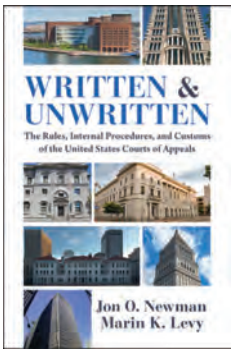
THIRTEEN FIEFDOMS

Inside the United States Courts of Appeals

BY DIANE P. WOOD

If asked, most people — even most lawyers — would probably say that the Supreme Court is the primary arbiter of legal questions in the United States. And in a certain sense, that is true: The Court has the last word on the existential questions of constitutional law on which our democracy rests. Such questions, however, do not arise every day, or even every month or term of court.

The Court's docket comprises both statutory matters on which a clear and uniform rule is needed, and constitutional questions that demand resolution. It is up to the Court to decide which cases meet these criteria. In doing so, it draws from a pool of some 6,000 requests for review (known by the medieval term "petitions for a writ of *certiorari*," or informally as "certs"), from which it selects the 60 or 70 that seem most deserving of the Court's scarce resources. For all the rest — the more than 5,900 for which review was sought unsuccessfully, plus the balance of the 40,000 to 50,000 cases on which cert is not sought[1] — it is the federal courts of appeal that have the last word.[2]



Written and Unwritten: The Rules, Internal Procedures, and Customs of the United States Courts of Appeals

BY JON O. NEWMAN & MARIN K. LEVY
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That fact alone is reason enough for this book, written by two of the country's leading experts on federal procedure, Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit and Professor Marin K. Levy of Duke University School of Law [Levy is also faculty director of the Bolch Judicial Institute, which publishes *Judicature*]. Given the pivotal role played by courts of appeals, the uninitiated might think that there is a unified institution to which all those courts belong. This book is here to tell you that nothing could be further from the truth. There is no such thing as "the" federal court of appeals, in the sense of one massive intermediate appellate court charged with the duty of handling appeals from district courts and federal agencies across the land. Instead, what we have had since 1982[3] are 13 distinct institutions: the Courts of Appeals for the First through the Eleventh Circuits, known sometimes as the "regional" courts of appeals; the Court of Appeals for the District of Columbia Circuit, which is roughly the same as the regional courts but has a much greater diet of administrative cases; and the Court of Appeals for the Federal Circuit,[4] whose jurisdiction is limited to specified areas such as patents, international trade, certain cases against the United States, contract appeals, and issues concerning government employment.[5]

That is not to say that the circuits are strangers to one another — far from it. A single set of basic procedures, found in the Judicial Code and the Federal ▸

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Rules of Appellate Procedure, govern them. In addition, the Administrative Office of the United States Courts serves as a unifying force through its services to the Third Branch of government.[6] And at the apex of the federal courts' governance system sits the chief justice of the United States and the Judicial Conference of the United States, which the chief justice chairs.[7] The remaining membership of the Judicial Conference consists of the chief judge of each of the 13 circuits and a district judge from each circuit (or, in the case of the Federal Circuit, a judge from the Court of International Trade).[8] Both through the Conference's formal committee structure and through the opportunity afforded by a biannual Conference meeting for chief judges and their circuit executives to meet and discuss matters of mutual interest, the individual circuits are naturally drawn together. Each benefits from the experience of the others, and harmonization of practices is often the outcome.

But note the implicit qualification in that last statement: The choice of a given circuit to emulate one or more of its sister circuits is largely a voluntary one. From the outside, it may seem that the differences among circuits are unimportant and inconsequential. I doubt, however, that any student of procedure or institutions could finish reading this book and still hold to that view. It would be more accurate (if a bit melodramatic) to say that, at the intermediate level of the federal courts, we have 13 distinctive fiefdoms. When we lift the veil and see how each circuit operates, as Judge Newman and Professor Levy have done, differences large and small come into view. Each circuit prizes its own history, and each one not so secretly thinks that its own procedures are the best — or, more modestly, the best adapted for its own part of the country, its own size, and its own docket. One ignores these substantive and cultural differences at one's peril.

