1993

Federal Court Reform Should Start at the Top

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American Judicature Society
Joint Luncheon with the
National Conference of Bar Presidents
New York City
August 7, 1993
Noon

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There can be little doubt that the federal courts are confronting a caseload crunch of mammoth proportions. How could it be otherwise, with more and more attorneys filing more and more lawsuits as the result of more and more causes of action created by Congress? Let's look at the numbers. In 1981, approximately 180,000 civil cases were filed in the United States District Courts.[1] In 1991, the number was nearly 208,000.[2] In 1981 approximately 31,000 criminal cases were filed in the district courts, and in 1991 the figure was about 46,000.[3] During the same decade, Congress authorized increases in district court judgeships from 516 to 649.[4] The circuit courts of appeals had 132 authorized judgeships and about 26,000 filings in 1981.[5] By 1991, filings had increased by roughly 16,000 cases to 42,000, but there were only 35 more judgeships than there were in 1981.[6]

In the one hundred years since the Second Circuit Court of Appeals was formed, our authorized judgeships have gone from 3 to 13, an increase of 433%.[7] During the same period, however, our filings have gone from 196 to 4,165, an increase of over 2,000%![8] As filings increase, without any corresponding increase in the number of judges, each judge must handle more cases and the median disposition time for each case necessarily

becomes longer. If the mission of the lower federal courts is to provide for the just, speedy and inexpensive determination of every dispute brought before them, their present overburdened condition calls into question their ability to perform the mission. There are two options. The first is to continue the present course, with the expectation of incremental increases in the caseload and with expansion of the judiciary continually lagging behind need. The other option is reform, including changes in such areas as court structure, procedural rules, case management techniques, the decisional process, subject matter jurisdiction and methods of alternate dispute resolution. It seems clear that the time for reform is at hand.[9]

Three years ago, the Federal Courts Study Committee, created by Congress to assess the developing crisis and to make appropriate recommendations, rendered its final report. In the report, the Committee noted the existence of "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion."[10] The Committee did not recommend any increase in the number of judges, although that would seem to be a logical place to start. A lively debate is now in progress between those who believe that there should be a "cap" on the number of federal judges and those who think expansion is in order, with excellent arguments on both sides.[11] However that question may be resolved, the fact is that in recent years the President and Senate have had a great deal of difficulty in filling current vacancies. At this moment, there are 106

unfilled slots in the district courts and 20 unfilled slots in the courts of appeals.[12]

Back in 1975, the Hruska Commission proposed the establishment of a National Court of Appeals, a new court to be interposed between the Supreme Court and the regional courts of appeals.[13] It would receive cases on reference from the Supreme Court and by transfer from the regional courts. The Study Committee rejected the idea of a national intermediate appellate court but did present five structural change possibilities for further inquiry and discussion: A single unified National Court of Appeals operating through regional divisions; a four-tier system, with the first appellate tier consisting of 25-30 regional appellate divisions hearing appeals of right from the district courts and the second-tier appellate court taking cases on a discretionary basis from the first; National Appeals Courts structured according to subject matter, as in the federal circuit; a single, centrally organized court of appeals; and consolidation of existing courts into five jumbo circuits.[14] All these proposals have their unique problems, as the Study Committee indicated.[15]

There are those who see merit in giving the courts of appeals discretion as to what cases they will accept.[16] My chief judge, Jon Newman, has a different approach. He favors a system of discretionary access to federal courts at both the trial and appellate levels so as to reallocate jurisdiction between state and federal courts.[17] Under his proposal,

discretion as to access would be vested in the federal courts and would be exercised for individual cases and designated categories.[18] Proposals have been made to modify or severely curtail diversity jurisdiction,[19] to replace with a workers' compensation scheme the statutes allowing injured railroad workers and seamen to sue in federal courts,[20] and to establish a special court to adjudicate claims under the Social Security Act.[21] Other suggestions for reform have included a small claims procedure for certain federal tort claims,[22] the creation of an Article III Appellate Division of the United States Tax Court with exclusive jurisdiction over federal income, estate and gift tax cases,[23] a requirement for exhaustion of state administrative remedies prior to the commencement of prisoners civil rights suits[24] and mandatory use of alternate dispute resolution mechanisms.[25]

