The Journal of Appellate Practice and Process

Volume 9 | Issue 1 Article 6

2007

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A MECHANISM FOR "STATUTORY HOUSEKEEPING": APPELLATE COURTS WORKING WITH CONGRESS

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This year the bipartisan leadership of the House and Senate Judiciary Committees called for the United States Courts of Appeals' widespread participation in a decades-old project to let Congress know about possible technical flaws in statutes.[1] Its chief purpose is not to promote remedial legislation but rather to provide legislators and their bill-drafting staffs information about how appellate courts interpret the legislative product. The project is noteworthy as an approach to the long-standing search for practical ways of alerting Congress to drafting problems in judicial opinions and as an example of legislative-judicial cooperation and communication.

I. SOME BACKGROUND

Over forty years ago, Judge Henry J. Friendly of the Second Circuit, commenting on the importance of statutory law, bemoaned "the problems posed by defective draftsmanship," especially in uncontroversial legislation.[2] He described "the occasional statute in which the legislature has succeeded in

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1. Ltr. from U.S. Sen. Patrick Leahy & U.S. Sen. Arlen Specter to James Fransen, Legis. Counsel, U.S. Sen. (Feb. 14, 2007) (on file with authors) [hereinafter Leahy/Specter Letter]; and Ltr. from U.S. Rep. John Conyers, Jr., & U.S. Rep. Lamar Smith to M. Pope Barrow, Legis. Counsel, U.S.H.R. (May 23, 2007) (on file with authors) [hereinafter Conyers/Smith Letter], both enclosed with Memo. from James C. Duff, Dir., Admin. Off. of the U.S. Cts., D. Brock Hornby, J., U.S. D. Ct. for the D. of Me., & Robert A. Katzmann, J., U.S. Ct. of App. for the 2d Cir., to Judges, U.S. Cts. of App., and Clerks of Court, U.S. Cts. of App., *Project to Provide Congress with Appellate Opinions Bearing on Technical Matters of Statutory Construction* (July 19, 2007) (on file with authors).

2. Henry Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Col. L. Rev. 787, 794 (1963).

literally saying something it probably did not mean," and noted that "even the best draftsman is likely to have experienced the occasional shock of finding that what he wrote was not at all what he meant."[3] He also gave examples of ambiguous statutory language[4] and attributed these problems to the legislative time crunch, which caused "neglect of the undramatic type of legislative activity" described in his article.[5] Thirty-four years later, another circuit judge, James Buckley of the D.C. Circuit, who had served in the Senate in the 1970s, recalled that, in Congress, "[w]ith time often the enemy, mistakes—problems of grammar, syntax, and punctuation—are made in the drafting of statutes and affect the meaning of legislation."[6]

Judge Friendly's remedy for this problem was a legislative commission along the lines of the "ministry of justice" that Roscoe Pound proposed in 1917 and Benjamin Cardozo proposed four years later (with antecedents running back to early nineteenth century England): a small disinterested body of public and private citizens with legislative expertise to review statutes and call attention to their defects.[7] The 1970s, 1980s, and 1990s saw other proposals for informing Congress about possible defects in statutes, including a "'second look at laws' committee" in Congress; a committee in the judiciary to sift through judicial opinions for references to defects;[8] and two judicial branch proposals that "Congress . . . consider a 'checklist' for legislative staff to use in reviewing proposed legislation for technical problems," such as the need for a statute of limitations, definition of key terms, severability, and whether retroactive applicability is intended.[9]

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3. *Id.* at 792 (footnote omitted).

4. *Id.* at 793-96.

5. *Id.* at 802.

6. James L. Buckley, *The Perspective of a Judge and Former Legislator*, 85 Geo. L. J. 2223, 2224 (1997).

7. Friendly, *supra* note 2, at 802, 805-07.

8. *See* Robert A. Katzmann, *Courts and Congress* 70 (Brookings Instn. Press/Governance Inst. 1997).

9. Fed. Cts. Study Comm., *Report of the Federal Courts Study Committee* 91 (Jud. Conf. of the U.S. 1990). The Judicial Conference endorsed this proposal in 1995. Comm. on Long Range Planning, *Long Range Plan for the Federal Courts* 125-26 (Jud. Conf. of the U.S. 1995) (setting out Implementation Strategy 91b, which provides that "Congress should be encouraged to require the legislative staff of all substantive congressional

Another way of treating these problems was a practical experiment, designed almost twenty years ago by the Governance Institute,[10] a small Washington, D.C., think tank. Through this project for "statutory housekeeping,"[11] in Justice Ruth Bader Ginsburg's apt phrase, courts of appeals identify opinions that point out possible technical problems in statutes and send those opinions to Congress for its information and whatever action it wishes to take.