Intermediate courts do not have to operate that way. We know this because 42 of 50 state intermediate courts[9] operate rather like the panels within a circuit — bound by what another division has done, and ultimately subject to correction by the state's highest court. (This latter mechanism, at least, does have a parallel at the circuit level, via the en banc court and then the Supreme Court.) By one count, as of 2021, 25 states described themselves as having a "unified" system[10] (though admittedly, definitions of "unified" may vary[11]).

At least in theory, these unified systems should make life easier on the state's apex court, not to mention users of the system: Each lower court is required to follow precedential decisions from all other courts; conflicts among different regions of the state ought to be more rare; and the volume of cases that require a supreme court's attention should be lower. That may or may not be true. But what is true is that there are also advantages in the federal way of doing things — that is, with circuits that are free to disagree with one another and free to experiment with court procedure and organization.

The Supreme Court relies on the percolation of ideas among the lower courts to help it sift through its cert petitions[12]: The Court's own Rule 10 says as much, when the first thing it identifies as a compelling reason for granting a petition for a writ of certiorari is if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ."[13] The circuits are well aware

of their role in this respect. They do not lightly create conflicts on important questions of law, and some, such as the Seventh Circuit, have a special procedure whereby every active judge on the court must be told if a panel proposes to create such a conflict.[14] That notice, issued pursuant to Local Rule 40(e), allows each judge either to agree with the panel's proposed approach or to ask the full court to hear the case en banc. If a majority of the judges in regular active service do not vote for en banc consideration, the proposed opinion may be published.

Against that backdrop, we are ready to ask what Judge Newman and Professor Levy have added to our understanding of the ways in which our 13 federal courts of appeals work. The short answer, for all but the few who have had the great privilege of sitting on a federal court of appeals, as I did for nearly 29 years, is an enormous amount. There have been excellent books about Supreme Court practice,[15] but woefully few about the courts of appeals.[16] And yet these courts are workhorses, which have mandatory appellate jurisdiction for the most part, and are keeping the trains running. This book is about how each circuit attempts to manage that feat. Its contributions take several forms. First, we learn about aspects of internal circuit operations that rarely see the light of day, not because there is anything confidential about them but only because, prior to Judge Newman and Professor Levy, people had not been asking. Second, they highlight some notable variations among the circuits. The book does not attempt to gather the data that would be needed to see how often those variations are outcome-determinative, but that would be interesting to study. And third, the book reveals that in certain ways the circuits do share important commonalities. I will offer a few observations about each of these categories, with the caveat that only a careful read of the book will capture the nuances the authors offer.

General Structure. Any lawyer with a federal appellate practice will know that each circuit is headed by a chief judge. The Judicial Code establishes the position and specifies who is eligible to serve and for how long.[17] Roughly speaking, an active judge becomes chief if she is the most senior in commission, has never been chief before, and has not yet reached the age of 65. She will serve for seven years unless she reaches the age of 70 before that term is up; if so, then she must step down. But what does the chief judge *do*, other than preside over any panel on which she sits? A great deal, though the workload differs by circuit.

In addition to presiding over either a panel or the en banc court, the chief judge fulfills myriad responsibilities related to the court's core operations. If the circuit wants or needs visiting judges to participate in its core job of resolving cases, it is normally the chief judge who extends invitations, either to district judges within the circuit or to any Article III judge outside the circuit. In some circuits, the chief judge also plays a part in creating the oral argument calendar, though other circuits prefer a certain insulation to ensure that no one perceives any political taint in the matchup between a given calendar and an assigned panel. Finally, after the case is submitted, someone needs to assign the responsibility for preparing an opinion to a panel member. Some circuits take into account the question whether the chief is in the majority, and they limit the chief's assigning power to that situation. (This happens also to be the way in which the Supreme Court handles that situation.) Other circuits allow the chief judge to assign even if he or she is in the minority, trusting to the good faith of the chief to perform this task objectively.

