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FOREWORD

CASELOAD GROWTH: STRUGGLING TO KEEP PACE

*Thomas J. Meskill**

INTRODUCTION

Each year the *Brooklyn Law Review* devotes one issue to a review of the decisions of the United States Court of Appeals for the Second Circuit. The contributors to this annual issue describe and comment in detail on the court's decisions affecting particular areas of the law. In preparing the Foreword for this year's Second Circuit Review, I thought that the reader would be interested in learning how the court deals with the current demands of the ever-increasing caseload from which the opinions analyzed in this issue are derived. I will attempt to accomplish this task as succinctly as possible, touching on some of the causes of the expanding workload and on our attempts to cope with it.

OVERVIEW

The number of appeals filed in our court has continued to increase over the years. The filings ebb and flow but during the sixteen years that I have been a member of the court the trend

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generally has been upward. The number of appeals filed in the year ending July 1, 1975, was 1,739. Last year the number was 3,424, an increase of almost 100 percent. In that same period the number of authorized judges only has increased from nine to thirteen. In spite of this, we have managed to clear the calendar in almost every year. By this I mean we have disposed of as many cases each year as were filed during that year. Also notable is the Second Circuit's performance relative to the other circuits. In nearly every year during this sixteen-year period, we have established the best record of any circuit court for disposing of cases expeditiously. Some of the credit for this performance belongs to the senior judges on our court who still perform valuable judicial service and without whose help we could not keep pace with the ever-increasing workload. We have also been blessed with the help of visiting judges from other circuits and district judges from our own circuit who have sat on our panels by special designation of our Chief Judge. Additionally, in response to these workload demands, we have increased the number of panels that hear appeals. As a result, active judges on our court have been sitting more frequently than ever before and each panel has been hearing more cases. Despite these extraordinary efforts, we have failed to keep pace with the rapid growth in the number of appeals this year.

Why the Increased Filings?

The most frequently offered explanation for the increase in court activity at all levels is the "litigious nature" of our contemporary society. A close second in the blame department seems to be "too many lawyers." I disagree with both assessments. The federal caseload has been fueled in part by an avalanche of drug-related crimes and a doubling of bankruptcy filings in the last five years. Much of the increase in litigation, however, stems directly from legislative initiatives of the United States Congress. In particular, congressional initiatives such as OSHA, 29 U.S.C. § 651-678, ERISA, 29 U.S.C. § 1001-1461, Title VII, 42 U.S.C. § 2000e to e-17, as well as much of the environmental legislation, have spurred litigation in the federal courts. Indeed, our elected representatives often intentionally increase the business of the courts. Example: When Congress passed the Equal Access to Justice Act, 28 U.S.C. § 2412, it sought to encourage individuals and small corporations to stand up for their rights

when they felt they had been wronged or unfairly treated by the federal government. The Act conferred on private litigants, who prevailed in suits against the United States, the opportunity to recover costs and attorneys' fees from the government. In adopting this legislation, Congress plainly anticipated that an increase in litigation would occur. It did. Naturally, much of this increased litigation finds its way into the appellate courts. Often, in fact, by the time such cases reach us, the sole issue on appeal is the question of attorneys' fees.

Even when Congress does not intend or even anticipate that certain legislation will increase our caseload, the adoption of new laws often has that effect. For instance, when Congress passed the Sentencing Act of 1987, 18 U.S.C. § 3551-3856, its purpose was not to encourage criminal appeals. I seriously doubt that Congress believed the Act would produce much appellate work. Indeed, it was generally understood that if a district judge sentenced a defendant within the Guidelines there could be no appeal of the sentence. I am certain that our representatives in Washington would be surprised to learn that during a ten-month period last year almost one-third of all of the criminal appeals in our circuit were exclusively appeals of the sentences imposed after a guilty plea. These are only a few examples of congressionally created sources of the increase in our workload. There are others I need not mention to make my point.

The workloads of both the district courts and the courts of appeals are also impacted adversely by questions raised by federal legislation but seldom answered in the language of the statute itself. We necessarily spend much of our time examining federal statutes. Unless we conclude that the statute in question violates the Constitution, we apply the statute to the facts of the case. In construing statutes, we seek to discover and to implement congressional intent. In 1988 alone, according to a December 15, 1989 report by the Federal Bar Council Committee on Second Circuit Courts, federal courts discussed congressional intent in at least 1,516 cases. I have no figures for recent years, but I have no reason to believe that the frequency of that subject is on a downward trend. Unfortunately, the search for congressional intent is often in vain.

Anyone reading our published opinions and those of other circuits will see the words "silent," "scant" and "inconclusive" over and over again in courts' discussions of the legislative his-

tory of particular statutes. Judges spend valuable judicial resources trying to determine what Congress meant by what it said, resources that could profitably be devoted to other matters.

Attempts to Deal with the Problem

In order to determine the budgetary impact of new legislation on the judiciary, the Analytic Support Branch of the Administrative Office of the United States Courts prepares a judicial impact statement for the Budget Committee for the United States Courts. These judicial impact statements influence the judiciary's request for funds from the Congress. Indeed, they often reach conclusions different from the Congressional Budget Office's estimates on the same legislation. The latter often projects a savings while the former projects additional pressures on judicial resources. But this is an institutional problem with which we will have to live. There are, however, steps that can be taken which will serve the congressional purpose of bringing about desired change without adding unnecessarily to the workload of the federal judiciary.

