

The "Law of the Circuit" and All That: Foreword to the Second Circuit 1970 Term

Henry J. Friendly

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THE "LAW OF THE CIRCUIT" AND ALL THAT

FOREWORD TO THE SECOND CIRCUIT 1970 TERM

On behalf of the United States Court of Appeals for the Second Circuit, I thank *St. John's Law Review* for undertaking this series of critical comments on our decisions.

Another university's law review published a note about our court seven years ago.¹ Evidently it did not regard us as deserving continued attention. Perhaps it was right; the proof of this new pudding will be in the eating. Something will depend on us as well as on you, and something on the sheer luck of the draw. *St. John's* thus ought not to regard this promise, made without consideration, in the contractual sense, as a commitment *in perpetuo* if the results should be disappointing. The undertaking begins at a peculiarly interesting time since five of the nine judges who were in "regular active service"² at the beginning of the 1970 Term here under review took senior status³ either while the term was passing or before the following one was well under way. Next year's article will doubtless report on how far the changes in the court's membership are thought to have caused differences in decision.⁴

Perhaps a series such as this and similar ones relating to other circuits⁵ will help to resolve the identity crisis of judges of the federal courts of appeals. The district courts know what their business is—

¹ Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874 (1963).

² 28 U.S.C. § 43(b) (1970).

³ See 28 U.S.C. § 371(b) (1970). These judges, in order of their retirement, were Judges Waterman, Moore, Anderson, Lumbard and Smith. Judges Oakes, Mansfield, Timbers and Mulligan have succeeded the first four. At this writing no successor to Judge Smith has yet been nominated.

⁴ The effect of the retirements on decision-making is happily blunted by the continued participation of the senior judges on panels, although not in voting whether to hear or rehear a case en banc, or on an en banc court unless the senior judge was on the panel that first heard the case. 28 U.S.C. § 46(c) (1970).

⁵ See 4 SUFFOLK L. REV. 301 (1970), and 5 SUFFOLK L. REV. 565 (1971) (First Circuit); 2 U. TOL. L. REV. 49 (1970) (Sixth Circuit); 11 ARIZ. L. REV. 551 (1969) (Ninth Circuit); 21 HASTINGS L. REV. 863 (1970) (Ninth Circuit); 60 GEO. L.J. 281 (1971) (criminal cases of all circuits, with emphasis on the D.C. Circuit). The *Harvard Law Review*, under the inspiration of Professor Frankfurter, as he then was, preempted the Supreme Court long ago, first with a series of articles, Frankfurter & Landis, Frankfurter & Hart, Frankfurter & Fisher, and Hart, *The Business of the Supreme Court*, HARV. L. REV. 43:33, 44:1, 45:271, 46:226, 47:245, 48:238, 49:68, 51:577, and 53:579 (for the terms 1928-38) and then with an annual review by the editors, *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119 (1949). I understand that *St. John's* initiative with respect to our circuit is now to be followed by the *Brooklyn Law Review*.

disposing of cases by trial or settlement with fairness and with the optimum blend of prompt decision and rightness of result;⁶ they also have the responsibility of demonstrating the quality of federal justice to ordinary citizens — parties, witnesses and jurors. The Supreme Court knows what its business should be — deciding serious questions of federal law. All these functions are obviously of the highest importance and their discharge accordingly satisfying.

The role of the federal courts of appeals is more ambiguous. If a case involves questions of federal law of such importance as to be reviewed by the Supreme Court, the views of the court of appeals count, and should count, for little. I am unable to share the view, expressed on occasion by some polite Justices and entertained by some of my colleagues, that we have much to contribute in such cases; I doubt whether many of the Justices even read our opinions, at least on constitutional issues, except as these are filtered through the briefs of counsel or the memoranda of law clerks. Indeed, I think the Court should make more use of its power to grant certiorari before decision in the court of appeals⁷ and thereby shorten the unduly long period required for the determination of issues that may affect large numbers of cases in the lower courts.⁸ With the great run of less important

⁶ Perhaps it may seem shocking thus to suggest there should ever be compromise in the goal of attaining perfection. But the nature of the tasks of trial courts sets limits on their abilities to achieve this. Rulings on the admissibility of evidence are the most obvious instance where quick decision is essential. Beyond that I do not believe the greatest district judges to be those who stew for months and then write a long opinion on a novel point of law concerning which they are almost certain not to have the last word.

