. 175-192; Winslow Christian, "Delays in Criminal Appeals: A Functional Analysis of One Court's Work," Stanford Law Review, XXIII, no. 4, (April, 1971), pp. 676-702. This article concerns procedures used in the California state courts. However, many of the procedures used by these courts have suggested for use in the courts of appeals. Kenneth J. O'Connell, "Streamlining Appellate Procedures," Judicature, LVI, no. 6, (January, 1973), pp. 234-239; "Screening of Criminal Cases

of delay is the sheer volume of cases which the courts of appeals are called upon to handle. In the years since 1962, commensurate with their expanding role in judicial decision making, the courts of appeals have been called upon to handle a case load which expands in almost geometric progression. As Table 1-1 shows, the volume of cases reaching and decided by the courts of appeals nearly tripled in the decade since 1962.

This rapid increase has confronted the courts of appeals with the need to find some means to accommodate effectively all of the cases which come before them. If the court is conceived of as an organism in an environment, and its workload as a set of stimuli, then the question of how the organism responds to the stimuli becomes one of manifest importance.

The stimulus-organism-response model is one familiar not only to the biological sciences, but also to students of judicial behavior. However, previous works using this model have concentrated exclusively upon the judge and not the court as the organism.[22] There is therefore little substantive work concerning the reaction of a court as an organism to varied stimuli. It is within the field of administration, particularly those works relating to organizational theory, where theoretical propositions relating to the nature of this response are found.

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in the Federal Courts of Appeals: Practice and Procedure," Columbia Law Review, LXXIII, no. 1, (January, 1973), pp. 77-105.

[22]See Glendon Schubert, "From Public Law to Judicial Behavior" in Schubert, Judicial Decision-Making, pp. 1-10.

Table 1-1[a]

Appeals in the United States Courts of Appeals: 1962-1971

Fiscal Year	Filed	Terminated	Pending
1962	4823	4167	3031
1963	5437	5011	3457
1964	6023	5700	3780
1965	6766	5771	4775
1966	7183	6571	5387
1967	7903	7527	5763
1968	9116	8264	6615
1969	10248	9014	7849
1970	11662	10699	8812
1971	12788	12368	9232
Per Cent Change			
1962-1971	+165.1	+196.8	+204.6

[a]Annual Report of the Director of the Administrative Office of the United States Courts 1971 (Washington: U.S. Government Printing Office, 1972), Table 2, p. 99.

Organization theorists have hypothesized that

> When procedures are so complex that a great deal of time is required to specify the appropriate responses, one way of saving time is to specify some of the complex procedures simultaneously rather than sequentially. This can be accomplished by allowing components of the organization to specialize in a set of procedures leading to the achievement of subgoals. In this way each component simultaneously specifies the procedures for its subgoal achievement. Presumably, near simultaneous achievement of the set of subgoals results in achievement of the organization's over-all goal.[23]

This form of organization around semi-autonomous units each specializing in a particular area is defined as functional decentralization.

It is the premise of this thesis that the courts of appeals have developed this form of organization in response to the vast variety and number of cases which come before them. The method they have developed, consciously or not, is that of case specialization by the judges of the court. If so, then one may expect to find that for each type of issue area there are perhaps one or two judges who assume the most influential role in the formation of the court's opinion for cases in these issue areas. The specialization by the judges creates, in effect, a series of sub-courts within the court of appeals, each specializing in a particular issue area. The question then is this: is a court of appeals one general court with all judges participating equally in all issue areas, or is it rather a set of smaller,

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[23]Selwyn W. Becker and Gerald Gordon, "An Entreprenural Theory of Organizations, Part I: Patterns of Formal Organizations," Administrative Science Quarterly, XI, no. 3, (December, 1966), p. 339.

specialized courts, each handling one or two particular issue areas and relying upon the expertise of one or two judges?

This study will focus on one of the courts of appeals, the United States Court of Appeals for the Fourth Circuit. The reasons this court has been chosen are quite simple. First, it has the second smallest number of judges of any court of appeals. Second, the increase in caseloads has been the greatest in the Fourth Circuit, 384.4 per cent from fiscal 1962 to fiscal 1971.[24] This combination of factors places the Court of Appeals for the Fourth Circuit under tremendous pressure to dispose efficiently of its caseload. Therefore, according to the Becker-Gordon model, it would be reasonable to assume that it would be the most likely to develop a form of functional decentralization.

Following the stimulus-organism-response model, this study has been divided into three parts. First, there is a survey of the make-up and the rules which govern the operation of the Court of Appeals for the Fourth Circuit. This survey will allow for the definition of the component parts of the organism and determination of potential responses of the organism to the stimuli. The rules which will be under study will be those of Title 28 of the United States Code, and the "Local Rules of the Fourth Circuit Court of Appeals."

The second part will be a study of the interaction of the organism and the stimuli. This part will be concerned with the

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[24] Annual Report, U.S. Courts, 1971, Table 3, p. 101.

empirical determination of functional decentralization in the court. The data to be used will be the cases decided by the court during the years 1968-1970. These cases will be the source for answers to three questions:

A. What point of law was involved?[25]

B. What was the composition of the appellate panel?

C. Which judge served as chief judge?

The classification of cases by point of law and year will allow for the use of a variety of statistical tests of association and significance. If the hypothesis of functional decentralization is valid, the observed patterns of behavior should show marked differences for judges' seating patterns over the range of issue areas.

The final part of the study will deal with the nature of the response of the organism to the stimuli. Is the Fourth Court of Appeals functionally decentralized? If so, to what degree? What are the implications of this form of organization upon the administration of justice? If not, what is the nature of the response to the stimuli? What are the effects of this response upon the administration of justice?

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[25]This classification by point of law is similar to that used by Sheldon Goldman in "Voting Behavior in the Courts of Appeals."

II. THE UNITED STATES COURT OF APPEALS: THE STRUCTURE OF THE ORGANISM

The United States Court of Appeals for the Fourth Circuit is one of eleven regional courts of appeals established by Congress in 1891.[1] There were three reasons for their creation. The first was to relieve the Supreme Court of the burden of passing on the mounting volume of cases reaching the Court on appeal,[2] the second was to reduce the amount of time and travel which the Supreme Court justices spent away from the Court and Washington while riding the circuit,[3] and the third was to make possible the extension of federal jurisdiction on a more permanent basis than was provided by the then contemporary system of lower and circuit courts.[4]

The courts of appeals are empowered to hear cases as appellate courts for the review of all final decisions of cases which originate

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[1]Pursuant to Congree's power to create inferior courts, Art. III, sec. 1 of the U. S. Constitution, by the Act of March 3, 1891, 26 Stat. 826.

[2]Edwin G. Surrency, "A History of Federal Courts", Missouri Law Review, XXVIII (Spring, 1963), pp. 233-235.

[3]Felix Frankfurther and J. M. Landis, The Business of the Supreme Court (New York: MacMillan Company, 1927), p. 45.

[4]Richard J. Richardson and Kenneth N. Vines, The Politics of Federal Courts, (Boston: Little Brown, 1970), p. 77.

in the district courts. The appeals courts also review on appeal or grant enforcement for orders of the Secretary of the Treasury, orders of the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, certain orders of the Secretary of the Army, the Federal Power Commission, final orders of the National Labor Relations Board and the Securities and Exchange Commission, and wage orders of the Administrator of the Wage and Hour Division of the Department of Labor.[5] Thus the courts of appeals serve as appellate courts to review appeals from the decisions of the district courts; as courts of original jurisdiction to satisfy the due process requirements of the Administrative Procedures Act;[6] and as sanctioning bodies for decisions of the federal executive and quasi-judicial agencies. The courts of appeals are not empowered to review the decisions of state courts.

The courts of appeals have a wide jurisdiction in both civil and criminal cases. There are some 2500 different classifications of criminal offenses against the federal government which the courts of appeals have jurisdiction to hear. These include violations of narcotics, customs and immigration laws, violations of the internal revenue code, laws regulating interstate commerce, interstate transportation of stolen property, kidnapping, assault on federal officers,

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[5] 28 USC 1291.

[6] 60 Stat. 237 (10).

and many others.[7]

In civil matters, the courts of appeals have jurisdiction to hear cases based upon both federal and state law. The cases involving state law are those which involve diversity of citizenship proceedings. The plaintiff's case may be based upon either federal or state law; the courts of appeals apply whichever is appropriate.[8]

The courts of appeals also have jurisdiction to hear a number of specialized cases. These involve suits in admiralty; certain types of libel proceedings; questions of eminent domain; patent, copyright and trademark proceedings; a variety of suits against trusts, monopolies and unlawful combines, claims against the federal government, and bankruptcy proceedings.[9]

The courts of appeals are the courts of last resort for the overwhelming majority of these cases. While the Supreme Court retains the role of final arbiter of questions involving the interpretation of the Constitution, laws, and treaties of the United States, it is limited by statute in its review of lower court decisions. The right of appeal is extended to parties only when the questions raised meet one of two criteria. These are:

a) cases from courts of appeals when a state law or a provision of a state constitution has been invalidated

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[7] 18 USC 13.

[8] 28 USC 1332.

[9] 28 USC 1291-1294.

because of a conflict with a federal law, treaty, or a provision of the U. S. Constitution.

b) instances in which a federal law has been held unconstitutional provided the United States, or one of its agencies officers, or employers is a party to the suit.[10]

Of all the cases decided within the federal judiciary each year, the number of cases meeting either of these criteria is extremely small. Most of the cases heard by the Supreme Court reach the Court on writs of certiorari. Here again, there are statutory requirements which must be satisfied before the writ is issued. The Supreme Court exercises its discretionary jurisdiction as follows:

a) The Supreme Court reviews cases on certiorari from courts of appeals where a decision involves the application or interpretation of a federal law, or a provision of the U. S. Constitution or cases in which a United States court of appeals has upheld a state law or provision of a state consitution against the challenge that it conflicts with a federal law, treaty or provision of the U. S. Constitution.

b) The Supreme Court also reviews cases on certiorari in cases in which a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter or has decided an important state or territorial question in a way in conflict with applicable state or territorial law or has decided a federal question in a way in conflict with applicable decisions of the Supreme Court.[11]

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[10] 28 USC 1254-1255.

