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A CONSTITUTIONAL CHARGE AND A COMPARATIVE VISION TO SUBSTANTIALLY EXPAND AND SUBJECT MATTER SPECIALIZE THE FEDERAL JUDICIARY: A PRELIMINARY BLUEPRINT FOR REMODELING OUR NATIONAL HOUSES OF JUSTICE AND ESTABLISHING A SEPARATE SYSTEM OF FEDERAL CRIMINAL COURTS

VICTOR WILLIAMS*

Where there is no judiciary department to interpret, pronounce, and execute the law, to decide controversies, to punish offenses, and to enforce rights, the government must either perish from its own weakness, or the other departments of government must usurp powers for the purpose of commanding obedience, to the utter extinction of civil and political liberty.¹

I. INTRODUCTION

America's national court system has reached a critical juncture and is under increased public scrutiny.² For the past several years, our federal judiciary has endured consistently high judicial vacancy rates, while struggling to cope with substantial increases in civil and criminal cases.³ The resulting logjam of cases threatens the speed and quality of federal justice; without substantial change, the situation will worsen. Indeed, a first of its kind long-range planning effort by the U.S. Judicial Confer-

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1. JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 180 (1840).

2. See Doreen Carvajal, *Awaiting Judgment: A Special Report; New York's Clogged U.S. Courts Delaying Civil Verdicts for Years*, N.Y. TIMES, Apr. 17, 1995, at A1; Neil A. Lewis, *Survey to Press U.S. Judges on Caseload and Expenses*, N.Y. TIMES, Dec. 17, 1995, at 35.

3. See Janet Seiberg, *Court Vacancies Result in Longer Case Dispositions*, CONN. L. TRIB., May 9, 1994, at 8.

ence projects the judiciary's future as grave.⁴ "the picture in 2020 can only be described as nightmarish."⁵ The litigant casualties of this crisis are escalating, and the integrity of the judicial system is threatened.

For several years, the federal courts have suffered from high judicial vacancy rates. Scores of our nation's 840 judgeships—as many as one out of seven—have remained empty because of appointment malfeasance by the political branches.⁶ Indeed, a single judicial vacancy presently takes an average of 804 days to fill. As a direct consequence of these vacancies and appointment delays, the U.S. Courts' Administrative Office has declared "judicial emergencies" in all but one of the federal judicial circuits. In a recent state of the judiciary report, Chief Justice Rehnquist cautioned: "There is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem."⁷

President George Bush handed over more than 100 empty judgeships to incoming President Bill Clinton. Notwithstanding promises of prompt appointments, dozens of judicial vacancies have remained throughout the Clinton Administration's tenure.⁸ More than one-third of the more than sixty vacancies that existed in mid-1995 existed for longer than eighteen months.⁹

High judicial vacancy rates greatly weaken a system that is already stressed from the effects of a recent litigation explosion. Over the last thirty years, combined civil and criminal case filings have increased almost 1000% in the United States courts of appeals and more than 250% in the district courts.¹⁰ In the

4. *Coping With the Great Flood*, L.A. TIMES, Dec. 29, 1994, at B6.

5. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 18 (Mar. 1995) [hereinafter PROPOSED LONG RANGE PLAN]; see Randall Samborn, *Judges Foresee Federal Courts Caseload Crush*, NAT'L L.J., Jan. 9, 1995, at 1.

6. See, e.g., Mark Pazniokas, *Judgeship Vacancies Add to Case Backlog*, HARTFORD COURANT, Mar. 16, 1995, at A1.

7. WILLIAM H. REHNQUIST, 1993 YEAR-END REPORT ON THE FEDERAL JUDICIARY [hereinafter 1993 YEAR-END REPORT]; see William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, Address Before the University of Wisconsin Law School (Sept. 15, 1992), in 1993 WIS. L. REV. 1.

8. See Robert Marquand, *Clinton Races To Put His Stamp on Judiciary*, CHRISTIAN SCI. MONITOR, Mar. 7, 1995, at 1.

9. See Stephen S. Dunham, *Vacant Federal Judgeships Hamstring Our Legal System*, DENV. POST, July 22, 1995, at B7.

10. See FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMIT-

last fifteen years alone, the number of appeals filed per judge with the United States courts of appeals has doubled in number.¹¹

As the national effort to combat violent crime and drugs increases, the number of criminal cases correspondingly escalates.¹² In each of statistical years 1992 and 1993, federal prosecutors filed almost 50,000 criminal cases in district courts—an increase of sixty-seven percent since 1980.¹³ Appeals of those prosecutions added substantially to appellate courts already burdened by, among other things, cases raising new sentencing issues under the novel Sentencing Reform Act of 1987.¹⁴ Indeed, between 1988 and 1993, the total number of criminal appeals, from convictions and sentences, increased 400%.¹⁵

The growth in federal litigation is certain to continue. In recent years, Congress has expanded, rather than restricted, the scope of federal laws, most notably in the area of civil rights and employment discrimination. That trend is likely to persist. Congress also has responded to the startling rise of violent crime across the nation by enacting tough new criminal laws. At a time when public concern about violent crime is at an all-time high,¹⁶ and public confidence in the criminal justice process is

TEE REPORTS 26-30 (1990); 1993 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS [hereinafter 1993 ANNUAL REPORT]; 1992 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS [hereinafter 1992 ANNUAL REPORT]; 1991 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS [hereinafter 1991 ANNUAL REPORT].

11. See FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (1993) [hereinafter STRUCTURAL AND OTHER ALTERNATIVES].

12. See William W. Scharzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 653-54 (1994).

13. 1993 ANNUAL REPORT, *supra* note 10; 1992 ANNUAL REPORT, *supra* note 10.

14. Pub. L. No. 100-182, 101 Stat. 1266 (1987).

15. 1993 ANNUAL REPORT, *supra* note 10; 1988 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS.

16. See, e.g., Bob Barr, *A 'More Aggressive' Crime Bill This Time*, ROLL CALL, May 22, 1995, available in LEXIS, News Library, Rollcl File; Frank James & Timothy J. McNulty, *America, the Insecure*, CHI. TRIB., May 28, 1995, at C1; Michael Janofsky, *Thousands Seek Permits To Carry Concealed Arms*, N.Y. TIMES, July 6, 1995, at A14; Morton Kondracke, *Crime Wave, Coming Soon, Demands Action*,

at an all-time low,¹⁷ an event such as the bombing of the federal building in Oklahoma City is a shocking reminder of the importance of maintaining an efficient and fair federal criminal justice system.¹⁸ Our overworked, understaffed federal courts are certain to face an overwhelming number of additional criminal prosecutions, resulting from enforcement of the 1994 Violent Crime Control and Prevention Act,¹⁹ the pending Comprehensive Antiterrorism Act,²⁰ and subsequent national anticrime and reform legislation promised by the Republican Congress's "Contract With America."²¹

Case overload at both the trial and appellate levels has led inexorably to a state of gridlock.²² Federal civil litigants now

COMM. APPEAL, May 14, 1995, at B4; Miriam Pepper, *Violence Encroaches on the Job*, KAN. CITY STAR, Apr. 20, 1995, at B1. For a recent study of the complex dynamics involved in the fear of crime, see KATHLYN T. GAUBATZ, *CRIME IN THE PUBLIC MIND* (1995).

17. See, e.g., John Bare, *Williamson: The Best Defense*, CHAPEL HILL HERALD, Apr. 24, 1995, at 4; Charles M. Calderon, *Jury System Needs Reform*, USA TODAY, June 12, 1995, at A10; Rhonda Cook & Bill Rankin, *The Death GAME*, ATLANTA J. & CONST., July 23, 1995, at N1; Bill Hutchinson, *Poll Shows Lady Justice Is Also on Trial*, BOSTON HERALD, Jan. 29, 1995, at 24; Henry Weinstein & Tim Rutten, *Simpson Case Already Is Rewriting the Rule Book*, L.A. TIMES, June 11, 1995, at A1.

18. See Lincoln Caplan & Peter Annin, *And Now, for the Defense . . .*, NEWSWEEK, June 12, 1995, at 70; Daniel Klaidman, *Justice's Rising Star*, AM. LAW., June 1995, at 39; Melinda Liu, *A Case Built on a Web of Damning Detail*, NEWSWEEK, July 3, 1995, at 28; Trevor Nelson, *Not Wanted: Why Bounties for Criminals Don't Work*, NEW REPUBLIC, June 5, 1995, at 19; Pierre Thomas, *How Detectives Cracked Oklahoma Bomb Case; Computers Aid Chase for Clues*, WASH. POST, June 3, 1995, at A1; Sam Walker, *Bombing Trial Will Test U.S. Justice System*, CHRISTIAN SCI. MONITOR, Aug. 10, 1995, at 1.

19. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 8, 16, 18, 20, 21, 26, 28, 31, 42 U.S.C.).

20. S. 735, 104th Cong., 2d Sess. (1995); H.R. 1710, 104th Cong., 2d Sess. (1995).

21. See Naftali Bendavid, *Republican Crime Bill Invades Judges' Turf*, RECORDER, Apr. 20, 1995, at 1.

22. Federal district and appellate courts within the Second Circuit exemplify the problem. The courts of the Second Circuit, long regarded as the most efficient of all the federal courts in the nation, have been plagued with chronic judicial vacancies. With 24 judgeships vacant in 1993, the circuit took 20% longer to dispose of the average case that year than it did in 1992. During fiscal year 1993, the number of cases pending before the courts of the Second Circuit rose 24%, the number of bankruptcy filings escalated 72.7%, and the number of bankruptcy appeals increased 35%. See 1993 ANNUAL REPORT OF THE SECOND CIRCUIT; Seiberg, *supra* note 3, at 8. In

must endure years of unavoidable, yet totally unacceptable, delays.²³ Civil trials are postponed habitually, as federal judges honor the Speedy Trial Act and give priority to processing criminal cases. Notwithstanding record civil case backlogs, civil case filings remain high. Indeed, in 1992 and 1993 combined, nearly 500,000 civil cases were filed in the federal district courts.²⁴

The delays are certain to worsen and to harm the very people for whom the judicial system exists. Civil justice delays can be devastating to individual litigants, many of whom do not have the resources to queue up outside our federal courthouses to wait indefinitely for their day in court. These one-time players are less likely than other litigants (such as commercial enterprises) to exercise the increasingly popular option of dispute resolution alternatives, such as commercial arbitration.²⁵ They are thus more vulnerable to the vagaries of a system that is struggling under the burdens of gridlock.

The growth of private justice as an alternative to the faltering judicial system has been remarkable in recent years. The American Arbitration Association, for example, now manages an annual average of 60,000 cases—one-quarter that of the federal judiciary—and has revenues of \$100 million and claims estimated at \$5 billion.²⁶ The fact that private justice is becoming more attractive, at least to those litigants who can afford it, demonstrates the caseload crisis in our courts. Frank E.A. Sander, head of Harvard's Dispute Resolution Program, succinctly stated the reason for the explosive demand for private justice: "ADR

U.S. District Courts in Connecticut alone, criminal case filings increased 28% from 1992 levels, resulting in a caseload of 523 cases per district judge and 557 civil cases pending over three years. Seiberg, *supra* note 3, at 8.

23. See generally Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913 (1994) (summarizing structural reform proposals to solve the present problems and to meet the future needs of the U.S. Courts of Appeals).

24. 1993 ANNUAL REPORT, *supra* note 10; 1992 ANNUAL REPORT, *supra* note 10.

25. See, e.g., Shannon P. Duffy, *3rd Circuit Caseload: There's Good News and Bad; Arbitration, Diversity Numbers Up, Sloviter Says*, PENN. L. WKLY., Apr. 17, 1995, at 10.

26. Eric Schine & Linda Himmelstein, *The Explosion in Private Justice*, BUS. WK., June 12, 1995, at 88.

[alternative dispute resolution] has become so appealing because the judicial system has failed so many people."²⁷

Our too few federal judges have endeavored valiantly to handle their burgeoning caseload. As a result, federal courts remain the preferred forum for attorneys over the even more overcrowded state court fora.²⁸ The caseload crisis has directly resulted in the use of judicial shortcuts as institutional coping mechanisms, and such dubious docket management efforts are likely to grow.²⁹ At the trial level, some judges cope with crushing caseloads by improperly relying on the work of law clerks and magistrates, placing undue pressure on litigants to settle cases, actively encouraging criminal plea bargains, and pressing fellow senior judges (some of whom are in their eighties) to return to full-time service. Some appellate judges cope with their burdensome caseloads by reducing the percentage of appellate cases in which oral argument is granted, limiting the number of written and published opinions, and relying too often and too readily on the services of "visiting" district judges who are temporarily elevated to appellate status in order to make up three-judge appellate panels.

At this critical juncture in the judiciary's history, we must ask: Will our national justice system continue to labor under the strain of its present caseload while facing a substantial increase in civil and criminal cases and thus ration justice and sacrifice the rights of litigants in the process? Or, alternatively, will the nation's political branches honor their constitutional obligation to establish and regularly maintain the nonpolitical third branch and thus ensure both civil and criminal justice? The need for reform is manifest; consensus on solutions, however, is lacking.

Some members of our nominally status quo federal judiciary are begging for relief from judicial gridlock. Ninth Circuit Chief Judge Clifford Wallace, concerned that the federal judiciary is "fast approaching a crisis point," recently called for a national

27. *Id.*

28. Daniel Wise, *Federal Court Still Lawyers' Preferred Forum; Respondents Cite State's Limited Resources*, N.Y. L.J., Jan. 10, 1995, at 6.

