Appealing to Injustice

Author : Steve Vladeck

Date : October 28, 2014

William M. Richman & William L. Reynolds, Injustice on Appeal: The United States Courts of Appeals in Crisis (2013).

Professors William M. Richman and William L. Reynolds have been writing about the "crisis" facing the U.S. Courts of Appeals—a crisis borne out of the combination of a dramatic uptick in appellate caseloads and the lack of any corresponding increase in the number of federal appellate judges—since before I was born. Readers familiar with their groundbreaking earlier work in the field might therefore wonder whether there's anything to learn from their new monograph on the subject, *Injustice on Appeal.* But the longevity of their critique actually underscores the significance of their newest work. By almost any account, the crisis facing the thirteen federal Courts of Appeals is only getting worse—and the steps those courts are taking in an effort to abate that crisis (what Richman and Reynolds refer to as the "Appellate Triage" regime) are only getting that much more controversial. Indeed, it is no overstatement to suggest that *Injustice on Appeal* is at once the most comprehensive—and yet accessible—descriptive account to date of both the crisis itself and the Appellate Triage regime that circuit judges have devised in response.

The real contribution of *Injustice on Appeal*, though, is not in its descriptive account of how the appellate crisis came to be, how circuit judges have responded, or why contemporary judges and lawmakers are so comfortable with such a problematic status quo. As the title suggests, Richman and Reynolds' thesis is that the judicial response has created "injustice," by producing a disproportionate impact on a specific subset of litigants. In their words, the effect of the Appellate Triage regime "falls disproportionately on the poor and middle class, whose appeals are deemed less momentous than the 'big' cases brought by or against the government or major private economic actors." But while it's impossible to discount the plight of poor and middle-class federal litigants in recent years, the real question Richman and Reynolds raise (but do not answer) is whether it's the appellate crisis—as opposed to increasingly harsh procedural and substantive rules—that is to blame.

I. The Caseload Crisis and the "Appellate Triage" Regime

As Richman and Reynolds document, the average caseload per federal appellate judge has jumped from just over 57 cases per year in 1960 to over 340 in 2010. That statistic would be staggering enough in the abstract, but it comes alongside two additional developments that make it that much more jarring: First, the same period has seen a dramatic *reduction* in the number of cases heard by the Supreme Court—leaving the increasingly overworked Courts of Appeals with the last word on an ever-increasing majority of questions of federal law. Second, and less obviously, the same period has seen a proliferation in administrative appeals—in at least some of which (*e.g.*, immigration and social security cases) the Courts of Appeals are all too often the *first* meaningful Article III word on those same questions.

In response to the undeniable pressures these developments have created, the circuit courts have, in addition to more zealously guarding their appellate jurisdiction, adopted a series of triage measures for cases within their purview. The hallmarks of this regime include (1) the screening of nearly all appeals by staff attorneys in the Court of Appeals' clerk's offices to assess the merits—or lack thereof; (2) the

disposition of many—if not most—of those cases without oral argument; and (3) the resolution of the appeal through unpublished (and, until 2006, uncitable) "memorandum dispositions." Through these devices, Richman and Reynolds argue, the Courts of Appeals have transmogrified themselves from courts of mandatory appellate jurisdiction into *de facto* certiorari courts, with only a specially chosen minority of cases receiving the full range of "traditional" appellate adjudication, including a "sufficiently detailed explanation so that the whole world can second-guess the result—and have an informed idea as to the state of the law." And whereas a similar move by the Supreme Court in the 1980s was at least tied to statutory amendments to its jurisdiction (and thereby pursuant to a legislative sanction), these developments within the Courts of Appeals have taken place entirely through internal (and usually informal) procedural changes.

At some level of generality, all of Richman and Reynolds' conclusions should be familiar to those with experience practicing before (or working with) the Courts of Appeals. But Richman and Reynolds replace anecdotal experience with incontrovertible evidence—and the numbers are staggering. According to the Administrative Office of the U.S. Courts, 81.4% of cases decided by the Courts of Appeals on the merits in 2012 were resolved through unpublished orders or opinions. A typical appellant, in other words, has less than a 1-in-5 chance of receiving the benefits of "traditional" appellate review from the Courts of Appeals. Reasonable minds can certainly differ as to whether such a regime is normatively desirable; what cannot be gainsaid is the complete absence of any meaningful *democratic* involvement in—or accountability for—such a fundamental shift in our judicial processes.

II. The Injustice of Contemporary Appeals and the Reform Agenda

As Professor Marin Levy has explained, the true insight of Richman and Reynolds' work is not simply in describing the Appellate Triage regime. Rather, the insight is in showing how "it is not simply that some cases receive less judicial attention overall, but rather that some *kinds* of cases receive less attention—namely, social security cases, prisoner cases, and criminal cases," *i.e.*, "cases brought by parties who are arguably the most vulnerable in our legal system," including criminal defendants, prisoners, and certain administrative claimants such as veterans and Social Security beneficiaries. In other words, Richman and Reynolds conclude, although the Appellate Triage regime would be problematic enough in its own right, it appears to not be "neutral," but rather to give informal preference to litigants with means over those without:

Of course, this unfortunate result does not come from any deliberate attempt to harm disfavored groups; the federal appellate courts remain, in theory, a bulwark protecting the citizenry. Nevertheless, the harm is there for all to see; judges are simply less likely to devote serious effort and attention to the routine veterans' benefit denial appeal than to the interesting corporate tax case. The discrimination may be ad hoc rather than planned, de facto and not *de jure*, but it is nonetheless real.

The "injustice" of the Appellate Triage regime, then, becomes Richman and Reynolds' core impetus for reform; for if the regime is not sufficiently worthy of reform as such (and it hasn't been, at least thus far), surely this effect, whether intended or not, is one that should not be tolerated by the American people—or, through them, federal policymakers. Instead, Richman and Reynolds conclude, Congress should finally accept the need for more federal appellate judges, even if the circuit courts themselves won't.

In appealing to "injustice," though, Richman and Reynolds' work raises—but does not answer—perhaps the most important question. Students and scholars of Federal Courts jurisprudence know all too well how difficult it has become for many of these same classes of litigants to press their claims in *any* forum—a result of a controversial series of judge-made procedural obstacles and legislative constrictions of remedies over the past thirty years. And insofar as these statutes and doctrines have

increasingly circumscribed both the entitlement of these parties to any judicial relief and the discretion of judges to so provide, the injustice of contemporary appeals may merely be an inevitable byproduct of the far more pervasive (and problematic) injustices pervading our contemporary legal system writ large.

Regardless, Richman and Reynolds have written a book that is a must-read even for those already familiar with its conclusions, but especially for those who are not. There may be some disagreement as to the causes of the injustices plaguing present-day federal appeals, but there can no longer be denial of their existence.

Cite as: Steve Vladeck, *Appealing to Injustice*, JOTWELL (October 28, 2014) (reviewing William M. Richman & William L. Reynolds, **Injustice on Appeal: The United States Courts of Appeals in Crisis** (2013)), https://courtslaw.jotwell.com/appealing-to-injustice/.