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# ESSAY

## REFLECTIONS ON JUDICIAL ADMINISTRATION IN THE SECOND CIRCUIT, FROM THE PERSPECTIVE OF LEARNED HAND'S DAYS

*Gerald Gunther\**

In venturing some thoughts on judicial administration in the Second Circuit, I tread on dangerous ground: I cannot assert the same expertise I can claim about constitutional law or judicial biography. As Learned Hand's biographer,<sup>1</sup> however, I can speak with some confidence about his views of the subject, although I am quite aware that his Second Circuit service, from 1924 to 1961, occurred in an era that must seem rather antiquarian in the 1990s. In addition, I have by no means any inside sense of the problems the exploding caseload has brought to the federal appellate courts—not even the kind of insider's view one can gather as a law clerk, as I was for Hand in 1953-54. Yet some comparative comments on the past and the present may be appropriate. And this effort may be worthwhile if only to assuage former Chief Judge Feinberg's concern that "judicial administration is the stepchild of the law," that it is "in large part ignored or, at best, tolerated by law schools, law reviews and scholars."<sup>2</sup>

Despite my eagerness to make amends for past neglect, I cannot help but bring to bear the rather jaundiced view

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<sup>1</sup> GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

<sup>2</sup> Wilfred Feinberg, *Foreword: Judicial Administration: Stepchild of the Law*, 52 ST. JOHN'S L. REV. 187, 188 (1978).

Fully conscious of my neglect of the field in the past, I dedicate these comments to my friend, one of the great judges of the modern Second Circuit, Wilfred Feinberg.

Learned Hand took of most matters of administration, even while he dispatched them with the kind of care he characteristically bestowed upon all matters, large and small, that came before him,<sup>3</sup> most especially the many thousands of cases he had to decide. Immersion in the life and work of Hand for more than two decades makes his impact on me unavoidable.

In effect Hand served as chief judge of the Circuit from February 1939, when the beleaguered Martin T. Manton resigned, until 1951, when Hand retired "from regular, active service."<sup>4</sup> At the outset, he was simply the "Senior Circuit Judge" since the office of chief judge was not so designated until the 1948 revision of the federal judicial code.<sup>5</sup> But from the outset, Hand's position as senior circuit judge imposed a host of new administrative duties on him, although the range of those was not nearly as great as it is today.<sup>6</sup> A few days before Hand became senior circuit judge, he noted that the duties of the post did not seem "very formidable," and believed that he would not have to spend much time on them: "After all, a judge spends substantially all his time in judging—or at least he ought to."<sup>7</sup> Even he, however, found that his administrative duties were more time-consuming than he would have liked. Occasionally he complained about the burden, but in fact he probably spent less than ten percent of his time on administrative chores.<sup>8</sup> By contrast, Wilfred Feinberg, at the time that he was chief judge in 1984, thought his administrative duties absorbed about fifty percent of his time.<sup>9</sup> Changing times and circumstances have made much of this inevitable. For example, during most of Hand's years as chief judge, the Second Circuit comprised only six judges; today, its personnel is more than twice that number and its

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<sup>3</sup> See Henry J. Friendly, *Learned Hand: An Expression From the Second Circuit*, 29 BROOK. L. REV. 6, 13 (1962).

<sup>4</sup> 28 U.S.C. § 371 (1982 & Supp. III 1985).

<sup>5</sup> See Act of June 25, 1948, ch. 646, § 46(c), 62 Stat. 869, 871 (1948), codified as amended at 28 U.S.C. § 46(c) (1988).

<sup>6</sup> See Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369 (1984). The 1948 law provided that the "circuit judge senior in commission shall be the chief judge of the circuit." *Id.* at 370 n.6.

<sup>7</sup> GUNTHER, *supra* note 1, at 514.

<sup>8</sup> GUNTHER, *supra* note 1, at 514-15.