The federal judiciary, with the assistance of the Federal Judicial Center, long has experimented with case management techniques. The authority of judges to take hold of a case in its earliest stages and to keep the case under close supervision, with established deadlines, has proved to be essential to the achievement of maximum efficiency in court operations. Despite the fact that the lower federal courts are running as fast as they can and have been refining management techniques and administrative procedures over the years, the Congress enacted the Civil Justice Reform Act in 1990.[26] The Act requires each district court in the nation to create an expense and delay

reduction plan. Just what the courts needed at a time when they are understaffed and underfunded: a congressional requirement to micromanage the courts and to reinvent the wheel. What a waste!

It is Congress, of course, that is responsible for all this mess in the first place. Justice O'Connor once referred to the "underdeveloped capacity [of Congress] for self-restraint."[27] Nowhere is the lack of self-restraint more evident than in the federal criminal laws. I have been writing and speaking about the federalization of crimes for more than a decade, but nobody seems to listen. There are about 3,000 separate provisions scattered throughout the United States Code criminalizing various forms of conduct. Do you know that it is a federal offense to reproduce the image of Woodsy Owl[28] and Smokey the Bear?[29] To impersonate a 4-H club member?[30] To transport water hyacinths in interstate commerce?[31] To bring false teeth into a state without the permission of a local dentist?[32] Every time Congress meets, more state crimes are made federal crimes in response to the problems of the moment. Last year it was car jacking.[33] This year it looks like it will be domestic violence,[34] a quintessential state crime. Is it any wonder that the number of Assistant United States Attorneys has increased two-and-one-half fold since 1980?[35] If the number of Article III judges had increased at that rate, we would have 1,620 judges instead of the 816 we now have.

Criminal statutes have not alone been responsible for the increase in business in the federal courts. Congress continues

to create new sources of civil litigation as well. Last year, Congress established a civil cause of action providing for the recovery of damages from any individual who engages in torture or killing under color of the law of any foreign nation.[36] It appears that any victim of state terrorism may sue here if there is no remedy in the place where the conduct occurred.[37] And, oh yes, there is a ten-year statute of limitations.[38] Congress has decided to turn loose on world terrorism the mightiest force it could think of -- lawyers pursuing civil litigation! That ought to strike fear into their hearts! In passing that legislation, Congress had no idea about how many suits the new statute would spawn nor what impact it would have on the federal judicial system. Such is the way with all congressional legislation. When I was a member of the Judicial Conference Committee on Federal-State Jurisdiction, I participated in the preparation of a checklist for Congress to consider in reviewing proposed legislation.[39] The checklist was designed to identify technical and interpretive problems, duplicative and unnecessary legislation and the general impact of legislation on the courts. The checklist has, I fear, come to naught.

It seems to me that one of the major reasons for the inundation of the federal district and circuit courts is the uncertainty of the law. The Scriptures ask this question: "If the trumpet give an uncertain sound, who shall prepare himself to the battle?"[40] My answer is: "Every lawyer worth his salt." If the law is not settled, there is every incentive to litigate.

And in our judicial system, there is only one body that can resolve uncertainty -- the United States Supreme Court. Yet the High Court seldom takes the trumpet to its lips, and when it does, the sound often is very weak indeed. I respectfully suggest that, at the Supreme Court level, an increase in the number of cases decided and some changes in the decisionmaking process itself would go far toward alleviating the problems of the lower federal courts. Federal court reform should start at the top.

