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William K. Thomas

BOOK REVIEWS

*Reviewed by The Honorable William K. Thomas**

FEDERAL JURISDICTION: A GENERAL VIEW, by Henry J. Friendly. New York, London, Columbia University Press, 1973. 199 pp. $10.00.

Those who did not attend the Columbia University Carpentier Lectures on federal jurisdiction, delivered in November, 1972 by Judge Henry J. Friendly of the Court of Appeals for the Second Circuit, may now read these remarkable lectures, published as the main portions of *Federal Jurisdiction: A General View*. A mini-textbook with a mission, its 199 pages and 797 footnotes are encyclopedic but engaging, scholarly but unassuming, and always lucid and candid.

Within a year after graduation from Harvard Law School and while clerking for Mr. Justice Louis D. Brandeis, Henry J. Friendly had published an article on federal jurisdiction.[1] Since then he has eyewitnessed the subject as practicing attorney, active member of the American Law Institute, and since 1959 as Judge and Chief Judge of the Second Circuit Court of Appeals. He is now convinced:

> . . . that the inferior federal courts now have more work than they can properly do — including some work they are not institutionally fitted to do. This arises in part because Congress is continually giving them more to do and, in part, because of the Supreme Court's generosity in construing the grants made by the Constitution and congressional legislation.

Initially, in this ten-part text, the author constructs a minimum and maximum model of federal jurisdiction. He suggests that an intelligent choice "between two extremes" must await a survey of "the present and probable future conditions of the federal courts with respect to workload and judge-power." Promptly predicting the results of his survey, the author says: "the general federal courts cannot do all they are now doing and will have to do under inevitable congressional legislation . . . ."

He then discloses his main thesis:

> . . . that the general federal courts can best serve the country if their jurisdiction is limited to tasks which are appropriate to courts, which are best handled by courts of

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* Judge, United States District Court for the Northern District of Ohio.

[1] *See* Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483 (1928).

> general rather than specialized jurisdiction, and where the knowledge, tenure and other qualities of federal judges can make a distinctive contribution.

The "explosion of federal court litigation" has primed and timed Judge Friendly's public formulation of his federal jurisdiction proposals. He graphs the startling increase in federal court filings. Using the time frame of 1960-1972, he notes that 1960 saw 87,421 cases filed in the district courts and 3,899 cases filed in the courts of appeals. While filings in district courts grew to 143,216 in 1972, cases filed in courts of appeals had jumped to 14,535. He states simply, "the courts of appeals are already in a state of crisis."

Judge Friendly asks, "Why, with a 64% increase in district court filings between 1960 and 1972, was there an increase of 273% in the workload of the courts of appeals?"[2] He notes:

> Not surprisingly, criminal appeals more than quadrupled; with the Government providing a free lawyer and a free transcript for an indigent defendant, more liberal bail procedures, and, except in most unusual cases, an assurance against a heavier sentence on retrial, it is hard to see why almost every convicted defendant should not appeal.

Then he points out that there was also "a trebling of what are characterized as 'private civil appeals,' although these include petitions by state and federal prisoners which are not 'civil' in the usual sense."

Judge Friendly observes that "one can readily discern certain areas where judicially affected doctrinal development has had substantial consequences upon the business of the federal courts." The author identifies a number of these areas, led by the "Supreme Court's revitalization of the Fourteenth Amendment guarantee of 'equal protection of the laws'."[3] He further speaks of "many pieces of new legislation placing additional responsibilities on the courts

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[2] One answer to Judge Friendly's question is supplied in an article written by Jerry Goldman, research associate at the Federal Judicial Center [Goldman, *Federal District Courts and the Appellate Crisis,* 57 JUDICATURE 211 (December, 1973)]. Mr. Goldman undertakes to explain the rate of increase from 1960 to 1970, which saw district court filings increase 50% while "appellate filings rose by a staggering 200 per cent." He finds it in the "changing pattern of civil decision-making in the district courts." Later totals revised in November, 1973 by Mr. Goldman reveal that contested judgments in civil cases (other than prisoner petitions) grew from 7,215 in 1960 to 13,908 in 1970. The breakdown of these contested judgments is enlightening. United States plaintiff cases increased from 1,055 to 4,142; United States defendant cases from 1,446 to 2,455; federal question cases from 1,387 to 3,209; and diversity jurisdiction cases from 3,327 to 4,102. Mr. Goldman concludes: "It is upon this expanding pool of contests in the district courts that the tide of appellate litigation rises."