At that point, the case is in the hands of the assigned judge, for better or for worse. Most of the time, it is for better: The assigned judge follows the circuit's recommended time for disposition (often 60 to 90 days), the parties learn who prevailed and why, and life goes on. But sometimes it is for worse: The case languishes in the chambers of the assigned judge for no apparent reason. It is here that the chief judge enters the picture. While the problem is common to all circuits, the remedial mechanisms at the chief's disposal vary. None of these tools is perfect, largely because every judge has the de facto life tenure assured by the Good Behavior Clause of Article III, section 1 of the federal Constitution. The bottom line is that a chief judge has few effective tools she can use if an assigned judge proves to be a laggard. Judge Newman and Professor Levy report considerable variation in the way each circuit chief handles the problem. Some assign fewer cases to the judge with the outstanding opinion(s); some cancel any new assignments to that judge; some reassign the responsibility for the case; and some simply publicize the delinquency to the rest of the court. This all assumes that there is no significant personal reason for the delay, such as illness or an ongoing serious family problem.

The administrative roles of the chief judge may be even less understood, and less visible to the public, than the core ▸

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decisional work. As the authors point out, the Judicial Conduct and Disability Act of 1980 assigns primary responsibility for the enforcement of this statute, and ethical rules more generally, to the circuit chief judge.[18] The chief judge receives all complaints filed under that statute, and in addition has the responsibility to identify complaints if potential misconduct or disability comes to the chief's attention. All circuit chiefs are bound by these statutory provisions and the Judicial Conference's implementing rules, so unsurprisingly there is little difference in this aspect of the chief judge's duties.

The other principal administrative duty that falls on the chief judge's shoulders relates to court governance. At the circuit level, the chief judge chairs the Judicial Council of the Circuit, which is the circuit's primary governing body. At the national level, the chief judge serves as the representative of the circuit on the Judicial Conference of the United States. That involves staying up to date with the work of all of the conference committees, attending the conference twice a year (in March and in September), and staying informed about congressional initiatives that would have an impact on the judiciary.

Apart from these more formal roles, many chief judges undertake additional responsibilities. Indeed, the time commitment of the chief's duties in the aggregate prompts many, if not most, chief judges to take a reduced caseload themselves. For example, chiefs often sponsor events designed to foster collegiality on the court, and they are the public face of the court when civic education events are scheduled.

Variations Among Circuits. Perhaps the most interesting part of this book is the extent to which it shows that both culture and custom within each circuit are distinctive. Examples of this abound, including oral-argument practices (Chapter 7), the choice between precedential and nonprecedential dispositions (Chapters 8 and 9), the way in which court staff attorneys are used, the particular procedures leading up to and for conducting en banc hearings (Chapter 10), and the use of senior and visiting judges (Chapters 1 and 13). A few examples from each of these illustrate how significant these differences can be.

One of the most variable practices concerns oral argument. Federal Rule of Appellate Procedure 34 allows the courts of appeals to dispense with oral argument in any case in which "a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary" for one or more of three reasons: "(A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."[19] The interpretation and implementation of this national rule, as the present book shows, have varied widely.

Although the average national percentage of cases that receive oral argument is 20 percent, that number hides more than it shows. The book provides a useful circuit-by-circuit account of the way in which cases are assessed (or not) for oral argument purposes, whether any classes of cases are deemed inappropriate for oral argument (e.g., uncounseled prisoner appeals), and who decides. Table 7.1, derived from statistics maintained by the Administrative Office of the U.S.

Courts, gives us the details: The Fourth Circuit used oral argument for only 11 percent of its cases in the year ending in December 2022, while the D.C. and Seventh Circuits had oral arguments more than three times as often, in 35 percent of their cases. To the extent oral argument makes a difference, perhaps by ventilating issues that arise only when counsel begins talking, this difference in culture is striking.