[11] 28 USC 1294 and 28 USC, Appendix, Rule 19 cited in Theodore Bernard Pedeliski, "Interaction Patterns in the U. S. Court of Appeals for the Second Circuit (1941-1951)" (unpublished Master's thesis, University of North Dakota, 1965).

The number of cases reaching the Supreme Court on writs of certiorari is also quite limited. Thus, the courts of appeals form a filter between the district courts and the Supreme Court. It is through this filter that cases on appeal must pass, and only the most select types reach this final destination. Indeed, the courts of appeals have become the "courts of last resort in the run of ordinary cases."[12]

The only exceptions to this filtering by the courts of appeals are those cases which may be appealed directly to the Supreme Court from the decisions of the federal district courts. Moore and Ward describe the exceptions as follows:

> a) The United States has a very limited right of appeal from certain judgments [sic] of a district court.[13]
>
> b) In the civil area, there is direct appeal to the Supreme Court under the Expediting Act of 1903, as amended, from decisions of three judge courts and from decisions invalidating Acts of Congress when the government is a party, the process of certification.
>
> c) Certain interlocutory orders are appealable as right. And the Interlocutory Appeals Act of 1958 permits an appeal to be taken from any interlocutory order that contains the statement prescribed by 28 USC 1294(b) if the court of appeals permits the appeal to be taken.[14]

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[12] Textile Mills Securities v Commissioner of Internal Revenue. 314 U.S. 326 (1941), p. 344.

[13] See note 12(b).

[14] James W. Moore and Bernard J. Ward, Moore's Federal Practice 9 vols. (New York: Matthew Bender, 1948), Vol. 9, pp. 3-4.

While the courts of appeals are empowered to hear a wide variety of cases, in the disposition of these cases they are limited in their decisional latitude. In the disposition of diversity of citizenship proceedings, the courts of appeals must apply state law, if appropriate, whether statutory or derived from court decisions.[15] Thus, state law in these cases is much more binding upon the decisions of the courts of appeals than upon the state court which may have established the original precedent, since a court of appeals is not empowered to rule upon the validity of a state law.[16] The decisions of the courts of appeals in cases of this nature are not binding upon subsequent decisions of the state courts. Instead, they are subject to being declared invalid later by subsequent decisions of the state courts.[17]

In dealing with cases involving questions of federal law, the decisions of the courts of appeals must conform to the decisions of the Supreme Court. The judges of the courts of appeals may disagree with the precedents of the Supreme Court, but

> (r)arely would a court of appeals be justified in declaring devitalized and no longer to be followed a Supreme Court decision passing directly on the precise point of issue because of another decision of the Supreme Court in a different though related area. The resolution of possible

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[15] Erie v Tomkins, 304 U.S. 64 (1938).

[16] Moore, p. 4061.

[17] Ibid.

> inconsistencies in the Supreme Court's decision is ordinarily not the prerogative of inferior courts.[18]

Thus, there are limits placed upon the decision-making processes of the courts of appeals. These limits and the constraints they place upon the decisions of the courts of appeals should not be construed to imply that they serve no other function than the mechanical implementation of precedents established by other courts. The true nature of their function is quite the opposite.

The Supreme Court takes jurisdiction by certiorari only if there is a substantial federal question to be decided, questions of interpretation that are of national interest, or questions that relate to the proper powers of government agents. Relatively few of the cases disposed of by the courts of appeals meet these criteria. Indeed, most such cases rarely have an effect which extends beyond the contending parties.[19]

Because of this, it has been suggested that the federal judicial system is marked by a division of function between the levels of the judiciary, especially between the courts of appeals and the Supreme Court. Kenneth Vines has suggested that the lower courts may handle policy questions and respond to pressures and resolve conflicts different from those that reach the Supreme Court.[20]

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[18] U. S. v Ullman, 221 F. 2d 760.

[19] Moore, op. cit., pp. 13-15.

[20] Vines, "The Role of the Circuit Courts," p. 307.

What then constitutes the work of the courts of appeals? Richard Richardson and Kenneth Vines have classified the types of appeals which are handled by the courts of appeals. They are:

a) ritualistic appeals. These are the cases in which the action of taking appeal is more important than the eventual disposition of the case. The classic example is the rhetorical "arguing all the way to the Supreme Court."

b) frivolous appeals. Those are appeals which generally originate with prisoners confined in either state or federal prisons. For the most part these appeals present claims with little substance or chance of success. An example of one which did succeed is Holmstead v U. S.[21]

c) bureaucratic appeals. Those cases in which the requirements of procedural due process must be satisfied. Appeals from administrative decisions constitute a portion of appellate dockets.

d) consensual appeals. Those cases in which there is a substantial consensus as to how the issues should be resolved. The "bread and butter" issues of the courts of appeals.

e) non-consensual appeals. These are appeals in cases which present a major question of public policy. These cases usually have the best chance of reaching the Supreme Court.[22]

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[21]227 U.S. 438 (1928).

[22]Richardson and Vines, op. cit., pp. 81-83.

This typology, while not specific as to particular types of suits, is specific enough to reinforce Vines' hypothesis of functional division between the layers of the judicial system and also to suggest the possibility of functional division within the courts of appeals for the disposition of different types of appeals.

The existence of specialized structures within a court of appeals can occur only within the structures and procedures of the court as directed by statute. Each court of appeals is nominally headed by the Circuit Justice, a member of the Supreme Court assigned by the Chief Justice to that particular circuit.[23] Traditionally, the Fourth Circuit has been headed by the Chief Justice of the Supreme Court. The contribution of the Circuit Justice to the practical administration of justice in the Court of Appeals is minimal. He plays no real substantive part in either the administration of the court or its decisions.

The true head of the court of appeals is the Chief Judge. The Chief Judge is that member of the court who is senior in commission and under seventy years of age. The Chief Judge has precedence and presides at any session of the court he attends; other circuit judges have precedence and preside according to seniority of commission. In instances where circuit judges have the same date of commission, seniority is determined by age.[24]

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[23] 28 USC 42.

[24] 28 USC 45.

"The primary function of the Chief Judge is the administration of the panel system,"[25] the system of three judge panels by which the courts of appeals hear the overwhelming majority of cases.[26]

The power and influence of the Chief Judge, however, are dependent upon the method used by him to determine the composition of panels. There are several methods used in the courts of appeals. Some minimize the power and influence of the Chief Judge and others enhance it. Two of the most widely used are the lottery and the mechanical rotation. The lottery reduces the potential effects of the Chief Judge more than any other method. In preparing the calendar for the court, cases are noted solely by their docket numbers which are entered on slips of paper to be placed in a bowl. The names of the judges of the court are placed in another. From the first bowl is drawn the docket number of a case and from the second bowl, the names of three judges. These three judges will form the panel which hears and decides the case. This random process almost completely negates any influence which the Chief Judge may be able to exert upon the resolution of the case.

The rotation method is not quite as free of possible influence by the Chief Judge. Under the rotation system, the aim of the Chief

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[25]Delmar Karlen, Appellate Courts in the United States and England (New York: New York University Press, 1963), p. 44.

[26]28 USC 46. Occasionally, one will find the courts of appeals sitting en banc. However, these instances are much the exception to the rule of three man panels. The appropriate legislation concerning en banc proceedings may be found in 28 USC 46 (c).

Judge is to equalize the workload of the judges by using as many panel combinations as possible.[27] The simplest variation of the rotation method is to have a given panel hear all cases argued before the court for a given time period, typically a week. Table 2-1 indicates one possible method for varying panel composition for a court of six members. This variation of the rotation system is only one of many used in the courts of appeals. The potential influence exerted by the Chief Judge upon decisions of cases before the court is minimized or enhanced by the degree which each variation allows him to match particular case types with particular panels or individual judges.

Table 2-1[a]

Schedule for Panel Composition

Week	Panel
1st week	Judges A,B,C
2nd week	Judges D,E,F
3rd week	Judges A,B,F
4th week	No sittings
5th week	Judges C,D,E
6th week	Judges A,D,F
7th week	Judges B,C,E
8th week	No sittings

[a]Karlen, Appellate Courts pp. 43-44.

[27]Personal information supplied to the writer by Samuel W. Phillips, Circuit Executive, United States Court of Appeals for the Fourth Circuit, in a letter of May 10, 1973.

The Fourth Judicial Circuit

The Fourth Judicial Circuit of the United States is one of the oldest in the nation, originally established in 1789.[28] The circuit is composed of five states: Maryland, North Carolina, South Carolina, Virginia, and West Virginia.[29] Within the circuit, there are nine federal district courts; one in Maryland, three in North Carolina, two each in Virginia and West Virginia, and one in South Carolina. These five states form the environment for the United States Court of Appeals for the Fourth Circuit. Tables 2-2 through 2-4 illustrate some of the relevant demographic factors of the environment of the Court of Appeals for the Fourth Circuit.

Table 2-2[a]

Population of the Fourth Judicial Circuit: by State

State	Population
Maryland	3,922,935
North Carolina	5,082,059
South Carolina	2,590,516
Virginia	4,648,494
West Virginia	1,744,237
Total	18,388,281

[a]Department of Commerce, U.S. Census of the Population: 1970 (Washington: Government Printing Office, 1971).

[28]First Judiciary Act of September 24, 1789, R. S. 608.

[29]28 USC 41.

From Table 2-2, it is possible to see that the Fourth Judicial Circuit contains slightly less than ten per cent of the nation's population. It has neither heavily nor sparsely populated states. It does contain several areas of high population density, most notably the Maryland and Virginia suburbs of the District of Columbia, the metropolitan areas of Baltimore and Richmond, and the Hampton Roads-Newport News area of Tidewater.