[3] Not surprisingly he cites *Brown v. Board of Education,* 347 U.S. 483 (1954).

of appeals in reviewing agency action."[4] He says that "the old idea that administrative appeals concern mainly the independent agencies — the NLRB, FCC, FTC, CAB, FPC, SEC, FMC, and AEC — has gone by the board, although we are not yet fully aware of it." Finally, he raises the spectre of appellate review of sentences. He hopes Congress will realize that this "would administer the *coup de grace* to the courts of appeals as we know them."

Judge Friendly deals with the obvious question of whether "the explosion in federal litigation" can be quelled with more judges. He doubts the effectiveness of increasing the number of district judges but leaves the question unresolved. He has "no such doubt with respect to the courts of appeals." He says: "the essential difference is that the latter are collegial." In tracing the history of courts of appeals[5] and the use of the three-judge panel system he notes that as the number of judges on a court of appeals has increased, "the possibility of one panel's proceeding in ignorance of what another was doing," has become greater. He stresses the "desirability of judges of a collegial court really knowing each other." Collegiality "promotes understanding, prevents unnecessary disagreements, and avoids the introduction of personal animosity into those differences of opinion that properly occur."

His final reason for concluding that there must be a limit on the volume of cases decided by the courts of appeals and, as a prerequisite, on the number of filings in the district courts, is "the effect of an increase on the volume of petitions for certiorari to the Supreme Court." He discusses the proposed creation of a National Court of Appeals to pass on petitions for certiorari, grown to 3,643 for the 1971 term, and other proposals of the Study Group on the Caseload of the Supreme Court. He leaves this thought:

> The greatest contribution made by the *Report* is in thus revealing the painful choices that will confront the country, at the Supreme Court level, if decisions by the courts of appeals and petitions to review them were to double, as they will unless fundamental corrective action is taken to prevent this.

Returning in Part III to his minimum model of federal jurisdiction, Judge Friendly commences with the "central core of cases over which such courts must have power." Most essential is the enforcement of federal criminal law in federal courts. But he immediately plunges into the question of whether "federal criminal

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[4] The author itemizes fifteen such laws in a footnote.

[5] Courts of appeals, consisting of three judges, were created in 1891. As more judges have been added to each court (now fifteen in the Fifth Circuit), the three-judge panel system has been instituted.

prosecutions have not greatly outreached any true federal interest." With thinly-veiled incredulity, Judge Friendly says, "one might have thought the limit was reached in the so-called Travel Act of 1961 [18 U.S.C. § 1952], but that was not to be so." He notes:

> Congress has since enacted statutes which make certain activities criminal on the basis of its determination that they *affect* interstate commerce, even though the acts in the particular case were entirely local, and the Supreme Court has sustained this.

His first illustration is a traditional federal crime that requires that a state line be crossed. But apparently Judge Friendly could not resist asking "Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, N.Y." The answer at least in the Northern District of Ohio is that the Federal Government could not care less. This reviewer has tried one Mann Act case since he became a federal judge in 1966, and that involved a charge of crossing state lines for public, not private, assignation.

Judge Friendly's next interrogatory better illustrates criminal activities made federal by Congress because they *affect* interstate commerce. He asks, "Why should the federal government be concerned with a $100 robbery from a federally insured savings bank although it is not if someone burned down Macy's?" Having tried bank robberies as a state judge, and now as a federal district judge, this writer can attest that making a federal crime of a robbery of a federally-insured savings and loan association is justified. The national banking system, including federally-insured banks and savings and loan institutions, has been better protected by prosecutions of bank robberies under the National Bank Robbery Act, with its uniform range of penalties, than by prosecutions under differing state criminal laws.

Though meritorious, his reference to "Discretionary Restraint in Exercise of Concurrent Jurisdiction,"[6] his hopes that its recommendations will be enacted, and that "The Attorney General and the United States Attorneys will exercise a real sense of retraint" in prosecuting crimes within concurrent federal-state jurisdiction, is likely to be a wasted exercise of rhetoric.

In his study of the civil side of the "Minimum Model Today" he drives home the point "that determinations under regulatory statutes normally should be lodged in the first instance in the administrative process."

