HOUSEKEEPING IN THE AGE OF STATUTES

Remarks of U.S. Circuit Judge Frank M. Coffin
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at Panel Discussion on

"Congress and the Judiciary -- An Inquiry into the
Problems of Statutory Construction and Revisions"

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The subject of this panel discussion is, to borrow Judge Ruth Bader Ginsburg's felicitous phrase, "Statutory Housekeeping."[1] A quarter of a century ago Judge Henry Friendly catalogued the increasing sweep of statutes in field after field, concluding, in Winston Churchill's phrase, that the onset of statutory dominance in the law was "not even the beginning of the end although it may be more than the end of the beginning."[2] Today we are at least in the middle of an age of statutes . . . and often in a muddle as we try to cope with their care, nurture, and upkeep.

In a way, the very modesty of our subject is a recommendation. In a time when circuit conference agendas are freighted with sessions on sentencing guidelines, how to deal with increasing caseloads and even how to attract and keep a judiciary of independence and competence at existing compensation levels, our subject for this hour is unique. It is a manageable subject. The problem we deal with is doable. It has the following four characteristics:

1. It is a significant, if not earthshaking problem. It is a micro, not a macro problem. We are not talking of any idea as ambitous or grandiose as the Ministry of Justice envisaged by both Cardozo and Pound, but an edifice and function much more humble.
2. The problem involves both the federal judiciary and the Congress, each of which branch has a role in our governance in a statutory era.
3. The problem is capable of easy solution. Each branch shares an interest in applying the solution. There are as many problem solvers as there are Article III judges . . . not to mention 535 legislators and their staffs.
4. The problem needs only a vehicle. Some means of putting together the problems and the solutions.

Here is how Judge Ginsburg defines the problem:

> Federal judges are "firefighters"; they do not, ignite the conflagrations that produce litigation, but if their authority is properly invoked, they "'must respond to all calls.'" (Footnote

[1] R. B. Ginsburg and P. W. Huber, Commentary -- The Intercircuit Committee, 100 Harv. L. Rev. 1417 (1987).

[2] Friendly, The Gap in Lawmaking -- Judges who Can't and Legislators who Won't, 63 Colum. L. Rev. 787 (1963).

> omitted.) Judges, in turn, regularly call in alarms to the legislature for the law revisions needed to curb or cohesively resolve litigation. (Footnote omitted.) As we have seen, courts are not shy about identifying the deficiencies in legislation. The problem has been that, too often, no one in Congress hears the plea.[3]

Judge Friendly's lament was "that the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed." He added,

> My criticism is not of Congress's fallibility, but of its failure to move promptly to correction. Why, when such situations come to light, does not the legislature act speedily to express what it meant, rather than let years go by while judges try to puzzle out what to do and citizens are left in doubt? If the legislature repaired the damage as soon as the defect was discovered, the problem would at least be confined to small compass and short duration. But such rectification of error does not appear to enjoy a high priority on congressional calendars.[4]

My first interest in the subject was reflected in a passage in my book, The Ways of a Judge, when I described the hypothetical prosecution of a defendant for smuggling marijuana in a yacht, Lucky Lady, off what might have been my own rockbound coast. Lucky Lady made its way up an estuary and was about to deposit its contraband when the Coast Guard sighted it. Thereupon Lucky Lady took off but was ultimately caught. The defense, startling and counterintuitive, was based on Keck v. United States, 172 U.S. 434 (1899), in which the Supreme Court relied upon old English law that required goods to be landed in order for the crime of smuggling to be accomplished. To insist that goods actually be deposited on land before the crime of smuggling could be committed seemed to me an insistance on a senseless technicality.

Fortunately for the court deciding the hypothetical case in my book, reversal was indicated because of the insufficiency of evidence so that the nice point about the scope of "smuggling" did not have to be reached. But I had the court do what all of us quite often do, express the pious hope for remedial legislation.

Nevertheless, one does not blithely ignore technicalities when they are pronounced by the Supreme Court and never disavowed. I had the opinion writer in my hypothetical case do exactly what was done in an actual case I had sat on, United States v. Lespier, 601 F.2d 22, 28 (1st Cir. 1979) . The opinion writer was the eminent Montana judge William Jameson, born one year before Keck was decided. He closed our opinion thusly:

> We confess to a sense of frustration, but we feel compelled to follow this express holding of Keck, which has been on the books for eighty years and followed in many cases without provoking any action by Congress to clarify the definition of smuggling. Accordingly we reverse the judgment of conviction.

I did more, however, than merely write about Keck v. United States. I gave the case to Leo Levin when he was head of the Federal Judicial Center. He in turn presented it to the appropriate committee of the Judicial Conference, the Committee on Administration of Criminal

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[3] R. B. Ginsburg and P. W. Huber, supra note 1, at 1429.

[4] Friendly, supra note 2, at 792.

Law. With such sponsorship, I had high hopes of a modest clarification. The sad truth is that neither he nor I ever heard of the matter again. It was this early experience that whetted my appetite for trying to do something in this particular vineyard.