⁷ 28 U.S.C. § 1254(1) (1970). Perhaps in order to encourage this and yet avoid undue imposition on the Court's time, the right to seek certiorari in advance of decision by a court of appeals should be limited to the United States, whether it has lost or won in the district court. Appeal may be taken directly to the Supreme Court from a judgment holding an Act of Congress unconstitutional in an action to which the United States was a party. 28 U.S.C. § 1252 (1970).

⁸ Making the optimistic assumption that the appeal is brought on for argument in the court of appeals within the time limits prescribed by the Federal Rules of Appellate Procedure, four months will have elapsed after the filing of the notice of appeal. If the court of appeals takes its job seriously, one could hardly expect an opinion in an important case in less than two months after final submission. Such cases are prime candidates for petitions for rehearing and suggestions for rehearing en banc. This is likely to take another month at minimum — considerably more if rehearing en banc is granted. Depending on the nature of the case, two to five months more will elapse before a petition for certiorari is ready for action. SUPREME COURT RULES 22 & 24. If certiorari is granted, the Court allows another two and a half months for briefs. Moreover, unless certiorari is granted rather early in the Supreme Court's term, the case is not likely to be reached for argument until the next term. This means at least two years' delay, and probably more, from the decision of a district court to that of the Supreme Court. Of course, the courts can act much more rapidly — perhaps indeed too rapidly — but such cases are rare. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971);

"federal" cases that still present new issues concerning the appropriate rule of law, the Supreme Court has usually come close enough to the problem that our principal function is that of "a reflector, serving as a judicial moon."⁹ In appeals involving state-created rights, our role is even less dignified; we are "only the little dog seeking to make out his master's voice."¹⁰ Whether our utterance in such cases is an echo, as it generally is, or a prophecy, the job is not very satisfying. Worst of all, most appeals do not involve *any* new issues of law, but only the application of established rules or questions of fact, and many are frivolous, or nearly so.

That in 1971 the Supreme Court granted certiorari in only 18 cases out of a thousand we decided, and over three hundred in which certiorari was sought,¹¹ affords little basis for self-congratulation. The three hundred denials are less a tribute to our sagacity than a shocking illustration of the failure of the bar to pay the slightest heed to the Court's announced criteria.¹² Any court of appeals judge worthy of the name who contemplates the reams of necessarily pedestrian opinions being poured into the *Federal Reporter* must thus have asked himself on some occasions whether what he was doing was worth the effort and financial sacrifice or, alternatively and more productively, whether he and his colleagues could restructure their time allotments so as to increase their contribution to the growth of the law.

These nagging doubts concerning the role of the court of appeals judge have been intensified by two developments of the last decade. One is the sharp increase in the business of these courts, an increase far exceeding the growth in the business of the district courts. In 1961, when the Second Circuit had a complement of six judges in regular active service, augmented by four rather active seniors, 674 appeals were commenced.¹³ For 1971, when the court had a complement of nine judges in regular active service but, at the beginning of the term, only one senior, the corresponding figure was 1423.¹⁴ The explosive growth occurred between 1967 and 1970, with an increase from 979 to 1343.¹⁵

United Steelworkers of America v. United States, 361 U.S. 39 (1959); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

⁹ Choate v. Commissioner, 129 F.2d 684, 686 (2d Cir. 1962) (Frank, J.).

¹⁰ Friendly, *The Gap in Lawmaking, Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 789 (1963), reprinted in BENCHMARKS 41, 43 (1967).

¹¹ 1971 ANN. REP. OF DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Tables B1 & B2. [hereinafter A.O. ANN. REP.] All figures are for "fiscal years," *i.e.*, years ending on June 30.

¹² SUPREME COURT RULE 19.

¹³ 1961 A.O. ANN. REP., Table B3.

¹⁴ 1971 A.O. ANN. REP., Table 3.