<sup>9</sup> Feinberg, *supra* note 6, at 384.

caseload has grown dramatically. Moreover, the Circuit today needs to call in outside help far more often to form its panels.<sup>10</sup>

The sharp increase in personnel, non-judicial as well as judicial, and especially the dramatic growth in the number of cases to be processed, raises a host of problems for all judges, not just the chief judge. Indeed, what has happened since Hand's day has been described as a "crisis"<sup>11</sup> for the federal courts, above all a crisis with respect to the kind of judging that is possible on the Second Circuit. The traditional model—the model with which I am most familiar from my clerkship days and especially from my work on Learned Hand's biography, the model that has indeed been described as the "Hart-Hand model"<sup>12</sup>—views the federal appellate court as above all a collegial body composed of a small number of judges, a body that is deliberative and that produces adequately reasoned results. It is that model that is in crisis because, as Professor Monaghan puts it, the "litigation explosion carries with it the increasing bureaucratization of the federal appellate process."<sup>13</sup> That litigation explosion, reflected in the mounting caseload, clearly puts special pressure on, and may endanger, the maintenance of the kind of collegial, deliberative tribunal on which Hand served and over which he presided.

Bearing in mind the limited qualifications I bring to assessment of issues of judicial administration, I will restrict myself to a few features of Second Circuit practices that had their fullest flowering during Hand's years: the use of pre-conference memoranda; the role and number of law clerks; the limited resort to en banc hearings;<sup>14</sup> and the conduct of

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<sup>10</sup> See, e.g., Wilfred Feinberg, *Foreword: Senior Judges: A National Resource*, 56 BROOK. L. REV. 409 (1990). The Circuit's caseload has increased more than tenfold since Hand's time. See *id.* at 413.

<sup>11</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

<sup>12</sup> Henry P. Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344, 345 (1985) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)). In preparing these reflections, I was much stimulated by Professor Monaghan's thoughtful, brilliant review of Judge Posner's book.

<sup>13</sup> *Id.*

<sup>14</sup> Like Judge Newman, I prefer "*en banc*" to "*in banc*," the term used in the current statutes and rules; unlike Jon Newman, I can afford to invoke the autonomy of a law professor to ignore the official commands. See Jon O. Newman,

Circuit Judicial Conferences.

*Pre-conference memos.* Probably no "procedural" feature contributed as much to the enviable quality of the Second Circuit in Learned Hand's days as the use (and enthusiastic support, by all of the judges) of pre-conference memos. Reliance on pre-conference memos contributed immeasurably to the collegiality, deliberativeness and reasoned elaboration of judgments that made Hand's court the nation's outstanding one. Their use played a central part in realizing the ideal of the Hart-Hand model on the Second Circuit.

The Second Circuit's pre-conference memo practice already existed when Hand took his seat there in 1924, but it reached its peak during his tenure for the next thirty-seven years, and he was its exemplary practitioner.<sup>15</sup> The main purpose of the pre-conference memo—in more recent years referred to as "voting memo"<sup>16</sup>—was to promote individual consideration of each case prior to giving it collegiate attention. In Hand's day, members of the judicial panel did not discuss the cases until more than a week after the end of oral arguments. Before conferring with their colleagues, each judge worked through the case, reached tentative conclusions, and circulated memos stating their tentative thoughts. The practice assured an unequaled degree of intellectual engagement. The memos typically ranged from two to four pages; in Hand's case they were frequently longer than that. The usual consequence of the pre-conference memo practice was to shorten the time needed to confer about a case in the judges' conferences, for the discussion could concentrate on areas of disagreement rather than on efforts to identify the central issues. Moreover, the memos proved useful after the judges conferred, helping the presiding judge to make assignments of opinions and aiding recollections when draft opinions were circulated.<sup>17</sup>

For several years after Hand stepped down as chief judge in 1951, the memo practice continued unabated, receiving especially strong support from Judges Henry J. Friendly and

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Foreword: *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 365 n.1 (1984).