II. HOW THE PROJECT DEVELOPED

In 1988, the D.C. Circuit—in particular Judge Buckley, Judge Ruth Ginsburg, Chief Judge Patricia Wald, and Judge Abner Mikva—endorsed an inquiry about the fate in Congress of judicial opinions that flag problems in grammar, apparent "glitches," ambiguous terminology, and omission of key details, such as effective dates.[12] They invited Judge Frank Coffin and author Katzmann to analyze what happened in Congress after that court issued statutory decisions with such opinions. Judge Coffin, himself a former legislator, was in 1988 chairman of the United States Judicial Conference's committee that seeks to promote effective judicial-legislative relations.[13] Katzmann was

committees and the Offices of Legislative Counsel in the Senate and the House of Representatives, when reviewing proposed legislation for technical problems, to satisfy to the greatest extent possible a 'legislative checklist,'" and also setting out a model checklist) (also available at http://www.uscourts.gov/lrp/index.html) [hereinafter *Long Range Plan*].

10. Created in 1986, the Governance Institute is a nonprofit organization concerned with exploring, explaining, and easing problems associated with both the separation and the division of powers in the American federal system. The Institute's focus is on institutional process—a nexus linking law, institutions, and policy. Products of the Governance Institute in its program on judicial-legislative relations include Robert A. Katzmann, *Courts and Congress* (Brookings Instn. Press/Governance Inst. 1997); *Judges and Legislators: Towards Institutional Comity* (Robert A. Katzmann ed., Brookings Instn. Press 1988); Frank M. Coffin, *Communication among the Three Branches: Can the Bar Serve as Catalyst?* 75 Judicature 125 (Oct.-Nov. 1991); Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 Geo. L. J. 1155 (2007).

11. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417, 1428 (1987).

12. Proceedings of the Forty-Ninth Jud. Conf. of the D.C. Cir., 124 F.R.D. 241, 312-36 (1988).

13. As chairman of the conference's Committee on the Judicial Branch, Judge Coffin moved his committee to include, in addition to traditional concerns, a long-range program devoted to the increased understanding of and respect for the judiciary. The core of this

then a Georgetown government and law professor, a Brookings Institution fellow, and president of the Governance Institute.[14] After identifying a small body of relevant opinions, Coffin and Katzmann explored legislative awareness of these opinions. They learned that committee staff were not much plugged into judicial opinions concerning technical aspects of the statutes under the committee's jurisdiction, even if they knew about decisions on broad, policy-oriented issues of statutory interpretation or decisions that a losing party with clout had asked Congress to undo.[15]

Working with legislators and their staffs, Coffin and Katzmann, with the counsel of Governance Institute Distinguished Fellow and former House member Robert W. Kastenmeier, developed a pilot project in which the D.C. Circuit's court of appeals would transmit its relevant statutory opinions to the House of Representatives.[16] Chief Justice Rehnquist endorsed the pilot project in 1993.[17] Two years later the Judicial Conference recommended that "[a]ll courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and inform Congress of same."[18]

By the early part of this decade, more than half the courts of appeals had transmitted opinions to Congress. Participation declined, however, because the project had not been fully institutionalized within the judiciary. For one thing, there was no method in place for telling new judges, chief judges, and clerks of court about it. In May 2006, the legislative counsel in both houses of Congress asked the Governance Institute to revitalize the project. (The Offices of Legislative Counsel in the House and the Senate are nonpartisan units that provide confidential drafting services requested by individual legislators and

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program was an examination of past, present, and future relations between Congress and the judiciary.

14. Katzmann assisted the Judicial Branch Committee pro bono.

15. Katzmann, *supra* n. 8, at 73-74.

16. *Id.* at 76-77 (noting meeting in Congress and with D.C. Circuit Judges Wald, Buckley, Ruth Ginsburg, and Mikva).

17. *Chief Justice Issues 1992 Year-End Report*, 25 Third Branch 1, 4 (Jan. 1993).

