

**Making Law  
in the United States  
Courts of Appeals**

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## Law Making in a Hierarchical Judicial System

On June 10, 1996, the U.S. Supreme Court handed down its decision in the case of *Whren v. United States*.<sup>1</sup> Whren and a co-defendant, accused of federal drug law violations, had been convicted in District Court and, after appealing to the U.S. Court of Appeals for the District of Columbia Circuit, had lost there too. At both courts they had requested that the drugs found in Whren's car be excluded from evidence at their trial, contending that the arresting police officers' purported basis for stopping them – a minor traffic infraction – was in fact a pretext, employed because the officers wished to search for drugs but had no probable cause to do so. Their argument now failed for a third time. According to a unanimous Supreme Court, "the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct" (819).

When viewed as a single Supreme Court case or even a series of cases involving a single defendant, these events probably seem unremarkable. In reality, though, they constitute only the final chapter in a complex, intriguing legal saga involving numerous defendants and courts. The first chapter began eleven years earlier, on June 5, 1985.

Early that morning, two men driving along Interstate 95 in Florida were stopped by a trooper from the Highway Patrol. The trooper called for a drug dog, which, sniffing the exterior of the men's car, signaled the

<sup>1</sup> 517 U.S. 806 (1996).

presence of drugs. A search of the car's trunk uncovered a kilogram of cocaine. The two men were arrested and charged in federal court with conspiracy to possess cocaine with intent to distribute.

At the trial, the trooper testified that he had become suspicious immediately upon seeing the defendants. He thought that they fit a drug courier profile, in that they were both young men, were in a car with out-of-state tags, appeared to be driving overly cautiously, and avoided looking at the trooper as they drove by him. He followed their car for about a mile and a half, observed it cross about six inches into the emergency lane and then back to the center line, and pulled it over. As Whren would later do, the defendants argued that the stop was unreasonable under the Fourth Amendment and asked that the seized cocaine be excluded from evidence at the trial. In their view, the trooper had used a trivial violation as a pretext to undertake a search for which he had no justification.

After the district court judge denied their motion to suppress the evidence, the defendants appealed to the U.S. Court of Appeals for the Eleventh Circuit. For the most part, the circumstances and arguments must have seemed dreadfully familiar to the three judges hearing the appeal. Drug cases had come to occupy a substantial portion of federal court dockets, and the particulars of this case were not unusual. Nor was the defendants' argument novel. The concept of "pretextual stops" had emerged as a ground for invalidating searches in a number of courts.

Nonetheless, the law in this area was not fully settled. In a series of cases beginning with *Scott v. United States*,<sup>2</sup> the Supreme Court had made clear that when evaluating Fourth Amendment claims, judges were to disregard police officers' intent and instead consider only whether searches or seizures were "objectively" reasonable. The Eleventh Circuit judges had to decide if and how judges could determine whether a stop was pretextual without reference to officers' intentions. No precedents from the Supreme Court, their own court, or even another court of appeals spoke directly to the question, and it was not an easy one.

Their solution was to announce this rule: "[I]n determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation."<sup>3</sup> The judges argued that their test was objective, in the sense that it asked not about an individual officer's thinking

<sup>2</sup> 436 U.S. 128 (1978).

<sup>3</sup> *U.S. v. Smith*, 799 F.2d 704 (11th Cir. 1986).



but about the typical behavior of officers in similar situations. This approach instantly became authoritative law for all federal courts in Florida, Georgia, and Alabama, the states of the Eleventh Circuit. But it did nothing to resolve the legal problem in any other federal circuit, all but one of which would be called on to decide the same issue in the next nine years.

The Fifth Circuit was the next to confront it, just a few months later. Without much discussion, the three-judge panel cited and adopted the rule from the Eleventh Circuit.<sup>4</sup> Any possibility of a national consensus disappeared shortly afterward, however, with another decision of the Fifth Circuit, this time sitting en banc.<sup>5</sup> By an 8–6 vote, the full court ruled that as long as police officers had observed some offense for which they have the authority to stop drivers, a stop would be considered valid, even if the offense was minor and it was unusual for the police to stop someone for it. Interestingly, although the dissenters approvingly cited the two cases just discussed, the majority failed even to mention them.