Table 2-3[a]

Crime Rates per 100,000 Population
by State and Year

State	1968	1969	1970
Maryland	3293.1	3281.6	3347.0
North Carolina	1345.7	1541.1	1861.4
South Carolina	1393.6	1691.7	2066.8
Virginia	1626.0	1763.3	2149.2
West Virginia	786.5	764.7	958.7

[a]J. Edgar Hoover, Uniform Crime Reports in the United States, 1968, 1969, 1970 (Washington: Government Printing Office, 1969, 1970, 1971).

Table 2-3 shows that the crime rates in the Fourth Judicial Circuit vary from the very high in Maryland (one of the highest rates in the nation), to the very low in West Virginia (one of the lowest rates in the nation).

Table 2-4[a]

Per Capita Income and National Rank
by State and Year

State	1968	1969	1970
Maryland	3712(10)	3965(10)	4264(11)
North Carolina	2606(43)	2987(39)	3208(41)
South Carolina	2339(47)	2731(47)	2934(47)
Virginia	3049(29)	3347(27)	3866(27)
West Virginia	2491(46)	2712(46)	3257(46)
Mean	2839(35)	3148(34)	3257(34)

[a]U.S. Bureau of the Census, Statistical Abstract of the United States: 1971 (92nd edition; Washington: Government Printing Office, 1972), Table 497, p. 314.

From Table 2-4, one can see that the Fourth Judicial Circuit is one of the poorer circuits in respect to per capita income. Only one state (Maryland) could be considered well off, while three of the states (North Carolina, South Carolina, and West Virginia) are among the ten lowest in the nation. Virginia is about average with respect to per capita income.

Industrially, the Fourth Judicial Circuit includes both heavy and light industry, agriculture, mining, shipping and related marine industries, fisheries, and a wide variety of other industries. Certain areas of the circuit have heavy concentrations of federal offices and supporting activities; there are also numerous military installations throughout the circuit. Labor organization reflects the types of industries throughout the circuit. There are the heavily organized United Mine Workers of West Virginia, the minimally organized textile

mills of Virginia and North Carolina, and the non-organized truck farms and lumber mills of North Carolina, South Carolina, and Virginia.

Thus, the Fourth Judicial Circuit could be considered as a microcosm of the United States. Both geographically and with respect to its peoples and industries, it reflects nearly all of the potential conflicts from which cases within the jurisdiction of federal courts could arise.

The United States Court of Appeals for the Fourth Circuit: Composition and Internal Procedure

The United States Court of Appeals for the Fourth Circuit is composed of seven judges, excluding the Circuit Justice, appointed by the President with the advice and consent of the Senate to serve "during good behavior."[30] Each judge is assigned not only to the seat of the court, Richmond, Virginia, but also to an official station within the circuit. The judges and their official stations for the years of this study are shown, in order of seniority, in Table 2-5.

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[30] 28 USC 44.

Table 2-5[a]

The Judges and Official Stations of the Court of Appeals for the Fourth Circuit 1968-1970

Judge	Official Station
Clement F. Haynsworth*	Greenville, S.C.
Simon E. Sobeloff	Baltimore, Md.
H. Stephenson Boremann	Parkersburg, W.Va.
Albert V. Bryan	Alexandria, Va.
Harrison L. Winter	Baltimore, Md.
James B. Craven	Asheville, N.C.
John B. Butzner	Richmond, Va.

[a]General Services Administration, United States Government Organization Manual: 1969-1970 (Washington: Government Printing Office, 1969) p. 38.

*Denotes Chief Judge.

In the study of any court, knowledge of the background of the judges of that court is always of potential value.[31] For that reason, a brief biography of each of the judges of the Court of Appeals for the Fourth Circuit follows.

Clement F. Haynsworth: Born in Greenville, South Carolina in 1912, he received his LLB. from Harvard in 1936. He was admitted to the South Carolina Bar in 1936 and practiced law as a member of the firm Haynsworth, Perry, Bryant, Marion and Johnstone until 1957. He

[31]See Sheldon Goldman, "Judicial Appointments to the United States Courts of Appeals" in The Federal Judicial System, ed. by Thomas P. Jahnige and Sheldon Goldman (New York: Holt, Rinehart and Winston, 1968) p. 16.

was appointed to the Fourth Circuit in 1957 by President Eisenhower and served as a circuit judge until 1964. In 1964, he was appointed Chief Judge by President Johnson. In 1969 he was nominated to the Supreme Court by President Nixon. The Senate refused, 55-45, to consent to his appointment for alleged conflict of interest. He is a Republican and an Episcopalian.

Simon E. Sobeloff: Born December, 1894 in Baltimore, he received his LLB. from the University of Maryland in 1915. He served as Assistant City Solicitor of Baltimore from 1919-1923. From 1927-1931 he served as Deputy City Solicitor and from 1943-1947, he served as City Solicitor. Between 1931 and 1934, he was the United States Attorney for the District of Maryland. From 1951-1952, he was chairman of the Commission of Administrative Organization for the state of Maryland. The years 1952-1954 found him in the capacity of Chief Judge of the Maryland Court of Appeals. He was Solicitor General of the United States from 1954-1956. He was appointed to the Fourth Circuit by President Eisenhower in 1956 and in 1958 was appointed Chief Judge of the Fourth Circuit. He served in this capacity until 1964 when he reached the age of seventy. He continued to serve on the court from 1964 until his retirement from active service at the end of the 1970 term. He is a Republican.

H. Stephenson Boremann: Born in Middlebourne, West Virginia, September, 1897, he received his LLB. from the University of West Virginia in 1920. He was admitted to the West Virginia bar in 1920 and maintained a law practice in Parkersburg, West Virginia, from

1921-1954, when not serving in official capacities. He was Assistant U.S. District Attorney from 1923-1927. He served as Prosecuting Attorney for Wood County, West Virginia, from 1929-1933 and as State Senator for Wood County from 1942-1950. He was the United States District Court Judge for the Northern District of West Virginia from 1954-1959. He was appointed to the Fourth Circuit in 1959 by President Eisenhower and served as a circuit judge until his retirement from active service in 1971. He is a Republican and a Presbyterian.

Albert V. Bryan: Born in Alexandria, Virginia, in July, 1899, he received his LLB. from the University of Virginia in 1921, graduating Phi Beta Kappa. He was admitted to the Virginia bar in 1920 and maintained an intermittent practice in Alexandria from 1921-1947. He served as City Attorney for Alexandria from 1926-1928 and as Commonwealth's Attorney for Alexandria from 1928-1947. From 1947-1961 he served as District Judge for the Eastern District of Virginia and as a member of the State Board of Corrections from 1943-1945. He was appointed to the Fourth Circuit in 1961 by President Kennedy and served until his retirement from active service in 1971.

Harrison L. Winter: Born in Baltimore in April, 1921, he received his LLB. from the University of Maryland in 1944. He was admitted to the Maryland bar in 1944 and was associated with the firm of Miles, Walsh, O'Brien and Maris until 1951, becoming a partner in 1951 and remaining with the firm until 1953. He was a partner in the firm Miles and Stockbridge from 1953-1959. He served as Assistant Attorney General of Maryland from 1948-1951, and as Deputy Attorney

General from 1954-1955. He was City Solicitor of Baltimore from 1959-1961 and served as District Judge for the District of Maryland from 1961-1966. He was appointed to the Fourth Circuit in 1966 by President Johnson and was the youngest member of the court for the period of this study. He is the most likely to succeed to the position of Chief Judge when Judge Haynsworth retires. He is an Episcopalian.

James B. Craven, Jr.: Born in April, 1918 in Lenoir, North Carolina, he received his LLB. from Harvard in 1942 and served with the United States Navy until 1946. He was admitted to the North Carolina bar in 1946 and served as Solicitor of the Burke County Criminal Court from 1947-1948. He was Assistant U.S. Attorney for Charlotte-Asheville from 1948-1952 and U.S. District Judge for the Western District of North Carolina from 1961-1966. He was appointed to the Fourth Circuit in 1966 by Johnson. He is a Methodist.

John B. Butzner: Born in Scranton, Pennsylvania, in October, 1917, he received his LLB. from the University of Virginia in 1941. He was admitted to the Virginia bar in 1946 and practiced law in Fredericksburg until 1958. He served as Judge of the 13th and 15th Judicial Circuits of Virginia from 1958-1962, and as U.S. District Judge for the Eastern District of Virginia from 1962-1967. He was appointed to the Fourth Circuit in 1967 by President Johnson.[32]

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[32]The preceeding biographical material is contained in Who's Who in America: 1970-1971, (Chicago: Van Hoffman Press, 1970).

Internal Procedure

The annual term of the Fourth Circuit begins on the first Monday of October. Sessions of the court are held thereafter during the first full week of each month in Richmond, except in the months of July, August and September. During these months, the court normally sits for one week at Baltimore, Maryland, and one week at Greenville, South Carolina, or elsewhere in the circuit as directed by the Judicial Council of the Fourth Circuit or the Judicial Conference of the United States.

Standard procedure for the court is for two panels to sit simultaneously. A third panel is occasionally used during periods of overload to reduce backlogs. District judges from within the Fourth Circuit are also utilized as panel members during periods of overload. As a rule, three or four district judges are scheduled to sit during a twelve-month period. The Senior Circuit judges[33] in the Fourth Circuit are utilized as panel members whenever an active judge is ill, away from the court, and also during periods of overload. Whenever a panel contains a district or Senior Circuit judge, only one is assigned per panel, thus active Fourth Circuit judges always comprise a majority.

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[33]A Senior Circuit Judge is a member of the Court of Appeals who has retired from active service and replaced upon the court. At the discretion of the Chief Judge, he may be recalled for duty; for the period 1968-1970, there were no Senior Circuit Judges on the Court.

The clerk's office maintains a brief board which contains the following information: the case number, date docketed, type of case, date the appellant's brief and appendix are due and filed, date appellee's brief filed, date case calendared, date case recalendared, and remarks. Using the brief board, the clerk periodically determines the cases in which the appellant's brief has been filed. He then prepares a screening list consisting of forty to sixty cases in which the appellant's brief has been filed and forwards the list to the staff law clerk for screening.

