

ANALYSIS OF THE SECOND CIRCUIT

A. Number of Authorized Judges and Current Request for Additional Judges

The Second Circuit has 13 authorized judgeships, five of which were vacant at the time of the Subcommittee hearing on the Second Circuit. Since the hearing, the Senate filled three of those vacancies, and the circuit is now asking that the remaining two seats be filled. Chief Judge Ralph Winter testified that unless the five vacancies are filled, the Second Circuit's caseload and backlog would swell to the point where he would have to certify an emergency, where visiting judges would comprise a majority of their judicial panels. Since the time of the Subcommittee hearing in September 1997, the Second Circuit has declared several judicial emergencies.

Judge Winter also requested that two additional judgeships be created for the Second Circuit. After his Subcommittee testimony, Judge Winter polled the Second Circuit judges, who unanimously voted that the additional judgeships were essential to the expeditious conduct of the court's business. However, the judges unanimously voted that two additional judgeships be temporary, rather than permanent, positions. Judge Winter argued that these temporary judgeships would ensure that if the circuit's needs were substantially reduced in the future, a "reduction in court size might be achieved."

B. Discussion of Second Circuit Caseload

The Second Circuit experienced a caseload increase of 20% in 1996-1997, a rise which Judge Winter attributed in part to the deaths of two active judges in 1996. Case filings increased from 2800 in 1985, to over 4816 in 1997. Almost one quarter of the appeals filed in 1997 were prisoner petitions. Termination of appeals increased from 3000 in 1985 to 4400 in 1997, while cases pending rose from 800 in 1985 to 2400 in 1997. Counseled cases had the highest growth rate. In 1997, over 50% of the appeals terminated were determined on procedural grounds and, therefore, did not require a judicial decision on the merits.

C. Second Circuit Case Management

In order to decrease demands on judge time, the Second Circuit utilizes the Civil Appeals Management Plan (CAMP) at the beginning of all civil appeals to help encourage litigants to dispose of a case or narrow the issues on appeal. According to Judge Winter, CAMP disposes of approximately 45% of all civil appeals conferenced.

The Second Circuit affords oral argument in all calendared appeals, except where a party seeks leave to submit or where an appeal involves an incarcerated prisoner. In fact, former Chief Judge Newman testified that the Second Circuit "is the last court in the Nation to afford oral argument to every litigant, including pro se litigants." The time consuming and often unnecessary or repetitive nature of oral arguments is a primary reason why other courts have implemented procedures to screen out certain cases. In fact, many other circuits hear oral arguments for less than 50% of all cases decided on the merits, while the Second Circuit continues to hear oral arguments in 100% of all cases before it. The Second Circuit rarely

holds en banc decisions because it feels that the time constraints imposed by en banc hearings are not justified and that it would have to utilize a large number of visiting judges.

Court Schedule and Recess Period: The Second Circuit is in “recess” for three weeks in July and three weeks in August. At least one 3-judge panel sits every week of the year except for four weeks in June/July, two weeks in August, and one week in December. If a panel determines that a pro se appeal is frivolous under 28 U.S.C. §1915, the appeal is dismissed without further briefing. In addition, 3-judge panels review pro se appeals for each of the seven weeks during which no panel is hearing calendared appeals. Panels reviewing these cases decide submitted motions for that week. The 3-judge panels hear 31 appeals per week. Each active judge sits on eight of these panels and, during the time-frame in which a regular panel does not sit, each judge sits on two pro se panels. The Second Circuit has one of the shortest disposition times from notice of appeal to decision. However, Judge Winter commented that when there is an increased caseload, the downside to a quick disposition rate includes a reduced quality of both deliberation and decision-making.

Judge Travel: According to the GAO judicial travel report, judges in the Second Circuit took a total of 59 non-case related trips in 1995, encompassing 156 travel days (110 of which were workdays). Of these trips, 33 (56%) were for activities such as teaching law school seminars and attending bar association meetings. The remaining trips were for circuit or district court meetings, AOUSC or FJC workshops, seminars and activities, or Judicial Conference meetings and activities.