The High Court is lumbering into the twenty-first century at the leisurely pace of the nineteenth century, seemingly oblivious to the needs of the federal judicial system. The lower courts are overwhelmed by the growth and caseload, but the Supreme Court actually is deciding fewer cases each year. One hundred and sixteen cases were decided this year, one hundred and twenty-seven the year before and one hundred and twenty-five the year before that.[41] Back in the 1980s, the figure reached as high as one hundred and fifty-one.[42] The Court certainly is trimming its docket in the face of an explosive growth of cases in the lower courts. This makes no sense. We need to get the Supreme Court up to speed. The interesting part of it is that the shrinkage has come as the Court has gained more and more control over its dockets, culminating in the 1988 legislation that effectively eliminated the Court's mandatory appellate jurisdiction.[43] As most lawyers know, the only way to get there on appeal now is by cert. And they just are not granting enough

cert. petitions, in my view. For one thing, more cases should be taken in order to settle the law where circuit courts of appeals are in conflict.

In the Judicial Improvement Act of 1990, Congress directed the Federal Judicial Center to undertake a study of the problems created by inter-circuit conflicts, including economic costs, forum shopping among circuits, unfairness to litigants and non-acquiescence by federal agencies.[44] The study has not yet been completed, but preliminary reports indicate that the number of conflicts has been greater than originally thought.[45] Justice White, who recently retired, has been in the vanguard of those who believe that the Supreme Court should do more to resolve inter-circuit conflicts. He frequently dissented from the denial of cert., pointing out the conflicts and urging his colleagues to resolve them. His dissents include language such as this:

> One of the Court's duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country. The Court is surely not doing its best when it denies certiorari in this case, which presents an issue on which the Courts of Appeals are recurringly at odds. [46]

and this:

> I agree with petitioner and the Government that the outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried.[47]

and this:

> Because a uniform rule should be announced by this Court on this important and recurring issue, I would grant the petition.[48]

Clearly, allowing circuit conflicts to continue generates litigation, because the law remains unsettled and attorneys take their cases to the forum most favorable. Where the Supreme Court has not spoken on an issue but some circuits have resolved the question in one way and some in another, litigation is encouraged in those circuits that have not yet spoken at all. Clients doing business nationally may have their conduct regulated one way in one place and one way in another and continue to challenge unfavorable precedent. Government agencies, charged with the administration of national law in a uniform way, follow policies of non-acquiescence, refusing to accept the views of a circuit that rejects the agency position. Aside from the fact that fairness is lost and justice is not seen to be done, the lower courts become clogged with cases that would not be brought if the law were clearly stated. The Supreme Court is the only place where the conflicts can be resolved, and the resolution must be accomplished more frequently and in greater numbers of cases. And I think that a greater number of important issues that have not yet festered into inter-circuit conflicts should be identified and decided by the Supreme Court in an effort to head off the inevitable clogging of the pipeline that comes from unsettled questions of law. Included in the issues that need to be resolved are thorny questions of statutory interpretation.

As a frequent consumer of Supreme Court services, I often am a confused victim of the Supreme Court's uncertain trumpet. For example, in 1990 the Supreme Court decided a case entitled Grady

v. Corbin,[49] in a 5-4 opinion by Justice Brennan. The case revolved around the Double Jeopardy Clause of the Fifth Amendment and changed the rule established in 1932 in a case called Blockburger v. United States.[50] According to Blockburger, whether you can be prosecuted for the same criminal act under two different criminal statutes requires a determination whether one statute requires proof of a fact that the other does not. Grady established a new gloss on the old rule. I was one of a three-member panel of my court to which fell a case requiring an interpretation of Grady. Each member of the panel wrote a separate opinion,[51] so disparate were our views of what the Supreme Court had said. It is bad enough to interpret unclear statutes, but it is even worse to interpret some Supreme Court decisions. In any event, the Supreme Court modified Grady somewhat in 1992 in United States v. Felix,[52] in which it noted our difficulties in deciding our case in the Second Circuit, which it then remanded for consideration in light of Felix. We thereupon wrote a new decision in December of 1992 in which we all concurred.[53] A little over a month ago, in a case called United States v. Dixon,[54] the Supreme Court overruled the Grady decision (I think) and returned to the Blockburger rule. I say "I think," because five separate opinions were filed in the most recent case. The double jeopardy trumpet continues to emit an uncertain sound.