18. *Long Range Plan*, *supra* n. 9, at 127 (setting out Implementation Strategy 91e, which is quoted in the text above).

legislative committees.[19]) In his capacity as Institute president, author Wheeler worked to do so with the Judiciary Committees, the legislative counsel, and the Judicial Conference's Judicial Branch Committee. The result was the July 2007 memorandum from Administrative Office director James Duff and Judges Hornby and Katzmann, which was sent to all circuit judges along with letters from the bipartisan leadership of both Judiciary Committees, asking all courts of appeals to participate.[20] The Memorandum also announced that the Administrative Office's General Counsel would help institutionalize the project by tracking the number of opinions sent and consulting periodically with the legislative counsel and the appellate courts as to whether the project needed adjustment.[21] The General Counsel's office also agreed to look for opportunities to remind judges and clerks of court about this legislative interest. A story in *The Third Branch*, the federal courts' newsletter, complemented the memorandum.[22]

Without legislative support, judicial participation would be a waste of time. Both legislative counsel had participated enthusiastically in the pilot project.[23] Legislators themselves have been consistently supportive. In 1992, the bipartisan House leadership "welcome[d] this . . . experimental initiative,"[24] and

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19. *See* Office of the Legislative Counsel, U.S. House of Representatives, http://legcoun.house.gov; Office of the Legislative Counsel, United States Senate, http://slc.senate.gov/index.htm.

20. Memo. from James C. Duff, Dir., Admin. Off. of the U.S. Cts., D. Brock Hornby, J., U.S. D. Ct. for the D. of Me., & Robert A. Katzmann, J., U.S. Ct. of App. for the 2d Cir., to Judges, U.S. Cts. of App., and Clerks of Court, U.S. Cts. of App., *Project to Provide Congress with Appellate Opinions Bearing on Technical Matters of Statutory Construction* (July 19, 2007) (on file with authors) [hereinafter Duff Memorandum].

21. *Id.*

22. *Feedback Requested on Technical Aspects of Law*, 39 Third Branch 7 (Aug. 2007) (also available at http://www.uscourts.gov/ttb/2007-08/feedback/index.html) [hereinafter *Feedback Requested*].

23. M. Douglass Bellis, *A View from the House of Representatives*, 85 Geo. L.J. 2209 (1997); Frank Burk, *Statutory Housekeeping: A Senate Perspective*, 85 Geo. L.J. 2217 (1997).

24. Ltr. from Rep. Thomas Foley, Speaker, U.S.H.R., Sen. Richard A. Gephardt, Majority Leader, U.S. Sen., & Sen. Robert H. Michel, Minority Leader, U.S. Sen., to Legis. Counsel David Meade, in Interbranch Relations, 1993: *Hearings Before the Joint Comm. on the Organization of Cong.*, 103d Cong. 309 (1993) [hereinafter *Hearings on Interbranch Relations*].

the bipartisan Senate leadership said that the project could be "a thoughtful and productive step in improving communications between the judiciary and the Congress to the benefit of both branches."[25] The Joint Committee on the Organization of Congress endorsed the project in 1993.[26] In 2001, with the project out of the pilot stage, the chair and ranking member of the Senate Judiciary Committee said that the transmitted opinions have "supplied pertinent information to Congress that it might not otherwise receive in a direct and timely manner,"[27] and, as noted, in 2007 the bipartisan leadership of both committees again encouraged all courts to participate.[28]

III. HOW THE PROJECT WORKS

Depending on the court of appeals, either the clerk of court or staff attorney identifies appropriate opinions or each three-judge panel does so. There is no strict definition of what kind of opinion is appropriate for transmission. The Duff Memorandum referred to "opinions that point out possible technical problems in statutes" such as "punctuation errors that may create ambiguities, lack of effective dates, and other gaps."[29] The emphasis, in any event, is on technical rather than substantive problems. Thus, an opinion declaring a statute unconstitutional is not appropriate for this project unless it also identifies a possible drafting problem.

A typology developed during the pilot project is instructive. It includes four types of problems:[30]

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25. Ltr. from Sen. George J. Mitchell, Majority Leader, U.S. Sen., Robert Dole, Minority Leader, U.S. Sen., & Sen. Robert C. Byrd, President Pro Tempore, U.S. Sen., to Frank Burk, Legis. Counsel, U.S. Sen., in *Hearings on Interbranch Relations*, *supra* n. 24, at 310.

