ILLUMINATING THE INVISIBLE COURT OF APPEALS

*Honorable John J. Gibbons**

In this issue, the editors of the *Seton Hall Law Review* have assembled a group of articles which focus upon discrete aspects of the jurisprudence of the Court of Appeals for the Third Circuit. For the reasons which follow, I suggest that this undertaking is of major importance to the bench and the bar within the Third Circuit, and that it should be repeated regularly.

On September 24, 1989, we will mark the two hundredth anniversary of the federal judiciary.[1] However, the courts of appeals are of more recent origin. They will not reach the century mark until March 3, 1991, the one hundredth anniversary of the Evarts Act.[2] The relative youth of the courts of appeals, when compared to the federal judiciary as a whole, was brought home to members of the Court of Appeals for the Third Circuit when, on June 27, 1988, it convened in ceremonial session to mark the fiftieth year of continuous service to that court by the Honorable Albert B. Maris. Judge Maris continued working for the Court until his death on February 7, 1989. Indeed, an opinion he wrote for the court came across my desk within the month, and he dictated a letter to me about cases he was working on from his hospital room the day before he died. Thus, his judicial service spanned more than fifty percent of the life of the courts of appeals.

At that ceremonial session, Judge Maris reminisced about how in 1938, the four member court met for three one-week sessions each year, heard oral argument in every case, wrote some kind of an opinion in every case, and disposed in each session of every case on the docket in which briefing was complete. In 1938, a judgeship on the court of appeals was, as he put it, a fairly easy job. By 1970, when I joined the court, Judge Maris had long since taken senior status. With eight active and seven senior judges participating in its work, the court was quite a dif-

* Chief Judge, United States Court of Appeals for the Third Circuit.

1 An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

2 The Circuit Court of Appeals Act of 1891 (Evarts Act) 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. § 43 (1982)).

ferent institution than when Judge Maris joined it three decades earlier. As a senior judge in the 1969-70 court year, he sat on three panels, the same number of panel sittings that he had as an active judge in 1938. However, the active judges for the 1969-70 court year sat far more frequently in order to keep abreast of the increase in appellate filings. From 1891 to 1960 appellate filings in the courts of appeals and appellate judgeships had increased roughly in proportion to the increased population. By 1970, appellate filings in those courts had been increasing at a rate faster than either population or judgeships.[3] Yet most courts of appeals were still processing cases about the same way they had in 1938. With the exception of two circuits in which the court of appeals had adopted screening devices which summarily disposed of some cases, all appellate cases closed by judicial action were scheduled for oral argument, and all produced some form of published judicial opinion.

The formation of the courts of appeals in 1891 was a response by Congress to the perceived need of an increase in federal appellate capacity. In 1875, Congress authorized the lower federal courts to entertain suits presenting federal question claims.[4] By 1890, that and other developments had combined to produce 54,194 case filings in the lower courts.[5] The United States Supreme Court retained the only appellate supervision of these courts, and supervision of so vast an array of judges and cases was beyond the physical and intellectual capacity of that tribunal. It was thought that the error correction function could be exercised by the new appellate courts, and that the Supreme Court could effectively supervise the development of precedent in the new courts by exercising discretionary review over their judgments.

Until the 1970s, the Everts Act scheme worked reasonably well. Courts of appeals were highly visible to the bar, their opinions were produced in small enough numbers that intra-circuit consistency and predictability in the law was no great problem, and the Supreme Court had ample appellate capacity to supervise their production of federal precedent. However, beginning in the early 1970s, it became clear that the courts of appeals

---

[3] For the figures on judgeships and filings, see 1987 DIR. OF THE ADMIN. OFFICE OF THE U.S. CTS. ANN. REP. at 138-58. For current population figures see STATISTICAL ABSTRACTS OF THE U.S., U.S. DEPT. OF COMMERCE at 8 (1987).

[4] Act of March 3, 1875, ch. 137, 18 Stat. 470 (1875).

[5] *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 60-65 (1928).

could not carry out their business as they had during the first eighty years of their existence.