The staff law clerk prepares a screening work sheet upon which is listed the type and number of each case, the status of the case in relation to its readiness to be placed upon the calendar, a short paragraph describing the nature of the case and the key issues raised by the appeal, and whether the case should be screened or placed upon the calendar for oral argument. In addition, the screening work sheet contains a place for the staff law clerk to designate whether the case is easy, average or difficult.

Upon receipt of the screening work sheet, the clerk notes those cases which are screened off for summary disposition by notation on the brief board and takes no further action on those cases until notified. The panel may accept the recommendation of the staff law clerk that the case be screened, in which event a memorandum opinion is filed with the clerk. Upon receipt of the memorandum decision, the case is removed from the brief board by the clerk. If the panel disapproves the staff law clerk's recommendation for summary disposition

of the case, the clerk is notified by memorandum, with a copy to the staff law clerk. Upon receipt of the panel's memorandum indicating disagreement, the staff law clerk prepares a revised classification in the light of the panel's reasons and forwards it to the clerk's office where the case is replaced on the brief board to be scheduled on the weekly hearing calendar.

Using the cases which are ready to be heard and which have not been screened for summary disposition, the clerk prepares a proposed case list of forty to sixty cases for the next session of the court, usually thirty days before oral argument, and forwards the list to the Chief Judge together with the staff law clerk's paragraph description. The clerk's case list contains the docket number of each case, the date during the week on which the case will be set for oral argument, and special notations to the Chief Judge concerning judge disqualifications and the names of the judges requesting the case to be set for oral argument.

The Chief Judge examines the list of cases and accompanying information and determines what three judges will constitute the panel for each case. He indicates his selection by placing the initials of the panel members beside the case number on the list of cases, and returns the list to the clerk for preparation of the final calendar. The Chief Judge attempts to balance the assignments in an effort to obtain an equal work distribution and also to enable each judge to sit with each other judge so far as is reasonably possible.

After the panels have been designated, the clerk prepares the final calendar containing the number and title of each case, the nature of the case, and the initials of the panel members for each day of the week. The description of the nature of the case is a short one-paragraph statement containing an extract of the precise issues raised and to be argued. As soon as the calendar is ready, the clerk forwards a copy to each circuit judge.

Approximately fifteen to twenty days before the hearing date, the clerk sends the attorneys of record a postcard announcing the date and time the case will be argued. The notice contains a request that the attorneys acknowledge receipt of the card. No information relating to other cases scheduled on the calendar appears on the card.

A few days before the beginning of the session, the clerk prepares a daily calendar listing each case scheduled for oral argument on a certain day during the week. The daily calendar contains the date, the order in which the case will be heard, the case number, the style of case and the initials of the panel judges. The daily calendar is posted each morning on the bulletin board outside the clerk's office. Upon arrival at the court, attorneys examine the bulletin board to learn which panel is scheduled to hear their case. This is the first knowledge the attorneys have of which judges will constitute the panel for their case.

Once a case is placed on the calendar for oral argument, it takes action by the panel before the case may be postponed or continued. Attorneys desiring a continuance may file a continuance

motion, but the policy of the Fourth Circuit in the granting of continuances is quite restrictive.[34]

Oral Argument

The court is called to order at 9:30 A. M. and normally recesses at 1:00 P. M. Under Local Rule 6, an attorney may be admitted to the bar of the court upon personal appearance before the court and oral motion. Admissions of attorneys to the practice of the court are usually handled prior to the call of the first case. To be admitted to the practice, it is requisite that attorneys first have been

> ...admitted to practice in the Supreme Court of the United States, the United States Court of Appeals for any circuit, any District Court of the United States, or the highest court of the state in which they reside, and that their private and professional character shall appear to be good.[35]

In oral arguments, the appellant or petitioner is entitled to open and conclude the argument of the case. In cases where there are cross-appeals, the cases are argued as one case, and the plaintiff in the lower court is entitled to open and conclude the argument. Only two attorneys for each party will be heard on argument. Each side is

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[34]Information on the internal procedure of the Court of Appeals for the Fourth Circuit was supplied to the writer by Samuel W. Phillips, Circuit Executive.

[35]Digest of the Supreme Court Report, 19 vols., "Local Rules of the Court of Appeals for the Fourth Circuit," (Rochester, New York: Lawyers' Cooperative Publishing Co., 1973), Vol. 19, p. 221.

allowed thirty minutes without special leave of the court for additional time, granted before the argument begins. The time may be apportioned between counsel of the same side at their discretion.[36]

Decision-Making and Opinion Writing

> Post-argument conferences are sometimes held by a panel immediately following argument of a case, but usually the conference is held at the end of the day after all the arguments. During the conference, a tentative decision can often be reached by the panel.
>
> Following the conference, the author, who is assigned by the senior member of the panel generally dictates a post-hearing memorandum. He records essential facts, key issues and legal citations, additional research needed and special comments concerning the case. Before writing the opinion, he reads the memorandum to refresh his reflection. It is especially helpful where, due to the complexity of issues, a delay is involved in the circulation of the draft opinion. As a general policy, drafts of opinions are circulated to all circuit judges within 45 days of the oral argument. A judge other than a panel member may question an opinion and suggest changes. If the suggested changes are deemed sound by the hearing panel, the opinion may be redrafted incorporating the changes. A member of the panel usually has 30 days after that to file a dissenting opinion. The dissenting judge contacts the author to advise him that he plans to file a dissent; however, dissenting opinions and special concurrences are infrequent.[37]

The specific internal procedures for the hearing and deciding a case on appeal to the Court of Appeals for the Fourth Circuit

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[36] Digest of United States Supreme Court Reports, "Local Rules of the Court of Appeals for the Fourth Circuit."

[37] Information supplied to the writer by Samuel Phillips in a letter of May 10, 1973.

indicate two very crucial procedures for the potential development of a system of specialized subcourts within the Court of Appeals. First, the Chief Judge is in a position to match case and panel directly. "The Chief Judge examines the list of cases and accompanying information and determines what three judges will constitute the panel for each case."[38] Thus, randomness in assignment is not necessarily the rule. Among the information available to the Chief Judge when he makes the assignment are the names of the judges requesting that the case be heard by oral argument, and the nature of the case and issues raised. The Chief Judge is, therefore, in a position to influence the potential disposition of the case. More importantly, in terms of this study, he is in a position where he can effectively assign certain judges to certain types of cases and in effect create a series of specialized sub-courts within the statutory framework of the Court of Appeals.

Second, should these sub-courts exist, in the drafting of opinions and the creation of decisions, it is not necessary that the decision-maker for an issue be a member of the panel which hears the appeal. Since opinions are always open to suggestions from other circuit judges, it is possible for the decision-maker for that area to create the decision and draft the opinion, especially if it is a per curiam decision, through his suggestions to panel members during the decision and opinion-writing phase. Under this system, it is

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[38] Ibid.

entirely possible that the court is not one court, but rather a series of smaller sub-courts dealing with specialized issue areas.

III. EMPIRICAL DETERMINATION OF SPECIALIZED SUB-COURTS

This research began with a hypothesis and a logical and systematic method of analysis. The end product is a result of the reformulation and redirection of the analysis to explain what standardized procedures and tools could not. The empirical determination of functional decentralization began with the selection of a time period of analysis. A pilot study in the same area indicated that the time period should be continuous and long enough to generate a sufficient number of cases for analysis[1] and that the membership of the court remain fairly constant over the range of the time period. The first two requirements could be satisfied by the selection of any continuous time period long enough to generate a sufficient number of cases. Satisfying the requirement of constant membership was not as easy.

It had been decided that the time period occur within the years 1962-1972, since the caseload for the Court of Appeals for the Fourth Circuit has increased most dramatically during this decade; however, the membership of the court has not remained stable for any period of time exceeding three years. In 1964, a new Chief Justice

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[1] 650 cases had been decided upon as the minimum number. A pilot study (a paper for Dr. James Herndon in Judicial Behavior) indicated that fewer than this number would not yield sufficient numbers of cases for each issue area.

was appointed to the court. In 1966, two additional positions on the court were authorized by Congress.[2] In 1967, a judge on active duty with the court, J. Spencer Bell, died, creating an additional vacancy on the court. At the conclusion of the 1970 term, Judge Sobeloff retired from active duty with the court, and at the end of the 1971 term, Judges Boremann and Bryan also retired. Thus, only the years 1968-1970 provided a time period for analysis in which the membership of the court was stable. For this reason, the period 1968-1970 was determined as the period to be used in this study.

The next step was to gather the data and order them for analysis. The sources of the data were cases gathered from the Federal Reporter[3] and classified as follows: year of decision, point of law involved, and membership of the appellate panel.

Most of the cases were sorted easily. Only one variable, type of case, caused difficulty. Appeals cases are not based on one point of law; many times a case is based on sections of law in different areas. Thus, the decision as to the point of law on which a case was based was often difficult. To solve such problems, cases were classified according to the West Key number system of legal indexing.

Nine hundred thirteen cases were finally selected. In organizing these cases, the following conventions were applied: cases disposed of by memorandum decisions were to be included; in those

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[2]78 Stat. 434; March 18, 1966, Pub. L. 89-372 s. 1(b).

[3]Federal Reporter (St. Paul: West Publishing Co.; 1968-1971), Vols. 318-432.

instances in which one opinion disposed of more than one case, this set of cases is considered as a single case. A decision on this matter was necessary since the situation occurs frequently. While the cases may be identical in substance, they are administratively different entities, even though they are heard at the same time by the same appellate panel. Finally, there are instances when different cases involve the same substantive interpretation. In these instances, a single panel may dispose of several cases simultaneously. Thus, the 913 cases used in this analysis represent in excess of 1150 actual cases docketed by the court.

Initially, the cases were to be sorted by type and by year. Seating patterns would then be analyzed over the range of case types and years to define which issue areas, if any, were marked by patterns of behavior which would allow them to be defined as specialized sub-courts. The results of classification by case types are shown in Table 3-1.