29. Thomas Baker described some of these procedural shortcuts as "intramural reforms." THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 106-50 (1995).

conference to better define the mission of our national courts.³⁰ Judicial vacancy rates and their resulting damage have become so serious in the Second Circuit that Chief Judge Jon O. Newman, citing "disgraceful" appointment practices, recently proposed a constitutional amendment to permit judicial appointments to be made by the *courts* when vacancies exist for more than one year.³¹

The more general solutions proposed by judicial leaders are most unsatisfactory. As noted, the U.S. Judicial Conference's Committee on Long Range Planning has conducted research that accurately evaluates the impending crisis of caseload growth.³² The Committee's 1995 Proposed Plan, however, advocates that the political branches implement a sharp curtailment of federal court jurisdiction and create a system of discretionary access to give lower federal appellate judges the arbitrary power of discretionary review.³³ In addition to suggesting that Congress raise substantial court access barriers to Social Security, ERISA, and employment bias litigants, the report encourages the institutionalization of judicial shortcuts and suggests a "comprehensive recodification" of the national criminal law to reduce federal criminal law to comport with the judges' circumscribed inventory of five offense categories.³⁴ Additionally, the Committee recommends that most diversity of citizenship cases be shifted to our overloaded state court systems.³⁵ The judges' report rejects a substantial increase in the number of federal judges, warning that "federal law would be babel" with a large judiciary.³⁶ Instead of welcoming needed growth and ensuring justice for all,³⁷

30. See J. Clifford Wallace, *Tackling the Caseload Crisis*, A.B.A. J., June 1994, at 88.

31. See Al Karmen, *Judicial Vacancies Spur Amendment Call*, WASH. POST, June 20, 1994, at A13.

32. See Robert Pear, *Judges Propose Limiting Access to Federal Courts*, DALLAS MORNING NEWS, Dec. 23, 1994, at 30A; Victor Williams, *It's Time for a Better, Bigger U.S. Judiciary*, NAT'L L.J., Feb. 6, 1995, at A23.

33. See PROPOSED LONG RANGE PLAN, *supra* note 5, at 21-38.

34. *Id.* at 23-25.

35. *Id.* at 29-32.

36. *Id.* at 19.

37. See John F. Rooney, *Long Range Plan for Federal Courts Is Target of Some Blunt Criticism at Last Public Hearing*, CHI. DAILY L. BULL., Dec. 16, 1994, at 1.

the judicial leaders appear ready to suggest that the political branches violate what the great American jurist, Second Circuit Judge Learned Hand, declared to be the first commandment of a democratic government: "Thou shalt not ration justice."³⁸

This Article seeks to examine the difficult future facing our federal judicial system, to analyze the constitutional mandate of our national courts, and to explore from a comparativist perspective the possibility of a substantial expansion and subject matter specialization of our national court system. As a beginning place for such specialization, this Article recommends that Congress "ordain and establish" a new, separate national criminal court system.

Part II traces the constitutional origins and historical development of our national court system. Part III explores the political branches' contemporary malfeasance in failing to maintain a fully staffed judiciary by abdicating their appointment responsibilities. This section includes an analysis of the disappointing appointment records of Presidents George Bush and Bill Clinton and a discussion of recent Senate confirmation delays and deadlocks. Part III directly contests the prevailing academic view that the Senate should play an assertive role in the appointment process and reviews Yale Professor Steven Carter's *The Confirmation Mess* as an example of the failure of this widely held view to appreciate the generous, almost exclusive, character of the Executive's appointment authority granted by both the traditional and recess appointment clauses of the Constitution's Article II, Section 2.

Part IV addresses the ramifications of contemporary criminal and civil case overloads resulting from an understaffed bench. Special emphasis is given to the institutionalization of various judicial coping mechanisms that ultimately shortchange justice, such as overreliance on staff attorneys, law clerks, and magistrates. Part V develops a comparative vision of national court specialization. This section also examines the efficiency accomplished with the numerically large, specialized judicial systems of Germany and France and applies it to our national courts.

38. Learned Hand, *Thou Shalt Not Ration Justice*, Address Before the Legal Aid Society of New York (Feb. 16, 1951), in *LEGAL AID BRIEF CASE*, Apr. 1951, at 3, 5.

Part VI explores the need for, and the sustained judicial resistance to, a substantial increase in the number of judges and a fundamental restructuring of the generalized jurisdiction of United States federal courts. Providing examples of this judicial resistance to growth, this section explores the judiciary's active lobbying and interpretative efforts against further federalization of crime and presents an alternative analysis of the Supreme Court's 1995 *United States v. Lopez*³⁹ decision that nullified the Gun-Free School Zones Act. Part VI not only analyzes *Lopez* in terms of its restriction on the interpretation of, and congressional jurisdiction pursuant to, the Commerce Clause for the first time in almost sixty years, but also analyzes it as a results-oriented constraint on congressional criminal lawmaking authority for the underlying purpose of controlling the size of the federal courts' criminal docket. This section also summarily reviews access-restricting and jurisdiction-stripping provisions of the judiciary's 1995 *Proposed Long Range Plan for the Federal Courts* as a further example of the judiciary's commitment to maintaining a small, elite national law-administering corps.

Finally, Part VII presents a preliminary blueprint for expanding and remodeling the United States federal court system. The proposal envisions an immediate significant infusion of additional federal judges, focusing placements in our most overcrowded jurisdictions. Prompt staffing of new judgeships through assertive executive appointment action is explored. The Article next proposes that Congress approve a substantial increase in the number of district and appellate judges and concurrently enact a fundamental restructuring of the generalized federal court structure, moving to a more specialized model. The restructuring should begin with a formal division of the national judiciary's civil and criminal processes and the creation of separate federal criminal courts—U.S. District Criminal Courts, U.S. Courts of Criminal Appeals, and a National Court of Criminal Appeals.

Part VII explores the constitutional basis for the creation of separate criminal courts and asserts that the division is both necessary to the national government's successful fulfillment of its increasing role in fighting criminal violence and integral to

39. 115 S. Ct. 1624 (1995).

the government's operation of a fair and efficient criminal and civil justice system. This section also preemptively responds to opposition that the existing judiciary certainly will level against a separate system of federal criminal courts. The final section concludes by discussing the structure and staffing of these new federal criminal courts.

II. GROWING A NATIONAL JUDICIARY

A. Judicial Deficiency Under the Articles of Confederation

In 1787, the Philadelphia Framers sought to perfect the Articles of Confederation union by creating a new government structure resting on three separate pillars of authority. The lack of a workable judicial system was a chief failing of the Confederation government and was a significant motivation for the Annapolis meeting and Philadelphia Convention; indeed, it was part of a larger Confederation failing concerning the absence of a direct relationship between the people and their national government.⁴⁰

The Articles of Confederation attempted to fill the appellate gap left by the loss of the Privy Council on account of independence from Britain⁴¹ by granting national congressional jurisdiction over three areas—piracy, admiralty, and disputes between the states.⁴² Ultimately, piracy jurisdiction was transferred to the jurisdiction of the states. Congress heard admiralty cases, until it eventually established the Court of Appeals in Cases of Capture.⁴³ That national admiralty court heard appel-

40. See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* (1928). For a somewhat contrary view, see MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781* (1940); MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789* (1950).

41. See generally JOSEPH H. SMITH, *APPEALS OF THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950) (describing and evaluating the Privy Council of England as a judicial body).

42. See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROBS.* 3 (1948).

43. The confederate court has been described as the ancestor of the present United States Supreme Court. See CLINTON ROSSITER, *THE GRAND CONVENTION* 50 (1986).

late cases from 1780 to 1786.⁴⁴ The court often was ineffectual in enforcing judgments rendered from state courts of origin because the newly independent states often simply ignored its rulings.⁴⁵

Incredibly, Congress oversaw adjudication of disputes arising between the states. The Articles of Confederation required the aggrieved state first to appear before the national legislature and, next, to proceed through a multifaceted arbitration process.⁴⁶ This ridiculously cumbersome process was used in settling three disputes between states, including a substantial land conflict between Connecticut and Pennsylvania.⁴⁷

The lack of a functioning national court system fostered interstate rivalries and damaged efforts to promote interstate commerce.⁴⁸ The unchecked aggression of individual state govern-

44. See generally J. FRANKLIN JAMESON, *The Predecessor of the Supreme Court*, in *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* 1-45 (1889) (discussing the judicial functions and organs of the federal government in the years preceding 1789).

45. *Id.*

46. Article IX of the Articles of Confederation provided:

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress stating the manner in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternatively strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number no less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy

ACT OF CONFEDERATION OF THE UNITED STATES OF AMERICA art. ix, *reprinted in* 1 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 89-90 (Merrill Jensen ed., 1976).

47. See HAMPTON L. CARSON, *THE SUPREME COURT OF THE UNITED STATES* 67-68 (1891).

48. See generally William F. Swindler, *Seedtime of an American Judiciary: From*

ments, which would at best ignore, and at worst directly challenge, the already limited judicial authority of the national government and the legitimacy of national law, threatened a short existence for the new confederation.⁴⁹ James Madison wrote to George Washington just a few weeks before the Philadelphia Convention on this issue:

The national supremacy ought to be extended . . . to the Judiciary departments It seems at least necessary that the oaths of the Judges should included a fidelity to the general as well as local Constitution, and that an appeal should lie to some National tribunal in all cases to which foreigners or inhabitants of other States may be parties.⁵⁰

B. Philadelphia Debate on the Need for a National Judiciary

The individuals who attended the Philadelphia Convention were uniquely educated and experienced to build a national court system; thirty-four of the fifty-five delegates were attorneys or were trained in the law. Drawing on their substantial experience with the long-established courts of Great Britain and the courts of the colonies/newly independent states,⁵¹ the attorney-delegates sought to establish a truly independent, and fully functional, national court system. Section 9 of Edmund Randolph's Virginia Plan provided a good starting point for structure, appointments, and independence:

Resolved, That a national judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their

Independence to the Constitution, 17 WM. & MARY L. REV. 503 (1976) (discussing the development of the American judiciary prior to the adoption of the Constitution).

49. See generally J.C. Bancroft Davis, *Federal Courts Prior to the Adoption of the Constitution*, 131 U.S. app. at lvi-lviii (1889) (describing the American judicial system prior to the adoption of the Constitution).

50. DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 15 (1990).

51. In theory, state jurists enjoyed the formal guarantees of judicial independence under state constitutions, most of which provided for continuing tenure and salary on good behavior. In practice, however, the political branches of the state governments could, and too often did, actively interfere with the decisions of the state courts.

offices during good behaviour; and to receive punctually at stated times fixed compensations for their services, in which no increase or diminution shall be made so as to affect the person actually in office at the time of such increase or diminution.⁵²

As to the authority and jurisdiction of the judicial system, Section 9 stated:

That the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies & felonies on the high seas; captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officer; and questions which involve the national peace or harmony.⁵³

Not all delegates agreed, however, with the idea of, or need for, a national court system. Early in the Convention proceedings, John Rutledge of South Carolina argued that state courts were the only proper fora in which to decide cases in the first instance:

Mr. RUTLEDGE, having obtained a rule for reconsideration of the clause for establishing *inferior* tribunals under the national authority, now moved that part of the clause in the ninth resolution should be expunged; arguing, that the state tribunals might and ought to be left, in all cases, to decide in the first instance, the right of appeals to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction of the states, and creating unnecessary obstacles to their adoption of the new system.⁵⁴

Roger Sherman agreed with John Rutledge and specifically complained about the financial cost of supporting such a national judiciary. James Madison, however, responded directly to

52. ROSSITER, *supra* note 43, at 362-63.

53. *Id.*

54. JONATHAN ELLIOT, 5 DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 158-59 (1941).

Rutledge's criticism of inferior level national courts:

Mr. MADISON observed, that, unless inferior tribunals were dispersed throughout the republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, though ever so distant from the seat of the court. An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive or judiciary would be the mere trunk of a body, without arms or legs to act or move.⁵⁵

During the debate, James Wilson and John Dickinson supported Madison's argument that a national judiciary was a necessary complement to a national legislature. Madison reported: "Mr. Dickinson contended strongly that if there was to be a National legislature, there ought to be a national judiciary, and that the former ought to have authority to institute the latter."⁵⁶ Similarly, Nathaniel Gorham later argued that "[i]nferior tribunals are essential to render the authority of the national legislature effectual."⁵⁷ Initially, the Convention vote was divided over Rutledge's first motion to eliminate inferior courts from the new government structure. The question reemerged several times during the summer and often centered on the jurisdiction and cost of establishing such national courts.⁵⁸

Opponents of establishing lower federal courts consistently argued that such courts were not needed and that their jurisdiction would interfere with the authority of state courts. Pierce Butler of South Carolina "could see no necessity for such tribu-

55. *Id.* at 159.

56. *Id.*

57. *Id.* at 331.