26. H.R. Rpt. 103-413(I) at 24 (Dec. 17, 1993) (encouraging "the appropriate committees of jurisdiction in the House and Senate to monitor regularly and systematically Federal court decisions and to report periodically to their respective Chambers on the significant issues that merit review in this relationship").

27. Ltr. from U.S. Sen. Orrin G. Hatch & U.S. Sen. Patrick Leahy to James Fransen, Legis. Counsel, U.S. Sen. (Mar. 21, 2001) (on file with authors).

28. *See* Leahy/Specter Letter & Conyers/Smith Letter, *supra* n. 1.

29. Duff Memorandum, *supra* n. 1.

30. The examples come from Katzmann, *supra* n. 8, at 70-73.

- First, statutes that require courts to fill in a gap—to determine whether the statute contemplated a private right of action, for example, or whether Congress intended the statute to be retroactive.

- Second, statutes with ambiguous language that courts must resolve.

- Third, statutes with grammatical problems that can affect meaning. Consider the phrase "the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary." Does "to such extent" modify "shall promulgate" or "quantity"?

- Fourth, statutes with a perceived problem about which a judicial opinion suggests the possibility of legislative action. In one case surveyed for the pilot project, a concurring opinion tried to let Congress know that some safety and health acts say nothing about who should pay for retraining laid-off workers.

Once an opinion has been identified for transmission, the clerk of court sends it, in the nature of an executive communication, to the Speaker of the House and the President Pro Tempore of the Senate, with copies to the Judiciary Committees, the House and Senate Offices of Legislative Counsel, the General Counsel of the Administrative Office, and the Governance Institute. The Duff Memorandum included suggested text for the transmission letter: simply "Enclosed please find an opinion of the United States Courts of Appeals for XXX Circuit, which may be of interest to the Congress." The reason for this protocol—not commenting substantively on the opinion in the transmission letter—is the norm that judges speak on matters under litigation through their opinions. Transmitting an opinion to Congress—an opinion that legislative staffers could find through normal legal research if they had more time—is different from elaborating on the opinion

extrajudicially. Attention to such subtleties of interbranch relations helps explain the give-and-take necessary to bring the project into existence.

The project puts minimal burdens on the courts. For one thing, by establishing the transmission protocols, and securing testimonials of receptivity from the Congressional leadership, the project relieves the circuit judges from worrying that Congress will misinterpret as officiousness their good-faith efforts to call legislative attention to a possible statutory problem. In this sense, the project is of a piece with what Charles Geyh characterized as the "Judicial Conference['s] . . . long-standing policy of not speaking to Congress unless spoken to."[31]

Second, the project imposes few administrative duties on the courts. Either judges on the panel, or a staff attorney, or the clerk's office staff must identify opinions that are appropriate for transmission, but the panel judges are of course familiar with the opinion anyway, and in most courts, the staff attorney's office reads most published opinions in any event. And the clerk of court's transmission duties are essentially ministerial. The clerk of the D.C. Circuit's court of appeals reported that "[a]lthough the project's founders committed significant time and effort to ensure that it came to fruition, the efforts required of court staff to continue the project are minimal."[32]

The legislative counsel are the project's catalysts. They analyze each transmitted opinion to identify the technical problem or problems that motivated the court to transmit it and then identify the legislative committee or subcommittee most likely to have an interest in the opinion (or identify it as appropriate for consideration by the House Law Revision Counsel, which maintains the U.S. Code),[33] and send it to the relevant entity with a cover letter flagging the point(s) at issue. The counsel make clear that the transmission is purely informational—the recipient can do anything with the opinion,

31. Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* 240 (U. Mich. Press 2006).

32. Mark J. Langer, *Implementing the Project: A Court Administrator's Role* 85 Geo. L.J. 2219, 2221 (1997).

33. Bellis, *supra* n. 23, at 2210.

including ignoring it entirely—but the counsel offer the assistance of a staff member, consistent with their offices' mission.

Three other and somewhat related aspects of the project's operations bear mention. First, participation is entirely voluntary. The Judicial Conference and the Administrative Office have no authority to mandate courts' transmitting opinions in any event, and there is no hint in the Duff Memorandum of any obligation to do so. The appeal, rather, is to the virtues of legislative-judicial cooperation. Judge Hornby said that "[b]y responding to this legislative initiative, courts are partners in interbranch cooperation in ways that promote mutual understanding to the benefit of both branches."[34] Administrative Office Director Duff hit the same note: "Congress itself seeks the Judiciary's assistance in encouraging judges to share appellate opinions that bear upon its work."[35]

Second, and somewhat related, the project is not part of the judicial branch's legislative agenda. Congress need have no suspicion that the offices of federal judicial administration have screened the transmitted opinions in an effort to ensure that Congress sees only those that comport with Judicial Conference policy.