One author has referred to "the Justices' muddy, footnote-filled expository prose."[55] Far be it from me to accept such a

characterization! I do note that the members of the Court have some difficulty in agreeing on things. In Brecht v. Abrahamson,[56] a habeas corpus case decided this term, the following line-up, not especially unusual, was given: "Rehnquist, C.J., delivered the opinion of the Court, in which Stevens, Scalia, Kennedy, and Thomas, JJ., joined. Stevens, J., filed a concurring opinion. White, J., filed a dissenting opinion, in which Blackmun, J., joined, and in which Souter, J., joined except for the footnote and Part III. Blackmun, O'Connor, and Souter, JJ., filed dissenting opinions."[57] All those 5-4 and plurality opinions serve only to engender hope among lawyers and a resolve to continue litigating. Maybe there will be a switch in votes. Maybe a new member will join the Court. Maybe some new, persuasive reasoning will be advanced by the Bar. Without certainty in the law, litigation proliferates. An attorney would not serve his or her client well if he or she did not litigate issues left open. Forgotten is this admonition of Justice Brandeis: "It is usually more important that a rule of law be settled, than that it be settled right."[58]

Several other cases decided this term do not fully resolve the questions presented. In TXO Production Corp. v. Alliance Resources Corp.,[59] the vote was 6-3 to uphold an award of punitive damages, but the reasoning was all over the lot and no one opinion attracted a 5-vote majority. The qualifications of expert witnesses were left to the discretion of the district judges in Daubert v. Merrell Dow Pharmaceuticals,[60] but little

guidance was given as to how that discretion should be exercised. And, despite the strong language about gerrymandering used in Shaw v. Reno[61] (another 5-4 decision), acceptable methods of drawing congressional district boundary lines are still very much up in the air. Thus do cases proliferate in the lower federal courts for failure of the Supreme Court to resolve inter-circuit conflicts, to identify and decide important procedural and substantive issues before they ripen into inter-circuit conflicts and to provide clear, crisp and certain opinions for the guidance of the lower courts, the bar and the American citizenry. As I see it, a greater volume of cases fully decided at the Supreme Court level as well as more brevity and clarity in the Court's opinions, would do much to relieve the congestion in the lower courts. To achieve these ends, I propose consideration of the following possibilities:

1. More attention by the individual members of the Court should be paid to cert. petitions in an effort to identify the most important conflicts and issues for review. There is some basis for the belief that the present cert. pool of law clerks from the various chambers is not the most effective way of handling these matters.[62] More cert. petitions should be granted.

2. The newest Justice has stressed the importance of collegiality, which sometimes includes the need to submerge one's views in unimportant matters for the good of the institution and of the consumers of its products.[63] Let us hope that Justice

Ginsburg is able to persuade her colleagues of the importance of one voice. Too often is heard the cacophony of what appears to be nine separate courts.

3. Each Supreme Court opinion need not read as if it were the History of the World, Part I. If brevity is a virtue for judges of other courts and for lawyers, it should also be a virtue for Justices of the Supreme Court. The necessary increase in production can also be achieved through per curiam opinions and summary orders. Many an inter-circuit conflict could be resolved by a brief opinion adopting the decision of one of the circuits that considered the issue.

4. The effort to increase production in the Supreme Court might be assisted by cutting the summer recess from three months to two.[64] That lengthy recess really is a relic of the eighteenth century, and I know of no Justice who must return to the farm at harvest time.