In 1996 and the 9-month period ending September 30, 1997, the total number of non-case related trips taken by Second Circuit judges remained high - 65 and 50 trips, respectively. These trips constituted a total of 342 travel days, of which 233 were workdays out of the Second Circuit judges’ schedule. Once again, the majority of these trips (65 out of 115, or 56.5%) and workdays (133 of 205, or 65%) were for activities such as law school seminars or bar association meetings. For the 9-month period ending September 30, 1997, judges spent almost the same number of workdays on non-case related trips as they did for all of 1996.

Use of Staff Attorneys: Second Circuit staff attorneys are limited to writing bench memoranda involving pro se appeals and pending motions. Judge Winter believed that heavy reliance on staff attorneys inappropriately infringes on a judge’s critical decision-making function.

Use of Visiting Judges: The Second Circuit makes extensive use of visiting judges to fill out their panels. However, Judge Winter noted that the circuit is reluctant to place substantial reliance on visiting judges since he believed excessive reliance on such judges can result in decisional inconsistencies, unnecessary en banc hearings, and delay the rendering of opinions.

Use of Senior Judges: The Second Circuit extensively relies on its 8 senior judges to maintain its workload. Judge Winter estimated the workload of the senior judges to range from 30% to 72% of an active judge.

Use of Mediation Programs: The Civil Appeals Management Plan (CAMP) is the sole mediation program used by the Second Circuit.

D. Second Circuit Use of Other Court Efficiencies

According to Judge Winter, Second Circuit judicial panels have the authority to determine if their decisions have precedential or jurisprudential value. If the decisions do not have any such value, the court decides them by means of an unpublished summary order. In 1996, 63% of all Second Circuit appeals were decided by unpublished summary order. These orders, while brief, are detailed and contain complete judicial reasoning and governing authority. The Second Circuit also aggressively enforces procedural rules, a policy intended to send a strong message to the parties not to delay the judicial process.

E. Conclusion

On September 10, 1997, the Second Circuit judges voted unanimously that the court's five judicial vacancies be filled and two additional temporary judgeships be created. Judge Winter testified that his active judges could not undertake a permanent caseload increase without that increase having an adverse impact on the quality of the court's decision-making. He did not believe that decreasing published opinions, not providing rationales for decisions, or placing additional reliance on staff attorneys, were appropriate measures by which to deal with the increased workload. Judge Winter also argued that if the Second Circuit vacancies were not filled, only 44% of their scheduled panels would consist of two judges from the court, with possibly one being a senior judge.

Judge Winter felt that the Second Circuit had done everything possible to deal with their heavy caseload. He pointed out that even with the increased caseload, the Second Circuit had one of the shortest median disposition times from notice of appeal to decision. However, despite the court's use of methods to reduce calendared appeals and expedite dispositions, Judge Winter believed the backlog was "serious" by Second Circuit standards. He indicated that the Second Circuit has historically resisted seeking new judgeships, even when caseloads have noticeably increased. Further, he noted that the Second Circuit's request for two new judgeships was actually two fewer than the number of judges called for by the Judicial Conference's formula.

Judge Newman agreed that the Second Circuit's complement of active judges should be extended from 13 to 15 judgeships. Nonetheless, Judge Newman also testified that the optimum size of an appellate court is 9 or 11 judges, and cautioned that the number of judgeships for an appellate court should not exceed 15 judges. Both Judge Newman and Judge Winter believed that a court should exercise extreme caution in requesting new judgeships, and that an increase in court size could impact negatively coherence of case law, budgetary considerations and court collegiality.

Further, Judge Winter acknowledged that in his response to the 1996 Judicial Questionnaire, he did not think the Second Circuit required additional judgeships. Judge Winter qualified that statement at the Subcommittee hearing by noting that at that time, the court's caseload

had remained manageable largely because a district court backlog had reduced the number of appeals filed with the circuit. He also explained that the subsequent filling of district court vacancies led to a reduction in backlog and this correspondingly increased the number of appeals filed with the circuit court.