<sup>15</sup> See GUNTHER, *supra* note 1, at 286-88.

<sup>16</sup> Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 298 (1986).

<sup>17</sup> *Id.* at 301.

Harold R. Medina.<sup>18</sup> As recently as 1986, then-Chief Judge Feinberg reported that the judges' support for the practice, though somewhat modified, persisted. More recently, however, there has been less use of pre-conference memos.<sup>19</sup> Presumably, the mounting caseload of the circuit and the intense workload of every judge provides a large part of the explanation for this decreasing practice. Moreover, preparing pre-conference memos produces special inconveniences for judges living outside the New York metropolitan area. Because the memo practice precludes voting on cases during the week of arguments, the out-of-town judges are often required to return to New York City for the conference on the cases that they have heard.

These concerns are understandable, but nonetheless regrettable, especially if they augur impending abandonment of pre-conference memos by the court. The memos' contributions to collegiality and the quality of the ultimate judicial product are time-tested and enormous. The contemporary doubts about the practice testify to the impact of the modern caseload on the realization of the admirable ingredients of the Hart-Hand model. But abandonment of the memo practice today cannot be wholly attributed to the growing caseload. Judge Medina, for example, was initially skeptical about "this extra work," yet he quickly came to see the memo process as "a wonderful thing."<sup>20</sup> It would be a mistake for today's hard-pressed judges to think that the Hand era was typically one of light work and ample time for reflection, as Learned Hand's own enormous output of opinions and the thirty-nine boxes of pre-conference memos in the Learned Hand Papers amply demonstrate. One can only hope that, despite mounting doubts, the judges will find a way to continue this practice, an important ingredient of the Second Circuit's high reputation.

*Law Clerks.* The use of law clerks by the judges was an important institutional arrangement during most of Hand's years on the Second Circuit. The benefit to recent law school

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<sup>18</sup> *Id.* at 302.

<sup>19</sup> Letter from Wilfred Feinberg to Gerald Gunther (Sept. 22, 1994) (on file with author).

<sup>20</sup> Harold R. Medina, *Some Reflections on the Judicial Function at the Appellate Level*, 1961 WASH. U. L.Q. 148, 150.

graduates chosen as clerks was and is self-evident, but the provision of assistance by law clerks has also played an important role in the Circuit's special personal and intellectual atmosphere. Hand himself was the pioneer among lower court judges in using law clerks decades before Congress provided funding for the position. From 1909 through 1911, Hand imaginatively used public funding for a stenographer to hire a law-trained assistant to help him not only with secretarial chores but also with legal research. When Hand joined the Second Circuit in 1924, he was more eager than ever to have a young law-trained companion at his side. In the continued absence of congressional funding, he and his colleague Thomas W. Swan paid out of their own pockets for a shared law clerk. At last, in 1930, Congress provided financial support for the law clerk position.

For the rest of his career, Hand, like every other judge of his time, had only one law clerk. The working relationship between the law clerk and Hand was, it is safe to say, unique—indeed, of a kind to make any modern law clerk turn green with envy. No clerk for Hand ever wrote a single word, either in producing research memoranda or in drafting opinions. Instead, the Hand-law clerk relationship was one of extraordinary intellectual intimacy: it consisted entirely of face-to-face contacts, not any written work. The sole role of Hand's clerks was to familiarize themselves in any way they could with the issues pending before the judge and to serve as critics of the judge's thinking, pre-conference memos, and opinions as they evolved. Hand's constant hunger for critical analysis was part and parcel of his distinctiveness as a judge. He had a deep-rooted open-mindedness and skepticism about his work; he was not cocksure about anything; he had a genuine capacity for listening and indeed a deep-seated desire for points of view different than his own. These traits made him view conversations with his clerks as essential to his performance of his judicial function and vital to his inquiring mind, which never grew complacent and was never closed.<sup>21</sup>

