

1983

Book Review

John P. Flaherty

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

John P. Flaherty, *Book Review*, 21 Duq. L. Rev. 835 (1983).

Available at: <https://dsc.duq.edu/dlr/vol21/iss3/13>

This Book Review is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Book Review

HOW COURTS GOVERN AMERICA. By *The Honorable Richard Neely*. New Haven, Connecticut: Yale University Press, 1981. Pp. xvii, 226. \$15.00.

In a refreshingly candid and incisive fashion, Justice Richard Neely, of the Supreme Court of West Virginia, strips our system of government naked, and describes *How Courts Govern America*¹ by necessity. "In elected politics, the legislature and executive take idealistic, energetic, ambitious young men and turn them into whores in five years; the judiciary takes good, old, tired, experienced whores and turns them into virgins in five years."² "While a relative absence of graft helps the judiciary, its distinguishing feature is the absence of the sophisticated political and institutional trading which so permeates the legislative and executive branches."³

[W]hen the courts are going full speed at the lawmaking business, they still try to limit their lawmaking to "general interest" law as opposed to "special interest" law. . . . The difference between judges and legislators is that judges can betray their benefactors without fear of future retribution and usually, although not always, they do. . . . If judges did not engage in universal betrayal, some other neutral force would need to be invented.⁴

According to the author, "in any society there are two systems of government — *the myth system* and *the operational system*."⁵ "The duty which we have unconsciously thrust upon the courts is to get the results which the myth system promises but which the operational system does not deliver; however, courts are absolutely forbidden to call attention to the difference in the two systems or in any way to threaten the myth system."⁶ In order to do this, without addressing this "myth/operational disparity," of course, in a discreet way, the judicial institution uses a code, quite acceptable to law professors, such as the reasoning employed in *Baker v.*

-
1. R. NEELY, *HOW COURTS GOVERN AMERICA* (1981).
 2. *Id.* at 190.
 3. *Id.* at 191.
 4. *Id.* at 49.
 5. *Id.* at 12 (emphasis added) (footnote omitted).
 6. *Id.* at 13.

Carr,⁷ expressing the "definitive" reasons why the judiciary must provide relief in what was theretofore a "political question":

Prominent on the surface of any case held to involve a political question is found textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁸

The method principally employed in the "governing function" is constitutional law:

[A]ll law except constitutional law can be changed at any time by the legislative branch of government; consequently, all the rules concerning contracts, providing remedies for negligently inflicted injuries, and defining crimes and their punishments, along with almost every other question which a court ever decides, are open to legislative change at will. Courts spend much time administering this routine type of law, and while they are frequently criticized in individual cases for being wrong, stupid, or for deliberately interpreting a piece of legislation in a perverse manner, their actions in routine matters are seldom considered illegitimate, illegal, or usurpatory because the state legislature or Congress can immediately rectify any mistake by changing the law.

However, when we come to constitutional law, the actions of courts are almost entirely outside the control of the legislative branch.⁹

Setting the stage for judiciary rule is the nature of politics, thus, says the author:

The widely held tenet of democratic faith that elected officials, as opposed to bureaucrats or the judiciary, are popularly selected and democratically responsive is largely a myth which gives a useful legitimacy to a system that works relatively well in a society which has come to raise the ideal of democracy to the level of a religious creed. In fact, however, far from democratic control, the two most important forces in political life are indifference and its direct byproduct, inertia. This is not irrational, because people want first and foremost for the government to leave them the hell alone, and this sentiment is pervasive among such disparate groups as captains of industry, the solid middle class, and the majority of welfare clients.

. . . .
 . . . [T]he most compelling force in politics is inertia

7. 369 U.S. 186 (1962).

8. *Id.* at 217.