¹⁵ *Id.*

While we are exceeded in filings by the geographically bloated Fifth and Ninth Circuits, we have had the highest load of any circuit per judge in regular active service.¹⁶ To some extent this is a self-inflicted wound, since we have resisted requesting the added judgeships which our figures would have justified. We have done this because of our belief that an increase in the size of the court would augment the difficulty of maintaining consistency of decision, great enough in any court sitting in panels,¹⁷ and of conducting en banc proceedings, and also because of the increased judge-power anticipated from the addition of five senior judges and of some streamlining of procedures which we may be able to accomplish with the aid of the newly authorized circuit executive.¹⁸ The 1971 decline in the *rate* of increase in filings affords the first ray of hope that we may be able to hold the line, although it is too early to tell whether we have reached a plateau or still have steep rises ahead. Whatever the future may hold, we now sometimes feel we are working on an assembly line rather than with the peace and quiet — and the opportunity to throw draft opinions into the wastebasket — which Mr. Justice Frankfurter deemed essential to the proper discharge of appellate responsibilities.¹⁹

The other development has been a dramatic change in the consist of our work. This has two phases: in 1961 only 101 criminal appeals were filed out of our total of 674;²⁰ a decade later these had grown to 362 out of 1423,²¹ an increase in proportion from 15 percent to 25.5 percent. However, in order to appreciate the degree of our concentration on criminal business, one must add to the latter figure 51 motions to vacate sentence, 18 habeas corpus and 10 other petitions by federal prisoners, and 94 habeas corpus, 26 civil rights, and 3 other petitions by state prisoners.²² This creates a total of 564 cases essentially criminal in nature — approximately 40 percent of our total. We are by no means unique in this; as I remarked a year ago after surveying the nationwide figures,

¹⁶ Although Table 4 of the *A.O. Ann. Rep.* shows a higher number for the Fourth Circuit, the figures for that circuit are distorted by its practice of including all state prisoner applications for review as appeals, whether or not a certificate of probable cause has been granted as required by 28 U.S.C. § 2253 (1970). Compare 1971 A.O. ANN. REP., Table B7.

¹⁷ The statute creating the courts of appeals contemplated only three judges in each circuit. 26 Stat. 826 (1891). Once a court exceeds five judges, there is a possibility that one panel may decide in ignorance of the pendency of the same issue before another, unless opinions are circulated to all the judges.

¹⁸ 28 U.S.C. § 332(e) (1970).

¹⁹ See *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-59 (1959) (Frankfurter, J., dissenting).

²⁰ 1961 A.O. ANN. REP., TABLE B1.

²¹ 1971 A.O. ANN. REP., TABLE B1.

²² 1971 A.O. ANN. REP., TABLE B7.

[i]t is not generally realized to what extent the courts of appeals are becoming criminal courts.²³

Since such appeals only rarely present issues concerning the proper principle of law, as distinguished from the application of established rules or the sufficiency of the evidence, the increased proportion of time required to be devoted to criminal matters does not enhance the role of a court of appeals judge in the federal judicial system.

The other phase is the increased number of appeals in actions under the Civil Rights Act.²⁴ Judge Coffin has compiled an impressive list of the variety of questions under this head of jurisdiction presented to the First Circuit in its 1969 Term.²⁵ No one can say these appeals lack interest or importance; indeed, they are among the most important with which a federal court can deal. What is frustrating is that so often they involve a confrontation of right against right, and require a decision that is essentially political. For instance, assuming the funds for relief to be finite, declaring a required period of residence to be unconstitutional means less money for people having a longer identification with the state,²⁶ and holding a ceiling on family allowances, despite the number of children, to be unconstitutional would have decreased the allowance to families that had shown more restraint in procreation.²⁷ Again, assuming the funds that can be devoted to public education to be finite, a decision that a state must afford free elementary education to a retarded child, no matter what the expense, means less money for the education of other children.²⁸ In many of these cases, perhaps even in most, anyone who truly thinks that either the words or the spirit of the Fourteenth Amendment cast any real light is indulging in dangerous self-deception.²⁹

While it is tempting to say that such decisions are better left to state administrative or legislative bodies, our legal system requires the courts to deal with them except in the unlikely event that states should choose to give maximum recognition to all demands. All one can hope

²³ Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 144 n.9 (1970).

²⁴ 42 U.S.C. § 1983 (1970) and its jurisdictional implementation, 28 U.S.C. § 1343(3) (1970). The 105 appeals to the Second Circuit Court of Appeals under this statute in 1971 constitute only a partial reflection of such litigation in which circuit judges participate; many such actions require the convening of three-judge district courts pursuant to 28 U.S.C. § 2281 (1970). We had 18 of these during 1971. A.O. ANN. REP., Table 36.

²⁵ Coffin, *Justice and Workability: Un Essai*, 5 SUFFOLK L. REV. 567, 469-70 (1971).

²⁶ Shapiro v. Thompson, 394 U.S. 618 (1969).

