Washington Law Review

Volume 56 | Issue 2

3-1-1981

The Ways of a Judge: Reflections from the Federal Appellate Bench, by Frank M. Coffin (1980)

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BOOK REVIEWS

THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH

By Frank M. Coffin. Boston: Houghton Mifflin, 1980.
Pp. 249. $10.95.

Reviewed by Eugene A. Wright*

Here is a book for which we judges have been waiting, but it is one that should be required reading for others, both within and without the profession. It comes at a time when much public attention and criticism have been directed toward the courts, the news media have given wide coverage to pending and decided cases, and an extraordinary number of federal judges have resigned their offices for more lucrative endeavors.

Some writers of far less qualification than Judge Frank Coffin have purported to tell what happens behind the scenes in appellate courts. Lawyers, bar officials and judicial appointing authorities have observed that those with broad experience make the best judges. Chief Judge Coffin has that broad background. He served two terms in Congress and four years as a foreign aid administrator. His pre-judicial life also included three war-time years as a Naval officer and two more on a local school board. Add to that a year as law clerk to a federal judge and several years in private practice, and you have a broad background indeed.

The reader of this unusual book will realize how Judge Coffin has drawn upon all of that experience in his approach to specific cases, his administration as chief judge of his circuit, and his membership in the Judicial Conference of the United States for the past eight years. The latter is the federal judiciary's top policy making body.

Obviously, Judge Coffin is a well-organized, hard-working and exceptionally well-qualified judge. His work week varies from 48 to 60 hours. He reads briefs at home, at night and on weekends. This book was written on vacation time.

Although the judge draws upon his non-judicial public service, his book is not an autobiography telling war stories of his many successes and great opinions. Rather, he explains how an appellate court is organized, how the judges work with one another, and how they decide cases.

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In an early chapter, he provides a good historical review of the make-up of the circuits, the geographical size of each, and the number of judges of each.

He notes the roles and responsibilities of those in legislative and executive branches as compared to the judiciary. The appellate judge lacks visibility, he says. The judge now is out of party politics, no longer free to participate in charity drives, service on boards of directors and community activities that he once enjoyed.

Judge Coffin describes in detail the workings of his court, from the time briefs are received, throughout argument, to the point when an opinion is filed. This section of the book has exceptional value for a number of audiences:

1. *Newly appointed appellate judges,* paticularly those newcomers who need to know how a court is managed and how judges operate their offices, and to understand the relationships between appellate and trial courts.

2. *Senior presiding judges of appellate courts, state and federal:* He gives several pages to the judges' conferences after oral argument. This section of the book is a model and offers suggestions for guiding the discussions, keeping them on-target, and encouraging a complete airing of conflicting views so that no single judge dominates the discussion. This section will assist a presiding judge who must assign cases for opinion writing. The author lists a number of considerations that enter into those decisions—balancing the work load, using special judicial expertise in moderation, utilizing displays of interest on the part of individual judges, and selecting a writer who is likely to command a majority.

3. *Trial judges:* Judge Coffin speaks of the relationships between trial and appellate judges, saying: "Higher courts are right because they are superior, not superior because they are right." He confesses that appellate judges' correction of errors does not make them wiser than trial judges. The appellate judges' only claim to superior wisdom is in numbers (three, five, seven, or nine).

4. *Lawyers who practice before the federal appellate courts:* Entirely too few lawyers know how appellate courts function, how oral argument should be conducted, how effective briefs should be written, how the judges prepare for oral argument, and how opinion writing assignments are made. Judge Coffin provides a needed education on these matters.

5. *Judges, lawyers and law teachers who aspire to serve on appellate courts:* They, too, should read this book lest they be under the misapprehension that life there would be much easier than on the trial bench. While a trial judge may take 10 seconds to rule on an evidentiary question, an appellate court may take two months to decide if he was right.

6. *Law students, particularly those who aspire to judicial clerkships and those studying jurisprudence and advocacy:* A second-year student who considers applying to a federal judge should know something of the work habits of that judge, how he uses his clerks, the general responsibility of a law clerk, and the need for confidentiality. Judge Coffin, for example, writes 90 or more opinions in one year, always working under pressure. His law clerks obviously play a big part in preparing him for oral argument and decision making.

It does not appear that Judge Coffin's clerks prepare written bench memoranda for his use before or after he reads the briefs. These summaries and analyses are commonly used in appellate courts, some prepared by staff attorneys and others by judges' personal clerks. In the Ninth Circuit it has become common practice for the judges to exchange these materials well in advance of oral argument, providing an exchange of ideas, suggesting questions to be posed to counsel in advance of or at the time of oral argument, and alerting all judges to recent decisions not cited in the briefs. Law clerks in modern offices now have access to computerized retrieval systems which reveal the latest opinions in similar cases.

Lawyers, legal writers and even some judges have expressed concern about this practice, suggesting that the law clerk's work product may influence judges unduly or be used as a substitute for the briefs of the parties. Those concerns are ill-founded if judges are expected to read the briefs and do so before seeing a clerk's workup. The memoranda serve their greatest purpose if the judge has first scanned the briefs and made notes of his own views, and then shares the memoranda with other judges accompanied by his comments, perhaps offering conclusions contrary to those of his clerks.

I see other benefits to this practice. Recent law graduates need to be trained in concise legal writing, prepared for specific purposes, and to think and write objectively without preconceptions. A judge who gives a critique of their writing, giving abundant praise and suggestions for improvements, will provide valuable preparation for future careers in private practice, government service, teaching or the judiciary.

