

Other branches blamed for federal court bind

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By HERB JAFFE

Judicial vacancies and growing burdens being thrust on the federal courts by the other two branches of government have brought the courts in the U.S. Third Circuit to a crisis. Chief Judge Dolores Sloviter said yesterday in her message to the circuit's annual conference in Teaneck.

Sloviter, who is from Philadelphia, blamed the executive branch for the judicial vacancies, which she said have reached an "urgent" level, and the duration of the vacancies, which she called "troublesome."

Although New Jersey has received three new judgeships under the Judicial Improvements Act of last year, one appointment still has not been made, and another awaits background investigation.

Several hundred federal judges, lawyers and court officials from New Jersey, Pennsylvania, Delaware and the Virgin Islands are attending the judicial conference.

Sloviter said the judiciary's dependence on action by the executive and legislative branches for its ability to perform "has become most striking." In the area of vacancies, she said there are still 10 judicial appointments needed in the circuit. That's the number of vacancies that existed prior to the act that created 10 new judgeships for the Third Circuit, she noted.

In the meantime, Sloviter added, Congress continues to legislate new responsibilities for the federal courts.

She singled out a bill that would add murder to the list of federal crimes if the weapon used was a gun that had been shipped across state lines.

"The number of criminal cases filed in the federal courts jumped nearly 70 percent from 1980 to 1990," Sloviter said. "It is estimated that had this proposal been on the books in 1989, 95 percent of the nearly 12,000 homicides involving firearms committed that year could have been federal cases," she added.

But Sloviter commented that "this is not the only tornado descending on the courts." She told of pending legislation in which time constraints would

be imposed on court review of murder appeals.

"They would require federal district courts to determine a habeas petition on motion within 110 days of filing and the court of appeals to determine any appeal within 90 days after the notice of appeal is filed," she explained.

"These bills are illustrative of the manner in which the available judicial resources are being stretched in all directions," the chief judge of the federal circuit stated, explaining further:

"We are being faced with a dramatic increase in drug related prosecutions, speedy trial laws that require criminal cases to be given first priority, the need to learn and conform to the complex procedures of sentencing guidelines, and overwhelming increases in bankruptcy cases."

Sloviter said that, in addition, the courts are expected to satisfy a recent congressional mandate to develop procedures that would result in the reduction of cost and time in civil proceedings.

She emphasized the theme of her remarks was "that we are not in control of our own destinies."

"That this circuit circuit has performed as well as it has in the last year is nothing short of remarkable," Sloviter stated.

She said "the flooding of the federal courts with criminal cases, particularly drug cases, will exact an inevitable toll" on the courts' ability "to act as the vindicators of the statutory and constitutional rights of those who have neither economic nor political power, to provide a sanctuary for the claims of the disadvantaged and to serve as the neutral arbiters for disputes."

Sloviter noted there is a growing trend toward "job dissatisfaction" within the federal judiciary.

"More and more of our colleagues are finding themselves overwhelmed by an unbearable workload and the accompanying emotional and mental stresses. The number of judges who chose to resign from the federal judiciary in the last decade was unprecedented," she added.

Panel labors to put courts back in order

A federal court committee in New Jersey has been working for six months to bring order to the civil side of judicial business in the U.S. District Court.

Specifically, the committee's mandate is to devise a code of recommendations that could alleviate a problem which has been endemic to all federal and state courts across the country.

Some prefer to call it a "litigation explosion," others refer to it as "abuses and delays," ostensibly intended to help enrich lawyers.

Perhaps there is some truth to both premises, but the increase in lawsuit popularity may be founded on a deeper and more overriding reality, such as a growing realization that the Constitution entitles any citizen to use the courts for redress.

In addition, acts of Congress and rules of court often help exacerbate the situation. And in the case



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The Law

of the civil courts, where backlogs generally tend to grow, enforcement of the federal speedy trial act for criminal defendants is a priority and is frequently responsible for diverting judicial resources from the civil calendars.

Whatever the reasons for the crunch, there was a strong conviction in Congress that the popularity of the civil suit cannot be expected to diminish in the foreseeable future. That was when the Civil Justice Reform Act of 1990 was adopted.

One of the act's major provisions was to establish a "Civil Justice Expense and Delay Reduction Committee" in each of the 94 federal districts. The purpose of the committee is carved into its name, and the panel appointed by New Jersey Chief Judge, John Gerry, with Haddonfield lawyer George Kugler as chairman and Newark attorney Donald Robinson as vice chairman, has taken its task with a serious fervor.