Both Judge Winter and Judge Newman agreed that an increase in court size can adversely impact the quality, efficiency and thoroughness of an appellate court's decision-making. If additional judgeships are to be considered, the Subcommittee agrees with the Second Circuit's unanimous agreement that any new judgeships be made temporary. The Subcommittee agrees that making these positions temporary, rather than permanent, allows for a later determination of whether the additional judgeships are a long term necessity, and provides the court with an opportunity to examine the effect of the new judges on its ability to produce a coherent body of law.

In their responses to the 1996 Judicial Questionnaire, 15 out of 19 active and senior judges for the Second Circuit believed that there was not a problem with the then-current number of judges managing the circuit's workload. In fact, 67% of those judges responded that their caseload was manageable, and 53% stated that the current number of judges was sufficient to handle their caseload.

Judge Newman testified that he was deeply concerned about the constant growth in the overall size of the judicial branch, which he felt posed a "serious risk for the proper functioning of the federal judiciary." Judge Newman recommended that Congress take "systemic" measures to reduce the federal caseload and control the number of federal judgeships. Specifically, he suggested that Congress limit the creation of new federal civil causes of action, the federalization of new crimes, and the addition of new federal law enforcement personnel. Moreover, Judge Newman testified that Congress could partially rein in the increase and preserve the nature of the court system by reallocating some areas of federal jurisdiction back to the state courts. He indicated that between 20% to 30% of federal cases could shift to the state courts if such discretionary access was implemented. Judge Newman also recommended that Congress authorize the use of 2-judge panels to hear appeals. He believed this would beneficially impact the burgeoning caseload and decrease demand for the creation of federal judgeships. Judge Newman strongly believed that the federal judiciary should remain small in order to preserve quality, efficiency and thoroughness.

However, it appears that the Second Circuit still has the opportunity to implement a number of additional court programs and efficiencies to deal with its workload. For example, the Second Circuit could implement procedures to limit the number of oral arguments they hear. If the caseload has reached an overbearing point, as Judge Winter seemed to suggest, it makes little sense to remain the only circuit to cling to the practice of allowing oral arguments in every single appeal. Additionally, the circuit could use its recess period to work on non-oral argument tasks. The Second Circuit, unlike other courts, continues to take recess periods throughout the year. The court could further improve its ability to handle its existing cases if they were to sit throughout the year, as do many other circuits.

