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A COMMENTARY ON CONGESTION IN THE FEDERAL COURTS

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> If we want to improve the administration of justice in this country, we must try some things that some lawyers and judges may not find convenient or agreeable. . . . Our thinking must be imaginative, innovative, and dynamic, and we must experiment and search constantly for better ways, always remembering that our objective is fairness and justice, not efficiency for its own sake.[1]

This comment by Chief Justice Burger should be the polestar of our thinking in seeking to alleviate the terribly overburdened dockets of the federal courts. The federal court system now has more work than it can properly handle. The number of civil cases commenced in the district courts has increased over 100 percent in the last fifteen years. Approximately 57,800 civil cases were filed in 1960 as compared with 117,300 in 1975.[2] Similarly, approximately 26,000 criminal cases were filed in 1960 while 37,500 criminal cases were filed last year, reflecting a forty-four percent increase in the criminal caseload.[3] This burgeoning docket continues unabated. If the high standards we as a nation expect from our judiciary are to be maintained, judges must have the time to properly reflect upon and consider their decisions. This is impossible with a congested court system.

One of the primary reasons for the overcrowded federal docket is

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1. Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1127-28 (1973).

2. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, IMPACT STUDY: THE EFFECT OF MAJOR STATUTES AND EVENTS ON CRIMINAL AND CIVIL CASELOAD IN THE U.S. DISTRICT COURTS DURING FISCAL YEARS 1960-1975, at 1 (1976).

3. *Id.* chart 1, criminal caseload section.

the ease in moving between state and federal forums. The more a court system expands to meet existing demands, the more efficient and accessible a court system becomes, the greater the volume of filings. This has occurred within the federal court system causing a shift in the caseload from state courts to federal courts although many of the cases now appearing on the federal docket should be taken up in the state court system.

Since the Congress has not made any comprehensive reexamination of federal jurisdiction in over a hundred years, I believe the time has now come for a thorough review of the federal judiciary by the Congress. This paper will consider three broad areas, two of which, I feel, need congressional attention.

JURISDICTION

The simplest way to relieve the federal docket is to limit jurisdiction. Many legal commentators, including myself, believe the time has passed for continuing jurisdiction in federal courts based upon diversity of citizenship.[4] As Dean Pound admonished the bar at the turn of the century, the work of the American courts in the twentieth century cannot be carried on with the methods and procedures of the eighteenth and nineteenth centuries.[5] The abolition of diversity jurisdiction would eliminate over twenty-six percent of the civil cases presently filed in federal courts.[6] The federal courts should not be burdened with cases which no longer require protection from colonial self-interest and prejudice.

Some legal commentators believe that by raising the jurisdictional amount, this diversity problem will disappear. But experience teaches the contrary. Lawyers are sufficiently ingenious—even in these times of decreasing skill—to avoid the impact of such a game plan.

One of the primary reasons for this increase in the federal caseload is the lack of congressional foresight in specifically delimiting the ambit of federal concern. A large number of the cases filed are based upon

4. *See generally* Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Fraser, *Proposed Revision of the Jurisdiction of the Federal District Courts*, 8 VAL. U.L. REV. 189 (1974).

5. Address by Dean Roscoe Pound, American Bar Association Annual Meeting, Aug. 29, 1906.

6. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, IMPACT STUDY: THE EFFECT OF MAJOR STATUTES AND EVENTS ON CRIMINAL AND CIVIL CASELOAD IN THE U.S. DISTRICT COURTS DURING FISCAL YEARS 1960-1975, at 29 (1976).

statutes and procedures intended for quite different purposes but so broadly framed by the legislators that the language used can be interpreted to cover them. Statutes enacted by the Congress that create new bases of federal jurisdiction, or expand present ones, should be framed so that the explicatives of the legislation leave no doubt as to where the lines of federal jurisdiction are drawn. This, I believe, would go a long way in eliminating the present rash of bootstrap cases.

Federal criminal jurisdiction is presently in utter disarray. It appears that federal jurisdiction so overlaps that of the states that prosecutions for the same offense may be brought in either federal or state courts. This overreach is aptly illustrated by the fact that federal courts still hear prosecutions for drunk driving, auto theft, simple larceny and theft, gambling, prostitution, and drug abuse, among others.[7] Congress should review the federal penal code and eliminate all such proliferation where the matters involved are of local concern and the federal interest is merely peripheral. This would add more responsibility and dignity to local law enforcement offices and would tend to upgrade their performance.

STRUCTURE

It is often said that the pragmatic approach in the federal system to the increasing caseload is to create more circuits and to appoint more trial judges. I submit that neither of these two proposals is the answer. First, the creation of more circuits in the areas of heaviest congestion would necessarily result in having a territorial division of a state into two circuits. For example, it is proposed that California be divided, one-half remaining in the Court of Appeals for the Ninth Circuit and the other in a new circuit.[8] The result would be an unfortunate conflict in the interpretation of California law. It is also argued that more judges may detract from the prestige and overall quality of the federal judiciary. As the late Justice Frankfurter stated years ago, "a powerful judiciary implies a relatively small number of judges."[9] I support neither more circuits nor more judges.

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7. *See* 18 U.S.C. § 13 (1970) (drunk driving); *id.* §§ 641-44 (simple larceny and theft); *id.* § 1955 (gambling); *id.* §§ 2312-15 (auto theft); *id.* §§ 2421-24 (prostitution); 21 U.S.C. §§ 841-43 (1970) (drug abuse).