Third, the mechanism is quite simple, involving the creation of no new body or committee. It is merely a transmission belt that judicial branch and legislative personnel engage in the course of normal operations.

IV. MEASURING PROJECT SUCCESS

The strongest measure of the project's success is the legislative testimonials calling for all courts of appeals to participate. Legislators and their staffs, including the Offices of Legislative Counsel, have plenty on their plates. They would not ask for additional paper if they regarded it as superfluous. The transmitted opinions, in short, benefit the drafting process sufficiently to create calls for more transmissions.

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34. *Feedback Requested*, *supra* n. 22, at 12.

35. *Id.* at 9.

A second measure of the project's contribution is the uses that the legislative counsel make of the transmissions. Having seen how courts apply statutory language in specific contexts, each legislative counsel can be more attuned to drafting issues that result in litigation. Frank Burk, head of the Senate Office of Legislative Counsel in the 1990s, reported that the project "helped stimulate a comprehensive two-year review of the basic rules of legislative drafting" by his office, that the office "developed a drafting manual that compiles the drafting rules and conventions identified during the review," and that the office used transmitted opinions as teaching devices for beginning staff attorneys.[36] James Fransen, Burk's successor, has said that "it is useful for us if we can identify ways we can improve clarity and eliminate ambiguity."[37] House Legislative Counsel M. Pope Barrow concurred, observing that "[t]he opinions of judges would be especially useful if they can identify persistent patterns in drafting errors."[38] Deputy Legislative Counsel M. Douglass Bellis, who has overseen the project in the House for many years, has said that

> [t]he greater the communication between the judicial and legislative branches of government, the more the courts and Congress will grow to understand each other and the more the public can examine what its agents are doing on its behalf.[39]

Both Bellis and Fransen have told us that they circulate transmitted opinions to their staffs for their instructive value.[40]

At first blush, one might think that the most important measure of the project's success would be the number of remedial statutes enacted to fix problems raised in the opinions. From the outset, however, the project's creators cautioned that its main objective was not to produce legislative change, but rather to inform busy legislators and their staffs of possible

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36. Burk, *supra* n. 23, at 2217.

37. *Feedback Requested*, *supra* n. 22, at 9.

38. *Id.*

39. Bellis, *supra* n. 23, at 2215.

40. Conversations with M. Douglass Bellis, Dep. Legis. Counsel, U.S. House of Rep., & James Fransen, Dir., Sen. Ofc. of Legis. Counsel (June 5, 2006; Dec. 1, 2006; June 2007).

technical problems in statutes. As author Katzmann said in 1993, "[t]hese opinions are not being sent with the objective of getting Congress to do anything in particular but to give Congress information about how courts interpret its work."[41] Judges understand that sometimes ambiguities are the price of legislative compromise to secure enactment of the statute under review. And, as Bellis observed, Congress may do nothing because it determines that the relevant court "is making good decisions in hard cases,"[42] creating no reason for Congress to step in. The objective of the project "is not to find 'mistakes' that Congress made and should correct . . . [but] to open communication so that Congress can learn how the courts are reacting to and interpreting statutes."[43]

In fact, it would not be easy even to chronicle legislative changes made in response to transmitted opinions. Many of the problems highlighted, technical as they are, would probably be candidates for amendment in large omnibus bills rather than stand-alone bills. It would not be exceptional for the legislative counsel to transmit an opinion pointing out a grammatical error to the committee of jurisdiction, which might direct its staff to identify the legislative intent from the legislative history and insert a technical amendment in a large bill that might get enacted many months after the opinion was transmitted. This would leave the counsel unaware that a technical amendment lies somewhere in that inch-thick statute.

V. CONCLUSION

The focus of the project, in sum, is on improvements in the workings of our governmental institutions, through enhanced judicial-legislative communication.

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41. *See* Cris Carmody, *Congress and the Courts: Branches Try to Communicate*, 15 Natl. L.J. 3, 3 (July 19, 1993).

42. Bellis, *supra* n. 23, at 2213.

43. *Id.*