58. Roger Sherman was most concerned with cost: "He dwelt chiefly on the supposed expensiveness of having a new set of courts, when the existing state courts would answer the same purpose." *Id.* at 159.

nals"⁵⁹ and, early in the debates, threatened that the "states will revolt at such encroachments."⁶⁰ Butler suggested that the delegates follow the example of the Greek leader Solon who "gave the Athenians, not the best government he could devise, but the best they would receive."⁶¹ In a like vein, Maryland's Luther Martin was recorded as fearing that national courts "will create jealousies and oppositions in the state tribunals, with the jurisdictions of which they will interfere."⁶²

Edmund Randolph of Virginia forcefully answered these political and jurisdictional questions, arguing "the courts of the states cannot be trusted with the administration of the national laws. The objects of jurisdiction are such as will often place the general and local policy at variance."⁶³ Ultimately, James Madison successfully borrowed from the Virginia Plan to phrase the jurisdictional scope of the new judiciary in a manner acceptable to the convention delegates: "That the jurisdiction shall extend to all cases arising under the national laws, and to such other questions as may involve the national peace and harmony."⁶⁴

In the end, the delegates agreed to establish a supreme national judicial tribunal and to give Congress the authority to create a system of national lower courts. Opponents of the new federal judiciary nevertheless registered their disagreement to the very end of the Convention. For example, Virginia's George Mason circulated his "Objections To this Constitution of Government," which stated in relevant part:

The Judiciary of the United States is so constructed and extended, so as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.⁶⁵

59. *Id.* at 331.

60. *Id.* at 159.

61. *Id.*

62. *Id.* at 331.

63. *Id.*

64. *Id.* at 332.

65. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 638 (Max Farrand ed., 1966) (quoting K.M. ROWLAND, THE LIFE OF GEORGE MASON, II) [here-

C. Appointment Process

Convention delegates also were divided over the proper method of accomplishing judicial appointments.⁶⁶ The Convention debated throughout the summer over which of the two political branches should appoint judges.⁶⁷ Some delegates, such as Pennsylvanian James Wilson, believed that judicial appointment by the Congress would result in "[i]ntrigue, partiality, and concealment,"⁶⁸ and that a "principal reason for unity in the Executive was, that officers might be appointed by a single responsible person."⁶⁹ Other delegates, such as Charles Pinkney, resisted the idea of placing so much power solely in the Executive, who Pinkney believed "will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust."⁷⁰

As one of several Philadelphia compromises, the Convention eventually decided on two alternative appointment processes found in two different clauses of Article II, Section 2. Under ordinary circumstances, the President would appoint judicial officers with the Senate's majority concurrence. Recognizing the consequence of developing an efficient appointment process, the Framers divided that ordinary appointment authority unequally between the President and the Senate.

The Framers sought to charge the lion's share of the responsibility, including absolute initial selection authority and final appointment commissioning power, to the President. Even after having made a nomination and soliciting the Senate's "advice and consent" through confirmation, the Executive can choose not to commission the selected individual.⁷¹ As Thomas Jefferson

inafter RECORDS].

66. ELLIOT, *supra* note 54, at 156-57.

67. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 23-24 (1991).

68. ELLIOT, *supra* note 54, at 155.

69. *Id.*

70. *Id.* at 350.

71. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 659 n.3 (1970).

described this process, the first appointment clause of Article II, Section 2 "gives the *nomination* . . . to the President, the *appointment* to him and the Senate jointly, the commissioning to the President."⁷²

Alexander Hamilton also described the unequal division of power between the President and the Senate in *The Federalist*:

It will be the Office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made.⁷³

Further explaining the allocation of responsibility, Hamilton stated:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.⁷⁴

Although the Framers intended that regular appointments be accomplished by presidential selection with the Senate playing a limited role through confirmation, they gave the President the sole and complete power to make recess appointments in alternative circumstances, which the Constitution defined as any time the Senate recesses leaving a vacancy unfilled.⁷⁵ Article II, Section 2, Clause 3 states: "The President shall have power to fill up all Vacancies that may happen during the Recess of the

72. Thomas Jefferson, Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian P. Boyd ed., 1961).

73. THE FEDERALIST No. 66, at 387 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

74. THE FEDERALIST No. 76, at 429 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

75. For historical information on recess judicial appointments, see Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984).

Senate, by granting Commissions which shall expire at the End of their next Session."⁷⁶ The second appointments clause, the Recess Appointments Clause, which was adopted without debate at the Convention, protects the government from Senate inaction and guarantees the ceaseless functioning of the judiciary and the executive branch.⁷⁷

D. Ratification Debates

Even before the Confederation Congress adopted the September 28, 1787, resolution ordering transmission of the proposed Constitution to the states,⁷⁸ popular publication of the document's final draft generated strong opposition to the proposed national court system among various newspapers and state legislatures.⁷⁹ The most significant debates over the judi-

76. U.S. CONST. art. II, § 2, cl. 3.

77. See 2 RECORDS, *supra* note 65, at 540. Congress has attempted to restrict this constitutional authority by limiting salary payments to recess appointees. See 5 U.S.C. § 5503 (1994), which provides:

(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply—

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

(b) A nomination to fill a vacancy referred to by (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

Id. Application of this statutory encroachment on the Executive's appointment authority obviously raises serious separation of powers concerns.

78. The lame duck Congress resolved that the Constitution "be transmitted to the several legislatures in Order to be submitted to convention of Delegates chosen in each state by the people thereof." EDMUND C. BURNETT, *THE CONTINENTAL CONGRESS* 696 (1964).

79. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 797-829 (1984).

ciary were waged in the state ratification conventions by declared anti-federalists.⁸⁰ In Philadelphia, for example, anti-federalists expressed the belief that the new judiciary would prove to be a "daring encroachment on the liberties of the citizens,"⁸¹ that "State judicatories would be wholly superseded,"⁸² and that Congress would probably authorize too few judges, resulting in court delays.⁸³ James Wilson joined the ratification debate, explaining both the necessity and wisdom of the new Charter's judicial branch; his strong defense was crucial to securing Pennsylvania's ratification of the Constitution.⁸⁴

In other states, similar objections to ratification were based on an aversion to the new judiciary. In the Massachusetts ratifying convention, Abraham Holmes stated that the new government would "find Congress possessed of power enabling them to institute judicatories, little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*."⁸⁵ In Virginia's ratification convention, George Mason challenged almost every sentence in Article III of the new Constitution. In addition, Mason made a number of genuinely outlandish charges against the proposed national judiciary, such as that the inferior courts would not permit prosecution of federal officers for "the most insolent and wanton brutality to a man's wife or daughter."⁸⁶ James Madison, John Marshall, and Edmund Randolph

80. For works outlining the movements against ratification of the Constitution, see THE ANTIFEDERALISTS (Cecelia M. Kenyon ed., 1966); THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981); JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 (1981); ROBERT A. RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788 (1966).

81. DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 11 (1971) (quoting PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 154 (John B. McMaster & Frederick D. Stone eds., 1888)).

82. *Id.* (quoting PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-88, at 154 (John B. McMaster & Frederick D. Stone eds., 1888)).

83. *Id.*

84. *See id.* at 10-12.

85. *Id.* at 12-13 (quoting DEBATES AND PROCEEDING OF THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, AND WHICH FINALLY RATIFIED THE CONSTITUTION OF THE UNITED STATES 212 (1856)).

86. *Id.* at 16 (quoting 9 HUGH B. GRISBY, THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788, WITH SOME ACCOUNT OF THE EMINENT VIRGINIANS OF

successfully vindicated the proposed independent national judiciary and finally persuaded the closely divided Virginia ratification convention.⁸⁷

The convention and ratification processes are important to today's debates over the judiciary because they demonstrate that questions about the federal philosophical foundations and expansive jurisdictional scope of the national court system were fully discussed and firmly decided at the nation's founding. Specifically, reconsidering the objections to the creation of the federal courts is important because the debates demonstrate that the federal and state ratifying conventions understood completely the dynamic nature of the new national judiciary—indeed, the new national government—that they were proposing. The United States of America was a national government with the power to enact national laws, inclusive of a national court system created to enforce those laws. In contemporary times when “devolution” is properly being considered in a variety of public policy areas, it is important that these ideas should not be seen, or misused, to disempower the national government as an institution.

Understanding the limits to a constitutional interpretation of “limited national powers” is crucial inasmuch as the Supreme Court recently has attempted to strip Congress's authority to legislate on an issue of the gravest national concern in order to limit its own docket.⁸⁸ These debates refute the notion that the Framers created a national government of such limited and circumscribed powers as to be impotent to address fundamental issues of national concern.

The philosophical and jurisprudential federalism underpinning the Articles of Confederation was rethought and laid to rest in 1787. Ultimately, the requisite number of states decided to relinquish voluntarily their sovereignty in order to form a more perfect union.⁸⁹ The ratified Constitution thus gave the new

THAT ERA WHO WERE MEMBERS OF THE BODY 286 (1890-1891) (collections of the Virginia Historical Society, (n.s.) vols. 9-10)).

87. *Id.* at 16-19.

88. *See United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995) (striking down a federal law prohibiting firearms in a school zone as violative of the Commerce Clause).

89. The attempt of certain of the southern states to rescind and repudiate this

Republic's Congress the assistance of both a strong executive and a much needed judicial branch—both “arms and legs to move [and] act.”⁹⁰

E. A Model for Evolving, Efficient Judicial Institutions

The government structure created by the Framers included, as a necessary part, a new independent national judiciary—a third, nonpolitical branch of government that was to be more fully developed and perpetually maintained by the two political branches. While establishing “one supreme Court,”⁹¹ the Constitution charged the future political branches with the solemn responsibility of designing, establishing, funding, and staffing inferior courts. Article III states: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁹² Article I affirms this congressional authority: the Congress has the power “[t]o constitute Tribunals inferior to the supreme Court.”⁹³

In the judiciary, the Constitution created a dynamic national court system—a model for evolving governmental institutions, not a static organ of government. Charged with enforcing the ever-changing laws of the national government, the judiciary was “established,” and is to be “reestablished” regularly, by Congress, to effectuate Congress’s dynamic legislative will. Instead of creating constitutionally determined inferior court structures, the Framers wisely left the form and structure of the inferior courts to the same Congress that they charged with writing the laws that the courts would interpret and enforce.⁹⁴ Alexander Hamilton described the dual system of state and federal courts as “one whole,” yet he stated: “’Tis time only that can mature and perfect so compound a system, and can liquidate the meaning of all the parts, and can adjust them to each other

voluntary act of union was rejected at Gettysburg. See GARY WILLS, *THE WORDS THAT REMADE THE CONSTITUTION* (1992).

90. ELLIOT, *supra* note 54, at 71.

91. U.S. CONST. art. III, § 1.

92. *Id.*

93. *Id.* art. I, § 8, cl. 9.

94. *Id.*

in a harmonious and consistent WHOLE."⁹⁵

Congress is given the discretion to choose a court structure that is best able to effectuate the national law; indeed, the Constitution states only that Congress "may" create courts.⁹⁶ The Framers envisioned that changing national concerns and circumstances might require future Congresses "from time to time to ordain and establish" distinctive "inferior Courts."⁹⁷ Although the Framers were confident in charging Congress with creating inferior courts, they decided that an efficient appointment process necessarily would charge the President alone with the *sole* duty to select all federal judges. As Alexander Hamilton stated in *The Federalist*, the President is given the "sole and undivided responsibility" to choose appointees.⁹⁸ Efficiency in judicial staffing is doubly guaranteed by the alternative recess appointment procedure. By giving the President the sole authority to appoint federal judges without either the advice or the consent of the Senate at any time the Senate is in recess, the Framers sought to ensure a continuous system of justice.⁹⁹

During both his terms of presidential office, George Washington worked strenuously to breathe life into the Framers' vision of a strong, independent federal judicial system. President Washington took his judicial appointment responsibility most seriously; he exercised his appointment powers assertively, and he even used the recess appointment authority to fill a vacancy on the Supreme Court.

In a letter to John Jay, his appointee as the Supreme Court's first Chief Justice, President Washington referenced the importance of executive leadership in building a strong, independent, and principled federal court system:

95. THE FEDERALIST No. 82, at 458 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

96. U.S. CONST. art. III, § 1.

97. *Id.*

98. THE FEDERALIST No. 76, at 429 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

99. The Article III authority of recess-appointed judges has been affirmed by two appellate courts. See *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963). For a recent case voiding a recess appointment, see *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993).

I have always been persuaded, that the stability and success of the national government, and consequently the happiness of the people of the United States, would depend in a considerable degree on the interpretation and execution of its laws. In my opinion, therefore, it is important, that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation.¹⁰⁰

During the first 200 years of the Republic's history, the Framers' concept of a strong, nonpolitical third branch of government was regularly refashioned, expanded, and sustained through the diligent work of both political branches.¹⁰¹ Beginning with the Judiciary Act of 1789,¹⁰² congressional leaders of the past were not afraid of structuring and restructuring the courts, of adding judges to the inferior courts when needed, or of adding jurisdictional responsibility to the evolving judicial department, thus ensuring continuing perfection in its formation and guaranteeing its ability to meet the changing needs and demands of the nation.¹⁰³

III. APPOINTMENT NEGLECT; CONFIRMATION CIRCUS

Over the past several years, political malfeasance has taken a grievous toll on our federal court system.¹⁰⁴ Most fundamental-

100. 10 THE WRITINGS OF GEORGE WASHINGTON 86 (Jared Sparks ed., 1836).

101. See generally ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS (1987) (chronicling the history and evolution of the federal court system).

102. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

103. See DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 1-4 (1971). Examples of this historical maintenance of the federal judiciary by the political branches run from the first Judiciary Act of 1789, which established a district court in each of the 13 states comprised of a single district judge but required Supreme Court Justices to ride circuit; to the second act of judicial legislation in 1802, which formally established six federal circuits and allowed cases to be decided by one judge; to the judiciary acts of 1869 and 1875, which required Supreme Court Justices to sit in circuit every two years and substantially broadened the original jurisdiction of the inferior courts; to the groundbreaking 1891 act, which established the Circuit Court of Appeals; to the 1911 act which adopted a Judicial Code formally creating district courts; to the judiciary acts of 1925, 1948, and 1958, which reduced direct review by the Supreme Court and changed the circuit court of appeals to the U.S. Court of Appeals, raised the diversity jurisdictional requirement to \$10,000, redefined corporate citizenship, and allowed discretionary interlocutory appeals. *Id.*

104. See generally Diana G. Culp, *Fixing the Federal Courts*, A.B.A. J., June 1990,

ly, the political branches have failed to respond to the third branch's increasing civil and criminal caseload, chronic judicial vacancy rates, and significant budgetary concerns.¹⁰⁵ By increasing the federal effort to combat escalating violent crime without adding any judicial resources, the political branches recklessly jeopardize the quality of national civil and criminal justice.¹⁰⁶ Indeed, a five-year retrospective report shows that criminal appeals increased over thirty percent in the five-year period between 1989 and 1993,¹⁰⁷ a trend that is certain to continue.

According to the Administrative Office of the U.S. Courts, the 1994 Crime Control and Prevention Act has the potential to overwhelm the federal courts with additional criminal prosecutions.¹⁰⁸ Individuals accused of federal crimes will look to a federal court system that already is strained to the breaking point for criminal justice.¹⁰⁹ Civil litigants, many of whom already have waited years to see the inside of a federal courtroom, will be forced further back in the courthouse queue.

Beginning during the Bush Administration and continuing through the present, as the caseload of the judiciary has increased and its budget has fluctuated, our federal court system has functioned with a chronic number of judicial vacancies.¹¹⁰ The problem, stemming from general political branch acceptance

at 63 (advocating adoption of a comprehensive plan for reform of the federal judiciary proposed by the Federal Courts Study Committee).

105. Garry Sturgess, *Another Clash over Criminal Caseload*, LEGAL TIMES, Apr. 1, 1991, at 7.

106. See *Is U.S. Justice System in a State of Crisis?*, NAT'L L.J., Aug. 2, 1993, at 23.

107. *U.S. Courts: Caseload on the Rise*, LEGAL INTELLIGENCER, Sept. 9, 1994, at 1.

108. The Act's authorization of \$200 million to finance supervision and defender services for criminal defendants is not likely to ease the adjudicative burdens imposed by the Act. It is important to note that the Act's "Drug Courts" provision does not allocate any resources to the federal judiciary. Rather, these so-called "courts" are federally subsidized drug rehabilitation programs. See generally Mark Curriden, *Drug Courts Gain Popularity*, A.B.A. J., May 1994, at 16 (discussing the drug courts' emphasis on intervention and treatment).

109. See John F. Rooney, *Crime Bill Could Swamp Courts Moran Says*, CHI. DAILY L. BULL., Feb. 17, 1994, at 1; John F. Rooney, *Federal Judges Launch New Salvo at Crime Bill*, CHI. DAILY L. BULL., Mar. 14, 1994, at 1.

110. See Will Pryor, *Wanted: 69 Judges for Federal Bench*, DALLAS MORNING NEWS, Mar. 13, 1995, at A13.

of delays in the appointment process, and specifically worsened by a lack of executive leadership in confronting Senate confirmation deadlock, is substantial; judicial positions have remained vacant for years at a time.¹¹¹ Indeed, in his 1993 year-end state of the judiciary report, Chief Justice Rehnquist stated: "There is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem."¹¹²

A. George Bush's Failed Four Years

President George Bush declined to assert his appointment authority vigorously;¹¹³ he failed to keep a full slate of nominees before the Senate, proved impotent to push nominees through to confirmation, and refused to exercise his constitutional authority to recess-appoint judges. Moving from the vice-presidency to the White House, President George Bush could have left in place President Ronald Reagan's efficient, albeit strongly ideological, judicial selection process. Instead, the Bush Administration proved extraordinarily ineffective in making judicial selections, too often allowing senators of the states in which vacancies occurred to make judicial choices for the President.¹¹⁴ It took the Bush Administration, on average, more than one year to make judicial selections.¹¹⁵ While encouraging federal prosecutors to escalate the Administration's war on crime through increased federal prosecutions,¹¹⁶ President Bush failed to provide fully staffed courts in which to adjudicate the criminal actions, and the judiciary struggled with the criminal

111. Charles V. Zehren, *Justice Delayed By Empty Benches; Clinton Falls Short on a Promise To Fill Scores of Judgeships*, NEWSDAY, May 28, 1994, at A8.

112. 1993 YEAR-END REPORT, *supra* note 7.

113. Kevin Cullen, *Chief Justice Warns of a Court Overload; Presses Bush Administration To Fill Vacancies*, BOSTON GLOBE, Jan. 1, 1992, at 3.

114. Judith Havemann, *Democrats: Judicial Vacancies Galore; Bush Lags Behind Reagan, Carter in Filling Bench, Group Says*, WASH. POST, Jan. 26, 1990, at A21.

115. See Christi Harlan & Jonathan M. Moses, *Bush Misses a Chance*, WALL ST. J., May 4, 1992, at B13.

116. Paul M. Barrett, *Attorney General Barr Targeting Violent Crime, Comes On Like Gangbusters in a Campaign Year*, WALL ST. J., Feb. 11, 1992, at A18; Michael deC. Hinds, *Bush Aides Push State Gun Cases into U.S. Courts*, N.Y. TIMES, May 17, 1991, at A1; Michael Wines, *Drug War To Widen on Same Budget*, N.Y. TIMES, Feb. 28, 1992, at A9.

case overload.¹¹⁷

Moreover, in 1991 and 1992, an appointment impasse arose between the Bush Administration and the Senate Judiciary Committee over committee staffers' alleged misuse of confidential FBI reports. The impasse lasted for months.¹¹⁸ From this time until the end of Bush's one term of office, the Democrat-controlled Senate was successful in repeatedly stalemating Bush's judicial nominations.¹¹⁹

Commenting on this political branch malfeasance, the New York State Bar Association President stated in July 1992: "President Bush's and the Senate Judicial Committee's slow response in filling federal judicial vacancies has created a state of emergency in the federal courts in New York State."¹²⁰ The judicial work of many other federal courts across the nation was similarly impaired, but the metropolitan areas were especially hard hit.¹²¹

In one of the most manifest displays of political feebleness in modern times, Republican President Bush, during the months before and after losing the 1992 general election, failed to demand forcefully that the Democrat-controlled Judiciary Committee take immediate confirmation action on fifty judicial nominations that were languishing in the Senate. As he had done throughout his four years, Bush also specifically rejected the suggested exercise of his recess judicial appointment powers¹²² and handed over 100 empty judgeships to Democrat President-elect Clinton on January 20, 1993.¹²³

117. See GAO: *More Federal Judges Needed To Cut Case Backlog*, CHI. TRIB., May 28, 1991, at 4; *Senator Says Judges Needed for Drug Cases*, WASH. TIMES, May 28, 1991, at A2.

118. Glenn R. Simpson, *Panel Studying Nominating Process Puts Onus on Bush*, ROLL CALL, Feb. 6, 1992, at 1.

119. See *Another Holdup*, WALL ST. J., May 5, 1992, at A20.

120. *New York State Bar Scores Senate Judiciary for Federal Judge Vacancies*, U.S. Newswire, July 1, 1992, available in LEXIS, News Library, Usnwr File.

121. See Gail Appleson, *U.S. Court Cases Hit Judicial Vacancy Bottleneck*, Reuter Lib. Rep., July 21, 1992, available in LEXIS, News Library, Reuwl File; Doreen Carvajal, *Awaiting Judgment: A Special Report*, N.Y. TIMES, Apr. 17, 1995, at A1.

122. See *supra* notes 102-03 and accompanying text.

123. See *The Quantity of Justice*, L.A. TIMES, Nov. 23, 1992, at B6.

B. Bill Clinton's Troubled Tenure

William Jefferson Clinton was widely expected to move quickly to fill Bush's vacancies and leave his administration's stamp on the federal judiciary.¹²⁴ Selected by the American people on November 7, 1992, after running on a platform to break gridlock and change politics, Arkansas Governor Clinton had two and one-half months in Little Rock before taking the presidential oath of office in which to develop an efficient judicial selection process.

In January 1993, there were 109 federal judicial vacancies; one year later, there were 113 empty federal judgeships.¹²⁵ As President Clinton entered the second half of his second year of office, vacancy rates of over 100 in number continued to plague both the trial and appellate federal courts.¹²⁶

The Administrative Office of the U.S. Courts estimates that in 1993 alone, the district court vacancy rate resulted in 109 lost "judge-years." In summer 1994, more than one out of eight of our 840 lower court judgeships was empty.¹²⁷ In the summer of 1993, over sixty benches were still vacant, and half of those vacancies had existed for more than eighteen months. Personnel and personal problems within the White House have seriously harmed President Clinton's judicial selection process.¹²⁸

A serious lack of focus at Janet Reno's Justice Department, described by University of Virginia Professor David O'Brien as "far more scandalous" than Whitewater,¹²⁹ has further retarded President Clinton's judge-picking efforts.¹³⁰ In the summer of 1993, then-White House Counsel Bernard Nussbaum firmly asserted that every one of the 120 federal court vacancies would

124. This Author mistakenly expected the Clinton partnership to take assertive action and develop an efficient process for filling the over 100 judicial positions. See Victor Williams, *Senators Cannot Be Choosers*, NAT'L L.J., Feb. 1, 1993, at 17.

125. See *Status of Article III Judgeships*, THIRD BRANCH, Dec. 1993, at 3.

126. See *Clinton Dithers While Federal Bench Shrinks*, L.A. TIMES, July 19, 1993, at B6.

127. See *Judicial Boxscore*, THIRD BRANCH, June 1994, at 9.

128. See William Grady & Linda P. Campbell, *Filling Federal Bench Takes a Back Seat*, CHI. TRIB., July 5, 1993, at 2.

129. David M. O'Brien, *Beyond Reno's Charisma: Mismanagement at Justice*, L.A. TIMES, May 1, 1994, at M2.

130. *Id.*

be filled by May or June 1994.¹³¹ As of that date, however, over 100 vacancies remained.¹³² George Mason University Professor Michael Krauss recently attempted to explain why President Clinton has been tardy in making lower court appointments: "The Clinton Administration doesn't know what kind of people it wants on the bench. This is a dilemma of being a new liberal or an old liberal. This is the internal debate that has characterized the administration."¹³³

Although Professor Krauss's analysis may account for part of the answer, an equally plausible explanation is that the Administration simply does not understand the consequences of a dilatory appointment schedule.¹³⁴ The Clinton Administration appears plagued by a pattern of appointment delinquency.¹³⁵ This pattern is evident in all areas of the justice system, with vacancies existing on the trial and appellate court benches, in United States Attorneys' offices across the nation, within the highest ranks of the Justice Department, and even on the United States Sentencing Commission.¹³⁶ At the end of President Clinton's first year in office, Brookings Institution presidential scholar Stephen Hess commented on Clinton's appointments record: "He has done very, very badly, no question about it. It is his major blemish as a presidential manager. It is really inexplicable."¹³⁷

131. See Deborah Pines, *Swift Action on Judges Promised: Nussbaum Vows To Fill 125 Existing Fed'l Vacancies Inside a Year*, N.Y. L.J., June 28, 1993, at 1.

132. Ironically, President Clinton slightly worsened the lower court judicial vacancy rate with the promotion of Circuit Judges Ruth Ginsburg and Stephen Breyer to the high court and the removal of District Judge Louis Freeh to fill the FBI's top post. See Kristan Metzler, *Further Judicial Backlog?; Ginsburg Gain Is D.C. Court's Loss*, WASH. TIMES, June 15, 1993, at B1.

133. Zehren, *supra* note 111, at A8.

134. See Ted Gest, *Clinton's Law: Front and Center*, U.S. NEWS & WORLD REP., July 26, 1993, at 30.

135. See Alan McConaghan, *Top Posts Vacant*, WASH. TIMES, Feb. 15, 1994, at A7.

136. Al Kamen, *Hang-up at Sentencing Panel*, WASH. POST, June 1, 1994, at A17. A reported dispute between Senate Judiciary Committee members Edward Kennedy and Joseph Biden regarding who should be selected as chairman of the Sentencing Commission left four positions on the important criminal justice organ vacant for months. *Id.*

137. Michael Kranish, *Clinton Lags in Filling Top Posts*, BOSTON GLOBE, Feb. 13, 1994, at 1.

The appointment neglect pattern also is evident in the way in which President Clinton has extended George Bush's nonconstitutional reliance on "senatorial courtesy" as the standard process for making judicial selections.¹³⁸ Notwithstanding his dependence on senatorial selection of judges, President Clinton has been unable to shorten the time for Senate confirmation so as actually to place judges on the bench. Incredibly, the Administrative Office of the U.S. Courts reports that it presently takes the political branches an average of 804 days to fill a single judicial vacancy.¹³⁹ It seems fair to ask whether President Clinton, the former constitutional law professor and former state attorney general, really understands the severe damage that every week of appointment delay causes the justice system.