Today's panel discussion will center around an interesting group of cases assembled by the district and circuit judges in this circuit. This is the ideal circuit to launch such discussion, for it is the statutory circuit par excellence. There are some twenty cases in number, to which I have added several from my own circuit.

Although we are dealing with too small a sampling of cases for a definitive charting of the field, the harvest we have already reaped does suggest the beginnings of a taxonomy or classification. I think it is useful for us to keep in mind the various categories of problems since the proper solution for some may not be the proper solution for others. As a starter, therefore, I suggest that the cases we have before us today fall into four groups.

I. Gaps

The first group consists of the failure or refusal of Congress to cover all the bases or touch all the facets that could profitably be considered in drafting statutes. In most cases there is no reason to think that this failure or refusal was deliberate. What I am referring to are questions that were never asked, not to mention answered, with the result that courts have had to struggle, sometimes creating circuit conflict. Here is a partial catalog of unasked questions:

-- Did Congress intend the federal statute to "occupy the field"? City of New York v. F.C.C, 814 F.2d 720 (D. C. Cir. 1987).

-- What is the proper period of limitations?

-- Must administrative proceedings be exhausted?

-- Was a private right of action contemplated? Attorneys' fees?

-- Should any special deference be paid to the agency?

-- Are the provisions severable?

-- Is the legislation intended to be retroactive? When is it to go into effect?

-- In what court or courts is there to be original jurisdiction? In re: Korean Airlines Disaster of September 1, 1983, 829 F.2d 1171 (D. C. Cir. 1987) .

-- In what court is there to be appellate jurisdiction? Center for Nuclear Responsibility, Inc. v. N.R.C., 781 F.2d 935 (D. C. Cir. 1986); Van Drasek v. Lehman, 762 F.2d 1065 (D. C. Cir. 1985); Sharp v. Weinberger, 798 F.2d 1521 (D. C. Cir. 1986) [division of appellate authority between Federal Circuit and other circuits].

II. Glitches

The second group of cases involves errors of punctuation, syntax or grammar. All of these are obviously correctable.

-- The misplaced comma. In re Newbury Cafe, 841 F.2d 20 (1st Cir. 1988) (automatically allowing interest on secured claims in bankruptcy cases, absent special agreement, would wreak havoc on pre-bankruptcy code law; but such would be the case if the misplaced comma after "interest" in the following passage were taken seriously: "Interest . . . , and any . . . , fees, costs, or charges provided for under the agreement").

-- The misplaced modifier. (Judge Ginsburg in her commentary has given us a good example in Young v. Community Nutrition Institute, 106 S. Ct. 2360 (1986). In the Food and Drug Act there is the following sentence: "The Secretary shall promulgate regulations (limiting the quantities of hazardous substances) to such extent as he finds necessary." The question spawning litigation in the Supreme Court was whether "to such extent," modified "shall" or "quantity.")

-- The clear literal meaning that may create an internal inconsistency. The old sentencing law, pre-guidelines 18 U.S.C. § 4025(a), stated that a prisoner could be eligible for parole after serving one-third of his sentence or ten years, whichever happened earlier. In the next succeeding section (b), however, a judge was entitled to sentence to any maximum term, the prisoner to be eligible for parole after serving one-third of it. The result of these two sections, if taken literally, was that one convicted of first degree murder would be eligible for parole in ten years while one convicted of second degree murder could be sentenced to ninety years with parole eligibility to be deferred until thirty years had been served. United States v. Castonquay, ___ F.2d __, No. 87-1555, slip op. (1st Cir. April 4, 1988) .

III. Ambiguities

There are probably more ways in which words and phrases can create ambiguities than the ingenuity of man can reckon. Here is a beginning at listing them.

A. Words with several meanings

In Block v. U.S. Department of Transportation, 822 F.2d 156 (D.C. Cir 1987), the court discerned at least four meanings that could be given to the following phrase: "joint request of a state governor and the local governments concerned."

Judge Ginsburg has noted in her Commentary how the D. C. Circuit in Church of Scientology v. IRS, 792 F.2d 488 (D. C. Cir. 1986), dealt with a floor amendment to the then longest Internal Revenue Code position. The amendment added to the definition of "return information" the words "in a form" in the context, "not data in a form which cannot identify a particular taxpayer." As a result of these three words, the court found itself adopting an interpretation at odds with two other interpretations adopted by the Seventh and Ninth circuits.

In American Mining Congress v. EPA, 824 F.2d 1177 (D. C. Cir. 1987) , the court had to resolve the question whether "discarded" meant the abandonment of reusable solid waste or waste that was not even fit for its original use.

In McWherter v. Bush, Civ. No. 87-1184 (D.D.C. 1987), the district court, in dealing with the notice of disapproval process relating to monitored retrieval storage facilities for nuclear waste, had to confront the phrase "authorized pursuant to this section." Did the phrase mean approval by Congress or mere submission of the facility being studied by the Department of Energy to Congress?