Other circuits were now faced with two alternatives, sometimes referred to as the “would” rule (Eleventh Circuit) and the “could” rule (Fifth Circuit). Over the next three years, three more circuits weighed in, with the Seventh and Eighth Circuits adopting the “could” rule<sup>6</sup> and the Tenth Circuit adopting the “would” rule.<sup>7</sup> Throughout this time, as circuit courts grappled with the difficult issue and confusion grew, the Supreme Court remained silent, even though in three of the cases litigants asked it to grant certiorari and issue a definitive ruling on the question.

In fact, the Supreme Court did not speak for another six years, denying four more petitions for certiorari before granting *Whren*’s in 1996. During this time, six more circuits decided the issue. One, the Ninth, adopted the “would” rule.<sup>8</sup> Four others adopted the more permissive standard of the Fifth Circuit.<sup>9</sup> The Sixth Circuit wavered, first inclining against the “would” rule, then adopting it, and finally, in an en

<sup>4</sup> *U.S. v. Johnson*, 815 F.2d 309 (5th Cir. 1987).

<sup>5</sup> *U.S. v. Causey*, 834 F.2d 1179 (5th Cir. 1987).

<sup>6</sup> *U.S. v. Trigg*, 878 F.2d 1037 (7th Cir. 1989); *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990).

<sup>7</sup> *U.S. v. Guzman*, 864 F.2d 1512 (10th Cir. 1988).

<sup>8</sup> *U.S. v. Cannon*, 29 F.3d 472 (9th Cir. 1994).

<sup>9</sup> *U.S. v. Hassan El*, 5 F.3d 726 (4th Cir. 1993); *U.S. v. Scopo*, 19 F.3d 777 (2nd Cir. 1994); *U.S. v. Whren*, 53 F.3d 371 (DC Cir. 1995); *U.S. v. Johnson*, 63 F.3d 242 (3rd Cir. 1995).

banc decision, rejecting it for a variant of the “could” rule.<sup>10</sup> The Tenth Circuit revisited the issue, now choosing to adopt the “could” rule en banc.<sup>11</sup>

By the time of the Supreme Court’s *Whren* decision, matters stood as follows: In Alabama, Alaska, Arizona, California, Florida, Georgia, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington state, the U.S. Constitution barred police from stopping suspects unless a reasonable officer would have stopped them for the same offense. In almost every other state of the union, the Constitution allowed police to make a stop as long as the suspects had technically violated some law.<sup>12</sup> For nine years, suspects had been accorded more protection by the Constitution in some states than in others. For ten years, in some states, police had been constrained and evidence suppressed on the basis of a rule that the Supreme Court would unanimously reject when it finally considered it.

#### THEORETICAL ISSUES

This story of the development of a legal rule, while by no means typical, highlights an important truth and raises a host of questions about the dynamics of law making in large court systems. The truth, well known but often overlooked in the media and even in serious scholarship, is that lower court judges play a major role in the development of legal doctrine. Issues reach them first, and higher courts might not address those issues for years afterward if in fact they ever do. Furthermore, in many systems courts of equal authority are not bound to heed, or even take note of, one another’s decisions when deciding their own cases, even where they are constructing legal policy from the same statutes, constitutional provisions, or higher court precedents.

As a result, even if a particular court is just a single mid- or low-level component of a large system, it may well possess the power to affect legal policy independently and substantially. In a hierarchical structure, its best opportunities to do so arise when it confronts issues not yet resolved by a higher court. The research described here is motivated by curiosity about how judges react to these opportunities. Do they feel con-

<sup>10</sup> *U.S. v. French*, 974 F.2d 687 (6th Cir. 1992); *U.S. v. Ferguson*, 989 F.2d 202 (6th Cir. 1993); *U.S. v. Ferguson*, 8 F.3d 385 (6th Cir. 1993).

<sup>11</sup> *U.S. v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995).

<sup>12</sup> The only exceptions were the four New England states making up the First Circuit, which had not ruled on the issue.

strained by the courts around and above them? In what ways, and why? More specifically, as they consider unsettled issues, do they attempt to determine how a higher court would rule in their place and decide accordingly? How much attention do they pay to other judges of equal authority who have addressed the same issue? Do they tend to follow the leads of these judges? What factors make them more or less likely to do so?