In 1994, the Clinton Administration strongly rejected appointment criticism and challenged the negative characterization of the Administration's appointment process. Assistant Attorney General Eleanor Dean Acheson stated: "I absolutely, aggressively disagree. Critics have no clue as to the process and how incredibly important it is to be deliberate."¹⁴⁰ Acheson stated that a "last gasp" effort to announce more nominees would be made before the end of the then current session of Congress.¹⁴¹ Deputy Attorney General Jamie Gorelick expressed similar sentiments when she stated that she had lived up to her confirmation hearing promise to "keep the pipeline full for the Senate Judiciary Committee."¹⁴²

The Administration has received support and praise from many commentators for its commitment to racial and gender

138. Some states' U.S. Senators make their "selections" personally, while other states' senators have institutionalized "senatorial courtesy" with formal nominating commissions. See, e.g., *Metzenbaum's Court Blunder*, PLAIN DEALER, June 22, 1994, at B10; John F. Rooney, *Senators Eye 'Wisconsin Seat' on 7th Circuit*, CHI. DAILY L. BULL., June 21, 1994, at 1; Janet Seiberg, *Lieberman Seeks Woman for Federal Bench*, CONN. L. TRIB., May 23, 1994, at 8; Bill Voelker, *2 More Judges Added to Judge List*, TIMES-PICAYUNE (New Orleans), Feb. 5, 1994, at B4.

139. See *Senior Judges Help District Courts Keep Pace*, THIRD BRANCH, May 1994, at 1.

140. Tony Mauro, *"Last Gasp" Scramble To Clear Up Backlog*, USA TODAY, June 27, 1994, at A2.

141. *Id.*

142. Henry J. Reske, *Keeping Pace with Judicial Vacancies*, A.B.A. J., July 1994, at 34.

diversity on the bench.¹⁴³ Facing a Republican Senate majority for the remainder of his term of office, however, President Clinton will likely face the partisan realities of further difficulty in the appointment arena.¹⁴⁴ This difficulty could turn into deadlock if the Republican-controlled Senate Judiciary Committee delays confirmation action for Clinton nominees to the degree that Democrats did during the last year of the Bush Administration. Some court scholars are suggesting that the Clinton Administration may run short of time in its effort to leave a lasting impression on the federal judiciary before the 1996 presidential election.¹⁴⁵ For example, judicial scholar Sheldon Goldman of the University of Massachusetts stated: "They have to act very quickly. I mean now. The confirmation window is closing fast."¹⁴⁶

Agreeing with the catch-up analysis, Virginia Professor David O'Brien commented: "The Clinton team thought they would get to judges in the second term. They were confident of reelection. Now they are playing catch-up."¹⁴⁷ Although his comments are framed in the context of the present partisan dynamic, Professor O'Brien has accurately calculated the high cost to justice of both nomination delay and confirmation deadlock: "Nationally, appeals in the federal appellate courts jumped 24% between 1989-93. In the district courts, civil filings have increased 9% over the last three years. Leaving aside the caseload of criminal cases, a diminished federal bench will further delay civil suits currently pending, due to crowded dockets."¹⁴⁸

143. See Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1866-72 (1994).

144. See Neil A. Lewis, *A Republican Senator Forces the Administration To Rethink its Strategy on Judicial Appointments*, N.Y. TIMES, Dec. 9, 1994, at B7.

145. See Robert Marquand, *Clinton Races To Put His Stamp on the Judiciary*, CHRISTIAN SCI. MONITOR, Mar. 7, 1995, at 1.

146. *Id.*

147. *Id.*

148. See David M. O'Brien, *Diversity Goal Hurts Liberals*, L.A. TIMES, Feb. 5, 1995, at M1.

C. Senate Malfeasance: Confirmation Delay and Televised Circus Acts

During the past dozen years, the United States Senate, as an institution, has demonstrated an unparalleled lack of appreciation for its solemn constitutional duties regarding judicial appointment confirmation. At its root, this problem stems from a misunderstanding of the relatively limited role the Senate was designed to play in the appointments process and the bipartisan lack of strong executive leadership in correcting the misunderstanding.

1. Senate Confirmation Delay

Even if a full slate of President Clinton's judicial nominations were immediately forthcoming, our national justice system will continue to suffer if the Clinton Administration is not forceful in demanding swift and certain confirmation action from the Senate.¹⁴⁹ For three years, the Senate has continued the same sluggish confirmation process for Clinton's nominees that it demonstrated during the Bush years, notwithstanding the fact that, for two of those years, both the Senate majority and Executive were of the same political party. The Senate has delayed confirmation action on dozens of President Clinton's judicial and justice system nominations. These delays must be analyzed as an institutional problem—one that raises serious separation of powers issues.

A startling example of this institutional retardation of the appointment process can be seen in Yale Law School Dean Guido Calabresi's nomination to the U.S. Court of Appeals for the Second Circuit.¹⁵⁰ Dean Calabresi, a legal scholar and teacher of sterling reputation, a lawyer of impeccable credentials, and an individual of the warmest, most engaging temperament, was nominated by Yale law alumnus Bill Clinton in Feb-

149. Federal judicial gridlock recently has been blamed in part for the imbalance and bias in jury selection. See Joseph P. Fried, *Bias Charged in Selection of U.S. Juries*, N.Y. TIMES, June 2, 1994, at B1.

150. See Todd S. Purdum, *Yale Law Dean Is Nominated to 2d Circuit Appeals Court*, N.Y. TIMES, Feb. 10, 1994, at B7.

ruary 1994 to the understaffed Second Circuit.¹⁵¹ Hearings were conducted shortly before the Senate took its Fourth of July, 1994 recess;¹⁵² however, definitive action was not taken on the nomination until late July 1994.¹⁵³ For six months, the Second Circuit was deprived of the needed skills of Judge Calabresi; for six months, Second Circuit justice was further delayed to the tangible detriment of anxious litigants. Incredibly, there was no "problem" with Dean Calabresi's nomination. The nation and the Second Circuit are most fortunate to have Guido Calabresi on the important Second Circuit, where some of the nation's greatest jurists have served—Learned Hand, Jerome Frank, and Augustus Hand, to name only a few.

The Calabresi appointment detainment is an excellent example of institutionalized Senate confirmation delay.¹⁵⁴ It also signifies a substantial lost opportunity for President Clinton—that is, the opportunity to have made a recess appointment of Judge Calabresi on July 4, 1994. To the Senate and the President, a six-month confirmation delay apparently constitutes a harmless appointment hold-up, even considering that each week of Senate confirmation inaction results in months of lost judge time. The Senate must have perceived as a sign of political frailty President Clinton's failure to demand immediate confirmation from a Democrat-controlled Senate or, alternatively, to have recess-appointed Judge Calabresi.¹⁵⁵

151. *Id.*

152. David Lightman, *Yale Dean Wins Praise at Hearing*, HARTFORD COURANT, June 30, 1994, at A4.

153. *Today's News*, N.Y. L.J., July 20, 1994, at 1.

154. See *Who Will Inherit the Colonial Case from Cabranes?; Action on Cabranes and Calabresi Expected Soon*, CONN. L. TRIB., June 13, 1994, at 1.

155. Another lost recess appointment opportunity for President Clinton involved his nominee to head the Resolution Trust Corporation (RTC). Although the nomination was made in June 1993, no action was taken by the Senate Banking Committee or the full Senate before the Senate recessed at the end of the first session of the 103d Congress. The nominee specially requested President Clinton to appoint him during the Senate recess; President Clinton, however, acting through Deputy Treasury Secretary Roger Altman, informed the nominee that a recess appointment was "not available." Jerry Knight, *Tate Denies Reports of Withdrawal*, WASH. POST, Nov. 26, 1993, at B12. Roger Altman thus was forced to continue to serve as temporary head of the RTC during its politically charged investigation of a failed Arkansas savings and loan institution. Ironically, the Senate's confirmation inaction and President Clinton's failure to recess-appoint an RTC chief forced a dual politi-

In a more recent demonstration of Senate confirmation delay, Montana Senator Conrad Burns has effectively put a "hold" on all district and appellate judicial confirmations related to the Ninth Circuit until the Congress splits the U.S. Court of Appeals for the Ninth Circuit into two separate circuits.¹⁵⁶ A pending bill introduced by Senator Burns and Washington Senator Slade Gorton renews an old debate¹⁵⁷ regarding the size, unmanageable caseload, and "California slant" of the Ninth Circuit; if enacted, the legislation would create a Twelfth Circuit, composed of Montana, Idaho, Oregon, Washington, and Alaska.¹⁵⁸ Senator Burns pledged to stop all confirmation action for Ninth Circuit judgeships until "this miscarriage of justice is corrected";¹⁵⁹ during the summer of 1995, two Clinton nominees for appellate judgeships languished as a consequence.¹⁶⁰

2. Confirmation Circus: Reviewing Stephen Carter's Confirmation Mess: Cleaning Up the Federal Appointments Process

In addition to its institutional torpor in making confirmation decisions, the Senate has come under increasing criticism for producing nationally televised "confirmation circuses" worthy of P.T. Barnum.¹⁶¹ In these senatorial circuses, select nominees

cal/regulatory role for Altman—a role that exploded into a major controversy and set the stage for yet another televised Senate circus. *Altman Defends His Actions on Whitewater*, BNA Banking Daily, Aug. 3, 1994, available in LEXIS, News Library, Bnabd File.

156. *Ninth Circuit Nominations on Hold*, THIRD BRANCH, June 1995, at 8.

157. For a history of the movement to split the Ninth Circuit, see BAKER, *supra* note 29, at 74-99.

158. Willam D. Murray, *Domestic News*, UPI, Aug. 10, 1995, available in LEXIS, News Library, UPI File; see Richard C. Reuben, 'Split Decision' Pending in Congress, A.B.A. J., Feb. 1996, at 34.

159. *Id.* Senator Burns stated: "It's probably no coincidence that the most vocal critics of splitting the 9th Circuit are the California judges and lawyers who stand to lose their huge, powerful fiefdoms. These people control the legal destiny of one-fifth of the population of the United States, and their decisions are consistently out of touch with many of the people they are suppose [sic] to serve." *Id.*; see also *Court Watch; Partisan Game*, L.A. TIMES, June 23, 1995, at B8 (criticizing Senator Burns's obstructionist tactics).

160. Howard Mintz, *Time of the Essence for Clinton's Judicial Nominee*, RECORD-ER, Aug. 1, 1995, at 1.

161. See, e.g., Sidney Blumenthal, *Adventures in Babysitting*, NEW YORKER, Feb.

are expected to perform satisfactorily in three rings: juggling serious issues of law and scholarship, dodging innuendo knives of personal attack, and walking the judicial/executive independence tightrope. These performances occur while nominees attempt to be forthcoming during exhaustive, often repetitive, and sometimes inane questioning.¹⁶²

Yale law professor Stephen Carter extensively catalogs and vividly describes various such performances (including Zoe Baird's, Clarence Thomas's, and Robert Bork's) in his most recent book,¹⁶³ *The Confirmation Mess: Cleaning Up the Federal Appointments Process*. In the Preface, Professor Carter states:

[W]e have reached in our confirmation processes a strange pass at which, once we decide to oppose a nominee, any argument will do. Nobody is interested in playing by a fair set of rules that supersede the cause of the moment; still less do many people seem to care how much right and left have come to resemble each other in the gleeful and reckless distortions that characterize the efforts to defeat challenged nominations. All that seems to matter is the end result: if the demonized nominee loses, all that has gone before is justified.¹⁶⁴

The book describes graphically the deterioration of the confirmation process and how the contemporary search for evidence of a nominee's "disqualification" too often replaces consideration of the nominee's substantive "qualifications." Professor Carter relates how the somber consent responsibility of the upper house of Congress is and has been transformed into "a full-blown national extravaganza"¹⁶⁵ and how confirmation "strategy (especially public relations strategy) [has become] far more important

15, 1993, at 53; Stuart Taylor, *Inside the Whirlwind*, AM. LAW., Mar. 1993, at 64.

162. See ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); TIMOTHY M. PHELPS & HELEN WINTERNTZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* (1992).

163. Professor Carter's previous works include *The Culture of Disbelief* and *Reflections of an Affirmative Action Baby*.

164. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* ix (1994).

165. *Id.* at 17.

than issues or qualifications."¹⁶⁶

The work paints a disturbing picture of the confirmation process. Professor Carter argues that the Senate too rarely votes on policy issues and too often "votes the nation's moral fervor . . . [and] hold[s] a referenda [sic] on how bad a person the nominee is."¹⁶⁷ He offers a number of proposed structural reforms to improve the present process but rejects each, suggesting that the only proper solution is "that we make important changes in our national mood."¹⁶⁸ In offering that perplexing solution, Professor Carter diagnoses the real and only substantial problem as stemming from "our attitudes—the way we think about public service in general, and the Supreme Court in particular."¹⁶⁹

The book is surprisingly disappointing in its historical and contemporary analysis of constitutional confirmation concerns.¹⁷⁰ Central to the book's deficiency¹⁷¹ is Professor Carter's substantial overstatement of the role the Senate should play in the appointment process¹⁷² and his lack of appreciation for the constitutional authority of the executive branch in selecting and commissioning appointees.¹⁷³ Professor Carter argues that "closer Senate scrutiny of as many nominees as possible would plainly be a good thing, for the reassertion of the legislative prerogative moves us closer to the balance of power that the Founders expected."¹⁷⁴ Indeed, he even criticizes the "tradition of deference," by which a President selects his own administra-

166. *Id.* at 14.

167. *Id.* at 30.

168. *Id.* at 22.

169. *Id.* at 206.

170. For a range of popular reviews of the work, see Ross K. Baker, *The Confirmation Mess*, WASH. MONTHLY, May 1994, at 59; Jeffrey Rosen, *Prosecuting the Nominees*, WASH. POST, June 19, 1994, at X11; Cass R. Sunstein, *Has the Nominee Ever Sinned*, N.Y. TIMES, May 22, 1994, § 7 (Book Review), at 9.

171. Professor Carter also fails to acknowledge efforts by former Senate Judiciary Committee Chairman Joseph Biden to reform the confirmation process by, for example, holding at least one closed hearing for each Supreme Court nominee to review confidential FBI information and air any concerns that are likely to be sensationalized.