9. R. NEELY, *supra* note 1, at 5.

. . . Partisan controversy sets the county clerk against the prosecuting attorney, the circuit judge at odds with the circuit clerk, the county commission against the local sheriff and assessor, all in the interest of showing what a bunch of rascals the opposition party is. The result is total lack of cooperation, confusion, and deliberate torpedoing of major economic projects, urban renewal, and any other program which might reflect credit on the opposition.¹⁰

In essence, judges are actually "surrogate sovereigns," individually with absolute powers, but: "No individual judge has very much power through the judicial lawmaking function. There is a hierarchy of courts, with appellate courts supervising trial courts . . ." ¹¹

The judiciary is the only branch of government which absolutely requires that the person making a decision do his own work: the decision-maker must personally sit on the bench, hear oral arguments, listen to the testimony of witnesses, make his own findings of fact and law, and ultimately sign his own name to the order rendering a decision.¹²

The author compares the courts to the legislature, bureaucracy, and executive functions well, indeed. Regarding the legislature, "a legislature cannot be designed which will pass good legislation in a timely manner and simultaneously prevent the passage of dangerous legislation."¹³ The reason for this is the nature of the institution itself. Courts, by their nature as an institution, have less reason to "trade for one's own account." Courts, importantly, also do not control their own dockets, as do the legislatures.

As for the bureaucracy:

There are roughly three million civil service jobs in the federal merit system of which none is elected. In fact, in the entire federal executive branch, there are but two elected officials, the president and vice president. In the state governments, there are usually, in addition to the governor, a few statewide elected officials variously called treasurers, comptrollers, auditors, commissioners, attorneys general, or superintendents, all with executive duties. However, even where there are numerous statewide elected officials in the state executive branch, the majority of the state civil servants, ranging from five thousand to hundreds of thousands, depending on the state, are responsible to the governor.

The myth of democratic control becomes even more ironic when it is remembered that in addition to the ratios of elected officials to civil service employees, neither presidents nor governors select the civil service; its members are passed on from administration to administration.¹⁴

10. *Id.* at 25-27.

11. *Id.* at 191.

12. *Id.* at 201.

13. *Id.* at 47-48.

14. *Id.* at 80.

Indeed, says the author:

The pervasive desire to get as many functions as possible out of politics creates board after board and converts local elected officials into appointees at an ever accelerating pace. The war cry of "democratic control" is usually invoked *after* a particular function has been "depoliticized"; whenever a function is directly in the hands of elected politicians the complaint is universally heard that a given function has become "political," by which is meant that the officials exercising the control are either incompetent or trading for their own accounts. Notwithstanding everyone's love of democracy, there is almost universal agreement that the elective process brings a higher number of incompetents and self-dealers to high positions than the appointive process.¹⁵

The legislature creates the myriad of agencies,

intentionally to remove them from political control.

. . . Since there is not obvious reason to believe that the agencies will be wrong more often than the courts, why not let the agencies make the decisions? . . . The answer to this criticism is that courts are not as likely to be wrong as the agencies; while they are equally susceptible to human error, they are almost immune from institutional error.¹⁶

The supervisory role of the courts, then, is actually to return the bureaucracy to "political control"! "The answer lies in an analysis of bureaucracies as institutions and a dissection of their inherent institutional weaknesses. The intent of the courts' supervisory role is to supply corrective balance to institutional weaknesses, although legal scholars seldom speak in terms of social structure, but rather of 'procedural due process.'"¹⁷ The way the courts do this is:

First, the court can find procedural irregularity on the part of the agency, such as failure to give notice, lack of a fair hearing, or inadequate findings of fact to support the agency's conclusion. Second, if the agency has been careful to protect its procedural flanks, the court can find the action by the agency in excess of its authority, "arbitrary," or contrary to the weight of the evidence. There are occasions, of course, where there is real procedural irregularity or where an agency does act in excess of its authority; however, most of the reversals which cause public outcry occur because the court disagrees with the agency's policy and finds some procedural device on which to turn its ruling.¹⁸

Agencies, "[w]hile they are not tempted to individual self-dealing in the same way that elected political officials are, they are

15. *Id.* at 87 (emphasis in original).

16. *Id.* at 81 (emphasis in original).

17. *Id.* at 82.

18. *Id.*

nonetheless tempted to institutional self-dealing, that is, acting in such a way as to further the ends of the bureaucracy as a whole."¹⁹

In my view, the following is representative of the tone of the author:

Implicit in the whole structure of court control of administrative action is society's desire to remove important decision making from the hands of administrators and place it in the hands of politicians. To refer to judges as 'politicians' may seem silly in light of the lengths to which we go to 'depoliticize' courts, but the term politician in this context does not connote partisan or ideological politics, but merely experience with the entire body politic. Judges are judges because of politics, either by being elected or by being appointed. Furthermore, most judges are first appointed in their late forties, which means that the majority of sitting judges are in their middle fifties. They have seen a great deal and had considerable experience: they have defended innocent people against a corrupt system; they have represented struggling businesses against arrogant regulators; they have represented the consumer against the powerful predators of American industry; they have represented the government against organized crime; and, frequently, they have represented organized crime against the government.