Table 3-1

Case Types, 1968-1970

	Type	Number of Cases
1.[a]	Patent	20
2.	Criminal Procedure	290
3.	Jurisdiction	16
4.	Labor	82
5.	Tax	45
6.	Civil Procedure	50
7.	Admiralty	30
8.	Habeas Corpus	66
9.	Liability	26
10.	Negligence	40
11.	Insurance	33
12.	Bankruptcy	13
13.	Draft	31
14.	Criminal Conspiracy	7
15.	Social Security	40
16.	Contract	35
17.	Administrative	29
18.	Civil Rights	17
19.	Anti-Trust	7
20.	School Desegregation	11
21.	Workmen's Compensation	6
22.	Libel	7
23.	Federal Habeas Corpus	6
24.	Eminent Domain	6

[a]In some of the tabular presentations of this chapter, the titles of case types are too long to permit a unified display. Therefore, in some instances, they will be designated by the numbers which appear to the left of the title in Table 3-1.

Since a further classification of cases by years of decision would reduce the number of cases in many instances to very small numbers, it was decided that such a classification should not be made. This absence of a classification by year of decision does not, however, significantly alter the basic direction of the analysis. Since the composition of potential sub-courts was expected to remain constant, the aggregate seating patterns would be sufficient to reflect this expected consistency.

The next step in the analysis was to define a specialized sub-court. From the hypothesis set out in Chapter One, a specialized sub-court would be one in which one or two judges are found to participate in a significantly large number of cases with other members of the court sitting at a fairly constant and lower rate. A non-specialized sub-court would be one in which all members of the court participate at roughly the same rate. The extreme form of a specialized sub-court would be one in which the same three judges sit on all cases within a given issue area. A non-specialized court would be one in which every judge sat on the same number of cases. Table 3-2 illustrates these extreme patterns of behavior.

Table 3-2

Extreme Seating Patterns for Case Type
Example n = 28

Judge	Specialized	Non-Specialized
A	28	12
B	28	12
C	28	12
D	0	12
E	0	12
F	0	12
G	0	12

For purposes of this study, a specialized sub-court is one whose seating patterns (for some issue area) depart to a statistically significant degree from what would be expected were chance the only factor affecting participation. The test of statistical significance is Chi-square calculated for expected and actual participations for each judge individually and for all judges collectively in each issue classification.

In a seven man court in which cases are heard by panels of three members each, there are thirty-five possible combinations of

judges. Each judge would be a member of fifteen of these combinations.[4] If each panel is equally likely (i.e., if chance is the only factor affecting assignment of judges to panels and assignment of cases to panels), the probability that any judge will hear any given case is 15/35, or .427. The expected number of times that any judge will sit on cases in a particular issue area is .427n, where n is the number of cases in the issue area for the period under investigation.

Table 3-3 reports expected participations, observed participations, numbers of cases, and Chi-square values for each issue area. For individual judges, Chi-square is taken with one degree of freedom. At the .10 level of statistical significance, in a one-tailed test, the critical value of Chi-square is 2.71. For seven judges, Chi-square is calculated for six degrees of freedom; the critical value, in a one-tailed test, is 10.64. A one-tailed test was used since the

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[4] The number of combinations = $\frac{C!}{p!(C-p)!}$, where C is the size of the court and p is the size of the panel. For a seven member court using panels of three members each, the number of combinations = $\frac{7!}{3!(4)!} = 35$. It is possible to argue that the court of appeals has eight members. As explained in Chapter Two, it is not unusual for a district judge from within the circuit to sit upon appellate panels. These judges could have been treated here collectively as an eighth judge, they could have been ignored, or the effects of their participation could somehow have been discounted. Since district judges sat only during periods of overload or when a regular member of the court was unable to sit, it was determined that the use of an "eighth" judge was more the exception than the rule and that their participation could safely be ignored.

the direction of expected behavior was known. The .10 level of significance was used so that marginal occurrences of specialization could be included. The inclusion of marginal examples would allow for a three-way classification of issue areas as specialized ($p \leq .05$), moderately specialized ($.05 < p < .10$) and non-specialized ($p > .10$).

Table 3-3

Primary Case Types

Judge	Expected	Observed
	1. Patent n = 20	
Haynsworth	8.52	9
Sobeloff		9
Boremann		8
Bryan		8
Winter		7
Craven		10
Butzner		7
		$\overline{X}$ = 8.29
		Chi square = 1.55
	*2. Criminal Procedure n = 290	
Haynsworth	123.5	132*
Sobeloff		106
Boremann		106
Bryan		110
Winter		113
Craven		132*
Butzner		113
		$\overline{X}$ = 116
		Chi square = 10.81

*Denotes significant value of Chi-square.

Table 3-3 (continued)

Judge	Expected	Observed
	3. Jurisdiction n = 16	
Haynsworth	6.8	6
Sobeloff		4
Boremann		9
Bryan		8
Winter		6
Craven		3
Butzner		10
		$\overline{X}$ = 6.57
		Chi square = 2.01
	*4. Labor n = 82	
Haynsworth	34.9	20
Sobeloff		24
Boremann		34
Bryan		37
Winter		44
Craven		37
Butzner		40
		$\overline{X}$ = 33.70
		Chi square = 13.13
	5. Tax n = 45	
Haynsworth	19.1	9
Sobeloff		21
Boremann		21
Bryan		18
Winter		19
Craven		17
Butzner		20
		$\overline{X}$ = 17.86
		Chi square = 4.12

Table 3-3 (continued)

Judge	Expected	Observed
	6. Civil Procedure n = 50	
Haynsworth	21.3	18
Sobeloff		21
Boremann		19
Bryan		16
Winter		18
Craven		25
Butzner		19
		$\overline{X}$ = 19.43
		Chi square = 2.82
	7. Admiralty n = 30	
Haynsworth	12.8	12
Sobeloff		7
Boremann		9
Bryan		12
Winter		17
Craven		10
Butzner		17
		$\overline{X}$ = 12.0
		Chi square = 8.17
	8. Habeas Corpus n = 66	
Haynsworth	28.1	30
Sobeloff		25
Boremann		22
Bryan		36
Winter		26
Craven		23
Butzner		29
		$\overline{X}$ = 27.29
		Chi square = 7.45

Table 3-3 (continued)

Judge	Expected	Observed
	9. Liability n = 26	
Haynsworth	11.14	13
Sobeloff		8
Boremann		8
Bryan		9
Winter		12
Craven		7
Butzner		10
		$\overline{X}$ = 9.57
		Chi square = 3.07
	10. Negligence n = 40	
Haynsworth	17.04	19
Sobeloff		11
Boremann		12
Bryan		15
Winter		18
Craven		19
Butzner		18
		$\overline{X}$ = 16.0
		Chi square = 4.99
	11. Insurance n = 33	
Haynsworth	14.05	7
Sobeloff		13
Boremann		15
Bryan		10
Winter		19
Craven		12
Butzner		16
		$\overline{X}$ = 13.14
		Chi square = 8.0

Table 3-3 (continued)

Judge	Expected	Observed
	12. Bankruptcy n = 13	
Haynsworth	5.53	4
Sobeloff		4
Boremann		7
Bryan		4
Winter		5
Craven		5
Butzner		6
		$\overline{X}$ = 5.0
		Chi square = 1.66
	*13. Draft n = 31	
Haynsworth	13.2	7
Sobeloff		10
Boremann		13
Bryan		13
Winter		23*
Craven		12
Butzner		13
		$\overline{X}$ = 13.0
		Chi square = 11.09
	14. Criminal Conspiracy n = 7	
Haynsworth	2.98	4
Sobeloff		2
Boremann		1
Bryan		3
Winter		3
Craven		4
Butzner		3
		$\overline{X}$ = 2.86
		Chi square = 2.75

Table 3-3 (continued)

Judge	Expected	Observed
	15. Social Security n = 40	
Haynsworth	17.04	17
Sobeloff		14
Boremann		15
Bryan		17
Winter		14
Craven		15
Butzner		17
		$\overline{X}$ = 15.57
		Chi square = .933
	16. Contract n = 35	
Haynsworth	14.91	10
Sobeloff		20
Boremann		9
Bryan		20
Winter		10
Craven		13
Butzner		12
		$\overline{X}$ = 13.43
		Chi square = 8.24
	17. Administrative n = 29	
Haynsworth	12.35	8
Sobeloff		13
Boremann		8
Bryan		14
Winter		11
Craven		10
Butzner		17
		$\overline{X}$ = 11.57
		Chi square = 6.35

Table 3-3 (continued)

Judge	Expected	Observed
	18. Civil Rights n = 17	
Haynsworth	7.24	4
Sobeloff		7
Boremann		10
Bryan		5
Winter		9
Craven		7
Butzner		5
		$\overline{X}$ = 6.71
		Chi square = 4.74
	19. Anti-Trust n = 7	
Haynsworth	2.98	2
Sobeloff		3
Boremann		3
Bryan		5
Winter		3
Craven		3
Butzner		2
		$\overline{X}$ = 3.00
		Chi square = 2.66
	20. School Desegregation n = 11	
Haynsworth	.468	1
Sobeloff		4
Boremann		4
Bryan		6
Winter		5
Craven		5
Butzner		6
		$\overline{X}$ = 4.43
		Chi square = 4.55

Table 3-3 (continued)

Judge	Expected	Observed
	21. Workmen's Compensation n = 6	
Haynsworth	2.55	2
Sobeloff		3
Boremann		2
Bryan		2
Winter		2
Craven		4
Butzner		1
		$\overline{X}$ = 2.29
		Chi square = 2.416
	22. Libel n = 7	
Haynsworth	2.98	3
Sobeloff		4
Boremann		6
Bryan		0
Winter		2
Craven		2
Butzner		3
		$\overline{X}$ = 3.86
		Chi square = 9.47
	23. Federal Habeas Corpus n = 6	
Haynsworth	2.55	3
Sobeloff		3
Boremann		1
Bryan		1
Winter		4
Craven		2
Butzner		4
		$\overline{X}$ = 2.57
		Chi square = 4.63

Table 3-3 (continued)

Judge	Expected	Observed
	24. Eminent Domain n = 6	
Haynsworth	2.55	2
Sobeloff		1
Boremann		2
Bryan		3
Winter		4
Craven		3
Butzner		2
		$\overline{X}$ = 2.43
		Chi square = 2.638

In two issue areas, Criminal Procedure and Draft, the value of the Chi square for individual judges was statistically significant at the .10 level. In three issue areas, Criminal Procedure, Draft, and Labor, the value of Chi-square for the court as a whole was significant at the .10 level. Two issue areas, Criminal Procedure and Draft, satisfied the requirements of a specialized sub-court.