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[6] Quoted in full from the Final Report of the National Commission on Reform of the Federal Criminal Laws (January, 1971).

In reviews of administrative determinations as in cases of "direct enforcement by the Government," he notes that "the federal courts have become the arbiters of social policy in those frequent instances where Congress has not spelled out its intentions with sufficient precision and detail." Though Judge Friendly thinks "we have gone too far down this road," he concedes that he will not arrest the trend.

Federal judges have enlarged judicial review, often applying due process standards to preserve basic constitutional protections. As Judge Friendly says, the effect is to make federal judges arbiters of social policy. Enlarged judical review also increases federal court business. Both consequences should counsel a federal judge in these situations to exercise with discretion and caution his authority to interpret and apply the Constitution. Congress can help, too, by spelling out whether there is a right of judicial review and, if there is, what its scope is. For example, Congress has never expressly established the nature and extent of any judicial review that a federal employee may have from a determination of the United States Civil Service Commission that upholds the employee's discharge or suspension.

Part IV, "Civil Rights Actions, Abstention, Comity and Exhaustion," relates to jurisdictional matters constantly confronting federal district judges. All federal judges will agree with Judge Friendly that "the outstanding category of federal question jurisdiction consists of private actions charging violations of federal civil rights." Thus, this reviewer's March, 1974 docket of 225 civil cases included 42 civil rights cases and 43 personal injury cases. Two years earlier it included 74 personal injury cases and 26 civil rights cases. The sweep of cases brought under 42 U.S.C. § 1983, for example, continues to expand. Recently, this reviewer spent the morning conducting a settlement hearing, fortunately successful, in a case in which a policewoman claimed constitutional deprivation under section 1983 because of an order banning policewomen from wearing pantsuits. In the afternoon he conducted a pretrial in a case in which a land developer, denied a building permit, is seeking damages under section 1983, claiming that under color of state law, city officials and city council members have deprived him of property rights without due process of law. Civil rights cases require more legal research than personal injury cases, they occupy more courtroom time, and they are more difficult to settle and compromise.

Title VII of the Civil Rights Act of 1964 (the fair employment provisions) and Title VIII of the Civil Rights Act of 1968 (the fair housing provisions) require resort to agencies (EEOC or Secretary of HUD) for conciliation. Only thereafter may private actions to enforce the Acts be filed in federal district court. Additionally, these Acts provide for deferral to any available state agency, and at least

under Title VII this is a prerequisite to private action. Judge Friendly rightly supports Congress' provision in these laws that administrative agencies in the first instance should investigate and attempt conciliation. As he says, there is "need for immediate employment, not litigation."

This reviewer has encountered defenses to Title VII cases which arose because, it is claimed, the EEOC did not undertake adequate conciliation efforts. Congress intended that EEOC in fair employment cases and HUD in fair housing cases should engage in genuine conciliation efforts. It is hoped, as the author forecasts, that the independent power to enforce sanctions given EEOC by Congress in the 1972 amendments to Title VII will equip EEOC with an "effective bargaining tool in conciliation negotiations."

As his mildest deprecation of *Jones v. Alfred H. Mayer Co.*,[7] Judge Friendly comments:

> There was some early concern that in the case of Title VII, the fair housing statute, the congressional train was going to be derailed even before it got underway by the Supreme Court's decision in Jones v. Alfred H. Mayer Co., giving unsuspected meaning to long quiescent section 1982, the roots of which are in section 1 of the Civil Rights Act of 1866.

He states that the effect of *Jones* has been less than expected, and relying on "only twenty-eight decisions . . . annotated in the U. S. Code," he asks, "one must wonder where the suitors are." Perhaps these cases are slow in reaching the upper courts, but these suits *are* being filed in federal district courts. Also these housing cases, unlike other types of civil rights cases, are frequently settled.

It is noted that the Supreme Court has yet to determine whether race discrimination employment cases can be brought under 42 U.S.C. § 1981 as an alternative to a Title VII proceeding. Even if the Supreme Court should uphold courts of appeals rulings that Title VII does not impliedly repeal section 1981, Judge Friendly asserts:

> . . . the striking fact is how few attempts have been made to circumvent the deferral and administrative conciliation provisions of Title VII by way of section 1981 in order to proceed directly in the federal courts.