These questions form the central focus of this study. The answers will in turn generate deeper questions. For example, if we found that judges did attempt to anticipate the Supreme Court's reactions, we would naturally wonder why they did. Such questions go to the core of judicial decision making, have long been debated, and are critically important. The results of this study will not speak as directly to them as to the central questions, but they will allow for some inferences. I discuss these in the final chapter of the book.

In my search for answers, I have chosen to study the twelve regional U.S. Courts of Appeals. Also known as circuit courts, they form the middle level of the American federal judicial system, above the district (trial) courts and below only the Supreme Court. Where the Supreme Court has not already spoken, each court of appeals sets the law for all federal judges within its jurisdiction. For all but one of the circuits, the District of Columbia, this jurisdiction covers at least three states. In a typical year, the courts of appeals together decide more than a hundred times as many cases as does the Supreme Court. In short, the circuit courts are tremendously important and undeniably worthy of attention.

Even so, the questions confronted in this research have been surprisingly unexplored, and there is little existing knowledge on which to build. Furthermore, the present study, though theoretically grounded and carefully conducted, is, inevitably, imperfect. For these reasons, conclusions will have to be drawn with some caution. Realistically, I aim to produce an accurate broad picture of the policymaking role of courts of appeals in the federal system along with highly credible evidence as to the details and, in doing so, to contribute to broader debates over the factors influencing judges' decision making.

Caveats notwithstanding, I will not hesitate to discuss interesting implications of the study's findings. In considering these implications, it is important to keep in mind that the courts of appeals constitute just one set of courts among many. What we learn about them here should have relevance for other sets as well, in the United States and in other countries. Two interesting examples that come to mind are U.S. state courts under federal law and European national courts under European

Union law. In both cases, individual courts of equal authority serve very different constituencies and proceed under no obligation to respect each other's views. They are bound by the rulings of only one court (the U.S. Supreme Court and the European Court of Justice, respectively). Unless judges in different jurisdictions have far less in common than I imagine, the behavior of those in the other systems should mirror that of circuit judges to some extent. At the same time, though, unique circumstances and institutional arrangements of each system may produce important differences. Thus, the study will not allow for confident inferences about other legal systems, but it should generate insights and questions for scholars interested in them.

Similarly, because circuit judges are not unique, any conclusions about internal and external influences on their behavior will cast at least some light on the actions of other judges. For example, by the final chapter we will have encountered substantial – albeit mostly indirect – evidence that legal goals affect circuit judges' decisions. In that chapter I argue that the same conclusion probably applies to most kinds of courts in most situations.

#### EXISTING RESEARCH

Twenty years ago, the claim just made about the state of our knowledge would have been unsurprising. Writing in 1981, J. Woodford Howard had the following to say: "Beyond general impressions . . . knowledge of the functions and operations of circuit courts is largely intuitive and fragmentary. . . . Courts of Appeals remain among the least comprehended of major federal institutions" (xvii). Now, the neglect of the circuit courts seems a thing of the past. Howard's book itself constituted a major advance, and the study of circuit courts has continued steadily since. Political scientists have substantially furthered our understanding of the factors at work in circuit judges' decision making while legal scholars concerned with issues of caseload and capacity have devoted considerable attention to circuit rules and procedures. We now understand circuit courts far better than we once did.

Yet, precisely because there was so much to be learned, studies have almost invariably taken a broad view, asking how courts operate and how judges behave *generally*. Most of the work of circuit judges involves the application of settled legal rules. Information about their actions in typical situations does not permit firm conclusions about their behavior in those special cases where they can actively shape the law.

As a clarifying example, consider the question of whether circuit judges try to decide unsettled issues of law as they think the Supreme Court would. Researchers have developed a highly credible body of evidence showing that circuit judges and other lower court judges are generally (though not perfectly) responsive to the policies announced by their superiors. They tend to comply with and otherwise adjust their decision making in response to precedents from higher courts (Gruhl 1980; Stidham and Carp 1982; Johnson 1987; Songer and Sheehan 1990; Songer and Haire 1992). Furthermore, their decisions typically track ideological trends in higher courts (Baum 1980; Songer 1987; Songer, Segal, and Cameron 1994; Rowland and Carp 1996; but see Sheehan, Hurwitz, and Reddick 1998). But because the relationship between higher and lower court decision making is not perfect and the studies do not isolate and examine cases not covered by higher court precedents, we cannot conclude anything about decision making on open issues. The findings of substantial but imperfect responsiveness are entirely consistent with the possibility that lower court judges adhere faithfully to higher court precedents – and so appear responsive in the bulk of their cases – but ignore their superiors entirely when deciding new questions. For instance, if the Supreme Court became increasingly conservative in the area of search and seizure, so would the precedents governing the cases that came before circuit judges. If the circuit judges followed those precedents, we would expect to see a conservative trend in their decisions, regardless of whether they tried to decide cases as the Supreme Court would.