Because the numbers of cases in some issue areas may have been too small to permit significant differentiation in seating patterns to show, eight new secondary issue areas were formulated. These were aggregates of the primary case types and were grouped according to a common area of law. They were:

Business - composed of primary case types Patent, Contract, Insurance, Anti-Trust and Bankruptcy.

Conscientious Objection - composed of primary case types Draft and Federal Habeas Corpus.

Equal Rights - composed of primary case types School Desegregation and Civil Rights.

Bureaucratic - composed of primary case types Labor, Administrative, Social Security, Workmen's Compensation, and Tax.

New Deal - composed of primary case types Social Security, Workmen's Compensation and Labor.

Civil - composed of primary case types Civil Procedure, Liability, and Negligence.

Criminal - composed of primary case types Criminal Procedure, Habeas Corpus, and Criminal Conspiracy.

Article 6 - composed of primary case types Admiralty, Jurisdiction, and Eminent Domain.

Table 3-4 sets out expected participations, observed participations, numbers of cases, and Chi-square values for cases in the set of eight secondary issue areas.

Table 3-4

Secondary Case Areas

Judge	Expected	Observed
	25. Business n = 108	
Haynsworth	41.58	32
Sobeloff		49
Boremann		42
Bryan		47
Winter		44
Craven		43
Butzner		43
		$\overline{X}$ = 42.85
		Chi square = 5.30
	*26. Conscientious Objection n = 37	
Haynsworth	15.76	10
Sobeloff		13
Boremann		14
Bryan		14
Winter		27
Craven		14
Butzner		17
		$\overline{X}$ = 15.57
		Chi square = 11.29
	27. Equal Rights n = 28	
Haynsworth	11.92	5
Sobeloff		11
Boremann		14
Bryan		11
Winter		14

Table 3-4 (continued)

Judge	Expected	Observed
Craven		12
Butzner		11
		$\overline{X}$ = 11.14
		Chi square = 5.49
	*28. Bureaucratic n = 202	
Haynsworth	86.05	58
Sobeloff		74
Boremann		79
Bryan		88
Winter		90
Craven		83
Butzner		95
		$\overline{X}$ = 81.0
		Chi square = 12.64
	29. New Deal n = 128	
Haynsworth	54.5	39
Sobeloff		41
Boremann		51
Bryan		56
Winter		60
Craven		56
Butzner		58
		$\overline{X}$ = 57.57
		Chi square = 8.85

Table 3-4 (continued)

Judge	Expected	Observed
	30. Civil n = 116	
Haynsworth	49.4	50
Sobeloff		40
Boremann		39
Bryan		40
Winter		48
Craven		51
Butzner		47
		$\overline{X}$ = 45
		Chi square = 6.00
	31. Criminal n = 363	
Haynsworth	154.6	164
Sobeloff		134
Boremann		130
Bryan		149
Winter		142
Craven		159
Butzner		145
		$\overline{X}$ = 146.1
		Chi square = 9.15
	*32. Article 6 n = 52	
Haynsworth		20
Sobeloff		12
Boremann		20
Bryan		23
Winter		27
Craven		16
Butzner		29
		$\overline{X}$ = 21.0
		Chi square = 11.24

In only one area, Conscientious Objection, did Chi-square exceed critical value.

Study of the seating patterns indicates that a reformulation of the research design may be necessary. In many instances, judges are participating in issue areas at rates above 50%, but still are not being identified as decision-makers nor the issue areas being defined as specialized.

The first aspect of the research design to be examined is the assumption of random assignment and equal participation rates. Table 305 shows the aggregate seating patterns for the members of the court over the three year time period.

Table 3-5

Aggregate Seating Patterns n = 913

Judge	Expected	Observed	%
Haynsworth	389	342	.375
Sobeloff		337	.369
Boremann		344	.377
Bryan		365	.400
Winter		394	.432
Craven		380	.416
Butzner		390	.430
		$\overline{X}$ = 365.57	$\overline{X}$ = .400
		Chi square = 22.8	

Prior to any statistical analysis Table 3-14 reveals some very pronounced patterns of seating behavior. The court is marked by one significant fact. The three senior judges, Haynsworth, Sobeloff, and Boremann, sit at a very constant rate between themselves. The three junior judges, Winter, Craven and Butzner do likewise. Judge Bryan sits at a rate almost exactly between these two divisions.

Rank order correlation reveals a -.85 correlation between seniority and the number of cases sat. Rank order correlation also reveals a -.98 correlation between age and the number of cases sat. Obviously age and seniority are two factors which must be taken into consideration when determining the expected rate of participation for each judge. These two factors, while perhaps significant enough to explain most of the variances in participation, suggest that there may be others. A chi-square based upon random expectations of seating behavior results in a value of 22.8 for Table 3-14. With 6 degrees of freedom, this is large enough to reject the hypothesis of homogeneous participation rates for the seven judges at the .05 level.

Reformulation of the research design to control for the factors of age and seniority now becomes the problem. The problem is, however, easily solved by one assumption. Assuming that there are potentially an infinite number of factors which could affect a judge's seating behavior, of which age and seniority are but two, then the cumulative effect of these factors is exhibited in each judge's aggregate rate of participation over the three year time period. If this assumption is valid, then the expected rate of participation for each judge would be

E x n, where E is a judge's percentage participation rate over the three year time period and n is the number of cases in each issue area. Significantly high seating rates for a judge within an interest area could then be interpreted as a preference by the judge for that type of case.

Using the new expected participation rates, the hypotheses were retested over the range of issue areas. Table 3-6 shows the results for both primary and secondary issue areas.

Table 3-6

Primary Issue Areas

Judge	Expected	Observed
	Patent n = 20	
Haynsworth	7.52	9
Sobeloff	7.38	9
Boremann	7.54	8
Bryan	8.14	8
Winter	8.64	7
Craven	8.32	10
Butzner	8.60	7
		Chi square = 1.63
	Criminal Procedure n = 290	
Haynsworth	108.75	130*
Sobeloff	107.00	107
Boremann	109.33	107
Bryan	118.03	110
Winter	125.28	113
Craven	120.64	132
Butzner	124.70	113
		Chi square = 8.11

Table 3-6 (continued)

Judge	Expected	Observed
	Jurisdiction n = 16	
Haynsworth	6	6
Sobeloff	5.90	4
Boremann	6.03	9
Bryan	6.51	8
Winter	6.91	6
Craven	6.65	3
Butzner	6.87	10
		Chi square = 5.95
	Labor n = 82	
Haynsworth	30.75	20
Sobeloff	30.25	24
Boremann	30.91	34
Bryan	33.37	37
Winter	35.42	44
Craven	34.11	37
Butzner	35.25	40
		Chi square = 8.71
	Tax n = 45	
Haynsworth	16.87	11
Sobeloff	16.60	20
Boremann	16.96	20
Bryan	18.31	18
Winter	19.43	19
Craven	18.71	17
Butzner	19.34	20
		Chi square = 3.48

Table 3-6 (continued)

Judge	Expected	Observed
	Civil Procedure n = 50	
Haynsworth	18.75	18
Sobeloff	18.45	21
Boremann	18.84	19
Bryan	20.34	16
Winter	21.59	18
Craven	20.79	25
Butzner	21.49	19
		Chi square = 3.05
	Admiralty n = 30	
Haynsworth	11.25	12
Sobeloff	11.07	7
Boremann	11.31	9
Bryan	12.21	12
Winter	12.96	17
Craven	12.48	10
Butzner	12.90	17
		Chi square = 5.08
	Habeas Corpus n = 66	
Haynsworth	24.75	30
Sobeloff	24.35	25
Boremann	24.88	22
Bryan	26.86	36*
Winter	28.51	26
Craven	27.45	23
Butzner	28.37	29
		Chi square = 5.53

Table 3-6 (continued)

Judge	Expected	Observed
	Liability n = 26	
Haynsworth	9.75	13
Sobeloff	9.59	8
Boremann	9.80	8
Bryan	10.58	9
Winter	11.23	12
Craven	10.81	7
Butzner	11.18	10
		Chi square = 3.43
	Negligence n = 40	
Haynsworth	15	19
Sobeloff	14.76	11
Boremann	15.08	12
Bryan	16.27	15
Winter	17.28	18
Craven	16.63	19
Butzner	17.20	18
		Chi square = 3.15
	Insurance n = 33	
Haynsworth	12.37	7
Sobeloff	12.17	13
Boremann	12.44	15
Bryan	13.43	10
Winter	14.25	19
Craven	13.72	12
Butzner	14.19	16
		Chi square = 5.82

Table 3-6 (continued)

Judge	Expected	Observed
	Bankruptcy n = 13	
Haynsworth	4.87	4
Sobeloff	4.79	4
Boremann	4.90	7
Bryan	5.29	4
Winter	5.61	5
Craven	5.40	5
Butzner	5.58	6
		Chi square = 1.63
	Draft n = 31	
Haynsworth	11.62	7
Sobeloff	11.43	10
Boremann	11.68	13
Bryan	12.61	13
Winter	13.39	23*
Craven	12.89	12
Butzner	13.33	13
		Chi square = 9.14
	Criminal Conspiracy n = 7	
Haynsworth	2.62	4
Sobeloff	2.58	2
Boremann	2.63	1
Bryan	2.84	3
Winter	3.02	3
Craven	2.91	4
Butzner	3.09	3
		Chi square = 2.28

Table 3-6 (continued)