"Our committee was broken into four subcommittees, and the members have worked hard to get us to the point where we are just about ready to report back to the court with a comprehensive plan of reforms and alternatives," said Robinson.

He explained the report during and after last Friday's annual breakfast meeting of the judges, magistrates, court officials and lawyers' advisory committee of New Jersey's U.S. District Court.

Robinson noted the four subcommittees "covered areas where we felt the problem was most pressing. They dealt with alternatives to the court, putting a limit on discovery, problems that involve the federal and state governments as litigants, and case monitoring, which is similar to a system already being used effectively in New Jersey's state courts."

The irony of the report, expected in final form by Oct. 1, is a finding that the civil calendar in New Jersey's federal court is not nearly as critical as was first believed.

The Civil Justice Reform Act suggests, ideally, that there be an 18-month period from the filing of a civil lawsuit to its disposition. "Of approximately 5,250 pending civil cases, we found about 95 percent of them were being decided in less than 18 months," Robinson said.

Additionally, under the median disposition time, the New Jersey court is 15th best of the 94 federal districts, even though it had the seventh highest number of cases filed last year.

"So one of our conclusions is that we may not have the same degree of the problem in New Jersey that exists in other federal districts," Robinson added.

Still, the federal civil caseload in New Jersey for the 12 months ending June 30 grew by 2.3 percent over the preceding year at a time when the national trend showed a 6 percent decline in civil cases filed.

Irrespective of the numbers, the committee's mandate is to offer recommendations that could reduce the civil caseload impact even further. Among the remedies, that will be proposed are:

- Amendments to the rules for tighter management of civil discovery procedures. One rule would speedup the system considerably by ordering plaintiffs to present certain documents at the time the complaint is filed, rather than to begin such discovery proceedings after the case filing.

- Use of "special masters" in complex cases. These are lawyers appointed and paid by the court to assist the judge and to speedup the process considerably. They would be available for the litigants to seek quick decisions, even by telephone, rather than have to wait for the judge's availability.

- Greater emphasis on mediation to bring the parties together for settlement rather than impose on the judge's time.

- Expanded use of "summary" jury trials, in which witnesses do not appear. Although the decision would not have to be binding, it is a procedure that has been popularized as bringing quick and satisfactory results.

- More use of arbitration. The federal courts in New Jersey have been praised nationally for having the most effective system of arbitration in the country, federal Magistrate Jerome Simandle reported at the annual breakfast.

"We handled more than 1,100 cases by arbitration last year, which represented approximately 20 percent of our entire civil docket," said Simandle.

Judges Clog Federal Docket

Bench Trial Rulings, Pending Motions Pile Up In Texas Courts

BY GORDON HUNTER

One federal judge in Texas has yet to rule on a bench trial that concluded nine years ago. Another has 468 pending motions on his civil docket that have lingered without a ruling for six months or longer, a huge backlog that represents 22 percent of all such motions before the 42 active federal district judges statewide.

Both blame their problems on heavy caseloads.

These two oddities are among the many examples of sluggishness in the federal civil docket found in a new report on the productivity of the nation's federal judges. The report details the depth — and the sources — of the logjam in civil cases facing lawyers and judges in Texas' Southern and Western districts.

The report is the first under a section of the Civil Justice Reform Act of 1990 requiring federal judges to provide a case-by-case inventory of motions pending longer than six months, bench trials concluded and awaiting a ruling for longer than six months, and cases on their dockets pending longer than three years.

The first report, obtained from district clerks, covers the first two categories for the six months ending Sept. 30; a report on the 3-year-old cases is expected later this year. Subsequent

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U.S. DISTRICT JUDGES IN TEXAS**
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reports on all three categories are scheduled every six months.

Federal judges for years have supplied numerous details of their caseloads and workdays to officials with the Administrative Office of the U.S. Courts, but the information has never before been released publicly on a judge-by-judge basis.

The Civil Justice Reform Act, as part of the effort aimed at reducing the cost and delays in civil litigation, called for public disclosure of court activity by individual judges as "an incentive [for the judges] to work a little faster" and enhance their accountability, said a senior aide to the U.S. Senate Judiciary Committee who played a role in form-

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Texas Judges Clog Federal Docket

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ing the legislation. The aide would comment only if guaranteed anonymity.