Basing his conclusion on his discovery of only four U. S. Code annotations is misplaced. There have been separate 1981 suits. But a more frequent practice is for a civil rights race discrimination suitor to join a 1981 claim with a Title VII claim. following receipt of his

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[7] 392 U.S. 409 (1968).

right-to-sue-letter. Moreover, the absence of a built-in statute of limitations in sections 1981 and 1982 has required federal district courts to apply the most analogous state statute to claims under these sections. Thus, in Ohio the pertinent periods of limitation appear to be six years, contrasted with shorter periods specified in Title VII and Title VIII cases. Claims under sections 1981 and 1982 may still persist where Title VII and Title VIII claims are time barred.

Concerning 42 U.S.C. § 1983, largely responsible for "the recent enormous growth of private civil rights litigation," Judge Friendly is admittedly ambivalent. He catalogs the proliferating list of situations in which section 1983 suits for injunctive relief and damages have been brought based on claims of deprivation of constitutional rights "under color . . . of any statute, ordinance, regulation, custom, or usage, of any state." He regrets *Lynch v. Household Finance Corp.*,[8] modifying the limitation of *Hague v. CIO*,[9] wherein the Supreme Court had concluded that "the civil rights statute would apply only 'whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights . . .' ." Because this limitation on "the breadth of Civil Rights Act jurisdiction" has been dismantled, Judge Friendly suggests that federal district courts should abstain in appropriate cases as one means for lessening federal-state tensions.

Another decision of the Supreme Court that the author deems to be "devastating to proper federal-state relations" is *Mitchum v. Foster*,[10] which held that the Civil Rights Act (section 1983) constitutes an exception to the anti-injunction statute (28 U.S.C. § 2283), a comity section. Judge Friendly declares: "The uncertainties, and worse, which the Court has managed to create by this series of decisions cry out for new legislation." He follows this criticism with recommended legislation that represents a meld of an ALI proposal[11] and a proposal of Professor David Currie.[12] Here again he details a constructive suggestion that is worth serious consideration.

A final point in this well-thought-out part considers whether there should be exhaustion of state remedies (judicial or administrative). As he notes, in section 1983 cases the Supreme Court has not required exhaustion of state judicial remedies and has cast some doubt on old precedents that required exhaustion of state administrative remedies. Judge Friendly recommends that:

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[8] 405 U.S. 538 (1972).

[9] 307 U.S. 496 (1939).

[10] 407 U.S. 225 (1972).

[11] ALI STUDY, § 1372.

[12] Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U.CHI. L. REV. 268, 329 (1969).

> Congress should provide that a federal court faced with a challenge to the constitutionality of state action, whether under the Civil Rights Act or otherwise, *may* abstain pending exhaustion of state administrative remedies and *shall* do so whenever these remedies are plain, adequate and effective.

Repeating only his ultimate conclusions, without his reasons, he "would consider it a serious mistake to impose a general requirement of 'exhaustion' of state judicial remedies in civil rights cases." But he believes that state prisoner civil rights actions under section 1983 (chiefly relating to conditions of confinement and good-time credits) warrant a different rule. Likening this breed of section 1983 cases to prisoner habeas corpus petitions under 28 U.S.C. § 2254, those prisoner 1983 cases that seek declaratory or injunctive relief should be subject to 2254's requirement of prior exhaustion of state judicial remedies. Similarly, prisoner damage actions under section 1983 should be encompassed within the same legislative requirement "if the state provides an adequate remedy, as most do not."

Part V first analyzes other federal question jurisdiction. It is concluded that the "present patchwork structure is indefensible." Pursuant to 28 U.S.C. § 1331, a minimum monetary jurisdiction of $10,000 is required in general federal question cases. In contrast under special statutes, most notable of which are the Civil Rights Statutes whose jurisdiction rests on 28 U.S.C. § 1343, no minimum monetary jurisdiction exists. Judge Friendly favors abolishing "the requirement of jurisdictional amount for initial invocation of jurisdiction in general federal question cases." It is evident he makes this recommendation in the interest of consistency. He does so though he recognizes the historical fact that from the inception of general federal question jurisdiction under the Judiciary Act of 1875 there has been a minimum monetary requirement.

One type of federal question litigation that already affects, and will have increasing impact on federal court filings involves private enforcement actions implied under federal regulatory legislation. He says,

> One need only consider the explosion of litigation under the SEC's Rule 10b-5, the proxy rules, and the new section dealing with tender offers added in 1968 to the Securities Exchange Act to realize the impact that any such regulatory law can have once a right of private action is implied.

