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CASELOAD FORCING TWO-LEVEL SYSTEM FOR U.S. APPEALS

By WILLIAM GLABERSON

A crushing load of cases is forcing a reshaping of the Federal appeals courts, creating a two-level justice system in which tens of thousands of appeals receive limited reviews, judges and legal scholars say.

Some judges say the changes are necessary so that judges on the appeals courts, second in importance only to the Supreme Court, can cope with the steadily growing number of cases without increasing the length of time people must wait for rulings.

But as fewer than half of all Federal appeals cases are argued before judges and only a fourth of all decisions are rendered in full published opinions -- many decisions consist of a single word, like "affirmed," upholding the lower court's decision -- critics say the country's circuit appeals courts are changing their role, with people's legal rights often damaged by the shift.

Instead of reviewing every case that comes before them, as Federal law requires, the critics say, the appeals courts are becoming more like the Supreme Court, which has the power to decide which cases it will hear.

Complex civil rights, antitrust and other cases that appeals judges deem important get the same detailed consideration as always. But some judges and legal scholars say that entire classes of appeals deemed routine, such as petitions from prison inmates and individuals' disability claims under Social Security, get abbreviated attention as staff lawyers sort out cases to recommend for full hearings.

"It is a two-track system, and the tracks basically get allocated by nonjudges," said Patricia M. Wald, a judge on the Federal Court of Appeals for the District of Columbia.

The country's 12 regional Federal circuit courts began reorganizing themselves in the 1980's, introducing shortcuts in the way they review appeals to help judges cope with the number of cases, which grew to 53,805 last year from 33,360 in 1985.

In one of the most controversial changes, the appeals courts created new staff lawyer positions, permanent employees with the authority to screen and, some critics say, to effectively decide thousands of cases by giving judges brief summaries of recommended decisions.

Now the question of whether the new shortcuts are fair has been put squarely before one of the appeals courts that has led the changes, the United States Court of Appeals for the 11th Circuit in Atlanta, in an appeal of a political corruption case here in Fort Myers, on Florida's Gulf Coast.

In the case, lawyers for a former county commissioner convicted of depriving her constituents of her "honest services" are trying to challenge a one-word ruling upholding the conviction -- "affirmed" -- by a three-judge panel. Her lawyers contend that it is not even possible for them to tell why her appeal was denied, much less to try to appeal to the Supreme Court.

The lawyers have asked the full 12-member court to review the decision as well as the court's streamlined appeals procedures.

The case has attracted national attention among defense lawyers, partly because the Atlanta court is known as one of the architects of abbreviated appeals procedures.

Some judges and scholars say the proliferation of one-word decisions and other abbreviated procedures is shortchanging litigants in the appellate process by limiting the consideration given to their cases by appeals judges.

"We have so many procedural shortcuts that appeals today are processed in a kind of assembly line and the judges are not paying enough attention to individual cases because they can't," said Prof. Thomas E. Baker at Drake University Law School in Des Moines, who has written extensively about the appeals courts.

With the Supreme Court giving full review to no more than 200 cases a year and the highest courts of many states also limited in the number of cases they can hear, some legal scholars say, the increasing use of abbreviated review procedures by intermediate appeals courts means litigants are quickly losing the right to meaningful appeals.

One measure of the abbreviated treatment given to many cases, some judges and scholars say, is a sharp decline in the number of decisions Federal appeals courts publish in law books. Unpublished decisions do not establish precedents.

In studies of unpublished decisions, two law professors, William L. Reynolds of the University of Maryland and William M. Richman of

the University of Toledo, say the rulings are usually so succinct that it is impossible to discern the facts of a case or the reasons for the judges' ruling.

Court statistics show that Federal appeals courts publish only 24 percent of their decisions, down sharply from 54 percent in 1985. "It is sort of a formula for irresponsibility," said Richard A. Posner, the chief judge of the United States Court of Appeals for the Seventh Circuit in Chicago. "Most judges, myself included, are not nearly as careful in dealing with unpublished decisions."

Some Federal appeals judges say many cases are given abbreviated reviews because they are frivolous. No one, they say, is being denied careful appellate review.