Today, almost all circuit courts of appeals, including the Third Circuit, have rules which provide for the disposition of cases without oral argument or without published opinions, or both.[6] All active judges supervise a chambers staff of at least five, and in addition, all circuits have a central legal staff engaged in some phase of case disposition. Elimination of oral argument and written opinions in many cases, as well as the increased participation of a judicial bureaucracy in case terminations were essential developments that allowed the courts of appeals to cope with the enormous growth of appellate filings. It is fair to say that measured by per-judge terminations, the increased productivity of the courts of appeals over the past two decades has been one of the greatest triumphs in public administration in the country's history. This success has not, however, been without cost. Today, the courts of appeals are far less visible institutions than they once were. Many cases are decided without oral argument and thus without any direct contact with the judges. Even more significant is the fact that a very high percentage of cases submitted to a panel for disposition on the merits is disposed of without any kind of a reasoned written decision.[7]

On the other hand, the visible parts of the work of the courts of appeal—oral argument and published opinions—while declining as a percentage of terminations, have both increased in total. All judges of the courts of appeals are spending a greater percentage of their time on the bench than was the case two decades

---

[6] *See, e.g.*, 3RD CIR. R. 12(6), 3RD CIR. INTERNAL OPERATING PROC. ch. 5(6).

[7] System-wide, per active circuit judge, the figures are:

	1987	1986	1985
Terminations on the Merits	323	330	308
Written Decisions	114	118	110
Signed	42	48	45
Unsigned	57	54	52
Without Comment	15	16	13

ADMIN. OFFICE OF THE U.S. CTS., FEDERAL COURT MANAGEMENT STATISTICS 29 (1987).

In the Third Circuit, the figures are:

	1987	1986	1985
Terminations on the Merits	310	274	307
Written Decisions	115	101	131
Signed	60	51	72
Unsigned	4	5	4
Without Comment	51	45	55

Id. at 8.

ago, and all are writing more published opinions than did most of their predecessors.

The growth in published opinions can perhaps be appreciated if one notes that my name first appeared as a judge in volume 418 of the Federal Second Reporter. A mere eighteen years later we are at volume 863; 445 volumes occupying over eighty running feet of shelf space. For lawyers who pay rent for that space, that omnipresence in the library belies any claim that the courts of appeals are not supplying them with enough law. The opposite appears to be the case. The sheer volume of opinions raises questions about practical retrievability, and thus about the consistency of legal application. Proliferation of district court published opinions does no great systemic damage, for these are not regarded as binding precedents, even in the same district. Court of appeals opinions, on the other hand, are, at least in theory, binding precedents not only for the district courts in the circuit, but also for subsequent panels of the court of appeals unless the court *in banc* overrules them.[8] One may reasonably ask whether the sheer volume of ever more refined precedent is desirable, retrievable, or comprehendible.

Another troubling trend worth noting is that while terminations in the courts of appeals have kept pace with filings, the reversal rates in those courts have declined markedly in recent times. The gross national reversal rate was once twenty-two percent. In the 1987 court year, it had declined to 13.5 percent.[9] This evident increase in deference to the rulings of the courts of first instance may account in part for the remarkable increase in productivity in the courts of appeals, when productivity is measured by terminations. If so, however, questions must be raised about the quality of the supervision which courts of appeals are supposed to be exercising over those courts.

Another point of considerable significance is the role of the Supreme Court in supervising the courts of appeals. In 1945, the courts of appeals terminated 1,992 cases on the merits. The Supreme Court granted certiorari in 157 of them, or 7.9 percent. Since 1945, the number of cases in which the Supreme Court has reviewed decisions of the courts of appeals has remained relatively constant, while court of appeals terminations have increased steadily. In 1987, there were 18,502 court of appeals terminations on the merits, and the Supreme Court granted cer-

---

8 *See* 3D CIR. INTERNAL OPERATING PROC. ch. 8(c).

9 1987 DIR. OF THE ADMIN. OFFICE OF THE U.S. CTS. ANN. REP. 155-58.

tiorari in less than one percent of them.[10] Thus the Supreme Court's supervisory role, as contemplated by the Congress which passed the Everts Act, has contracted virtually to the point of invisibility. The consequence of this contractual Supreme Court role is that the courts of appeals speak finally on most issues of federal law. Moreover, this trend has developed during a period in which there has been a massive shift away from state law solutions toward national law solutions as a result of increased federal legislative activity.[11]

---

[10] *See id.* at 138-41, 146.