Today, the situation is very different. Since 1980, active

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<sup>21</sup> See GUNTHER, *supra* note 1, at 288-91, for my discussion of Hand's relationships with his clerks. Sometimes this process would produce more than a dozen draft opinions, all wholly written by Judge Hand. *Id.* at 620.

federal appellate judges have been authorized to employ three law clerks.<sup>22</sup> I hope that it is not mere nostalgia for my unforgettable year with Hand that makes me suspect that the expanding personal staff of judges may further erode the Second Circuit's capacity to continue the Hart-Hand model. The very large expansion in the number of supporting personnel for judges has, as Professor Monaghan persuasively argues, "profoundly affected the institutional character of the inferior federal courts."<sup>23</sup> Federal judges, he notes, "have increasingly become managers who direct, coordinate, and review the activities of subordinates."<sup>24</sup> The reliance on law clerks in opinion drafting, Monaghan also states, has resulted in opinions that are "all too frequently prolix, unimaginative, indecisive, and less credible."<sup>25</sup>

Certainly, as someone who is professionally obligated to read Supreme Court opinions more regularly and thoroughly than those of the Courts of Appeals, I have long thought that the prolixity (without greater clarity) of Supreme Court opinions correlates closely with the even greater increases in staff help the Supreme Court justices have received over the years. Of course, the litigation explosion, the growing caseload, is the main villain in this as well as other problems of appellate courts. The costs are real: it is impossible for a judge to have the same close relationship with law clerks once the staff has grown from one law clerk and one secretary to a small battalion. While it is reassuring to learn that the Second Circuit continues to strive, often successfully, for the high standards of judicial performance set by Learned Hand and his colleagues,<sup>26</sup> it is important to note that the growing

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<sup>22</sup> Thomas J. Meskill, *Foreword: Caseload Growth: Struggling to Keep Pace*, 57 BROOK. L. REV. 299, 303 (1991).

<sup>23</sup> Monaghan, *supra* note 12, at 346.

<sup>24</sup> Monaghan, *supra* note 12, at 346; see also POSNER, *supra* note 11, at 97, 103-04.

<sup>25</sup> Monaghan, *supra* note 12, at 347. Judge Posner has documented some of these unfortunate impacts at some length. POSNER, *supra* note 11, at 102-19.

<sup>26</sup> Commenting on the meaning of Hand's tradition to the Second Circuit today, Wilfred Feinberg stated:

His greatest impact, I believe, was in exemplifying the view that each case is important and that almost as much time and effort should be spent on the unglamorous cases as on the blockbusters. Friendly continued this tradition. With increased caseloads, the tradition is (necessarily?) slipping away, but it is a worthy ideal that still has its



bureaucratization of the federal judiciary threatens to undermine the basis for the Hart-Hand model and to impair the quality of judging traditionally performed in the courts of appeals.

*En banc proceedings.* In one important respect, the Second Circuit has come admirably close to adhering to Hand's views: it has nearly mirrored his skepticism about, and indeed antipathy toward, *en banc* proceedings. Federal courts of appeals have been authorized to rehear rulings by three-judge panels before the full complement of active judges ever since a Supreme Court decision in 1941;<sup>27</sup> Congress confirmed that power in 1948.<sup>28</sup> Judge Hand, however, had nothing but scorn for the utility of such hearings. As early as 1941, Hand stated that, "for myself, I should never vote to convene" an *en banc* court. Hand kept that promise to the end, and he mocked those courts that resorted to the practice with ever growing frequency. As he once wrote to his friend, Judge Herbert Goodrich of the Third Circuit: "I cannot but admire [Third Circuit Chief Judge] John Biggs' device of having all the judges of a Circuit sit together; it so much increases the certainty of the result. For example, [in a recent *en banc* ruling, the Third Circuit's] vote is four to three, when it might have been only two to one."<sup>29</sup> Then-Chief Judge Feinberg reported in 1984 that he thought, in the best tradition of Hand, "that for the most part in bancs are not a good idea: They consume an enormous amount of time and often do little to clarify the law."<sup>30</sup> In the same year, Judge Newman stated that the Second Circuit did not convene an *en banc* proceeding until 1956 and that its record for 1980 to 1983 showed significantly

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effect, particularly in the cases that result in published opinions.