"The Federal courts," said J. Harvie Wilkinson 3d, the chief judge of the Court of Appeals for the Fourth Circuit in Richmond, "have developed sophisticated management techniques that differentiate between cases that are genuinely difficult and challenging and those which are straightforward." His court had the highest percentage of unpublished decisions last year, 90 percent.

The new methods of handling appeals are necessary, some judges acknowledge, because many Federal appeals judges have fought efforts to increase their number. The judges have said the quality and collegiality of the Federal bench would be diluted if too many new judges were added. The number of judges on the circuit courts has increased to only 167 from 156 in 1985.

In the case here in Fort Myers, Vicki Lopez-Lukis, a former Lee County Commissioner, was convicted in 1997 of depriving her constituents of her honest services by taking payments from a Washington lobbyist, Sylvester Lukis, while considering government projects he was promoting for his clients. At the time, the two were having an affair. They are now married.

Federal prosecutors charged the two with 11 counts each in the bribery case. Mr. Lukis was acquitted of all charges while Mrs. Lukis was convicted of only one count. The couple contended that the payments were to help her pay for an apartment the two shared here and had not influenced her votes.

After a jury convicted Mrs. Lukis of one count and she was sentenced to serve 27 months in prison, she appealed. On Jan. 27, the three-judge appeals panel handed down its one-word decision.

The 11th Circuit Court handles Federal appeals from Alabama, Florida and Georgia. Each of the circuit courts across the country reviews cases in panels of three judges. Unusual cases are sometimes reviewed after a three-judge panel decision by all the judges on a circuit, typically a dozen or more.

Mrs. Lukis's lawyer, Thomas C. Green, a prominent Washington defense lawyer, says his client's case shows how unfair the shortcuts in the courts have become because he raised a series of legal arguments that he said were far from frivolous. Among other things, he said that if the appeals panel had issued an opinion defining "honest services" he would have had a better chance of convincing the Supreme Court to review the case.

Partly because of that concern, Mr. Green has asked the full 12-member 11th Circuit Court to make a rare decision to review the ruling of the three-judge panel in Mrs. Lukis's case and use it to limit what he says are unfair procedures.

The National Association of Criminal Defense Lawyers filed a brief as a friend of the court, asserting that shortcuts like the one-word opinions are diminishing the public's confidence in the courts.

The debate in the case shows how the dispute over the abbreviated appeals proceedings is playing out across the country. The Federal prosecutor in the case, Douglas F. Molloy, said fuller review of Mrs. Lukis's appeal would waste the court's time.

"When they issue a one-word opinion," Mr. Molloy said, "it's a way of saying, 'You brought an appeal that had absolutely no merit.'"

For defense lawyers, such succinct rulings are frustrating because they make it virtually impossible to appeal further. If a Federal appeals court has not even specified its reasons for upholding a lower court ruling, the chances that the Supreme Court will consider a case are small.

In an interview here, Mrs. Lukis said the one-word opinion left her wondering whether political influence or bias against her as a Hispanic woman had played a part in her case. "They didn't tell me why they decided what they decided," she said. "I think they owe me that."

Terse rulings in criminal cases that are deemed routine often benefit prosecutors, as courts uphold convictions without having to state legal reasons. But sometimes it is prosecutors who are put at a disadvantage.

When a Federal appeals court ruled in 1996 that there were legal problems with the politically popular conviction of Charles H. Keating Jr., the former savings and loan executive convicted of defrauding customers, the court issued a two-paragraph decision that did not mention some prosecution arguments.

In their studies of the use of brief circuit court decisions, Professors Richman and Reynolds have suggested that sketchy rulings may sometimes be used by judges who want to reach a certain legal result but are not anxious for their decision to be scrutinized.

Whatever the reasons, Professor Reynolds said, the rapid growth of shortcuts in the appeals courts means that people involved in legal

cases are not getting the attention from Federal appeals courts that most of them expect.

"Most people think if you have an appeal, your lawyer argues the case and a judge decides," he said. "That's not what we have. We have a system where there is often no argument, there is no requirement for a judge to write a decision and the decision making is largely done by people who are not judges."