Naturally, one can look for insights in research not specifically focused on the courts of appeals. I do so extensively in this study. But little work is directly relevant. Political scientists interested in judicial decision making have overwhelmingly tended to concentrate on individual judges' votes on case outcomes. While some studies of judicial behavior give close attention to the part that judges and courts play in developing legal doctrine (e.g., Shapiro 1965, 1970; Landes and Posner 1976; Canon and Baum 1981; Epstein and Kobylka 1992; Glick 1992; Wahlbeck 1997), these remain rare.

#### DESCRIPTION OF THE STUDY

In the research presented here, I add to the small store of such studies by focusing on the announcement and treatment of new legal rules. New legal rules are defined as either: (1) rulings on issues not previously

addressed by the Supreme Court or any federal court of appeals; or (2) unprecedented approaches to issues that previously had been addressed in other ways. (Clarifications and examples are given in Chapter 3.)

The study is based primarily on an examination of U.S. Courts of Appeals cases decided between 1983 and 1995 in the areas of antitrust, search and seizure, and environmental law. The full set of cases consists of those announcing new legal rules and subsequent cases for which the initial ones are relevant precedents.

The analysis of cases is supplemented with information from interviews with two dozen circuit court judges. The interviews provide theoretical grounding for hypotheses about judges' behavior, tests of some of the hypotheses, and additional context for understanding the various findings. Judges were asked about, among other things, their motivations, work styles, workload, attitudes toward and usage of precedent, and other judges' reputations.

I believe the two sources of data complement each other well. The analysis of cases provides for relatively rigorous, objective, and complete tests of hypotheses. It has limitations, though: chiefly a narrow focus, a tendency to identify commonalities among judges while obscuring differences, and some imprecision in the measurement of concepts. The interviews deliver contextually rich insights into dynamics generally, rather than just in three fields of law; reflect on the validity of the assumptions underlying my explanatory hypotheses; and reveal intriguing and significant differences among judges.

The picture of circuit court law making that emerges by the end of the study is not a simple one, but a few themes do come through rather clearly. One theme is the independence of circuit court judges. Their work does not appear to be closely supervised by the Supreme Court, nor does it seem that they try very hard to anticipate the Court's reaction when making their own decisions. They do not adhere slavishly to precedents from other circuit judges, and circuit conflict is fairly common. Their decision making appears individualistic, with ideology playing an important role. Yet there are also strong currents running in the other direction, toward uniformity. Different courts agree considerably more often than they disagree. Agreement probably arises in part from similar political values and shared standards of decision making, but it does not happen just by chance. Circuit judges pay serious attention to one another's views and are sometimes influenced by what others have done or even by who they are. Ultimately, it appears that their con-

fidence and self-reliance are tempered by respect and a sense of participation in a shared enterprise.

The construction of this picture begins in the next chapter, where I draw on existing research and the interviews to develop assumptions about judges' motivations. These are used to derive hypotheses about the factors affecting circuit judges' decisions on unsettled issues of law. Broadly, I hypothesize that the judges will more often adopt than reject the rules of their colleagues and that the likelihood of adoption will vary with their own attitudes and the actions and characteristics of the judges deciding before them. I do not take a position as to whether or not they are likely to anticipate the Supreme Court's response when making their decisions. Strong arguments can be made in either direction, and I adopt a neutral perspective to ascertain whether the weight of evidence favors one or the other.

Chapter 3 introduces the cases used in the quantitative analysis. I explain how they were chosen, provide preliminary descriptions of circuit judges' behavior in those cases, and summarize the Supreme Court's reactions to them. Chapters 4 and 5 are devoted to tests of the hypotheses about interactions among circuit court judges. The case analysis, which plays the primary role in the hypothesis testing, is presented in Chapter 4. The interviews, discussed in Chapter 5, provide further tests and additional information. Chapter 6 examines the influence of possible Supreme Court reactions, using only the cases. In Chapter 7, I discuss the implications of the findings.