Judge	Expected	Observed
	Social Security n = 40	
Haynsworth	15	17
Sobeloff	14.76	14
Boremann	15.08	15
Bryan	16.27	17
Winter	17.28	14
Craven	16.63	15
Butzner	17.20	17
		Chi square = 1.12
	*Contract n = 35	
Haynsworth	13.12	10
Sobeloff	12.91	20
Boremann	13.19	9
Bryan	14.24	20
Winter	15.12	10
Craven	14.56	13
Butzner	15.05	12
		Chi square = 10.81
	Administrative n = 29	
Haynsworth	10.87	8
Sobeloff	10.70	13
Boremann	10.93	8
Bryan	10.83	14
Winter	12.52	11
Craven	12.06	10
Butzner	12.47	17
		Chi square = 4.63

Table 3-6 (continued)

Judge	Expected	Observed
	Civil Rights n = 17	
Haynsworth	6.37	4
Sobeloff	6.27	7
Boremann	6.40	10
Bryan	6.91	5
Winter	7.34	9
Craven	7.07	7
Butzner	7.30	5
		Chi square = 4.61
	Anti-Trust n = 7	
Haynsworth	2.62	2
Sobeloff	2.58	3
Boremann	2.63	3
Bryan	2.84	5
Winter	3.02	3
Craven	2.91	3
Butzner	3.00	2
		Chi square = 2.23
	School Desegregation n = 11	
Haynsworth	4.12	1
Sobeloff	4.05	4
Boremann	4.14	4
Bryan	4.47	6
Winter	4.75	5
Craven	4.57	5
Butzner	4.72	6
		Chi square = 3.28

Table 3-6 (continued)

Judge	Expected	Observed
	Workmen's Compensation n = 6	
Haynsworth	2.25	2
Sobeloff	2.21	3
Boremann	2.26	2
Bryan	2.44	2
Winter	2.59	2
Craven	2.49	4
Butzner	2.57	1
		Chi square = 2.46
	*Libel n = 7	
Haynsworth	2.62	3
Sobeloff	2.58	4
Boremann	2.63	6*
Bryan	2.84	0
Winter	3.02	2
Craven	2.91	2
Butzner	3.00	3
		Chi square = 11.79
	Federal Habeas Corpus n = 6	
Haynsworth	2.25	3
Sobeloff	2.21	3
Boremann	2.26	1
Bryan	2.44	1
Winter	2.59	4
Craven	2.49	2
Butzner	2.57	4
		Chi square = 3.72

Table 3-6 (continued)

Judge	Expected	Observed
	Eminent Domain n = 6	
Haynsworth	2.25	2
Sobeloff	2.21	1
Boremann	2.26	2
Bryan	2.44	3
Winter	2.59	4
Craven	2.49	3
Butzner	2.57	2
		Chi square = 2.71
	Secondary Issue Areas	
	Business	
Haynsworth	40.50	32
Sobeloff	39.85	49
Boremann	40.71	42
Bryan	43.95	47
Winter	46.65	44
Craven	44.92	43
Butzner	46.42	43
		Chi square = 4.479
	Draft; Federal Habeas Corpus n = 37	
Haynsworth	13.87	10
Sobeloff	13.65	13
Boremann	13.94	14
Bryan	15.04	14
Winter	15.98	27*
Craven	15.39	14
Butzner	15.91	17
		Chi square = 8.98

Table 3-6 (continued)

Judge	Expected	Observed
Civil Rights and School Desegregation n = 28		
Haynsworth	10.5	5
Sobeloff	10.33	11
Boremann	10.55	14
Bryan	11.39	11
Winter	12.09	14
Craven	11.64	12
Butzner	12.04	11
		Chi square = 4.44
Labor, Administrative, Social Security, Workmen's Compensation, Tax n = 202		
Haynsworth	75.75	58
Sobeloff	74.53	74
Boremann	76.15	79
Bryan	82.21	88
Winter	87.26	90
Craven	84.03	83
Butzner	86.85	95
		Chi square = 5.53
New Deal n = 128		
Haynsworth	48	39
Sobeloff	47.23	41
Boremann	48.25	51
Bryan	52.09	56
Winter	55.29	60
Craven	53.24	56
Butzner	55.03	58
		Chi square = 3.65

Table 3-6 (continued)

Judge	Expected	Observed
	Article 6 n = 52	
Haynsworth	19.50	20
Sobeloff	19.18	12
Boremann	19.60	20
Bryan	21.16	23
Winter	22.46	27
Craven	21.63	16
Butzner	22.35	29
		Chi square = 7.22
	Civil n = 116	
Haynsworth	43.50	50
Sobeloff	42.80	40
Boremann	43.73	39
Bryan	47.21	40
Winter	50.11	48
Craven	48.25	51
Butzner	49.87	47
		Chi square = 3.17
	Criminal	
Haynsworth	136.12	164*
Sobeloff	133.94	134
Boremann	136.85	130
Bryan	147.74	149
Winter	156.81	142
Craven	151.08	159
Butzner	156.09	145
		Chi square = 8.67

Using the new expected value, statistically significant individual seating patterns could be found in six issue areas, Criminal Procedures, Habeas Corpus, Draft, Libel, Conscientious Objection, and Criminal. However, only two values of Chi-square for the seating behavior of the full membership of the court in an issue are statistically significant.

While variation exists for the judges' seating patterns over the range of issue areas, functional decentralization, as hypothesized, is not the cause.

Using an expected value based upon random assignment, statistically significant individual patterns were found in two primary case types, Haynsworth and Craven in Criminal Procedure, and Winter in Draft. Significant patterns for the court as a whole could be found in Criminal Procedure, Labor, Draft, Conscientious Objection, Bureaucratic, and Article 6.

Using an expected value based upon a judge's participation rate over the three-year time period, significant individual patterns were found in six issue areas, Haynsworth in Criminal Procedure, Bryan in Habeas Corpus, Winter in Draft, Boremann in Libel, Winter in Conscientious Objection, and Haynsworth in Criminal. Significant patterns for the court as a whole were found for two issue areas, Contract and Libel.

Only three case types, Criminal Procedure, Draft, and Libel, fulfilled both conditions using either expected value.

To explain these findings in terms of the hypothesis of functional decentralization is impossible. Less than ten per cent of the issue areas studied could fulfill the conditions necessary to be defined as specialized sub-courts.

IV. SUMMARY AND CONCLUSION

The aim of this study was to apply the hypothesis of functional decentralization to the United States Court of Appeals for the Fourth Circuit for the years 1968-1970. It was expected that there would exist a number of smaller specialized sub-courts handling particular issue areas. While a number of statistically significant individual patterns were found, and three specialized sub-courts were identified, these findings cannot be interpreted as substantively significant. The anticipated pattern was that a large percentage of the issue areas would emerge as specialized. The specialized sub-court found in the Libel issue area is negated by the fact that the issue area had only seven cases. In terms of the overall pattern of behavior of the court the two specialized sub-courts remaining cannot be interpreted as having any substantive significance.

That the anticipated patterns of behavior were not found may have two explanations. The first is that the seating patterns discerned occurred solely through chance. Thus, for the period 1968-1970, assignment of judges to appellate panels in the United States Court of Appeals for the Fourth Circuit was done on a completely random basis.

The second possible explanation is that there exists a fault in the research design which led to inability to reject the null hypothesis. There are several areas of potential error. The first

lies in the typing of cases. Inevitably, unless the researcher is skilled in the principles of law and has sufficient time to study every case before typing, some forcing of cases into inappropriate case types will occur. Future researchers employing this technique will have to decide for themselves how much forcing is acceptable. In this research, approximately five per cent of the cases were forced. When spread over twenty-four primary case types, this five per cent may not have had any significant effect, but the potential for error cannot be discounted nor is it possible to assume that the forced cases were distributed evenly through the range of case types.

Possibly the most important area in which potential for error existed was in the restriction of the court to a stable membership over a short time period. In order to acquire a sufficiently large number of cases and case types for statistical testing, per curiam decisions and decisions which included judges other than those assigned to the appellate bench were included of necessity. In retrospect, it is easy to see that the patterns of behavior which were under examination would hold regardless of the membership of the court. Since the court rarely changes more than two members in a year or even two years, patterns of behavior would not be severely affected. As new judges were rotated into the system, they would be trained and either be assigned or develop areas of responsibility. Thus the patterns of behavior would remain fairly constant and would in the long run probably be more discernible. The employment of this technique would allow the researcher to concentrate upon those cases in

which the decision of the court was given in a written opinion. These cases are those which treat the most important issues of the law and thus would be the ones most likely to cause the court to call upon its resident experts in particular types of law.

While this research was not successful in validating its basic premise, it has some merit. The most important of these was its focus upon the court as a collective body. For many years, students of judicial behavior have focused upon the single judge as their entity of study. The expansion of focus to the study of an entire court's behavior has been long overdue. One may argue with substantial justification that the behavior of the court collectively is nothing more than a composite of the patterns of behavior manifested by the individual judges. Thus it is the individual judge which is the important focus of study in judicial behavior. Conversely, one may argue that any group of individuals organized into a collective body as a goal oriented group will in effect establish its own system of directing its members' behavior toward successful accomplishment of the group's goal. Thus the individual pattern of behavior becomes significant only when viewed in terms of the group's collective behavior. This orientation was the focus adopted here. As a basis for research, it can be highly useful in studying the behavior of courts and their impact on national policy. It is, however, limiting upon the researcher and thus to the discipline if one orientation is used exclusively. Researchers and scientists must remain open and flexible to new ideas, concepts, and techniques.

Another merit of this study was that it focused upon a court other than the Supreme Court. Students of judicial behavior have long ignored the lower federal courts and the state courts in their study of judicial decision-making. Only by studying the entire judicial system, including both state and federal courts, will accurate generalizations concerning judicial behavior be generated.

The use of an hypothesis generated in a field other than judicial behavior is another merit of this study. The judicial system in our society is not and cannot be completely isolated from the society which it both governs and serves. The courts are receptive and responsive to stimuli which are generated in arenas other than the legal system. Questions of administration are valid whether or not they are concerned with the administration of national programs through an agency or with the administration of justice through the courts. In a legal system as diversified and complex as that which exists in the United States, administration is certainly an important area of concern, and again one which has been largely ignored.