Chapter 8 takes up the related issue of the choice between a precedential and nonprecedential disposition of the case. (As the authors point out, people once spoke of a "published" opinion and an "unpublished" memorandum or order, but, in today's world, everything is publicly available on the internet, so that vocabulary had to be abandoned for something more accurate.) Like oral argument practice, the choice between disposition types varies considerably among circuits. Some circuits allow any member of a panel to call for the opinion to be precedential: The book lists the First, Second, Fifth, Sixth, and Ninth in this category. In contrast, the Third, Eighth, Eleventh, and Federal Circuits require a majority of the panel to opt for precedential treatment. The Tenth draws a close line between published opinions and precedential dispositions, as does the Seventh. In the Seventh, however, if a disposition is initially released as nonprecedential, any person (party or otherwise) can ask the court to reissue it as a precedential one, and the court normally grants such requests. The Second Circuit requires decisions to be unanimous if they are to be nonprecedential, and, in the Federal Circuit, a dissenting judge can require the entire opinion to be precedential.

En banc proceedings, while roughly the same in every circuit once the court has assembled, vary in the way they reach that stage. (The Ninth Circuit has a special procedure, explained in Chapter 10 of the book, given the unwieldy nature of a proceeding involving 29 active judges.) The number of rehearings en banc shows the same circuit-to-circuit variations that we saw with oral argument. Table 10.1 shows the number of rehearings en banc from 2010 to 2020. The First, Second, and Tenth Circuits stood at the low end (seven, seven, and nine respectively), while the Ninth Circuit easily met the high end (166). The other circuits had between 18 (D.C. Circuit) and 58 (Fifth Circuit) during that period.

All the circuits regard rehearing en banc as an unusual procedure — one reserved for cases presenting an unresolved question of law, not just another chance to convince a panel about factual matters. Only the judges in regular active service are entitled to vote whether to hear a case en banc, but once a case is moved to the en banc docket, then any senior judge who participated in the panel decision may participate at the en banc level. Yet even that rule is not free from ambiguity: What happens to disqualified active judges? As of when is active status assessed? How should active judges who are unavailable but not recused be counted? These and other questions are explored in Chapter 10, on en banc procedures, usually with a circuit-by-circuit tally.

These examples just scratch the surface of the inter-circuit variations that exist. Not only counsel but also visiting judges must master these differences if they are to avoid stumbling. One can speculate about the origin of each circuit's practice, but that is useful only if the circuit is considering a change, perhaps in the direction of national uniformity. Otherwise, it may be more fruitful just to ask whether, or how, the differences in approach affect the adjudication of cases.

Commonalities Among the Circuits. In closing, it is worth returning to the fact that the circuits share many commonalities. All of them operate under the jurisdictional rules established by Congress, pursuant to which it is usually necessary to wait for a final judgment,[20] unless the party is seeking review of the grant or denial of a preliminary injunction or otherwise qualifies for interlocutory review.[21] All are governed, as noted at the outset, by the Federal Rules of Appellate Procedure. Although all can and do have local rules, Federal Appellate Rule 47(a) admonishes the circuits that they are not permitted to enact a local rule unless it is "consistent with — but not duplicative of — Acts of Congress and rules enacted" under the Rules Enabling Act.[22] Nearly every circuit has a mediation office, which facilitates the resolution of civil disputes with the help of trained personnel. And finally, as the courts saw during the COVID pandemic — when unexpected, unplanned-for, and severe challenges to the Third Branch of government hit everyone at the same time — the coordination provided by the Judicial Conference and the strong connections from court to court enable the judiciary to continue its vital business.

Anyone who is curious about where the process of legal development begins, and often ends, in our federal system, will find this book a rewarding read. The devil is in the details, as the saying goes, and no one could have done a more painstaking job of collecting the details about how the courts of appeals go about their business than ▸

This book makes it possible to have an intelligent conversation about the value of oral argument, the need for mechanisms to keep the law consistent and uniform both within a circuit and across the country, the internal governance of the courts, and the integrity of the judicial branch.