The Federal Courts Study Committee recommended on December 23, 1989,¹ that a checklist be created for use by Congress during the drafting of bills to encourage statements regarding:

- (1) the appropriate statute of limitations;²
- (2) whether a private cause of action is contemplated;
- (3) whether preemption of state law is intended;
- (4) the definition of key terms;
- (5) the mens rea requirement in criminal statutes;
- (6) severability; and
- (7) whether the new bill repeals or otherwise voids previous legislation.

Because these frequently raised issues are seldom resolved in the legislation itself or even in the legislative history, we judges have to divine answers by analogizing to other statutes or

¹ Federal Courts Study Committee, Tentative Recommendations for Public Comment 135-36 (Dec. 22, 1989), reprinted in 2 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (July 1, 1990).

² Section 313 of the Judicial Improvements Act of 1990 added a new section, § 1658, to Chapter III of Title 28 providing a four-year statute of limitations for civil actions accruing under Acts of Congress enacted after December 1, 1990. 28 U.S.C.A. § 1658 (Supp. 1991).

on occasion by resorting to little short of guesswork. Naturally not all judges and not all circuits come up with the same answers to these questions, and the ultimate answer often remains in doubt until it is provided by the already overburdened United States Supreme Court.

When we are unsure of a district judge's reasoning, we can remand for clarification. Unfortunately, we do not have the same avenue open to us when interpreting the language of a statute. We understand the reluctance of a representative or senator to be too specific when drafting legislation. And we recognize that it is relatively easy to gain support for legislation that has a popular purpose. By speaking in specific as opposed to general terms, however, legislators run the risk of losing the support of their colleagues and their constituents. This is because specific statutory language enables others more fully to appreciate the negative consequences of any given proposal. Regrettably, by opting for vagueness, Congress leaves it to the courts to come up with the answers, answers we are often unsure of but answers we must give if we are to decide cases. As you might expect, the answers we offer often displease the congressional sponsors of the legislation.

One thing is certain, leaving serious questions of congressional intent open for judicial determination substantially adds to our workload and consumes precious judicial resources unnecessarily. It also runs the risk of undercutting congressional goals.

Attempts to Respond

I wish to note, however, that Congress has not been unmindful of our needs where the number of judgeships is concerned. The same may be said for the logistical support Congress gives to the courts. New appellate judgeships have been created for our court whenever they have been requested. Funds were appropriated for a third law clerk for all active appellate judges in 1980 and for a second secretary in 1981. We have been supplied with hi-tech equipment such as computers and fax machines to help increase our productivity and speed the judicial process. But judging is still a thoughtful, deliberative process, a distinctly human endeavor. We are not machines. We cannot keep up with an ever-increasing workload by revving up our thought processes.

Opinion writing is also a time-consuming endeavor. A judge

is necessarily limited in the number of signed opinions that can be written in a year. For that reason, we dispose of many appeals by summary order. In an average year we dispose of about half of our argued cases in this manner. Summary orders are brief statements of our decisions directed only to the parties. The orders are by their nature terse and conclusory. They contain a caveat that they are not to be cited in any other case. The practice of disposing of appeals by summary order has been criticized by some counsel who feel that the time they invested in the appeal and the expense to their client merit more in the way of an end product. This reaction is understandable. On the other hand, our practice is efficient and we believe that with our heavy workload, the practice is necessary.

We do publish an opinion whenever we reverse the decision being appealed. We also publish an opinion when we affirm a decision under review if any member of the panel believes one is appropriate. Moreover, if a single judge on the panel believes that any jurisprudential purpose will be served by publishing, we publish. The questions we ask are, will a published opinion in this case be helpful to the bench or bar generally or will it add anything to the established law of the circuit? If the answer to either questions is yes, we publish. Our policy naturally results in fewer published opinions. I would hope that those who have to purchase each new volume of the Federal Reporter would find considerable merit in our approach.

In spite of all of our efforts to keep up with the caseload, we are still losing some ground. Enlarging the court is not an easy answer to the workload problem. It takes a long time to fill a vacancy on the circuit court. Also, we currently do not have adequate chambers space in the Foley Square Courthouse for all of our active judges.

Our Chief Judge has appointed a Case Management Committee to study the workloads of other circuits. We are always anxious to learn from others. One of our practices under review is allowing oral argument in all appeals except those brought by incarcerated pro se prisoners. Our circuit stands alone in this regard. Other circuits limit those instances in which oral argument is available to certain specified appeals.

We, however, do severely limit the time each side is allowed for oral argument. Because we read the briefs before hearing argument, we do not want counsel to expend valuable time on the

background facts of the case. It is amazing how much persuasive argument can be made in five or ten minutes by competent appellate advocates. Experienced counsel will get right to the point, discussing the legal issues involved and not waste time telling us what we already know. These tight time limits are necessary if we are to hear as many appeals per sitting session as we do now.

Some circuits have screening committees that decide which cases will be allowed oral argument and which will have to submit on their briefs. There have been suggestions that we do the same or that we at least deny all pro se appellants the privilege of oral argument. Experience has shown that most of these appeals are without merit and many are frivolous. Personally, I hope that we can continue to find time for oral argument in all cases, even those we consider frivolous after reading the briefs. Even these cases offer a surprise once in a while. If we must abandon our present policy on oral argument, I would hope that the decision to deny oral argument would be based on the briefs, the issues and the record on appeal, and not on the status of the advocate.

CONCLUSION

We do our best to carry out our appellate function in an expeditious fashion realizing that our first responsibility is to decide the appeal before us. Because of the increased workload we have had to make adjustments in our practice, tradeoffs, if you will. We undoubtedly will have to continue to make changes in the way we function as a court. In doing so, we can only hope that these changes will not erode the quality of justice that litigants have a right to expect from a federal appellate court.