To minimize this impact he wonders if Congress should not clearly specify in existing and future legislation those circumstances under which private persons may bring enforcement proceedings.

Part V discusses standing, termed by Mr. Justice Frankfurter as a "complicated specialty of federal jurisdiction." Here, Judge Friendly finds no basis for believing that Congress could improve "on what the Court has done." Nevertheless, he says "it must be realized what a vast expansion of federal jurisdiction the Court has wrought."

The impact of class action litigation on federal courts "needs urgent attention," Judge Friendly asserts. Discussion of the class action rule, Rule 23 of the Federal Rules of Civil Procedure, centers on *Eisen v. Carlisle & Jacquelin*,[13] an antitrust class action for damages involving the sale of odd lots of stock. Eisen's maximum actual damages will not be more than $15, but the class which he seeks to represent is estimated at six million. The Supreme Court, which has granted certiorari, will be considering, at its direction, whether the Second Circuit had jurisdiction to hear the interlocutory appeal in *Eisen* I. Should it reach the merits the Court will be ruling on the necessity of the plaintiff's complying, at his expense, with Rule 23(c)(2) that says that all identifiable members of the class must be individually notified in 23(b)(3) class actions for damages.

Having previously developed "how much and what difficult litigation must remain in the federal courts," beginning with Part VI Judge Friendly indicates how he would relieve these courts "of unnecessary burdens if they are to effectively discharge the tasks that are properly theirs."

Repealing the right of railroad and maritime workers to sue their employers for injuries in the course of their employment, now existing under the Federal Employers' Liability Act, the Jones Act, and the General Maritime Law of unseaworthiness, Judge Friendly would establish a workmen's compensation system for these employees. He asks, ". . . why in contrast to almost all other workers in the United States, this particular group should still be put to the burden of maintaining a court action or have the benefit of an unlimited recovery." He does not mention whether he contemplates provision for right of appeal to the federal district courts from denials of claims by workmen's compensation boards. Congress would likely provide for such appeals, though it might limit the right of appeal by requiring the courts to accept the board's findings of fact if supported by substantial evidence, as with social security appeals. Though the number of such appeals might be fewer than the present

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[13] 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (*Eisen* I); 391 F.2d 555 (2d Cir. 1968) (*Eisen* II)); 479 F.2d 1005 (2d Cir.) (*Eisen* III). The Supreme Court has now ruled that the Plaintiff must comply with Rule 23(c)(2), 42 U.S.L.W. 4804 (U.S. May 28, 1974). The decision was reached subsequent to the writing of this review.

filings of railroad and maritime worker cases, substitution of workmen's compensation would not completely accomplish the author's goal of eliminating cases that "do not belong in the courts at all."

In the category of litigation that he "would banish," the author also places actions arising out of motor vehicle accidents. He recommends creation of federal or state no-fault insurance to compensate victims of these accidents. But if not adopted, he favors the removal of automobile accident litigation from the federal courts. This could be accomplished, the author says, by "the abolition of diversity jurisdiction or, doubtless more speedily, by simply removing automobile accident litigation from the federal courts."

Part VII is devoted entirely to diversity jurisdiction (28 U.S.C. § 1332) that has been part of the jurisdiction of the federal courts since the first Judiciary Act (1789). In 1972, diversity jurisdiction accounted for 24,109 of the 96,173 civil cases filed in the federal district courts, and 18% of the civil appeals to the courts of appeals. Judge Friendly discusses and analyzes in detail the arguments for retaining or expanding diversity jurisdiction.

Of interest to this writer is the argument of Professor Moore and Judge Friendly's reaction contained in this quotation:

> Whatever force there may ever have been in the claim, recently repeated by Professor Moore, that diversity jurisdiction was needed to prevent inferior federal judges from becoming narrow technicians, mired in the intricacies of admiralty, bankruptcy, copyright and patent law, with consequently diminished attractiveness in joining the federal bench, and in my view there never was much, it has been wholly drained by the proliferation of new federal statutes and the birth of the federal common law.