²⁷ Dandridge v. Williams, 397 U.S. 471 (1970).

²⁸ Pennsylvania Ass'n for Retarded Children v. Pennsylvania, — F. Supp. — (E.D. Pa. 1971) (order by consent).

²⁹ To take another instance, the constitutionality of statutes making abortion a crime. *E.g.*, Corky v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

is that somewhat greater, and faster, response to social stresses by state executive and legislative bodies will lessen the extent to which the federal judiciary must make what in reality are political decisions. In this area we are peculiarly a halfway house; many of our decisions are likely to end up in the Supreme Court.

The case for a series of studies such as this *Review* is undertaking is therefore one that needs making. In my view, the really important work of the courts of appeals, other than as mere dispatchers of business, inheres in a relatively small number of cases each year. These present significant issues of federal law, not controlled by Supreme Court decisions, which have not previously arisen in the circuit but which the Supreme Court will not regard as so important as to justify intervention until a conflict has arisen or, sometimes, even when it has. I should guess that each term would see a score of such decisions — perhaps either “by reason of strength” or by using a less rigorous standard — two score, out of nearly a thousand cases disposed of after hearing or submission.

Leaving last term's decisions to the editors, I will cite two examples of what I mean. In *United States v. DeSisto*,³⁰ we held that testimony given at a former trial or before a grand jury by a witness who was on the stand and subject to cross-examination could be used not simply for impeachment but as affirmative proof of the facts stated, although a good argument could be made that testimony at a former trial should not be so usable since the witness was not “unavailable” and grand jury testimony should not be for the further reason that it was not subject to cross-examination at the time. While it was also arguable that our ruling ran counter to a Supreme Court decision which we distinguished,³¹ the Court denied certiorari. We have continued to apply what Professor Chadbourn calls “the Second Circuit view”³² with what we think to be good results. No circuit has yet followed us; one has declined to do so;³³ and others have been able to avoid a decision.³⁴ Now the *Proposed Federal Rules of Evidence* would go far beyond our decision, dangerously and wrongly so, and allow such use of any prior utterance by a witness, even an oral one which he denies having made.³⁵

My second example is a view, developed in our circuit long be-

³⁰ 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964).

³¹ *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945).

³² 3A WIGMORE, EVIDENCE § 1018 at 996-98 n.2 (Chadbourn rev. 1970).

³³ *Byrd v. United States*, 342 F.2d 939, 940 (D.C. Cir. 1965).

³⁴ *United States v. Classen*, 424 F.2d 494, 495 n.1 (6th Cir. 1970); *United States v. Schwartz*, 390 F.2d 1, 5-6 (3d Cir. 1968).

³⁵ PROPOSED FEDERAL RULES OF EVIDENCE Rule 801(d)(1). See *United States v. Cunningham*, 446 F.2d 194, 198 (2d Cir. 1971).

fore my time, that a trial judge's conclusion with respect to negligence is not a "finding of fact" within the protection of the "unless clearly erroneous" rule.³⁶ Six years ago we reexamined this in the light of an earnest argument that our doctrine ran counter to a later Supreme Court decision³⁷ and decided it did not.³⁸ Here we are in clear conflict with other circuits.³⁹ Yet the Court has been willing to leave the conflict unresolved.⁴⁰

What I have just written leads directly to my final point, namely, that a series such as this finds justification in the concept of the "law of the circuit." Although the dimensions of this may have been exaggerated, it is true that the Supreme Court's inability to hear more than a relatively few cases each term, its desire sometimes to let the dust settle before moving in, and other factors permit each circuit to make its own federal law in limited areas at least for a short time and occasionally, as the foregoing examples show, for a long one.

This process can lead to forum-shopping, and also to difficulties in cases transferred from one circuit to another,⁴¹ since I take the Supreme Court's decision⁴² that the transferee court is bound to apply the same conflict of law rules as the transferor to be limited to choices of *state* law. However pleasant it would be to share Judge Parker's anticipation⁴³ that all circuits will decide a question of federal law the same way or be corrected by the Supreme Court if they don't, such a view is mere wishful thinking. This is vividly demonstrated by the differing results reached with respect to the very subject, patentability, of which the judge was speaking.⁴⁴ The Supreme Court's recent ex-

³⁶ F. R. Civ. P. 52(a). We have added the gloss that the trial judge's conclusion "will ordinarily stand unless the lower court manifests an incorrect conception of the applicable law." *Cleary v. United States Lines Co.*, 411 F.2d 1009, 1010 (2d Cir. 1969).