172. Unfortunately, Professor Carter is in the mainstream of the legal academy in making such an overestimation. See, e.g., David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

173. CARTER, *supra* note 164, at 33.

174. *Id.* at 37.

tion team.¹⁷⁵

Professor Carter stresses the political importance of a President's support for a nominee, yet a fundamental depreciation of the President's constitutional role in appointments is clear in his textual analysis and his treatment of recommended solutions for cleaning up the mess.¹⁷⁶ Carter's discussion of the "nanny problem" in the context of Zoe Baird's confirmation debacle further demonstrates his failure to appreciate the authority of the Executive in executing appointments:

Thus, just two days after his inauguration, Clinton was forced to withdraw Baird's nomination. One form or another of this nanny problem would over the next few months fell another potential attorney general, a possible Supreme Court nominee, and . . . lots of other people as well, who suddenly found themselves crossed off the lists for the posts they thought were theirs.¹⁷⁷

Of course, it was not a "nanny problem" or the "disqualification" phenomenon that deprived the nation of Zoe Baird's excellent legal mind and superior administrative abilities; in truth, Bill Clinton was not "forced to withdraw" Zoe Baird as a nominee to head the Justice Department. Instead, President Clinton, on advice of select senators and with an ear cocked to the daily chatter of radio talk shows, purposely chose to jettison his carefully selected nominee.¹⁷⁸ The result of this decision was monumental: during the critical first weeks of his presidency, Clinton's Administration had to invest more precious time vetting another nominee, and the Justice Department remained without a leader. The very department of government that plays an integral role in the selection and appointment of many other executive and justice system officers languished during this time.

The new President attempted to avoid Senate conflict and

175. *Id.* at 31-37.

176. *Id.* at 187-206.

177. *Id.* at 7.

178. See Ruth Marcus & Michael Isikoff, *Clinton Withdraws Baird's Justice Nomination*, WASH. POST, Jan. 12, 1993, at A1; Diane Rehm, *Tower of Babel*, WASH. POST, Sept. 11, 1994, at C1.

public controversy rather than defend Zoe Baird by both publicly and privately demanding immediate Senate confirmation of his choice for attorney general. Analogous to the mistake of running from the schoolyard bully on the first day of class, the Clinton Administration, by that act of capitulation, guaranteed the development of what Clinton's first chief of staff, Mack McLarty, would come to describe as "confirmation hell."¹⁷⁹

Indeed, later that spring, Lani Guinier, nominated as Assistant Attorney General for Civil Rights, became yet another victim of the Clinton Administration's conflict avoidance problem.¹⁸⁰ With this nomination, as Professor Carter details, the Administration did not even allow the victim to respond to maligning critics¹⁸¹ or, more generally, to express her "disappointment."¹⁸²

Contrary to Professor Carter's curious thesis, the confirmation mess will not be remedied by changes in "our attitudes" or "our national mood." Professor Carter states that "we should balance what good the candidate might do when serving in the position against the evil the putatively 'disqualifying' factor represents."¹⁸³ The book does not explicitly define who is being referenced by the repetitive use of the terms "our" and "we." Professor Carter apparently desires, however, to reform society-at-large. Unfortunately, the harsh societal reality is that a significantly large minority of the American public-at-large will continue to find perverse pleasure in playing the "disqualification" game.¹⁸⁴

179. CARTER, *supra* note 164, at xi. For several months before resigning as chief of staff, McLarty discussed creating a bipartisan group to explore confirmation process changes, including ending "leaks" by Senate staffers. See *Taking the Fire Out of Confirmation Hell*, BUS. WK., Dec. 6, 1993, at 57.

180. One commentator, reviewing Bob Woodward's *The Agenda: Inside the Clinton White House*, has described this as more a personal problem of Bill Clinton's than a problem with the Administration. See Andrew Sullivan, *All the President's Problems*, N.Y. TIMES, July 3, 1994, § 7 (Book Review), at 2, 11 ("The psychological origins of this intellectual blindness are not hard to discern. The Bill Clinton Mr. Woodward portrays is pathologically averse to real conflict.").

181. See Gwen Ifill, *The Guinier Battle: Anatomy of the Failure To Confirm a Nominee*, N.Y. TIMES, June 5, 1993, at 9.

182. Professor Guinier has proved that she was ready, willing, and able to defend herself and her ideas, as demonstrated by her 1994 book, *The Tyranny of the Majority*.

183. CARTER, *supra* note 164, at 177-78.

184. The recent all day, every day "news" coverage of the O.J. Simpson criminal

Even if a nominal moral rebalancing of some societal attitudes were possible, the constitutional and political reality is that only genuine and forceful presidential leadership, designed to reassert the Executive's full constitutional authority in making both traditional and recess appointments, will clean up the mess and reduce confirmation delay.¹⁸⁵ In 1995, President Clinton's troubled nomination¹⁸⁶ and the Senate's procedural defeat of Dr. Henry Foster for U.S. Surgeon General¹⁸⁷ served as an excellent example of the need for assertive executive energy in selection, confirmation, and appointment.¹⁸⁸ The President must take the process of selecting judicial and executive nominees quite seriously and must then be prepared to fight for Senate confirmation or exercise recess appointment authority.

3. *Executive Energy To Clean Up the Mess*

Professor Carter's work fits well in the mainstream of academic scholarship in its failure to understand the different roles of the Executive and Senate in making judicial selections and appointments.¹⁸⁹ This scholarship often misinterprets and ne-

investigation and judicial proceedings is testimony to the media's willingness to feed that perversity. This coverage included live reporting and endless commentary, including murder scene investigations, the nationwide search, the freeway pursuit, endless prosecution and defense news conferences, and the months-long trial.

185. For articles favoring a strong executive appointment interpretation of the Constitution, see Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989); W. Bradford Reynolds, *Revisiting the Confirmation Process Only To Find It in the Same State of Disrepair*, 75 JUDICATURE 192 (1992); W. Bradford Reynolds, *The Confirmation Process: Too Much Advice and Too Little Consent*, 75 JUDICATURE 80 (1991).

186. See Gloria Borger, *The Foster Nomination: Another Revelation*, U.S. NEWS & WORLD REP., Feb. 20, 1995, at 10; *Doctor Foster Gets in Trouble*, ECONOMIST, Feb. 11, 1995, at 27.

187. See Francis X. Clines, *Clinton's Choice for Top Doctor Is Rebuffed by a Vote in Senate*, N.Y. TIMES, June 23, 1995, at A1; *Dr. Foster and Political Malpractice*, CHI. TRIB., June 23, 1995, at 20; Jerry Gray, *Senate Dooms a Vote for Surgeon General*, N.Y. TIMES, June 23, 1995, at A20.

188. *Advise, Consent, Destroy*, ECONOMIST, July 1, 1995, at 18.

189. See Strauss & Sunstein, *supra* note 172, at 1491; see also Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 69 (1991) (stating "it is my view that senators may reasonably inquire into and base their final decision to confirm or reject . . . on factors other than the nominees' personal and professional qualifica-

glects the history of the Constitution by articulating a strong Senate role in the appointment process.¹⁹⁰ The mainstream repeats the quite common, but incorrect, description of the singular "Appointments Clause" of the Constitution; there are in fact two appointments clauses in Article II, Section 2. As noted above, the Framers wisely foresaw the dangers of vacant judicial benches and executive positions due to Senate confirmation deadlock, delays, or neglect, and sought to avoid those dangers by providing for an alternative appointments process—recess appointments.

Many fine jurists have come to the bench through the recess appointment process, including Earl Warren, Thurgood Marshall, and William Brennan. Presidents Dwight D. Eisenhower and John F. Kennedy each readily used the recess appointment authority in filling judicial vacancies.¹⁹¹ Indeed, President Kennedy made twenty-two percent of his judicial appointments by this extraordinary appointment method, and every one of his recess appointments eventually received a permanent commission.¹⁹² Although the recess appointee is a truly temporary judge,¹⁹³ serving no more than two years, and although such an appointment is properly only an alternative to traditional nomination and confirmation, the selective exercise of this executive constitutional authority would serve to rebalance the appointment process.¹⁹⁴

tions"); Albert P. Melone et al., *Too Little Advice, Senatorial Responsibility and Confirmation Politics*, 75 JUDICATURE 187 (1992) (asserting that "[t]he Framers intended a shared responsibility between the executive and legislative branch that anticipates inter-branch cooperation"). For a research bibliography of past commentary on the Senate confirmation role, see Michael J. Slinger et al., *The Senate Power of Advice and Consent of Judicial Appointments: An Annotated Research Bibliography*, 64 NOTRE DAME L. REV. 106 (1989).

190. While quoting Alexander Hamilton's writings in *The Federalist* for the proposition that "advise and consent" serves to restrain the Executive, Professor Carter neglects to reference or discuss Hamilton's other *Federalist* writings, which severely circumscribe the Senate's role in selection and confirmation. See CARTER, *supra* note 164, at 32-33.

191. See HAROLD CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 114-15 (1972).

192. *Id.* at 114-17.

193. For an excellent article challenging recess appointment of judges, see Virginia L. Richards, *Temporary Appointments to the Federal Judiciary: Article II Judges?*, 60 N.Y.U. L. REV. 702 (1985).

194. President Clinton surprised many in making two executive branch recess ap-

The disappointing *Confirmation Mess* states that the Constitution's "entire discussion" of the nomination and confirmation process derives from Article II, Section 2.¹⁹⁵ Professor Carter, however, neglects to quote, discuss, or even reference the Recess Appointment Clause of that very section, which gives the President total authority in commissioning temporary appointments. Professor Carter's failure to either mention or discuss the President's Article II, Section 2, Clause 3 recess appointment power is somewhat ironic. Carter, who served as a law clerk for Associate Justice Thurgood Marshall, provides a lengthy discussion of the 1967 confirmation hearings to which then-Solicitor General Marshall was subjected when nominated by President Lyndon Johnson to the Supreme Court.¹⁹⁶ The book fails even to note the more important and most instructive example of Thurgood Marshall's earlier initial appointment to the United States Court of Appeals by President Kennedy, who exercised his authority under the Recess Appointment Clause.¹⁹⁷ This initial exercise of political will by President Kennedy positioned Circuit Judge Marshall for his subsequent appointments as Solicitor General and Associate Justice of the Supreme Court.

Although the Senate confirmation mess hinders the federal appointments process, the root of the problem is the Executive's lack of political will to exercise appointment responsibilities assertively. Ultimately, only a strong and determined President can clean up the appointment process by fully honoring his or her constitutional appointment responsibilities. Encountering such strong executive energy, the Senate will have to cancel future performances of the circus, restore dignity to the confirmation processes, and, simply, decide whether, as Hamilton framed the process, to "ratify or reject" presidential selections.¹⁹⁸

pointments in late 1994. See Al Kamen, *Recess Maneuver Raises Eyebrows*, WASH. POST, Jan. 6, 1995, at A19.

195. CARTER, *supra* note 164, at 11-12.

196. See *id.* at 3-5, 62-65, 128-32, 161.

197. President Kennedy's use of the recess appointment process was effective in circumventing Senate resistance to the NAACP attorney's nomination. See CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 279-86 (1993).

198. THE FEDERALIST No. 66, at 387 (Alexander Hamilton) (Isaac Krammick ed.,

C. *Judicial Pleas for Appointment Responsibility*

Perhaps neither recent administrations nor Senate majorities understand the damage that their appointment irresponsibility is having on the national justice system. Reports of civil litigants suffering from long delays occasioned by judicial vacancies and overloaded dockets are all too common. Chief Judge Thomas Platt of the Eastern District of New York, whose busy federal jurisdiction struggled for more than one year to process cases despite four vacant judgeships, recently described his court's backlog of 1,200 civil cases as not atypical, stating: "The old maxim—justice delayed is justice denied—still remains true today."¹⁹⁹

During an April 1994 meeting of the Connecticut Bar Association, U.S. District Judge Alan Nevas specifically challenged that state's legal profession to pressure the political branches to fill aggressively federal judicial vacancies existing in Connecticut, noting that one such judgeship had been vacant for four years. The trial judge informed the attorneys that the state's federal district courts had almost 4,000 pending civil cases and over 200 pending criminal cases, and that Connecticut's 657 civil cases per active judge ratio was the highest in the nation.²⁰⁰ U.S. District Judge T.F. Gilroy Daly also asked those lawyers attending the Connecticut bar meeting to help pressure the state's U.S.

1987). It is possible that the Senate would refuse confirmation to nonperforming nominees and, thus, further stalemate the appointment process. As Professor Carter notes, Senator Arlen Specter was quite upset by Ruth Bader Ginsburg's refusal to tell the Judiciary Committee her views on the death penalty during her confirmation hearing for appointment to the Supreme Court. See CARTER, *supra* note 164, at 54. Indeed, Senator Specter warned that someday the Senate would "rear up on its hind legs" and reject a nominee who is nonresponsive to questions about constitutional theory. *Id.*

Such a threatened exhibition of the Senate indicates the present imbalance in the appointment process. In the absence of calculated, demonstrated presidential leadership, one need only stay tuned to radio talk shows, and, if Nielsen ratings support, to live, "gavel-to-gavel" television coverage of Senate hearings, to enjoy the greatest shows on earth, or at least on Capitol Hill.