Expressing his "druthers" as one of the "inferior federal judges," this writer finds a diversity jurisdiction case, in which he sits as a state judge, a pleasant change of pace from a section 1983 case, a 10b-5 security case, an extended antitrust action, or a complicated chemical or electronic patent action. Yet it is evident that removal from federal courts of diversity jurisdiction, essentially state court cases, offers the best opportunity for substantially reducing the federal case load. State court judges, struggling to cut their own backlogs, will not take kindly to Judge Friendly's "de minimis" contention that state court civil litigation volume is so great that the increment from the transferred federal diversity jurisdiction would be insubstantial. Should it be decided by Congress to dump diversity cases on the state courts, this should only be done in conjunction with federal revenue sharing that would provide the extra

money required to support a proportionate increase in state judges, supporting personnel, and state court facilities needed to cope with any resulting increase in state litigation.

In Part VIII Judge Friendly urges the creation of a patent court to take over district court jurisdiction of patent litigation.

> . . . [A] Patent Court, following the model of the Court of Claims, would have a number of commissioners to conduct the trials; they could represent a broad spectrum of scientific knowledge and would be assigned in accordance with their individual capabilities. The case would thus come before the Patent Court with detailed findings of fact by a disinterested "judge" expert in the subject-matter.

Hearing the sigh of relief that federal judges heave when a complex patent case headed for a prolonged trial gets settled, one might presuppose Judge Friendly's suggestion falls on a receptive ear. Partly because in complicated patent cases beyond his ordinary ken a federal district judge may, if necessary, engage an independent expert to assist him in reaching his decision, and partly because patent cases are often combined with claims of antitrust, patent misuse, and pendent unfair competition claims, matters within a district judge's responsibility, I believe that the district judge "generalist" rather than the patent court "specialist" should retain jurisdiction of patent cases.

The remaining proposals of Part VIII make good sense. To reduce the burden of courts of appeals and to achieve uniformity of rulings, Judge Friendly recommends that civil appeals involving disputes over United States taxes should be routed from the trial tribunal to "a single Court of Tax Appeals," rather than to eleven circuit courts of appeals, as now. Since a taxpayer may now challenge an adverse IRS decision in either the tax court, a district court, or in the court of claims, there is much logic to Judge Friendly's further proposal to require "him to proceed in the Tax Court, once this was given Article III status and the powers possessed by district courts under the Federal Rules of Civil Procedure."

Consideration of other possible special courts appear in Part IX; namely, a court of administrative appeals and an antitrust court. Concerning the first his conclusion is:

> . . . the proposal for a general Court of Administrative Appeals should neither be adopted immediately nor dismissed out of hand, but rather should be kept under consideration both by the Administrative Conference and by the Judicial Conference. . . .

Similarly, he does "not see a sufficient case for an Antitrust Court at the moment."

Every line and every footnote of this easily-read text merits close study and thoughful contemplation. It is attracting a discriminating circle of readers — the Supreme Court included.[14] Reading the book just as a literary piece is not enough, however, if the crisis Judge Friendly so deftly depicts is to be cured.

Fortune magazine in December, 1961 examined the topic "Crisis in the Courts," concentrating on the delay in the trial of civil cases that it concluded was "so bad that justice could founder under tomorrow's loads unless reformers get their way." The author, Louis Banks, recommended more extensive use of pretrial procedures and better court management. As one federal judge said, "If a judge cannot control his court the lawyers will." In Ohio, in both federal and state courts, separate dockets (with cases assigned to judges by lottery according to categories) have gone a long way toward helping trial judges control their courts and cut delay in the trial of civil and criminal cases. Pretrial procedures continue to help. But nothing was said in the *Fortune* article about the condition of the dockets in courts of appeals. Their dockets had not yet reached the crisis stage that Judge Friendly now describes.

It behooves all of us — and I hope Congress is listening — to study Judge Friendly's recommendations and to take steps to alleviate the crisis that since 1961 has further engulfed the United States district courts and, more recently, affected the courts of appeals. The enjoyment and proficiency of judging are diminished when in order to stay current with his docket a judge must work days, nights, and weekends.

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[14] *See* American Pipe & Construction Co. v. Utah, 42 U.S.L.W. 4155 (U.S. January 16, 1974), which cites "H. Friendly, *Federal Jurisdiction: A General View* 118-120 (1973)" as one of three examples of "criticisms of Rule 23 and its impact on the federal courts . . . both numerous and trenchant." The same decision cites in separate footnotes two quotations of a Judge Friendly concurring opinion — still further recognition of Henry J. Friendly's legal and literary excellence.