³⁷ *McAllister v. United States*, 348 U.S. 19 (1954).

³⁸ *Mamiye Bros. v. Barber Steamship Lines, Inc.*, 360 F.2d 774, 776-78 (2d Cir.), *cert. denied*, 385 U.S. 835 (1966).

³⁹ *Merritt v. Interstate Transit Lines*, 171 F.2d 605, 608-09 (8th Cir. 1948); *Imperial Oil Co. v. Drlik*, 234 F.2d 4, 10 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956); *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745, 752 (9th Cir. 1960). Several other circuits generally oppose the Second Circuit view. *See Weiner, The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CAL. L. REV. 1020, 1024-1041 (1967).

⁴⁰ The denial of certiorari in *Mamiye Bros.* was not significant since we affirmed the district judge's conclusion of lack of negligence, although reasserting one power to reverse on something less than a "clearly erroneous" standard. But the Court has also denied certiorari where, applying the "Second Circuit rule," we reversed a conclusion of negligence, by an especially able judge, that would have necessarily been affirmed under the standard applied by the Sixth, Eighth and Ninth Circuits. *Esso Standard Oil Co. v. S.S. Gasbras Sul.*, 387 F.2d 573 (2d Cir. 1967), *cert. denied*, 391 U.S. 914 (1968).

⁴¹ 28 U.S.C. § 1404(a) (1970). *Cf. Ackert v. Bryan*, 299 F.2d 65, 71, 73 (2d Cir. 1962) (dissenting opinions).

⁴² *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

⁴³ *Clayton v. Warlick*, 232 F.2d 699, 706 (4th Cir. 1956).

⁴⁴ *See also Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 596-604 (1969).

tension of the rule of collateral estoppel in patent cases,⁴⁵ sound as I think it to be, will mean that a patentee who has lost his case on validity in a circuit which is "tough" on patents will not have whatever slight opportunity formerly existed to get a conflicting decision from another more favorably disposed.

A presupposition of the "law of the circuit" concept is that a court of appeals is not overly impressed by the fact that another has reached a contrary conclusion. One circuit will follow another or others when it is persuaded, has no strong views either way,⁴⁶ or considers immediate nationwide uniformity to be unusually important, but generally not when it firmly believes the other circuit or circuits have been wrong. The volume of precedents in each circuit and in the Supreme Court has become so great that only rarely is it necessary to rely on opinions of other circuits,⁴⁷ and a district court opinion is not likely to have an impact merely as authority unless it comes from a judge enjoying special esteem. The circuits have become increasingly ingrown or, if one prefers a less pejorative term, self-contained.⁴⁸ Annual compendia of their more important decisions are thus an important time-saver to practitioners and district judges, as well as to the judges of the court of appeals themselves.

Along with the value of having our opinions mercilessly dissected and criticized,⁴⁹ and, hopefully, of having some of their emanations developed, these factors are a sufficient justification for the difficult enterprise on which this law review is embarking. I wish it a long and prosperous voyage.

HENRY J. FRIENDLY
Chief Judge, Second Circuit

⁴⁵ *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

⁴⁶ *Cf. United States Steel Corp. v. United States*, 445 F.2d 520, 528 (2d Cir. 1971) *cert. denied*, 40 U.S.L.W. 3399 (U.S. Feb. 22, 1972).

⁴⁷ One is reminded of Holmes' remark that in a score of years the highest court of a state would have written on almost all legal subjects and would have little need to look elsewhere for precedents. In his later years he carried this a step further, rarely citing opinions other than his own.

⁴⁸ This is somewhat mitigated by the visits of judges of other circuits, from which we benefit in many ways.

⁴⁹ Although I thoroughly agree with Mr. Justice Brewer's observation "better all sorts of criticism than no criticism at all," *Government by Injunction*, 15 NAT. CORP. REP. 848, 849 (1898), I do pray some indulgence for the court of appeals' judge who in a single term may be obliged to write fifty or more opinions ranging from admiralty and bankruptcy to workmen's compensation and zoning. We cannot be as expert as the experts on everything, and we generally do not get the help we should from counsel. See Friendly, *Reactions of a Lawyer Newly Become Judge*, 71 YALE L.J. 218, 219-22 (1961), reprinted in *BENCHMARKS* 1, 3-6 (1967).