Whether the legislation achieves those goals remains to be seen.

"I hope it does," said Western District Chief Judge Lucius D. Bunton III. "Anything to speed up is great and if [the reform act] does it, that's great."

Bunton's district covers the region from Austin and San Antonio to El Paso and has six active judges — with authorization for four more — and a disproportionate share of the backlog among the Texas courts.

Combined, the judges in the Western District reported 1,370 motions pending longer than six months on their dockets as of Sept. 30, two-thirds of the total reported by all federal courts in the state.

U.S. District Judge H.F. "Hippo" Garcia of San Antonio reported the lion's share of the Western District total — 468 pending motions. While a few of the motions date from 1987, 1988 and 1989, most have accumulated in 1990 and this year.

A Heavy Load

In his report, Garcia attributed much of the delay to heavy civil and criminal caseloads. Court officials said that under the San Antonio case-distribution system, Garcia is assigned half the criminal cases, while two other judges handle the balance.

Garcia would not comment on the backlog. One of his law clerks, Marilyn Primomo, said the system used by clerks to account for the pending motions may have skewed the count. In some cases, several forms of relief requested in a single pleading were counted as separate motions, she said.

Clearing the backlog is "not a matter of working harder or faster but the number of judges" in the district, Primomo said.

Chief Judge Bunton also said Garcia has been in poor health and recently spent a week in the hospital. Two more judges are expected to fill out the bench in San Antonio, he said, although no timetable has been set.

Garcia was not alone in the district. U.S. District Judge James Nowlin of Austin reported 280 pending motions — well above the average of 48 motions pending longer than six months for each Texas federal judge.

Nowlin also would not comment, but a member of his staff who requested anonymity said that, as in Garcia's court, an overwhelming number of criminal cases has slowed the pace of action on civil cases.

Compiling the new reports required by the reform act — a two-day effort by Nowlin's staff — also compounded the problem, the staff member said. "It didn't help us move the docket."

The Lion's Share

U.S. District Judge Harry Lee Hudspeth almost matched Nowlin in the number of pending motions on his docket, but it is the El Paso judge's report on bench trials that sets him apart from all other judges in Texas.

Hudspeth reported eight bench trials that have concluded and been on hold for longer than six months because he has not ruled on them. Among all Texas federal judges, only 19 bench trials were reported in this category: four in the Eastern District, seven in the Southern District split among four judges, and Hudspeth's eight.



A HEAVY CRIMINAL CASELOAD has forced Judge H.F. "Hippo" Garcia of San Antonio to postpone rulings on 468 motions pending for longer than six months, according to his report.

In all eight cases, Hudspeth said in his reform act reports that the demands of his criminal docket caused the delay.

One of the bench trial decisions has been pending since earlier this year; two are from 1990; two from 1989; two from 1987; and one from Nov. 24, 1982. The most recent seven cases are four personal injury actions, a civil rights case, a trademark case and a forfeiture action.

The longest-pending case, a patent dispute over a gun sight, taxed the memories of the attorneys involved.

"I thought it was resolved," said defense counsel Clifford Williams, a Detroit solo practitioner, said of *W.R. Weaver v. Kwik-Site*, No. 82-361.

Plaintiff's counsel Francis Murphy, a partner in New York's Hopgood, Calimafde, Kalil, Blaustein & Judlowe, said he, too, had forgotten about the case, adding: "I think a decision from the judge would be useful." The patent elements of the case were obviated by an appellate court decision in an unrelated case, although some trademark issues remain in *Weaver*, he said.

Hopgood, Calimafde attorneys have handled cases in most states, Murphy said, and he did not know of any case that has lingered as long as *Weaver* for want of a ruling on a bench trial.

Local Texas plaintiff's counsel is W. Royal Furgeson Jr., a partner in El Paso's Kemp, Smith, Duncan & Hammond. "I inherited it from a partner who retired a year ago," he said, "and I don't know anything about the case."

In general, Furgeson attributed much of the problem with Hudspeth's civil docket to the criminal caseload. "I feel he's under such a burden on the criminal side that he's entitled to the benefit of the doubt on the civil side," Furgeson said.

Chief Judge Bunton refused to comment on Hudspeth's bench trial report, except to say, "You don't see any on my report." Hudspeth did not return a telephone call for comment on his docket.

