

BOOK REVIEWS

HOW COURTS GOVERN AMERICA

By Richard Neely

New Haven and London: Yale University Press, 1983. Pp. xvii, 233, index. \$7.95 paper.

Reviewed by *Gerald S. Held**

Justice Oliver Wendell Holmes once stated "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."¹ *How Courts Govern America*, written by Richard Neely, Chief Justice of the West Virginia Supreme Court of Appeals, works very hard to prove the validity of this quotation—so much so that the author, in his preface, states that "courts must do what the other branches of government seem incapable of doing." Justice Neely writes in a loose and informal manner and in a style that can be described as entertaining and quite readable. He is witty, yet he never crosses the border to satire nor is he facetious.

The sophisticated reader can find room for disagreement with the author, and the criticism could be advanced by such a reader that the book attempts to explain institutions of government with such a common denominator style of writing that at times the explanation is oversimplified. Justice Neely comes from a legislative and political background. He starts chapter one with the explanation that he became a judge because he couldn't win a Senate seat. This reviewer, as a Justice of the Supreme Court of the State of New York and having never aspired to any office other than judicial, took umbrage with this type of beginning, and therefore approached the balance of the book with doubt and skepticism. This doubt and skepticism, however, dissipated as the chapters progressed.

The book is divided into chapters concerning such topics as "power of courts"; it then goes on for several chapters to describe the interrelationship of the courts with the other branches of government and its political institutions. This portion of the book is realistic and explains the problems and complexities that are inherent under our constitutional mandate for separation of powers. The book then concerns itself with the political realities that exist in our society, under our form of government, and suggests reform that the author seeks. The reader can

* Justice, Supreme Court of the State of New York. B.A., Brooklyn College, 1952; LL.B., Brooklyn Law School, 1954.

1. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917).

find much room for disagreement with the author concerning his solutions; however the reader will not necessarily have any difference of opinion about identifying the problems.

One should take into consideration that Richard Neely is a Justice in the State of West Virginia. While the problems he describes are within the ken of his experience, his experience seems to be limited to the State of West Virginia and its contiguous areas. A cosmopolitan reader could reasonably be expected to look down his nose and suggest that not everyone lives in "Podunk." However, even the most sophisticated reader will, upon reflection, concede that the myriad problems facing judges of the courts of the smallest states are endemic to all states, and that the variance is only in the degree of intensity.

How Courts Govern America is worthwhile reading for student, legislator, judge, bureaucrat, and John Q. Citizen. It stirs the mind and gives room for debate.

DOMESTIC POLICY FORMULATION: PRESIDENTIAL-CONGRESSIONAL PARTNERSHIP?

By Steven A. Schull

Westford, Conn.: Greenwood Press, 1983. Pp. 218, index, hardcover.

Reviewed by *Thomas J. Brunner, Jr.* *

The author writes in his preface that “[t]he formation of domestic policy is an extremely complex process, often with unclear boundaries.” He then proceeds over the next two hundred pages to prove his point. Schull sets out to analyze the method by which domestic policy is formulated, using an empirical approach, but by the end of his work he is forced to conclude that “policy formation is much more complex than commonly assumed, and this preliminary effort has just scratched the surface of that complexity” (p. 180-81). Unfortunately, it is also true that Schull’s work does little to enhance our understanding of how domestic policy is made.

Schull discerns four distinct steps in policy formulation: “agenda-setting (through Presidential statements), initiation (Presidential actions to propose legislation), modification (congressional change in and/or support for Presidential positions), and adoption (the legislative success of Presidential positions)” (p. 183). Within this analytical context, the author examines the policy formation process from the Eisenhower Administration through the first two years of the Reagan Administration.

Schull identified several thousand Presidential proposals by an examination of Congressional Quarterly’s boxscore of yearly Presidential proposals to Congress and their reception in Congress. He also relied heavily on the index of *Public Papers of the Presidents of the United States* for coding data on Presidential agenda-setting. Commenting on his methodology, Schull was most candid when he wrote:

It should be obvious that some of the incorporated measures are crude and tentative. Probably none of them provides perfect pictures of reality. Considerable problems also are associated with utilizing these quantitative measures across time. It is probable that they are influenced by a multiplicity of factors only some of which were covered in this research (p. 198-99).

Because of these acknowledged difficulties in his methodology, Schull’s conclusions about how domestic policy is formulated are necessarily suspect. And what are these conclusions? Well, for one, when com-

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menting on the relationship between the President and the Congress, a subject obviously integral to his work, he writes:

This chapter has shown that Congress is not exalted in domestic policy formation, but neither is the President. Congress plays its greatest role in policy adoption, and if seldom capable of innovation, it certainly can thwart Presidential initiatives should it so desire (p. 139).

This is hardly news. The average observer of Presidential-congressional relationships could reach the same conclusion without the exhaustive analysis, complete with an array of graphs and charts, provided by the author. Unfortunately, Schull's other conclusions, drawn from his research, provoke the same "ho-hum" reaction. For example, to be told that "[t]he primary characteristic of a strong leader is effectiveness in obtaining desired results" neither illuminates the way in which policy is formulated nor strengthens the reader's belief in the incisiveness of empirical research (p. 169).

Political scientists like the author, who truly view themselves as "scientists," can have no real understanding of Tip O'Neill's often quoted statement that politics (and inferentially government) is nothing more than "blue smoke and mirrors." The number and strength of individual variables at work in the formulation of a major Presidential initiative are often incalculable. Whether public opinion, a President's relationship with Congress, the views of the White House, the influence of a lobbying group, or any one of dozens of other reasons results in an initiative being taken is more often than not unclear.

Politics is in its essence an art, not a science. While the investigation Schull undertakes is mildly interesting in its comparisons of various Presidential administrations, it does nothing to better inform us about why the principals (the President and Congress) acted as they did during the process of establishing policy. The very complexity which Schull notes in his preface is bound to diminish the importance of this book and those like it, which attempt to treat politics like physics and government like genetics. The process of examining how national policy is developed at the national level is indeed "complex" since it deals with people, not equations. For that elemental reason analysis of this sort is better left to historians, journalists, and biographers, who better understand the challenge inherent in making sense out of our system of government and the people who run it.