8. *See Hearings on S. 2988, S. 2989 and S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 1, at 35-38 (1974). Other suggestions for division of the Ninth Circuit that were rejected by the subcommittee may also be found in the report. *Id.* at 38-46.

9. Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928).

The answer to the circuit problem is to divide the congested circuits into divisions, somewhat along the lines that the district courts have been divided. The Fifth Circuit,[10] for example, could be divided into three divisions so that an even caseload in each division would be maintained. In case of conflicts the senior active judge or his designee of each division would sit to resolve such cases, and appellate review would lie in the Supreme Court through certiorari or appeal.

As to the district courts, our experience shows that an increase in judgeships is a temporary palliative. I would, therefore, depend on the more effective use of more magistrates, the improvement of trial techniques and procedures, and the assistance and cooperation of the practicing bar.

Two other structural changes within the federal judiciary need to be made—the removal of all tax and patent litigation from district courts and courts of appeals. I believe our present specialized courts, such as the Court of Claims and the Tax Court on tax cases and the Court of Customs and Patent Appeals on patents and copyrights, should handle these matters with certiorari direct to the United States Supreme Court. These specialized courts not only are better equipped to deal more effectively with these kinds of cases, but such a change would also contribute to the reduction of the caseload in the district courts and the courts of appeals.[11]

The tax litigant who questions his tax liability presently has three avenues he can pursue to obtain relief. If he is willing to pay the tax liability, suit for refund may be brought in either the federal district court or the Court of Claims. On the other hand, if the taxpayer is not willing or is unable to pay the tax liability, suit may be instituted in the Tax Court of the United States. The most troublesome aspect of such a splintered procedure is that there is no single resolution of tax disputes short of a pronouncement by the United States Supreme Court. This problem, coupled with the imposition upon the federal court judge to master the highly technical intricacies of the Internal Revenue Code, points up the necessity for placing initial jurisdiction in the Tax Court with certiorari to the Supreme Court.

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10. Other suggested divisions for the Fifth Circuit may be found in *Hearings on S. 2988, S. 2989 and S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 1, at 29-34 (1974).

11. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR, Table 4 at XI-17, Table 17 at XI-33, and chart at XI-35. These tables and chart show the figures for the different types of cases brought in the courts of appeals and the district courts.

Similar problems are encountered in patent litigation. If the patent litigant disputes a decision of the U.S. Patent Office, recourse can be had either in the Court of Customs and Patent Appeals or in district court. This bifurcated approach is exacerbated by the terribly undignified practice of forum shopping by litigants. A patentee who wants to sue for infringement will select a circuit which is favorably disposed towards patents whereas a user who wants a declaration of noninfringement or invalidity will select a circuit which is less receptive towards patents. A specialized court system would avoid unseemly forum shopping and relieve federal judges of this protracted and complicated litigation.

PROCEDURE

There is much that can be done to improve judicial administration now without having to await the time-consuming process of legislative action. We, as judges and officers of the court, can take the initiative in hastening caseflow through the stricter use and enforcement of rules and procedures promulgated for this purpose. In other words, the judges must exercise greater control over the pace of litigation through the judicial process.

The judge can fix a firm time limit for discovery, educate his courtroom clerk to expedite the procedures, and back up the clerk in the process. This is especially true in regard to the early requirement of pretrial discovery, the denial of continuances, eliminating dilatory motions, creating an atmosphere of early trials, and strictly adhering to the court rules and orders, all of which could significantly lessen the backlog of cases. On pretrial motions, judges can save time by either having one hearing where all motions are heard orally and ruled upon at that time by the court or by the submission of motions without argument, with the granting of a hearing only in unusual cases.

In conjunction with the above, the federal courts should more fully appreciate the utility of magistrates. As assistant judges, they could be of considerable help in performing duties and functions short of actually adjudicating cases. This would relieve the judges of many time-consuming tasks, especially in the pretrial phase, thus permitting them to devote more time to more pressing trial matters.

The criminal process can be expedited through the simple use of

techniques such as the omnibus hearing[12] or open file policy. By utilizing this process effectively, both guilty pleas as well as dismissals are expedited. Unfortunately, the Department of Justice frowns upon this procedure. But we—the judges—are the ones responsible for our dockets and where we find a procedure helpful, we should direct it.

To insure that these rules and procedures will be known and understood by both the bench and the bar, seminars or schools should be organized under the auspices of the judge and conducted by the bar and a local law school, at which the judge might appear from time to time to explain his requirements, participate in the training of the lawyers, and develop a closer relationship with the trial bar.

CONCLUSION

The federal judiciary is not the only court system warranting concern. The state judicial systems are experiencing the side effects of congestion. The trend away from state courts to federal courts must be slowed, if not stopped. If this shift in case flow is not remedied, the possibility exists that our state courts may become token judicial bodies. The Congress is presently considering Congressman Bennett's bill, H.R. 13219,[13] which would abolish diversity of citizenship as a basis for federal jurisdiction. As previously indicated, adoption of such a measure would be helpful in relieving the docket congestion. It is the duty of judges to aid in the adoption of these modernizations in our practice and procedures. If we do it in our own courts and encourage the law schools, the bar, and the public to assist us, we can accomplish our purpose—the disposition of lawsuits in an orderly, speedy, and effective manner.

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12. *See generally* Clark, *The Omnibus Hearing in State and Federal Courts*, 59 CORNELL L. REV. 761 (1974); Comment, *The Omnibus Proceeding: Clarification of Discovery in the Federal Courts and Other Benefits*, 6 ST. MARY'S L.J. 386 (1974).

13. 122 CONG. REC. 3354 (daily ed. Apr. 13, 1976).