5. There is a statutory provision allowing certification of questions of law to the Supreme Court by the courts of appeals.[65] This provision has fallen into disuse, but should be revived, even though the Supreme Court has the right to reject the matter certified.

6. The Court should be alert to the availability of its Rule 11, which allows it to grant cert. before judgment in the court of appeals. This allows the Court to take up an important case without delay, as it did in Mistretta v. United States.[66] In that case, it was important to deal with the constitutionality

of the Sentencing Reform Act of 1984[67] quickly, since some district courts throughout the nation were sentencing under the new Act and some were sentencing under the old law.

7. Some mandatory appellate jurisdiction might be restored in an effort to increase the Court's production. The erosion of mandatory jurisdiction over the years has been gradual,[68] and the end result seems to be fewer cases decided. Perhaps cases that involve the declaration of unconstitutionality of federal statutes would be a good place to start with mandated appeals.

8. The Supreme Court certainly could address more issues if it divided itself into panels to hear cases of a more routine nature. Three panels of three judges can decide more cases more efficiently and faster than can an in banc panel of nine.[69] Hearings by the full court could be reserved for cases in which a panel is in disagreement or for important constitutional issues.

9. The number of Supreme Court Justices is fixed by Congress.[70] Despite the explosion in federal litigation, the number of Justices has been fixed at nine since 1869![71] Before that, the number varied between five and ten.[72] There is nothing sacrosanct about the number nine. In light of the potential business that the Court should be addressing, an addition of at least three seems to be warranted. The rejected proposal of Franklin D. Roosevelt to increase the number of Justices was known as a Court-packing plan and was highly political in nature. What is called for now is a Court-expanding plan to take care of additional work.

10. I suppose that there is no way to mandate the issuance of clear and thoughtful opinions in one voice by the Supreme Court. But the observations of one Justice on the subject of clarity of opinions is most illuminating. The New York Times on June 29 of this year published a photograph of Justice White and, in a caption underneath the picture, noted his retirement after 31 years of service.[73] The caption continued: "He said that he intended to sit on Federal appeals courts during his retirement, and that he hoped that the Supreme Court's opinions would be clear and easy to follow."[74] I hope that Justice White comes to sit with us here in the Second Circuit as Justice Marshall did after his retirement.[75] I hope that I have the opportunity to sit with him and to join with him in applying Supreme Court precedent. We will then see if his subtle message to his former colleagues got through. We both can hope, can't we?

1. Annual Report of the Director of the Administrative Office of the United States Courts 86 (1991).

2. Id.

3. Id. at 90.

4. Id.

5. Id. at 81.

6. Id.

7. Roger J. Miner, Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee, 65 St. John's L. Rev. 673, 677 (1991).

8. Id.; United States Courts for the Second Circuit: Second Circuit Report 1992, at 4.

9. "At times in our system the way in which courts perform their function becomes as important as what they do in the result." United States v. United Mine Workers of Am., 330 U.S. 258, 363 (1947) (Rutledge, J., dissenting).

10. Report of the Federal Courts Study Committee 3 (1990) [hereinafter Study Committee Report].

11. See, e.g., Gordon Bermant et al., Federal Judicial Center, Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications (1993); Jon O. Newman, 1,000 Judges -- The Limit for an Effective Federal Judiciary, Judicature, Dec. 1992-Jan. 1993, at 187; Victor Williams, Solutions to Federal Judicial Gridlock, Judicature, Dec. 1992-Jan. 1993, at 185; Dolores K. Sloviter, The Judiciary Needs Judicious Growth, Nat'l L.J., June 28, 1993, at 17.

12. Judicial Boxscore, The Third Branch (Administrative Office of the United States Courts, Washington, D.C.), July 1993, at 11.

13. See Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F.R.D. 195, 236-41 (1975); see also J. Clifford Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 Cal. L. Rev. 913 (1983) (criticizing the Hruska Report).