199. Zehren, *supra* note 111, at A8.

200. See Janet Seiberg, "You Have Not Done Anything," CONN. L. TRIB., Apr. 25, 1994, at 1. Judge Nevas stated: "The problem is reaching crisis proportions. . . . You need to take an active concerted effort to help us because if you don't, we will drown and we will take you down with us." *Id.*

Senators to fill the empty judgeships, noting that the vacancies had resulted in eight years of lost judge time.²⁰¹

As the remarks of Judges Platt and Nevas suggest, the influential Second Circuit has the largest number of judicial vacancies in the nation (with some judgeships having been empty since 1990). Indeed, the chief judge of the Second Circuit, Jon O. Newman, is among the foremost jurists demanding appointment action. In a June 1994 speech before the Judicial Conference of the Second Circuit, Chief Judge Newman stated: "The number of vacancies is unacceptably high. The duration of these vacancies is absolutely disgraceful."²⁰² In a startling proposition, and one reflective of how serious the vacancy problem has become, Chief Judge Newman proposed a twenty-eighth amendment to the Constitution that would allow judicial appointments to be made by the *courts* when positions are vacant for more than one year. The appellate jurist bluntly stated to the President and Congress: "Either face up to your joint constitutional responsibility to nominate and confirm federal judges within a reasonable time limit or authorise some other mechanism to take action when, for whatever reasons, you find yourselves unable to do so."²⁰³

Acknowledging that "the federal judiciary is fast approaching a crisis point,"²⁰⁴ Ninth Circuit Chief Judge Clifford Wallace recently suggested the empanelment of a national conference, composed of representatives of the three branches of government, to define the mission of the federal courts more clearly. In an *ABA Journal* article proposing the national conference, Chief Judge Wallace specifically questioned whether the political branches even consider the impact of their political action and inaction on the health of the federal courts.²⁰⁵

Surely these judicial pleas for full staffing of our federal

201. *Id.* Judge Daly termed the appointment delay as "an insult to the bar of this court" and concluded: "I just want to leave you with an urgent request that you treat this with the highest priority." *Id.*

202. Al Karmen, *Judicial Vacancies Spur Amendment Call*, WASH. POST, June 20, 1994, at A13.

203. Gail Appleson, *Judge Says Courts, Not Congress, Should Fill Posts*, Reuters World Serv., June 17, 1994, available in LEXIS, News Library, Wires File.

204. J. Clifford Wallace, *Tackling the Caseload Crisis*, A.B.A. J., June 1994, at 88.

205. *Id.*

courts will be heard eventually. More problematic, however, is the fact that Congress, the President, and most of the federal judiciary have failed to recognize that a significant expansion and fundamental restructuring of the federal judicial system is the solution needed to ensure that the interests of all federal litigants can be met into the next century.²⁰⁶

IV. CONTEMPORARY FEDERAL JUSTICE: ABRIDGED, RATIONED, DELAYED, AND DENIED

A. Civil Case Overload and Criminal Case Avalanche

As noted in Part I, civil case filings have increased substantially over the last three decades in both our federal trial and appellate courts.²⁰⁷ Between 1980 and 1990, criminal drug prosecutions increased by 300% in the district courts and seventy-five percent in the courts of appeals.²⁰⁸ More recently, an avalanche of all types of criminal prosecutions and appeals has virtually buried federal court dockets.²⁰⁹ In each of statistical years 1992 and 1993, federal prosecutors filed almost 50,000 criminal cases in district courts, an increase of sixty-seven percent since 1980;²¹⁰ criminal appeals exceeded 10,000, an increase of 400% since 1988.²¹¹

Pursuant to the Speedy Trial Act,²¹² our nation's judges must give priority to criminal cases and, thus, have no alternative but to postpone habitually most civil litigation to make way for criminal adjudications.²¹³ Resulting civil justice delays espe-

206. For a variety of viewpoints on the future of the federal courts, see *Symposium on Judicial Administration*, 14 MISS. C. L. REV. 193 (1994).

207. See *Federal Court Filings Rise Across the Board*, THIRD BRANCH, Feb. 1993, at 1. In fiscal year 1992, filings in every major area of the federal judiciary increased. Civil trial filings increased nine percent, all appellate case filings increased nine percent, and bankruptcy appeals filings increased 28%. *Id.*

208. *Federal Courts Register Decade of Record Growth*, THIRD BRANCH, Feb. 1991, at 3.

209. Tracy Thompson, *Drug Case Avalanche Buries Federal Courts*, WASH. POST, Dec. 24, 1990, at A1.

210. See 1993 ANNUAL REPORT, *supra* note 10; 1992 ANNUAL REPORT, *supra* note 10.

211. See STRUCTURAL AND OTHER ALTERNATIVES, *supra* note 11, at 27.

212. 18 U.S.C. §§ 3161-3174 (1994).

213. See Charles F. Williams, *Making a Federal Case of More Crimes Leaves*

cially harm American businesses, which must struggle to compete in an increasingly competitive global market.²¹⁴ Foreign trading partners become wary of doing business in a litigious nation that does not even provide adequate judicial fora for the resolution of commercial legal disputes.²¹⁵ Hard economic times during the early 1990s propelled annual bankruptcy court filings to one million in number, and bankruptcy appeals increased by thirty percent.²¹⁶ Although the total number of initial bankruptcy court filings decreased mid-decade, recent statistics show bankruptcy filings are on the rise.²¹⁷ In general, the complexity of bankruptcy cases filed has increased significantly; multifarious Chapter 11 cases now consume substantial resources at trial and on appeal.²¹⁸

This breakdown of national justice injures civil litigants who have neither the resources nor the time to play the waiting game.²¹⁹ Consider the case of one such litigant, Mr. Kenneth Krazier, who collapsed and died inside the Buffalo federal courthouse, after waiting eleven years for his age discrimination suit to go to trial.²²⁰ Mr. Krazier's widow remains convinced that the "bitter, nerve wracking ordeal of waiting for the trial" result-

Judges Skeptical, CHI. DAILY L. BULL., May 24, 1994, at 1.

214. Sheldon H. Elsen, *Why Business Can't Get Its Day in Court*, FORTUNE, Apr. 22, 1991, at 251.

215. In the internationally important jurisdiction of the Southern District of New York, caseload delays have had an especially harmful impact. See Deborah Pines, *New Judges To Attack Federal Civil Backlog*, N.Y. L.J., June 23, 1994, at 1.

216. See Miles Magiure, *Avalanche of Cases Crushes Judges*, WASH. TIMES, June 27, 1991, at C1. In one year, from 1992 to 1993, Connecticut's U.S. Bankruptcy Courts experienced a 700% increase in the filing of bankruptcy petitions, and time-consuming adversarial proceedings increased 150%. Presently, individual bankruptcy case resolutions average 32 months. See 1993 ANNUAL REPORT OF THE SECOND CIRCUIT, *supra* note 22.

217. *Bankruptcy Filings Rise in Second Quarter of FY 95*, THIRD BRANCH, July 1995, at 12.

218. See Elaine Song, *Bankruptcy Burdens Weigh Heavily on District's Courts*, CONN. L. TRIB., Mar. 27, 1995, at 7.

219. See Allyson L. Moore, *U.S. Courts Still Crowded After All These Years*, N.J. L.J., Apr. 25, 1991, at 1.

220. Dan Herbeck, *Huge Backlog of Federal Cases Frustrates All Parties Involved Sharp Increase In Criminal Trials, Shortage of Staff in Courts Offer Little Hope of Relief to Clogged System*, BUFF. NEWS, Mar. 27, 1993, at 1.

ed in her husband's death.²²¹ Civil litigators now commonly hear a federal trial judge state: "To tell you the truth, I don't know when I will be able to try your case." Tragically, as in the case of the late Kenneth Krazier, litigants bear the ultimate burden and final cost of court delay.

Ironically, the much-praised 1991 Civil Rights Act²²² and the 1992 Americans With Disabilities Act²²³ are of little value to injured plaintiffs, who can not afford to wait years for federal justice. Nevertheless, such civil litigants continue to seek sanctuary in our national courthouses in the belief that they will receive timely justice. In fact, in 1992 and 1993 combined, federal civil rights case filings escalated by twenty-one percent.²²⁴ The impact of increased criminal prosecutions on civil litigation is particularly detrimental to civil litigants in our nation's most overcrowded and understaffed federal court jurisdictions.²²⁵ By increasing criminal prosecutions, without providing the judicial resources to provide for fair trials, the political branches also dramatically increase the danger that federal criminal defendants will not receive the criminal process and criminal justice due them under the American system of justice.

B. Congressional Denial

The federal court system not only has to deal with the case-load consequences of expansive national legislation and understaffed benches. It also must struggle with irresponsible financial projections²²⁶ and budget cuts²²⁷ by Congress, and crucial

221. *Id.*

222. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

223. Pub. L. No. 101-336, 104 Stat. 327 (1990).

224. See 1993 ANNUAL REPORT, *supra* note 10; 1992 ANNUAL REPORT, *supra* note 10.

225. For a recent empirical study of civil delay, see Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN'S L. REV. 757 (1993).

226. See Eva M. Rodriguez, *Federal Judiciary Frustrated with Budget Appropriations; Bickering Over Indigent Defense, Increasing Caseload*, RECORDER, June 22, 1994, at 1.

227. Cf. ABA Report Cites Funding Crisis in Justice System, THIRD BRANCH, Sept. 1992, at 2 (discussing the effects of budgetary constraints on the federal and state court systems).

reductions in needed spending.²²⁸ In June 1994, the House Appropriations Committee cut more than \$210 million from the judiciary's modest budget request for fiscal year 1995.²²⁹ Most problematic and ironic, as Congress finalized details of the 1994 Violent Crime Control Act,²³⁰ the House appropriated \$30 million less for defender services than for fiscal year 1994.²³¹

This action continued a four-year pattern of judicial budget cuts, which hit defender services especially hard.²³² The 102d Congress cut almost \$400 million from the judiciary's 1993 budgetary request, leaving the judicial system with \$200 million less than its 1992 allocation.²³³ The judiciary's newsletter, *The Third Branch*, reported: "Congress handed the Judiciary its leanest budget in recent years, funding the judicial branch at about \$200 million below the amount needed just to stay even with the services provided in fiscal year 1992."²³⁴ In 1993, the court system repeatedly was forced to go to Congress, hat in hand, begging for supplemental monies to pay for Criminal Justice Act defense attorneys and civil jurors and to avoid trial delays and dismissals of criminal prosecutions.²³⁵ As the ABA

228. See *Judicial Conference Approves Cost-Cutting Measures*, THIRD BRANCH, Apr. 1993, at 1; *Judiciary Faces Broad Spending Reductions*, THIRD BRANCH, Jan. 1993, at 1.

229. See *Budget Passed by House Falls Short of Judiciary's FY 95 Needs*, THIRD BRANCH, July 1994, at 1, 2 [hereinafter *Budget Passed by House*].

230. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 8, 16, 18, 20, 21, 26, 28, 31, 42 U.S.C.).

231. *Budget Passed by House*, *supra* note 229, at 2.

232. See Eva M. Rodriguez, *Budget Crunch Said To Imperil Civil Jury Trials*, LEGAL TIMES, Apr. 5, 1993, at 1.

233. *Judiciary Appeals Budget to Congress*, THIRD BRANCH, Sept. 1992, at 1.

234. *102nd Congress Adjourns: Results Are a Mixed Bag for the Judiciary*, THIRD BRANCH, Oct. 1992, at 1.

235. In his 1992 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist referred to the budget shorting as one area of significant concern for the judiciary and forcefully articulated the results of congressional malfeasance in financing the national court system:

Judiciary funding levels for fiscal year 1993 fall well short of our predicted needs, and will not even fund the same level of services provided in 1992. Although the judiciary will try to do more with less by eliminating nonessential expenditures, the current state of the budget may force us to reduce services to the public. The queue for civil litigation could get longer, needed automation projects—and resulting efficiencies—may be

Journal related:

For the third year in a row, the federal judiciary has found itself running out of cash and begging Congress for millions in supplemental appropriations. While the situation is by now familiar, and if past is prologue, the shortfall will likely be made up by Congress, a disturbing pattern has emerged. With each year, the shortfall not only grows larger but also occurs sooner.²³⁶

Such cuts from the judiciary's funding have direct effects: it was estimated that the 1993 cuts would result in the elimination of as many as 1000 existing staff positions in the judiciary's probation, pretrial, and clerks' offices for the 1995 fiscal year.²³⁷ The cuts also impair the judiciary's "abilit[y] to supervise criminal offenders who are on probation."²³⁸

In addition to failing to fund the national court system adequately, Congress remains reticent about the general structural breakdown of federal civil and criminal justice. Congress, it appears, remains in denial about the extent of the judiciary's caseload problem and the consequent harm suffered by litigants.²³⁹ As it cut the judiciary's 1995 budget, the House of Representatives continued work on a proposed "Judicial Improvements Act."²⁴⁰ The title of the Act was deceiving. The Act

postponed, and worthwhile pretrial services programs may have to be curtailed. Payments for jurors and defender services will again fall short, absent supplemental funding. Finally, although we appreciate the 35 new bankruptcy judgeships Congress provided, we have no funds to bring these judges aboard.

WILLIAM REHNQUIST, 1992 YEAR-END REPORT ON THE FEDERAL JUDICIARY.

236. Henry J. Reske, *Federal Courts' Budget Blues*, A.B.A. J., June 1993, at 20.

237. John F. Rooney, *House Trims Federal Judiciary's Budget Request*, CHI. DAILY L. BULL., June 30, 1994, at 1.

238. *Id.*

239. Congress's investigatory arm has even criticized the courts for undertaking long-range planning for court and office space. The General Accounting Office released a "damning" report, in which it charged that the judiciary's plans overestimated the judiciary's physical space needs by 16%. Testifying before Congress, Gerald Thacker of the Administrative Office responded to the report, asserting that the judiciary had underestimated court space needs by at least 15% and explaining that the courts presently were understaffed by 3100 positions. See Henry J. Reske, *Building Plan Challenged*, A.B.A. J., Jan. 1994, at 29.