Letter from Wilfred Feinberg to John P. Frank (June 27, 1994), *quoted in* John P. Frank, 108 HARV. L. REV. (forthcoming 1995) (reviewing *Learned Hand: The Man and the Judge*).

<sup>27</sup> *Textile Mills Sec. Corp. v. Commission of Internal Revenue*, 314 U.S. 326, 333-35 (1941).

<sup>28</sup> Act of June 25, 1948, ch. 646, § 46(c), 62 Stat. 869, 871 (1948), codified as amended at 28 U.S.C. § 46(c) (1988). See the very useful discussion in Newman, *supra* note 13, at 366. On Hand's attitude toward *en bancs*, see GUNTHER, *supra* note 1, at 515-16.

<sup>29</sup> GUNTHER, *supra* note 1, at 516.

<sup>30</sup> Feinberg, *supra* note 6, at 376-77.

fewer *en bancs* than any other circuit in the nation.<sup>31</sup> It is my impression that the Second Circuit has maintained its reluctance to convene *en bancs* and has held the number of such cases to a minimum.<sup>32</sup>

It seems strange that so many circuits are far more lenient than the Second in granting *en bancs* even while such hearings clearly impose added pressure on the already burdened workload of every judge. Perhaps this phenomenon is itself a reflection of the workload problem, which has resulted in a larger number of court of appeals judges around the nation, with the resultant greater risk that a particular three-judge panel's ruling may not adequately reflect the full bench's views. Perhaps, in short, the heavier caseload has produced more judges—which has diminished collegiality—and increased the risks of conflicts, adding further pressure for *en bancs*. Whatever the reason, the Second Circuit's resistance to this trend is surely occasion for applause.

*Circuit Judicial Conference.* Shortly after Learned Hand began to preside over the Second Circuit in 1939, Congress mandated an annual meeting of all of the active circuit and district judges "for the purpose of considering the business of the courts and advising ways and means of improving the administration of justices within [each] circuit."<sup>33</sup> Although Circuit Judicial Conferences are hardly uppermost in the mind of the chief judge and his or her colleagues during most of the year, the treatment of this statutory mandate by Hand and his successors offers a revealing contrast to the current practice.

Hand, characteristically disdaining pomp, circumstance and formal gatherings, implemented the statute's requirements in a manner least likely to detract him and his fellow judges from their primary task of deciding cases. In most circuits the annual conferences quickly became two- or three-day affairs, where the judges could socialize, attend discussion sessions, and mingle with invited members of the Bar. Throughout his years as head of the Second Circuit, from 1939 to 1951, Hand

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<sup>31</sup> Newman, *supra* note 14, at 365-66, 371.

<sup>32</sup> See Jon O. Newman, *In Banc Practice in the Second Circuit, 1989-93*, 60 BROOK. L. REV. 491, 491-92 (1994).

<sup>33</sup> Act of August 7, 1939, Pub. L. No. 76-299, § 307, 53 Stat. 1223, 1224 (1939), codified as amended at 28 U.S.C. § 333 (1988 & Supp. V 1993). See generally, GUNTHER *supra* note 1, at 516-17.