Students in appellate advocacy classes should pay attention to what Judge Coffin says about oral argument, about handling questions from the court and about focusing the argument on essential points. The author provides an example of typical colloquy between court and counsel.

For those students struggling with legal research projects, Judge Coffin's description of his own research methods will be helpful. Confusion and indecision at the outset are not uncommon, even for federal judges.

7. *New law clerks reporting for duty in the office of a circuit judge:* Judge Coffin covers the fundamentals of a law clerk's responsibilities. He

notes, for example, that confidentiality lasts for a lifetime. He has had thirty clerks and he believes that his request for lifetime confidentiality has always been heeded.

8. *Law teachers* who may not comprehend the workings of judges' offices, procedures in preparing for argument, assignment of opinions, and exchanges of views in conferences and when opinions are circulated. Law professors teaching trial practice, appellate advocacy, federal jurisdiction and procedure and evidence, or who serve on faculty clerkship committees, will find this treatise enlightening.

9. *Spouses of judges:* These long-suffering persons and their children need to know why judges must do judicial work at home or on vacation, why a reasonable amount of privacy is essential to proper reflection, and why judges treat their staff members with great courtesy and trust.

10. *Legislators,* especially those who pass on budgets for the courts and provide the tools with which judges must work.

11. *Members of the Appellate Judges' Conference of the American Bar Association,* all of them concerned about better judicial administration and eager to exchange ideas with other judges.

12. *Members of the media,* who are charged with satisfying the public's right to know about matters judicial, and those who comment on the significance of judicial decisions.

Judge Coffin suggests that, if counsel does not know the state of preparation of the judges on the panel, he should ask at the outset whether the court desires that he review the facts in detail. The suggestion is a good one, but an even better practice would have the court advise the attorneys at the outset that the judges have read the briefs, are well acquainted with the facts, and have questions to propound for counsel to answer during the course of argument. Those questions would then be posed and the lawyers could be left alone to deal with them as they saw fit.

This procedure has advantages over the custom of interrupting counsel in the middle of an argument. This presupposes, of course, that the judges have had a few minutes of discussion before the court convened or have exchanged memoranda in advance of argument.

Few appellate courts follow the practice of using pre-argument conferences of the judges to aid in preparation for oral argument. It has been suggested that the remarks of one judge might somehow undesirably influence others before they had heard from counsel. I find that hard to accept.

A well-prepared three-judge panel will be more likely to have meaningful questions for counsel, a better understanding of the facts and significant issues, a grasp of applicable legal principles and of the most recent decisions of the same court or other courts. Those who have

experimented with advance conferences and exchanges of views have applauded the practice. They have noted that they have been saved the embarrassment of entering the courtroom with a wholly erroneous view of the facts and law and of asking irrelevant questions of counsel.

Obviously, Judge Coffin presides over a serene court. He says that no judge seeks to manipulate anyone else. "Collegiality is a pearl of no little worth," he writes. His chapter on "The Workings of Collegiality" is a masterpiece.

Judge Coffin presides over a fine court, but it is the smallest federal court of appeals in the nation. At the time he wrote, it had just three judges. A fourth has been added. At times, one of the two senior judges may sit with the court or it may borrow a visitor, but essentially the four active judges carry the load. One wonders whether all of the author's techniques could be applied in a court of more than twenty judges, living in six or eight states, and sitting regularly in many cities.

The successful operation of the First Circuit is a strong recommendation for smaller circuit courts, more manageable in size, with sittings in fewer cities and with an abundance of collegiality. The author himself fears, however, that the small collegial courts like his may be an endangered species. But there are benefits derived from larger courts, too, not the least of which is the diversity of views held by the judges. A competent and hard-working staff, using modern management techniques, can leave the judges with the time needed for their essential judicial tasks.

Judge Coffin offers the suggestion that, if courts are not to be intolerably crowded, litigation too expensive and decisions delayed, there must be a movement of dispute resolution out of the courts. He proposes that extrajudicial systems be provided in prisons, universities, school systems and welfare and housing agencies. These systems would identify and protect rights, allocate responsibilities and impose sanctions fairly and consistently under reasonable standards. Resort to the courts would follow resolution in the "justice subsystem," but only if the latter failed to provide justice.

Such systems have worked in some federal prisons and have succeeded in effecting changes in correctional policy. The Federal Judicial Center has developed recommendations along these lines.

Coffin's chapter on "A Judge Seeks His Bearings" covers the philosophy of several writers, including Ronald Dworkin, John Rawls, Learned Hand and Felix Frankfurter.

He wrestles with the legitimacy of judge-made law in a democratic society and the sources of judicial decisions. They are not a matter of mystical revelation, nor all logic nor all science, nor just institutional compe-

tence or a search for neutral principles. Judicial decision making is rather a mixture of all of these. He sums it up:

> We realize, too, that the judge, laboring in the vineyard of specific disputes, finds himself working out practical solutions and crafting tailored remedies that are calculated to recognize rights and at the same time respect the need for responsible governance and direction.

He appeals for public understanding. His purpose in writing the book was to shed light on the subject of judging to help non-judges to understand judges. Judges must be accountable, but in the past dozen years they have, as he writes, "dramatically expanded their quantitative output per judge in an era when the law was becoming ever more complex."

The search for excellence must continue and Judge Coffin would have us recognize excellent judging where we find it. We shall find it among those who will profit by his example and follow his guidance.