The Western District has not cornered the market on long-running cases with pending motions gathering dust.

In the Southern District, U.S. District Judge Filemon Vela of Brownsville reported 14 motions — a relatively modest number — that were pending six months or longer as of Sept. 30. A March 1987 motion to vacate in *Aguirre v. Davis Forestry Corp.*, No. 81-142 is the oldest on his docket.

Solo practitioner T. Martin Davis of Little Rock, Ark., son of the founder of Davis Forestry, said, "I cut my teeth on this case." He graduated from law school and practiced law for 10 years while this case has continued. Davis Forestry is alleged to have violated federal labor laws when it recruited migrant workers in South Texas to work on Arkansas pine tree farms.

Davis said the plaintiff workers filed the motion to vacate in 1987 after appellate court rulings bolstered their case. He said there was a scheduling conference on the motion last summer, but no date has been set for arguments on the motion.

"It's still in the preliminary stages," he added.

The guidelines and forms for the judges' new reports were prepared by the Administrative Office of the U.S. Courts. The forms include space for judges to account for the reason or reasons for the delay in each case, and there is a smorgasbord of acronyms to explain: from SP (settlement pending) to ADCA (awaiting decision in court of appeals) to CC (complexity of case).

In all, the administrative office offered 19 reasons for delay, but some judges did not find that menu adequate.

For example, U.S. District Judge Norman Black of Houston said "CRADRM" was the reason for delay on three motions in one 1990 breach-of-contract case. He had a total of 43 delayed motions and no flagging bench trial decisions.

CRADRM, not on the administrative office's list of 19 reasons, stood for "Case Referred for Alternative Dispute Resolution/Mediation," Black said.

He said the new reporting requirement served the purpose to ensure that no cases "slipped between the lines" and would stimulate some peer pressure to improve performance.

For the litigator in federal court, the new reports may have only limited

The Slowpoke Report

As of Sept. 30, 1991

This list shows the number of motions pending longer than six months, followed by the number of bench trial rulings pending longer than six months.

Southern District	
James DeAnda, chief judge	25-0
Norman W. Black	43-0
Hugh Gibson, senior judge	0-0
Melinda Harmon	74-2
Hayden W. Head Jr.	32-0
Ricardo H. Hinojosa	36-0
David Hittner	11-0
Kenneth M. Hoyt	23-0
Lynn Hughes	0-2
George P. Kazen	4-0
Samuel Kent	4-0
Simeon T. Lake III	0-0
John D. Rainey	184-1
John Singleton, senior judge	31-2
Filemon B. Vela	14-0
Total	481-7
Western District	
Lucius D. Bunton III, chief judge	9-0
H.F. Garcia	468-0
Harry Lee Hudspeth	278-8
James R. Nowlin	280-0
Edward C. Prado	163-0
Walter S. Smith Jr.	27-0
D.W. Suttle, senior judge	0-0
"Judgeless Docket"*	145-0
Total	1,370-8
Northern District	
Barefoot Sanders, chief judge	12-0
David O. Belew, senior judge	16-0
Jerry Buchmeyer	No report filed
Sam R. Cummings	4-0
A. Joe Fish	5-0
Sidney Fitzwater	17-0
John H. McBryde	1-0
Eldon Mahon, senior judge	1-0
Robert Maloney	0-0
Mary Lou Robinson	50-0
Halbert O. Woodward, senior judge	5-0
Total	111-0
Eastern District	
Robert Parker, chief judge	10-0
Paul Brown	25-1
Howell Cobb	3-2
Joe Fisher, senior judge	0-0
Sam Hall Jr.	0-0
William Wayne Justice	28-1
Richard A. Schell	6-0
William M. Steger, senior judge	38-0
Total	111-4

SOURCE: U.S. 5th Circuit Court of Appeals report
*Docket left by a former judge

strategic value.

William H. White, a partner in Houston's Susman Godfrey and frequent litigator in federal courts, said few things are as important as knowing the speed at which a case will move. And many lawyers make a habit of studying the track records of judges to determine, among other things, whether they move a docket or not.

This is important information, he said, if you want to see your case progress rapidly — assuming you sense certain victory — or slowly.

But because cases are assigned in each judicial district on a random basis, White said, the information in the new reports may be more important when choosing in which district to file the case. ■