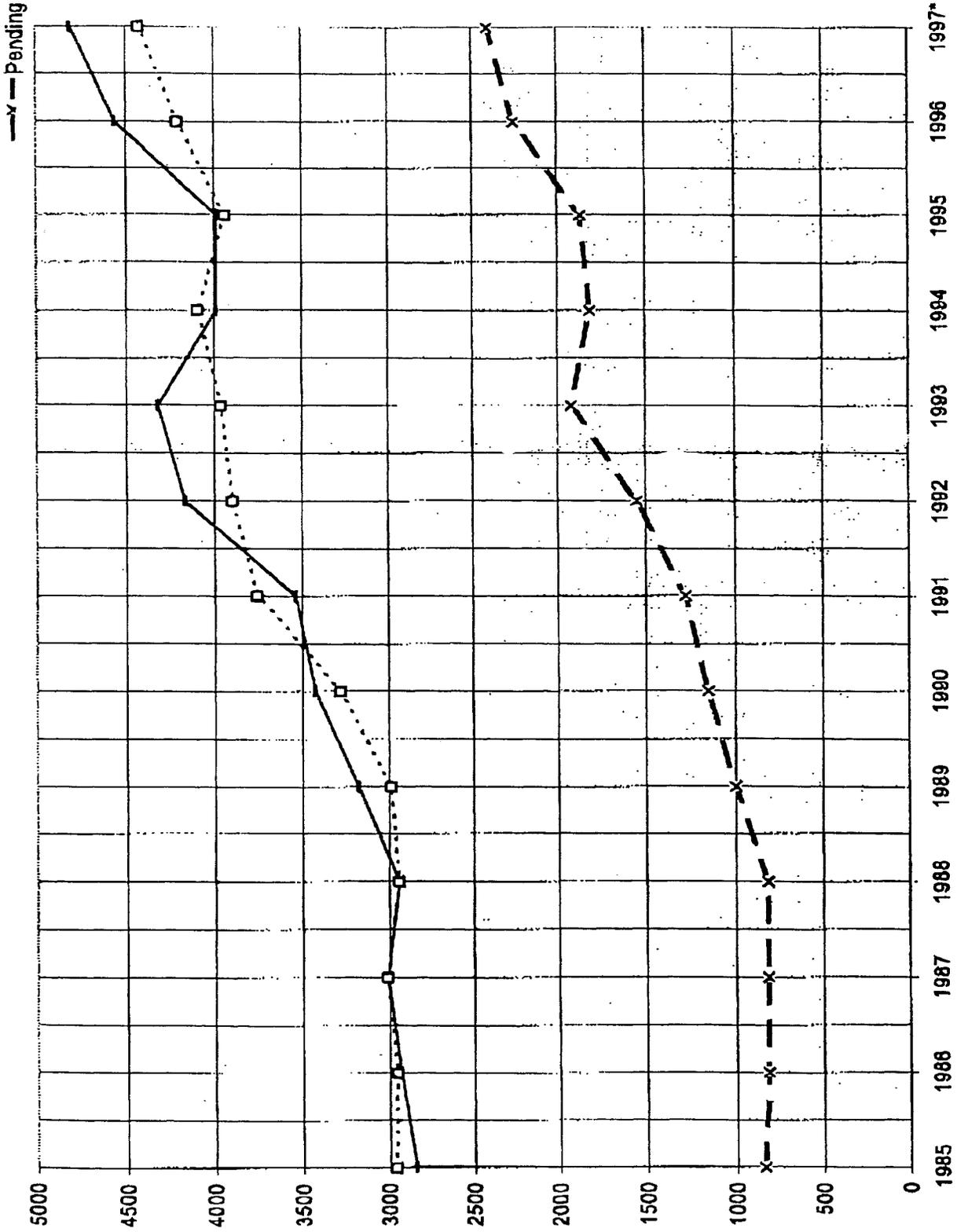
Judges in the Second Circuit could also spend fewer days on extracurricular travel. For example, while the Second Circuit declared 8 judicial emergencies consisting of 13 “judicial emergency days” in 1997-1998, the GAO judicial travel report showed that from January 1, 1995 through September 30, 1997, Second Circuit judges took 343 workdays for non-case related travel. About 59% (201) of these workdays were used for such activities such as teaching law school seminars and attending bar association meetings. The average number of workdays taken for non-case related travel per year (1997 was for only the first 9 months) was 114. These 114 workdays are the equivalent of about 5.7 workday months (at 20 days per month). If this trend continued, the Second Circuit judges would have spent about the same number of workdays on non-case related travel in 1998, a time in which they declared judicial emergencies. Arguably, a reasonable decrease in the amount of judicial travel could obviate the Second Circuit’s need to declare judicial emergencies.

Since the time of Judge Winter’s testimony, four of the five vacancies have been filled, a move sure to help alleviate the Second Circuit’s caseload and backlog. Based on the Second Circuit’s needs, the remaining judicial vacancy should be filled. However, given the opportunity of the circuit to implement a number of further cost and time efficient policies, the time is not ripe for the creation of new judgeships for the circuit, including temporary ones.