would have nothing to do with the grand gatherings which in other circuits often brought together 500 to 1000 people for a mixture of business and camaraderie. Instead, he typically sent a brief annual notice to every judge, citing the statutory provision mandating the meeting and announcing that the year's conference would take place in a room at the Foley Square Courthouse in downtown Manhattan at a specified date and hour. He announced, moreover, that he expected the proceedings would take very little time; and he usually appended a blanket excuse in advance for any judge who had more important business to transact on the scheduled day.<sup>34</sup> Once, Hand sought the aid of a district judge to help prepare a minimal agenda for the annual conference, but he made clear that the Second Circuit should avoid the extravagance commonplace in others—which occurred, as he told the district judge, “perhaps because they are not so busy” as the Second Circuit.<sup>35</sup> At another time, Hand described an impending conference to a former law clerk, saying that the conference members

will all be there, feeling pretty important. [We] shall talk a great deal to show each other how sagacious we are; [we] shall settle some things to present to Congress which Congress will probably not do. Then we shall go home with the sense that we are rather nice chaps which is really the case.<sup>36</sup>

The conduct of the Circuit Judicial Conference has changed significantly since Hand's day as chief. The change began under the leadership of Chief Judge Charles E. Clark, in 1955. Nowadays, a gathering of several hundred, including invited lawyers, meets for two and one-half days “in an area far from the madding crowd,” as then-Chief Judge Feinberg put it.<sup>37</sup> This certainly is not because the Second Circuit is “not so busy” these days as in Hand's time. Rather, the difference is Hand's preference for personal relations among judges rather than formal, bureaucratic ones. Perhaps the larger

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<sup>34</sup> Under the law, attendance by each judge is mandatory, “unless excused by the chief judge.” 28 U.S.C. § 333 (1988 & Supp. V 1993).

<sup>35</sup> Letter from Learned Hand to Mortimer W. Byers (Mar. 8, 1946) (on file with the Harvard Law Library).

<sup>36</sup> Letter from Learned Hand to Louis Henkin (Sept. 21, 1944) (on file with the Harvard Law Library).

<sup>37</sup> Feinberg, *supra* note 6, at 382.

number of judges in the circuit today makes Hand's approach no longer feasible.

Nevertheless, it is heartening to see the recent news from the District of Columbia Circuit's Fifty-fifth Annual Circuit Conference in 1994. A legal newspaper recently announced that the Annual Conference, "with its tennis and golf tournaments, banquets, and schmoozing, just got a little less annual," for then-Chief Judge Abner Mikva told the attendees that the Conference will not convene next year. (Chief Judge Mikva reported that "the judges agreed on this 'display of frugality' because of budget constraints and forced staff reductions."<sup>38</sup>) Perhaps gaining additional worktime in this manner may recommend itself to the Second Circuit as well.

*Conclusion.* As these comments suggest, so far the Second Circuit has done better than most in trying to adhere to the essentials of the Hart-Hand model. Yet the ineluctable forces of a growing caseload and spreading bureaucratization make it difficult to believe that the model can long survive, at least in the absence of drastic preservative measures. Serious consideration of such measures seems very much in order. For example, Professor Monaghan has cogently argued that

what is left of the Hart-Hand model of the courts of appeals can be maintained, if at all, only by sacrificing those courts' traditional 'corrective function'; that is, by eliminating appeals as of right, at least over large categories of cases . . . . In the near future, the defenders of the Hart-Hand model may need to assert their preference for discretionary review over some review as of right . . . .<sup>39</sup>

Once again revealing my penchant for nostalgia and my affliction of ignorance, I would add that any discussion of reforms might well bear in mind a comment in my Hand biography:

Despite—perhaps because of—his low regard for elaborate bureaucratic structures, committees, and formal meetings, Hand proved to be a superb administrator, eliciting enormous respect and affection from the judges of his circuit. He attended to all important administrative chores punctiliously, but he did not let them govern his life, or his work as a judge.<sup>40</sup>

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<sup>38</sup> LEGAL TIMES, June 13, 1994, at 3.

<sup>39</sup> Monaghan, *supra* note 12, at 357-58 (footnote omitted).

<sup>40</sup> GUNTHER, *supra* note 1, at 517.

