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# THE IMPACT OF NEW LEGISLATION

The statute mandates that the Advisory Group "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts." (Section 472 (c) (1) (D)) We begin that examination by considering what the Federal Court Study Committee has termed the "two major types of technical assessment of proposed statutes" that an Office of Judicial Impact Assessment would provide.

## 1. Assessing the Need for Additional Resources

### (a) Personnel and Materiel

The most familiar type of judicial impact assessment is a forecast of the additional resources that would be necessary "to dispose of the litigation the bill would create." One tends to think almost exclusively in terms of additional trial-level judgeships that would be required to dispose of the anticipated increase in caseload, because public statements concerning impact statements have tended to focus on this facet of the problem. This, however, is far too narrow a view; the forecast must inevitably cast a wider net. Trials are only one phase of the process. Criminal statutes with substantial impact can be expected to add to the need for magistrate judges to preside at arraignments and to fix bail, and as the experience in the Eastern District of Pennsylvania has demonstrated, such demands seriously restrict the availability of magistrate judges for civil litigation.

In sufficient volume, added cases require added deputy clerks and additional computer hardware. Trials spawn appeals and there are also administrative costs to be contemplated at the national level, in the Administrative Office of the United States Courts for example, to borrow from a recent impact statement prepared in connection with legislation currently pending.

The increase attributable to a single statute can be serious enough, but our primary concern is with the cumulative impact of many statutes, and it is well to remember that the Federal Courts Study Committee counted 195 statutes enacted by Congress in the course of the past four decades that impacted on the workload of the federal courts.

**(b) Reshaping Legislative Proposals**

With a forecast in hand, there are many choices open to the Congress. Sometimes the legislation under consideration can be shaped to minimize the impact and provide preferable alternatives. The National Childhood Vaccine Injury Act of 1986 provides a dramatic example. As the title of the Act indicates, the Congress was providing for redress to individuals injured by a program of vaccination. A large volume of cases was to be anticipated, each focusing on causation and requiring highly technical evidence. Trial in an Article III tribunal was really unnecessary to accomplish the purpose of the legislation; simple review by a district court would suffice. Yet, Congress, without the benefit of an impact statement, proceeded to enact legislation that called for Article III trials. Finally, there developed virtual unanimity

in the view that the statute was impractical. Congress remedied the situation a year later by passing another statute providing for Article III review.

In short, assessing the impact of a legislative proposal allows for alternative procedures to be considered, and if viewed favorably, to be substituted at an early stage.

**(c) Systemic Concerns**

Despite this emphasis on the need to provide resources necessary to meet new demands, it would be wrong to conclude that so long as Congress matched resources and workload one cannot object. As the Federal Courts Study Committee has warned, there is a price to be paid for too great an increase in the size federal judicial system. Federal judgeships would no longer be sought after by people of the quality we demand and expect. A high volume of routine cases, each of relatively little significance, would transform the federal courts and there is the risk that they would no longer resemble the judicial system that has played such an important role in the history of our country. Indeed, much of the debate in Congress and in the country concerning the transfer of drug-related or firearm-related criminal cases from state to federal courts is concerned with ultimate size and quality of the system as well as on the immediate burdens of looming caseloads.

In short, there are systemic considerations that must enter into the calculus, and assessment of the impact of new statutes helps the legislature focus on them when appropriate.

**(d) Revised Procedures and the Quality of Justice**

It is always open to the Congress, with or without an impact statement, to ignore the problem of added workload and to count on the courts to fashion procedures that will accommodate the additional burdens. There is a limit, however, to how much straw the camel's back can accommodate.

Even if the judicial system does not break down, there is reason to be concerned about eroding the quality of justice. Settlement, for example, voluntarily entered into between two knowledgeable parties, may be -- as Justice Brennan urged many years ago -- the best possible means of resolving a lawsuit, but a settlement coerced by the fact that no trial time is available for civil cases is undesirable. Such coerced settlements are undesirable even if on a statistical table it may be made to appear that once again the judges have responded to pressure from the Congress and increased their productivity.

Historically, new legislation has burdened the courts and the litigants, and only after the unmet need for new judgeships has been amply documented, the Judicial Conference would request and the Congress, after an intervening period of varying duration, would create new judgeships. Of course, many months, sometimes years, would then ensue before the vacancies thus created would be filled and the added resources would be applied to the unmet need. Unhappily, the experience in the Eastern District of Pennsylvania provides documentation.

In a report that responds to the welcome Congressional concern about cost and delay in civil litigation, it is hardly

necessary to expound on why this is highly undesirable. Assessment of the anticipated impact of new legislation should make it possible to improve this situation.

**2. Avoiding the Hazards of Drafting**

We turn to the second major function of an impact statement, "spotlighting drafting defects that might breed unnecessary litigation." Phrased affirmatively, it has been suggested that the "primary function" of an Office of Judicial Impact Assessment should be "to assist the committees of Congress in preparing legislation."

Pitfalls to be avoided include sins of omission and sins of commission. Often Congress leaves unanswered such questions as who may sue under a statute, is federal jurisdiction intended to be exclusive, is a private right created to obtain redress when public officials have violated the statute. A handy check-list could assure explicit answers and avoid needless and costly litigation.

Sometimes Congress uses terms that are intentionally ambiguous; studied ambiguity is the price of political agreement and passage of the legislation. But there are times when the ambiguity is quite inadvertent. The term "where the claim arose" in a venue statute has been characterized as "litigation-breeding," and with ample justification. That statute was recently amended, but only after years of costly litigation that could easily have been avoided.

Sometimes the ambiguity arises only after the provisions

of two statutes are juxtaposed. Does the provision in the Fair Labor Standards Act that actions under it may be maintained in state courts preclude removal to a federal court under provisions of the general removal statute? That issue was litigated last year in this district. Isaac v. Pflaumer & Sons, Civil Action No. 90-1622, Judge Shapiro ably reviews the precedents -- of course, other judges in other cases had had to deal with the problem -- and concludes that no, removal is not precluded. How much better if the issue could have been avoided by a knowledgeable eye providing review in advance.

**3. Conclusion**

The CJRA calls upon us to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation." We do not believe that the statute intended for us to undertake to quantify our conclusions, nor do we believe it would be useful to undertake that precarious task.

When we consider the sheer volume of new legislation that flows from the Congress, when we add changing administrative interpretations of existing statutes that spawn litigation designed to divine legislative intent that might have been clarified initially, when we realize how readily we discovered recent examples of ambiguity that could have been avoided, when we take note of the price exacted from litigants by the failure of Congress to provide the resources needed as a result of newly enacted statutes, the potential for a very significant contribution by judicial impact assessments becomes clear.

If such impact assessments are provided, will they be taken seriously by the Congress? Will the impact statements have impact? There can be little doubt that from time to time statutes will continue to reflect ambiguities born of political necessity; that is part of our democratic process and we do not challenge it. We do believe, however, that the process can be and will be improved by focusing on potential problems and attempting to resolve them. This, too, is part of an enlightened democratic process. The very fact that the Civil Justice Reform Act of 1990 obliges us to address this problem is in itself a cause for cautious optimism.