Judge Newman and Professor Levy. This book makes it possible to have an intelligent conversation about the value of oral argument, the need for mechanisms to keep the law consistent and uniform both within a circuit and across the country, the internal governance of the courts, and the integrity of the judicial branch. And at a more pragmatic level, I cannot imagine a firm with a nationwide appellate practice in federal court that would not want to make this book available to its attorneys. As the title promises, it covers both the written and unwritten law of the circuits. In so doing, it has opened up new vistas for research — and new insight into the federal courts. We are in the authors' debt.

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1 *See* Admin. Off. U.S. Cts., Stats., U.S. Courts of Appeals – Federal Court Management Statistics (June 30, 2024), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_apppro-file0630.2024.pdf.

2 Although the Supreme Court also accepts cases from state courts when those cases involve a federal question (see 28 U.S.C. § 1257), that group of cases makes up only a small part of the Court's merits docket. Because this book is about the operation of the intermediate appellate courts in the federal system, I put to one side the role that state courts play in the resolution of disputes and formulation of legal rules.

3 The Court of Appeals for the Federal Circuit — which was the successor to the old Court of Customs and Patent Appeals and Court of Claims — officially opened its doors on October 1, 1982, just one year after the Eleventh Circuit was split off from the old Fifth Circuit. *See* Jake Kobrick, *The Role of the U.S. Courts of Appeals in the Federal Judiciary*, Fed. J. Ctr., https://www.fjc.gov/history/work-courts/Role-of-the-Courts-of-Appeals (last visited Sept. 6, 2024).

4 Sometimes, in books of this type, people carve off the Federal Circuit and focus exclusively on the other 12. As our authors recognize, however, that would be a mistake for a book devoted to the internal workings of these vital institutions.

5 See 28 U.S.C. § 1295 for a detailed list of the cases over which the federal court has exclusive jurisdiction.

6 *See* 28 U.S.C. § 601 *et seq*.

7 *See id.* at § 331.

8 *Id.*

9 *See Intermediate Appellate Courts*, Ballotpedia, https://ballotpedia.org/Intermediate_appellate_courts (last visited Sept. 6, 2024). The jurisdictions that have opted not to have this intermediate level are Delaware, the District of Columbia, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming. *See id.*

10 For a tabulation of unified court systems at the state level, see *How Many States are "Unified"? There is no Definitive Answer Because There is no Definitive Definition.*, Nat'l Ctr. for State Cts. (Feb. 24, 2021), https://ncsc.contentdm.oclc.org/digital/api/collection/ctadmin/id/2502/download.

11 *See* John P. Doerner & Christine A. Marman, *The Role of State Intermediate Appellate Courts: Principles for Adapting to Change*, Council Chief Judges State Cts. Appeal (CCJSCA) (Nov. 2012), https://www.sji.gov/wp/wp-content/uploads/Report_5_CCJSCA_Report.pdf.

12 *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.").

13 Sup. Ct. R. 10(a).

14 *See* Cir. R. U.S. Cts. Appeals 7th Cir. 40(e).

15 *See, e.g.*, Eugene Gressman et al., Supreme Court Practice (9th ed. 2007).

16 I made much the same point when I explored the practice of writing separate opinions at the appellate court level. *See generally* Diane P. Wood, *When To Hold, When To Fold, and When To Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 Calif. L. Rev. 1445 (2012). That examination revealed a much greater degree of consensus at the intermediate appellate level than at the Supreme Court level, for reasons explored in the article.

17 *See* 28 U.S.C. § 45.

18 *See generally* 28 U.S.C. §§ 351 *et seq.*; *see also id.* at § 352(a) (providing that any complaint received under § 351(a) or identified under § 351(b) must be reviewed expeditiously by the chief judge).

19 Fed. R. App. P. 34(a)(2).

20 28 U.S.C. § 1291.

21 *See* 28 U.S.C. § 1292(a)(1) (preliminary injunctions); *see also id.* § 1292(b) (special permission); Fed. R. Civ. P. 23(f) (grant or denial of class certification); 28 U.S.C. § 158(d)(2) (certain bankruptcy appeals).

22 Fed. R. App. P. 47(a)(1) (referring to 28 U.S.C. § 2072).