Future research in the field of judicial behavior must be oriented in these directions. For too long we have concentrated on the Supreme Court and the individual judge as the foci of study. The legal system in this nation is vast and complex. There exists a plethora of courts and patterns of behavior which are as yet insufficiently studied. Areas of interaction between the state and federal judicial systems have yet to be defined fully, though these are of crucial importance in determining the precise nature of the

relationship between the federal and state governments. We have accepted the ideal of a completely independent judiciary as a reality and have subsequently failed to study adequately those areas of interaction in which judicial behavior becomes political behavior.

Much of the work which remains in the field of judicial behavior will be normative. While the researcher should not allow his personal values to pollute his research, there are standards by which judgements can be made. Questions of efficiency and the impartial administration of justice are ones which the student of judicial behavior cannot ignore. It behooves us as members of society not only to define the phenomenum, but also to judge it upon its merits, much like the men and courts we study are required to do.

SELECTED BIBLIOGRAPHY

Books

Abraham, Henry J. The Judicial Process. New York: Oxford University Press, 1962.

Cardozo, Benjamin N. The Growth of the Law. New Haven: Yale University Press, 1924.

_____. The Nature of the Judicial Process. New Haven: Yale University Press, 1921.

Cartwright, Dorwin and Zander, Adrian. Group Dynamics: Research and Theory. New York: Harper Brothers, 1950.

Etzioni, Amitai. Complex Organizations. New York: The Free Press, 1961.

Forrester, Ray; Currier, Thomas S.; and Moye, John E. Federal Jurisdiction and Procedure. St. Paul: West Publishing Company, 1970.

Frank, Jerome. Courts on Trial. New York: Atheneum Press, 1949.

Frankfurter, Felix and Landis, J. M. The Business of the Supreme Court. New York: MacMillan Company, 1927.

Goldman, Sheldon P. and Jahnige, Thomas P. New York: Harper and Row, 1971.

Jahnige, Thomas P. and Goldman, Sheldon P. The Federal Judicial System. New York: Holt, Rinehart and Winston, 1968.

Karlen, Delmar; Sawyer, Geoffrey; and Wise, Edward M. Anglo-American Criminal Justice. Oxford: Oxford University Press, 1967.

_____. Appellate Courts in the United States and England. New York: New York University Press, 1963.

Mason, Alpheus and Beaney, W. M. American Constitutional Law. New York: Prentice Hall, 1954.

Mayers, Lewis. The American Legal System. New York: Harper and Row, 1964.

Mendelson, Wallace. The Constitution and the Supreme Court. New York: Dodd-Mead, 1959.

Moore, James W. and Ward, Bernard J. Moore's Federal Practice, 9 vols. Albany: Matthew Bender Co., 1961.

Oakes, Stacey, ed. American Jurisprudence, 58 vols. San Francisco: Bancroft Whitney, 1945.

Petalson, Jack W. Federal Courts in the Political Process. New York: Random House, 1955.

Richardson, Richard J. and Vines, Kenneth N. The Politics of the Federal Courts. Boston: Little, Brown and Co., 1970.

Sanders, Paul H. "The Warren Court and the Lower Federal Courts: Problems of Implementation." In Constitutional Law in the Political Process, pp. 422-435. Edited by John R. Schmidhauser. Chicago: Rand-McNally, 1963.

Schmidhauser, John R. The Supreme Court: Its Politics, Personalities and Procedures. New York: Holt, Rinehart and Winston, 1960.

Schubert, Glendon A. "From Public Law to Judicial Behavior." In Judicial Decision-Making, pp. 1-10. Edited by Glendon A. Schubert. Glencoe: The Free Press, 1963.

_____. Judicial Policy-Making. Chicago: Scott, Foresman, 1965.

Sigler, John A. An Introduction to the Legal System. Homewood: The Dorsey Press, 1968.

Spaeth, Harold J. An Introduction to Supreme Court Decision-Making. San Francisco: Chandler Publishing Co., 1972.

Swisher, Carl Brent. American Constitutional Development. New York: Houghton-Mifflin, 1943.

Weiner, Frederick B. Effective Appellate Advocacy. New York: Prentice-Hall, 1950.

Wright, Charles A. Law of Federal Courts. St. Paul: West Publishing Co., 1970.

Who's Who in America: 1970-1971. Chicago: Van Hoffman Press, 1970.

Federal Reporter. St. Paul: West Publishing Co.

"Local Rules of the Court of Appeals for the Fourth Circuit." Digest of the Supreme Court Reports, 19 vols. Rochester: Lawyers Co-operative Publishing Co., 1973.

Unpublished Manuscripts

Pedeliski, Theodore B. "Interaction Patterns in the U.S. Court of Appeals for the Second Circuit." (1941-1951) (typewritten) University of North Dakota, 1965.

Periodicals

Becker, Selwyn W. and Gordon, Gerald. "An Entreprenural Theory of Organizations, Part 1: Patterns of Formal Organization." Administrative Science Quarterly 11 (December 1966): 328-351.

Bryan, Albert V. "For Swifter Criminal Appeal." Washington and Lee Law Review 25 (Fall, 1968): 175-192.

Bell, Griffin B. "Toward a More Efficient Federal Appeals System." Judicature 54 (August 1971): 237-244.

_____. "Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Procedure." Columbia Law Review 73 (January, 1973): 77-105.

Christian, Winslow. "Delays in Criminal Appeals: A Functional Analysis of One Court's Work." Stanford Law Review 23 (April 1971): 676-702.

Collinson, Jack S. and Davidow, Jack. "Second Circuit: Federal Judicial Administration in Microcosm." Columbia Law Review 63 (May 1963): 820-875.

Doub, George C. "Shall We Curtail Diversity Jurisdiction?" Journal of the American Bar Association 64 (March, 1958): 240-249.

Dahl, Robert A. "Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker." Journal of Public Law 6 (Fall, 1957): 279-295.

Frank, John P. "The Nations Top Commercial Court." Fortune 63 (January, 1951): 90-95.

Goldman, Sheldon. "Conflict and Consensus in the United States Court of Appeals." Wisconsin Law Review 1968 (Winter 1968): 461-482.

_____. "Voting Behavior in the United States Courts of Appeals, 1961-1964." American Political Science Review 60 (June, 1966): 374-383.

_____. "The Three Judge Court Act of 1910: Purpose, Procedure and Alternatives." Journal of Criminal Law, Criminology and Police Science 62 (June, 1972): 101-126.

Magruder, Calbert. "Trials and Tribulations of an Intermediate Appellate Court." Cornell Law Quarterly 64 (March 1958): 240-249.

Murphy, Walter. "Lower Court Checks on Supreme Court Power." American Political Science Review 53 (December, 1959): 1017-1031.

_____. "Chief Justice Taft and the Lower Court Bureaucracy." Journal of Politics 24 (August, 1962): 453-476.

O'Connell, Kenneth J. "Streamlining Appellate Procedures." Judicature 56 (January, 1973): 234-239.

Schubert, Glendon A. "The Study of Judicial Decision-Making as an Aspect of Political Behavior." American Political Science Review 52 (December, 1958): 307-321.

Surrency, Edwin G. "A History of Federal Courts." Missouri Law Review 28 (Spring, 1963): 231-240.

Ulmer, S. Sidney. "Toward a Theory of Sub-Group Formation in the United States Supreme Court." Journal of Politics 27 (August, 1965): 309-329.

_____. "The Analysis of Behavior Patterns on the United States Supreme Court." Journal of Politics 22 (August, 1960: 219-221.

Vines, Kenneth N. "The Role of the Circuit Courts of Appeals in the Federal Judicial Process." Midwest Journal of Political Science 7 (November, 1963): 305-319.

Government Publications

Annual Report of the Director of the Administrative Office of the United States Court, 1971. Washington: Government Printing Office, 1972.

U. S. Department of Commerce. U. S. Census of the Population: 1970. Washington: Government Printing Office, 1971.

U. S. Department of Commerce, Bureau of the Census. Statistical Abstract of the United States 1971. Washington: Government Printing Office, 1972.

General Services Administration. United States Government Organization Manual 1969-1970. Washington: Government Printing Office, 1969.

Hoover, J. Edgar. Uniform Crime Reports in the United States, 1968, 1969, 1970. Washington: Government Printing Office, 1969, 1970, 1971.

Cases

Erie v Tomkins, 304 U.S. 64 (1938).

Textile Mills Securities v Commissioner of Internal Revenue, 314 U.S. 326 (1941).

Colgrove v Green, 328 U.S. 549 (1946).

Baker v Carr, 369 U.S. 186 (1962).

Holmstead v U.S., 277 U.S. 438 (1928).

Swann v Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971).

Bradley v School Board of Richmond, 338 F. Supp. 67 (1972).

U.S. v Ullmann, 221 F. 2d 760 (1954).

Vaughns v Board of Education of Prince Georges County, 468 F. 2d 894 (1972).

Laws

U.S. Code, Vol. XXVIII (1952).

U.S. Code, Vol. XVII (1950).

Statutes at Large, Vol. LX (1946).

Statutes at Large, Vol. LXXVIII (1954).

"Federal Rules of Appellate Procedure." Appendix A to Title II, United States Code, Vol. XXVIII (1968).

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FUNCTIONAL DECENTRALIZATION IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

by

Stephen Ray Furr

(ABSTRACT)

The volume of cases reaching the United States Courts of Appeals has grown tremendously in the past ten years. Given the conditions of this growth and small court membership, it is inevitable that the Courts of Appeals must find some form of internal organization which is sufficient to allow the court to dispose of this tremendous caseload quickly and efficiently. Studies in administration suggest that the most likely form of organization to appear would be that of specialized sub-courts dealing with specific types of cases, a form of functional decentralization. This was the hypothesis tested on the United States Court of Appeals for the Fourth Circuit for the years 1968-1970. Statistical testing did not allow for the generalized application of the hypothesis to the court, even though highly differentiated seating patterns were found.