B. Unexplained differences in treatment.

In United States v. Pumphrey, 831 F.2d 307 (D. C. Cir. 1987), the question arose whether proof of an overt act was required in a special drug conspiracy statute, 21 U.S.C. § 846, as was required in the general conspiracy statute, 18 U.S.C. § 371. The omission of any mention of overt act led to litigation that could easily have been averted.

In P.N.H. v. Hullquist, ___ F.2d ___, No. 87-1584, slip op. (1st Cir. March 30 , 1988) , the question was, under the Carmack Amendment, which specifically made the first carrier strictly liable, whether strict liability or mere negligence should govern succeeding carriers. The silence of the statute invited this litigation.

C. The obscure referent.

In United States v. Castonquay, supra, the phrase "unless otherwise

provided" could have referred to another subsection of the particular statute or it could have referred only to other statutes.

In Daniels v. Wick, 812 F.2d 729 (D. C. Cir. 1987), a statute provided that the foreign service grievance board could recommend "other remedial action not otherwise provided for in this section." The question was: Did this override the foreign service career appointment statute giving the Secretary the power to recommend career status?

Judge Ginsburg in her commentary cited Phillips Petroleum v. FERC, 792 F.2d 165 (D. C. Cir. 1986), for a statute containing the phrase "just and reasonable rate," a seemingly simple referent but one that could have referred to the rate for gas produced by pipeline companies or to that for gas produced by independent companies.

IV. The express invitation to Congress to deal substantively with the statute.

This category, very substantive and perhaps controversial, is at the other end of the spectrum from gaps and glitches, as to which there ordinarily would be little or no controversy.

In American Bankers v. SEC, 804 F.2d 739 (D. C. Cir. 1986), the opinion ends with the suggestion that Congress do a comprehensive study of the Glass-Steagall Act and the Security Acts.

In Westfall v. Erwin, 108 S. Ct. 580 (1988), the Supreme Court invited congressional directions on the immunity of federal employees from tort liability.

In Brock v. Peabody Coal Co., 822 F.2d 1134 (D. C. Cir. 1987), the question was whether a laid-off miner is to be treated as a miner for all purposes. The concurring opinion invites the attention of Congress, noting that the solution would not be easy.

Even this cursory survey, made on the basis of the sample submissions to Judge Buckley from judges of this circuit, indicates that there is an abundance of raw material for the statutory housekeeping function. The question arises as to what is the most promising vehicle. In the discussion that follows your attention will be directed to some of the pros and cons concerning particular suggestions. Here are some of the more prominent proposals that have been made:

1. Judge Ginsburg has recommended a standing "second look at laws" committee.[5] This could be a joint committee of the House and the Senate or a joint subcommittee of the Senate and the House Judiciary Committees. Such a group of legislators would build on and elevate the function of the "Office of Law Revision Council."

2. Chief Judge Feinberg has suggested that the Judicial Conference "designate a handful of law professors working on a part-time basis as a committee to call attention to [noncontroversial] conflicts among the circuits."[6]

3. A bill introduced into the 90th Congress in 1967 would have created a national law foundation.

4. Professor Leo Levin, formerly director of the Federal Judicial Center and now head of the American Society of Judicature, in reflecting on my unhappy experience with United States v. Keck, recommended that a small group be convened either within the Administrative Office or the Federal Judicial Center to act as a traffic cop routing questions to proper bodies. Some questions could be routed directly to congressional committees or rules committees without

[5] R. B. Ginsburg and P. W. Huber, supra note 1, at 1432.

[6] Feinberg, Foreword -- A National Court of Appeals?, 42 Brooklyn L. Rev. 611, 627 (1976).

recommendation. Other questions could be routed to the appropriate committee of the Judicial Conference. And, as he concluded in his talk with me, at least there would be somebody to acknowledge all suggestions and tell what became of them.

5. Perhaps as a pathbreaker, an entity outside of the judiciary, the executive branch and Congress could collect, sift, organize, and present the judicial input to congressional committees or committees of the Judicial Conference. The purely technical could be separated from the substantive. There could be developed a series of reports of commentaries noting the problems most frequently encountered. The experience of collecting and organizing could lead to seminar sessions involving staffers, legislators, and judges. In time this could lead to a community of people dedicated to higher quality statutory draftsmanship.

One of the basic questions is that of mechanics. If a more complete taxonomy of statutory defects could be devised, could a simple code designation be devised for use in computer assisted legal research to signal the presence within a particular judicial opinion of a criticism, suggestion or invitation that eventually should have the ear of Congress? Or, could judges be counted on to send their opinions containing statutory criticism to an addressee undertaking to collate, sift, and forward to Congressional committees?

The situation is not unlike that faced in some high-tech industries. It is a problem in circuitry. All of the elements are present. What remains to be done is to find the precise way in which communication can be effective. My hope is that this panel will help in some measurable way to advance our thinking.