[11] Consider, as examples, the impact in federalizing traditional state law areas of such legislation as these:

National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified at 15 U.S.C. §§ 1391-1409, 1421-1425 (1982)); Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (codified at 23 U.S.C. §§ 105, 401-404 (1982)); Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified at 5 U.S.C. §§ 5314, 5315, 15 U.S.C. §§ 2051-2081 (1982)); Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-942, 88 Stat. 1470 (codified in scattered sections of 15 U.S.C.); Transportation Safety Act of 1974, Pub. L. No. 93-633, 88 Stat. 2156 (codified in scattered sections of 45, 46, 49 U.S.C.); Highway Safety Act of 1976, Pub. L. No. 94-280, tit. II, (90 Stat. 451 (codified in scattered sections of 23 U.S.C.); Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, 90 Stat. 503 (codified in scattered sections of 15 U.S.C.); Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, as amended by Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150, 153, 154 (codified at 30 U.S.C. §§ 901-933 (1982)); Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified at 15 U.S.C. §§ 633, 636, 30 U.S.C. §§ 800-961 (1982); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (codified at 30 U.S.C. §§ 901-945 (1982)); Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 941 (codified at 45 U.S.C. §§ 431-441 (1976)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.); Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 (codified at 33 U.S.C. §§ 1221-1227, 46 U.S.C. § 391a (1982)); Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified in scattered sections of 15, 18 U.S.C.); Fair Credit Reporting Act, of 1970 Pub. L. No. 91-508, 84 Stat. 1128 (1982) (codified at 15 U.S.C. §§ 1681-1681t (1976)); Fair Credit Billing Act, Pub. L. No. 93-495, tit. III, 88 Stat. 1511 (1974) (codified in scattered sections of 15 U.S.C.); Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (codified in scattered sections of 15 U.S.C.); Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 547, 590 (codified at 15 U.S.C. § 1702 (1982, amended 1984)); Equal Credit Opportunity Act, of 1974 Pub. L. No. 93-495, 88 Stat. 1521 (1982) (codified at 15 U.S.C. §§ 1691-1691e (1976)); Real Estate (Settlement Procedures Act of Jan. 2, 1976, Pub. L. No. 93-533, 88 Stat. 1724, as amended by Act of Jan. 2, 1976, Pub. L. No. 94-205, 89 Stat. 1157 (codified in scattered sections of 12 U.S.C.); Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, §§ 302-310, 89 Stat. 1125 (codified at 12 U.S.C. §§ 2801-2809 (1976)); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified in scattered sections of 42 U.S.C.); Water Quality Improvements Act of 1970, Pub. L. No. 91-224, §§ 101-107, 109-112, 84 Stat. 91 (codified in scattered sections of 33 U.S.C.); The Clean Air Amendments of 1970,

Finally, there is the role of the press. While the media covers the trial courts regularly, and the national newspapers cover the Supreme Court quite thoroughly, press coverage of the courts of appeals is a rarity. Only a handful of decisions by the Court of Appeals for the Third Circuit are the subjects of media coverage during the course of a year. Like its counterparts in other circuits, this court is virtually unknown to the public at large.

Today, the courts of appeals can therefore be said to have these features:

> 1. All of them, although in somewhat different degrees, recognize that their primary task is dispute resolution, and thus have adopted procedures which give precedence to closing files over other considerations.
>
> 2. Each year an increasing percentage of their case terminations on the merits is accomplished invisibly, without oral argument, and without a published or even an unpublished opinion.
>
> 3. Nevertheless, they are producing an enormous number of published opinions each year which, nominally, are binding precedents in each circuit.
>
> 4. They are virtually unsupervised autonomous institutions, since the Supreme Court can review only a minute fraction of their work, and even the press appears to be unaware of their role.
>
> 5. Even as their work has become more invisible and more free from supervision, their reversal rate has declined, which suggests that just as they are virtually unsupervised, the district courts are gradually becoming unsupervised as well.

The developments I have outlined should be matters of serious concern to thoughtful members of our profession. Unfortunately, academic scholarship, appearing principally in the law reviews published by our law schools, tends to focus attention on the work of the Supreme Court in matters of federal law or on the common law pronouncements of the highest state courts. There is a need for greater attention to and criticism of the work of the courts of appeals. No institution of government will remain vibrant and healthy

---

Pub. L. No. 91-604, 84 Stat. 1676 (codified in scattered sections of 42, 49, 50 App. U.S.C.); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 12, 15, 31, 33 U.S.C.); Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (codified in scattered sections of 7, 15, 21 U.S.C.); Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. §§ 4901-4918, 49 U.S.C. § 1431 (1982)); Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126 (codified at 33 U.S.C. §§ 1501-1524, 43 U.S.C. § 1333 (1982)).

without an awareness that its work is under scrutiny and at risk of exposure. Thus, the decision of the editors to devote a volume of the *Seton Hall Law Review* to an examination, in discrete areas of the law, of the work of the United States Court of Appeals for the Third Circuit should be applauded by the courts, the legal profession, and the public in the circuit. Speaking only for myself, I hope that such a volume will become a regular feature of the Review.