The day-to-day practice of law is an inherently unintellectual undertaking, which may be why the results in reported cases are frequently more satisfactory than the reasoning. Good judges often intuit the correct result, although they may not be able to articulate their reasons in terms of theoretical structures which would be satisfying to law professors. By the time a good trial lawyer has practiced for twenty-five years, he has about seen it all. If he is any good, the stereotypes which he learned at university no longer impress themselves upon his imagination, and he understands that there are *two* sides to every issue. Concisely stated, he has learned to hate a little less.

The same, of course, is true of elected politicians and high appointed officials; however, they are not in control of the day-to-day operation of government. A G.S. 15 government executive is almost, by definition, devoid of broad-based experience, because if he had not spent his entire life in a particular bureaucracy, he would not be a G.S. 15. The purpose of placing ultimate responsibility for administrative action into the hands of the courts, therefore, is to protect everyone outside the government *from* the government itself.²⁰

How true!

As for the "non-political" bureaucrat—"the affairs of much of the country are inevitably managed to some degree by a group of people who consider areas west of the Hudson, except California, as Indian country."²¹ "What happens when high staff positions are

19. *Id.* at 83.

20. *Id.* at 110-111 (emphasis in original).

21. *Id.* at 104.

filled with the inordinately arrogant graduates of the Yale and Harvard law schools who have been trained that they have a monopoly on, not only all the intellect, but all the morality as well?"²²

[T]he courts are peculiarly suited to combatting bureaucratic self-dealing. . . . [C]ourts are able to shift the responsibility for truly important decisions away from young, Ivy League-trained but inexperienced lawyers and administrators into the hands of older, more experienced, and more truly representative persons from all over America who have no institutional stake in the outcome of any given issue.

. . . The essential mission of the courts in bringing the myth system and operational system into alignment involves supplying balance.²³

The role of the courts is accepted because:

American courts enjoy greater prestige than any other American governmental institution, and I believe it is because the average American intuits the functional justification for court intervention in the political process. The average American may not be able to explain the mechanics of how a political machine can cheat him of his economic, civil, and political rights, but he knows that the machines are out there ready to take him to the cleaners unless courts or some other institution besides elected politicians provide protection.²⁴

Only a supreme court justice with guts would admit what is so true —

I have seen countless administrative appeals where the records amounted to twenty thousand pages, yet I know of no judge who ever read such a record in its entirety. . . . In administrative appeals, however, the factual issues are secondary to the social and political perspective from which those facts are viewed. If that is the case, then we can do the world a great favor by admitting it.²⁵

As for judicial selection, the justice observes —

What is a "better quality" appointee? If federal judges are no longer appointed through the political patronage system (which has substantial checks against gross incompetence, such as a required Justice Department investigation, bar association evaluation and recommendation, and Senate confirmation), how are they to be appointed? If state bar associations are to do it, they will obviously suggest lawyers who have been active in the bar. Bar associations, like other committees and clubs, are run by small groups of active members. Usually these lawyers come from big firms with big clients who subsidize participation in bar activities. Are these people necessarily better candidates than the rough-and-tumble lawyers who are involved

22. *Id.* at 106.

23. *Id.* at 113.

24. *Id.* at 144.

25. *Id.* at 210.

in politics?

. . . I have further observed that on the federal bench, where all judges are appointed, those who come from day-to-day politics maintain a higher level of civility, consideration, and gentlemanly conduct in their courts than those who come from United States senator bosom-buddyhood or suggestion by anonymous committees. The correlation between good judging and extensive political background is strong.²⁶

All in all, I consider this one of the best works on government I have ever read — it is *required* reading for anyone now in the system or anticipating being part of it.

Indeed, a mastery of this analysis would well be a much better alternative to one interested in pursuit of a career in law than two years of law school.

*The Honorable John P. Flaherty**

26. *Id.* at 214-15.

*Associate Justice, Supreme Court of Pennsylvania.