Exhibit A

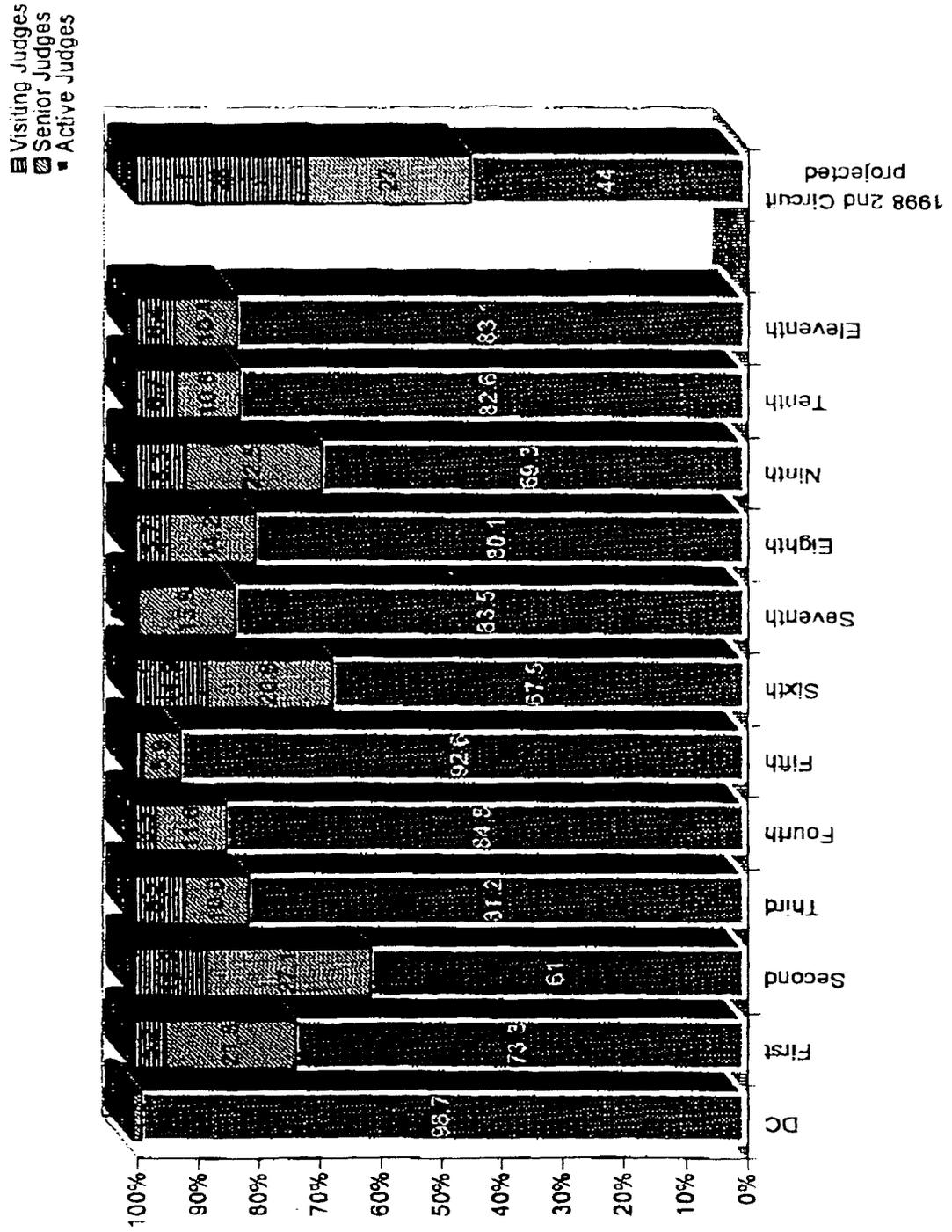
U.S. Court of Appeals, 2nd Circuit Filings, Terminations and Pending Caseload 1985-1997

— Filings
... Terminations
—x— Pending



*1997 12 Month Period Ending June 30th
Source of 1985-1996: Administrative Office, U.S. Court of Appeals, Judicial Caseload Profile.
Source for 1997: Administrative Office, Appeals Statistical Tables for the year ending June 30, 1997.

Case Participation By Resident Active, Resident Senior and Visiting Judges by Circuit, 12 Months Ending June 30, 1997 and 2nd Circuit 1998 (projected)



*1997 12 Month Period Ending June 30th
 Source of 1985-1986: Administrative Office, U.S. Court of Appeals, Judicial Caseload Profile.
 Source for 1997: Administrative Office, Appeals Statistical Tables for the year ending June 30, 1997.