14. See Study Committee Report, supra note 10, at 117-23.

15. See id.

16. See, e.g., David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985).

17. See Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. Chi. L. Rev. 761, 770-76 (1989).

18. Id.

19. See, e.g., Dolores K. Sloviter, Diversity Jurisdiction Through the Lens of Federalism, Judicature, Aug.-Sept. 1992, at 90; Study Committee Report, supra note 10, at 38; Miner, supra note 7, at 717 n.288 (citing sources).

20. See Study Committee Report, supra note 10, at 62-63.

21. See id. at 55-59.

22. See id. at 81.

23. See id. at 69.

24. See id. at 48-50.

25. See id. at 83-85.

26. Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-82 (Supp. 1993)).

27. Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

28. See 18 U.S.C. § 711a (1988).

29. See id. § 711.

30. See id. § 916.

31. See id. § 46.

32. See id. § 1821.

33. See Anti-Car Theft Act of 1992, Pub. L. No. 102-519, § 101, 106 Stat. 3384, 3384 (codified at 18 U.S.C. § 2119 (Supp. 1993)).

34. See H.R. 1133, 103d Cong., 1st Sess. (1993); H.R. 688, 103d Cong., 1st Sess. (1993); S. 11, 103d Cong., 1st Sess. (1993); S. 6, 103d Cong., 1st Sess. (1993).

35. See Janet Novack, How About a Little Restructuring?, Forbes, Mar. 15, 1993, at 91, 91.

50. 284 U.S. 299 (1932).

51. See United States v. Calderone, 917 F.2d 717, 718-22 (2d Cir. 1990) (Pratt, J.), vacated, 112 S. Ct. 1657 (1992); id. at 722-26 (Newman, J., concurring); id. at 726-29 (Miner, J., dissenting).

52. 112 S. Ct. 1377 (1992).

53. See United States v. Calderone, 982 F.2d 42 (2d Cir. 1992).

54. 61 U.S.L.W. 4835 (U.S. June 28, 1993).

55. Alan Hirsch, Book Review, 61 Geo. Wash. L. Rev. 858, 859 (1993) (reviewing Joseph Goldstein, The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand (1992)).

56. 113 S. Ct. 1710 (1993).

57. Id. at 1713.

58. Di Santo v. Pennsylvania, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

59. 61 U.S.L.W. 4766 (U.S. June 25, 1993).

60. 61 U.S.L.W. 4805 (U.S. June 28, 1993).

61. 61 U.S.L.W. 4818 (U.S. June 28, 1993).

62. See Ted Gest, The Court: Deciding Less, Writing More, U.S. News & World Report, June 28, 1993, at 24, 26.

63. See Neil A. Lewis, The Supreme Court; Ginsburg Affirms Right of a Woman to Have an Abortion, N.Y. Times, July 22, 1993, at A1.

64. See Promoting Public Understanding of the Supreme Court, Judicature, June-July 1992, at 4, 4 (editorial).

65. See 28 U.S.C. § 1254(2) (1988); see also Sup. Ct. R. 19 (procedure for certifying a question).

66. 488 U.S. 361 (1989).

67. Pub. L. No. 98-473, 98 Stat. 1988 (codified at 18 U.S.C. §§ 3551 et seq. (1988)).

68. See Erwin C. Surrency, History of the Federal Courts 254-55 (1987).

69. See Robert L. Stern, Remedies for Appellate Overloads: The Ultimate Solution, Judicature, Aug.-Sept. 1988, at 103, 106-08.

70. U.S. Const. art. III., § 1.

71. See generally Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (1927); Surrency, supra note 68.

72. See Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 72, 73 (six justices); Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89 (repealed 1802) (five justices); Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421 (seven justices); Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176 (nine justices); Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794, 794 (ten justices); Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209, 209 (seven justices); Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44, 44 (nine justices).

73. See N.Y. Times, June 29, 1993, at A11.

74. Id.

75. N.Y.L.J., Jan. 15, 1992, at 1.