240. Actually, the Act was drafted by the Judicial Conference and submitted as

actually would do very little to attempt truly to improve the federal court system;²⁴¹ instead, it seeks only to patch up the overworked system.²⁴² An especially problematic provision would authorize Article I magistrates to conduct certain criminal trials without the defendant's consent or the defendant's waiver of rights to trial before an Article III judge.²⁴³ In attempting to ease the criminal caseload of Article III judges by eliminating the defendant's option of insisting on an Article III judge for petty offenses and allowing defendants to orally consent to having magistrates conduct their misdemeanor trials,²⁴⁴ Congress avoids squarely addressing the need for additional judges.

Not surprisingly, the proposed legislation makes a renewed effort to reduce federal diversity cases by raising the jurisdictional amount in controversy from \$50,000 to \$75,000.²⁴⁵ Two separate measures introduced in the House Intellectual Property and Judicial Administration Subcommittee would eliminate In-State-Plaintiff (ISP) diversity jurisdiction. One proposed bill, H.R. 4357, would eliminate diversity jurisdiction if any plaintiff were a citizen of the state in which the litigation is filed; the second proposed bill, H.R. 4446, would eliminate the jurisdiction

proposed legislation to Congress. See *Federal Courts Improvement Act Transmitted to Congress*, THIRD BRANCH, Dec. 1993, at 9.

241. Among other things, the legislation would make technical amendments to judicial administration statutory provisions by, for example, raising the district court filing fee from \$120 to \$150, increasing attorney admission fees, lifting the cost-of-living freeze for judicial personnel, and authorizing probation and pretrial services personnel to carry firearms. The legislation also would affect various judicial retirement matters. One important provision, which promises some genuine "improvement," allows the creation of public defender organizations in all judicial districts and requires the creation of such organizations in districts with more than 200 annual attorney appointments. See *Federal Courts Improvement Act Transmitted to Congress*, *supra* note 240, at 9; *Judges Voice Support for Judicial Improvement Legislation*, THIRD BRANCH, July 1994, at 3-5.

242. For recent Judicial Conference testimony outlining provisions of the legislation, see *Federal Courts Improvement Act of 1994: Hearing on H.R. 4357 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Committee on the Judiciary*, 103d Cong., 2d Sess. 53 (1994) [hereinafter *Improvement Act Hearing*].

243. H.R. 4357, 103d Cong., 2d Sess. § 303 (1994).

244. *Improvement Act Hearing*, *supra* note 242, at 53.

245. H.R. 4357, 103d Cong., 2d Sess. § 101 (1994); see *Improvement Act Hearing*, *supra* note 242, at 58 (noting the Judicial Conference's estimate that the increase in jurisdictional amount will result in a 10% decline in diversity filings).

only if all plaintiffs were citizens of the forum state.²⁴⁶

For years, commentators from the bench and the academy have argued strongly that federal diversity jurisdiction should be totally eliminated or, at least, limited.²⁴⁷ In late May 1994, the Chairman of the Judicial Conference Committee on Federal-State Jurisdiction, District Judge Stanley Marcus of Miami, testified on the Conference's behalf in support of the pending House bills.²⁴⁸ Appearing before the House Subcommittee on Intellectual Property and Judicial Administration, Judge Marcus described the "changing jurisdictional environment" of the federal courts and labeled ISP diversity jurisdiction an "historical relic" that is no longer justified.²⁴⁹

Bar groups²⁵⁰ and members of the academy²⁵¹ have argued equally strongly for retaining federal diversity jurisdiction.²⁵² Their arguments are based on diversity jurisdiction's constitutional basis²⁵³ and the fact that our crowded state court systems are in no position to absorb these cases.²⁵⁴ The political

246. In 1992, ISP diversity cases comprised 16,000 of the total 220,000 cases filed in district courts. *In-State Plaintiff Diversity Jurisdiction: Hearing on H.R. 4357 and H.R. 4446 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Committee on the Judiciary*, 103d Cong., 2d Sess. 14-15 (1994) [hereinafter *Plaintiff Diversity Jurisdiction Hearing*].

247. See, e.g., Frank Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 BROOKINGS REV. 1, 34 (1992); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

248. *Plaintiff Diversity Jurisdiction Hearing*, *supra* note 246, at 8-27, 32-33.

249. *Id.* at 9, 11. Judge Marcus testified:

As Congress continues to change the jurisdiction of the federal courts, in light of contemporary social and economic developments, it remains an obvious concern of everyone to ensure that scarce judicial resources are used wisely. Repeals of ISP diversity jurisdiction would assist the federal courts in meeting the needs of contemporary plaintiffs who seek judicial enforcement of the rights conferred on them by federal law.

Id. at 15.

250. See, e.g., Charles L. Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way with Its Feet*, N.Y. ST. B.J., July 1989, at 20.

251. See, e.g., James W. Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964).

252. See, e.g., John P. Frank, *Diversity Jurisdiction: Lets Keep It*, 3 ADELPHI L.J. 75 (1984).

253. See Henry J. Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

254. See Wise, *supra* note 28, at 6.

prospect of Congress's placing an increased burden on crowded state court systems remains especially problematic.²⁵⁵ In 1994, for the second year in a row, the National Center for State Courts reported substantial caseloads facing our state courts: 93.8 million new cases (civil and criminal) and 259,000 appeals were filed in the country's state courts in fiscal year 1992.²⁵⁶ The report projected that the dockets of many state trial and appellate courts will double by the end of this decade.²⁵⁷

Representatives from the American Bar Association, American Trial Lawyers Association, and American Corporate Counsel testified before the judicial administration subcommittee against the pending House bills.²⁵⁸ ABA spokesperson Mitchell F. Dolin forcefully testified against the partial elimination of diversity jurisdiction, noting that plaintiffs without the financial backing to bring actions outside their state would be denied access to federal court.²⁵⁹ He also challenged the assumption that the jurisdiction-stripping measure would be an effective method of dealing with the national caseload problem: "The organized bar speaks with one voice on this issue Moving cases from a federal logjam to a state logjam is no solution."²⁶⁰

The stopgap proposed legislation served its purpose in 1994 as an avoidance measure. Unfortunately, it reinforces the view that Congress is in denial about the need for more fundamental changes in our federal court system. Congress's reckless action in increasing the civil and criminal jurisdictional burdens of the

255. See Randall Samborn, *State Court Filings Hit New Highs*, NAT'L L.J., May 4, 1992, at 7.

256. Randall Samborn, *Accelerating Caseloads Threaten To Swamp Courts*, NAT'L L.J., May 9, 1994, at A11.

257. On the criminal side of the state dockets, felony actions increased the most, up 65% since 1985, and domestic relations cases, taking up one-third of all state civil dockets, increased 43% during the same period of time. *Id.*

Brian J. Ostrom, the director of the statistics project of the National Center for State Courts, stated that state civil, criminal, and juvenile cases are "growing at rates far in excess of population and, most importantly, are growing at a rate in excess of resources and the number of judges that are available to the courts. . . . Courts are continuing to have to do more with less." *Id.*

258. *House Subcommittee Hears Arguments on Limiting Federal Diversity Jurisdiction*, Wash. Insider (BNA) (May 27, 1994), available in LEXIS, Bnawi File.

259. *Plaintiff Diversity Jurisdiction Hearing*, *supra* note 246, at 46-64.

260. *Id.*

federal courts while shorting the judiciary's budget is eclipsed only by Congress's demonstrated lack of leadership, and apparent lack of understanding and vision, in fulfilling its constitutional duty to the lower courts of the third branch.

More recent examples of Congress's lack of vision can be seen in proposed legislation that would create special purpose judicial bodies—such as the World Trade Organization's (WTO) Dispute Settlement Review Commission²⁶¹ and the Comprehensive Antiterrorism Act's special alien terrorist removal courts²⁶²—and would staff these bodies with existing Article III judges. As drafted, neither of these measures would create additional judgeships or other judicial personnel positions to staff these new bodies. Instead, the legislation would remove several judges from their existing courts to process these cases.²⁶³

District of Columbia District Judge Stanley Harris, representing the U.S. Judicial Conference, testified before the Senate Finance Committee in May 1995 against the WTO measure that would authorize the President to appoint five court of appeals judges to the Dispute Settlement Review Commission for five- to eight-year terms.²⁶⁴ Judge Harris acknowledged the importance of international trade issues, but raised the present and projected workload of the federal appellate courts as a barrier: "As important, however, is the ability of the federal Judiciary to resolve disputes within its jurisdiction justly, efficiently, and speedily. The Judiciary's challenge to fulfill these responsibilities over the next decade is particularly acute."²⁶⁵ He presented the obvious case against pulling these judges from work on their

261. See World Trade Organization Dispute Settlement Review Commission Act, S. 16, 104th Cong., 1st Sess. (1995).

262. See S. 735, 104th Cong., 2d Sess. (1995); H.R. 1710, 104th Cong., 2d Sess. (1995).

263. Five federal judges would be appointed for each of these bodies. For additional information regarding the authority of the "terrorism court," whose members the Chief Justice would appoint from among sitting district court judges for the purpose of deciding the removal cases of aliens charged with terrorist activities, shielding classified information from defendants, and providing defendants with only a summary of the charges, see *Congress Moves on Antiterrorism Bills*, THIRD BRANCH, July 1995, at 2.

264. *Judiciary Urges Change in Make-up of WTO Review Commission*, THIRD BRANCH, June 1995, at 5.

265. *Id.* (quoting U.S. District Judge Stanley S. Harris).

existing dockets to fill the full-time positions on the commission: "The executive branch and legislative branch will be best served if the commission members are either already well-versed in the subjects of international law and trade regulation instruments and procedures, or can devote undivided attention to becoming so. The judicial branch will be best served if it is able to devote 100 percent of its resources to the resolution of disputes within its jurisdiction."²⁶⁶ Congressional consideration of legislation that would remove ten federal judges from the existing judiciary during these times of judicial gridlock demonstrates Congress's fundamental lack of vision for its responsibility to federal justice.²⁶⁷

Still another example of the lack of congressional understanding of third branch troubles is the recent effort to terminate funding for Post-Conviction Defense Resource Centers across the nation. Even though these federally funded resource centers have proven to be a most efficient and cost-effective way to provide required post-conviction legal assistance to indigent prisoners, House leaders have targeted the centers for termination.²⁶⁸

Most recently, the judiciary was caught in the political battle over the 1996 budget after President Clinton vetoed H.R. 2076, the Commerce, Justice, State, and Judiciary Appropriations Bill in December 1995: The Judicial Conference publicly warned of a "potential shutdown of the Federal Court system" when money ran out for jurors, court security officers, and contract court reporters and interpreters. Federal judges across the nation were encouraged to call their congressperson to request funding. Days before a shutdown, Congress passed and President Clinton signed a targeted appropriations bill funding the courts through September 30, 1996 along with passport offices, national parks, and other noncontroversial agencies. The aborted debacle demonstrated the specific need for Congress to implement a free-

266. *Id.* (quoting U.S. District Judge Stanley S. Harris).

267. See Marianne Lavelle, *Federal Judges Cast Wary Eye On Trade Panel*, NAT'L L.J., May 22, 1995, at A16; John F. Rooney, *House Panel Urged To Prevent Lapse of Temporary Judgeships*, CHI. DAILY L. BULL., May 11, 1995, at 1.

268. See Naftali Bendavid, *Capital Habeas Law Offices on Chopping Block*, RECORDER, Aug. 7, 1995, at 1; Anthony Lewis, *Abroad at Home, Cruel and Reckless*, N.Y. TIMES, Aug. 11, 1995, at A29.

standing judiciary appropriation process for 1997 and all future fiscal years.²⁶⁹

C. Judicial Coping Mechanisms

It should be emphasized that most of our federal judges have attempted valiantly to cope with the burgeoning civil and criminal caseloads.²⁷⁰ Too often, however, judicial coping mechanisms have become institutional shortcuts. Often guised as reforms, these shortcuts, at the appellate level, include restricting (abbreviating and disallowing) oral arguments²⁷¹ and self-imposed limitations on writing²⁷² and publishing²⁷³ opinions.

269. See Victor Williams, *Keep the Federal Judiciary Out of the Budget Battle*, CHRISTIAN SCI. MONITOR, Jan. 29, 1996, at 19; see also Mark Hansen, *Court Spending Under Review*, A.B.A. J., Feb. 1996, at 24 (discussing funding of the judiciary).

270. See William W. Schwarzer, *Teaching Judges How To Cope*, LEGAL TIMES, Dec. 19, 1994, at 20 (discussing the problems posed by large caseloads).

271. Federal Rule of Appellate Procedure 34 was altered in 1979 to allow promulgation of a local rule to allow a unanimous three-judge panel to disallow the norm of oral argument. FED. R. APP. P. 34(a); see Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 47-48. The subjective process involved in the implementation of the national rule and use of the local rule is most troubling; the loss of the values of debate and discussion inherent in oral argument is also substantial. Apparently, the outcome of the decision to grant oral argument frequently appears to determine the final decision, as cases not argued are affirmed at higher rates. Robel, *supra*, at 48; see also Robert S. Thompson & James B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 66-67 (discussing success of a program that emphasized oral argument over briefs); Stephen L. Wasby, *The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges*, 65 JUDICATURE 340 (1982) (analyzing the debate within the legal community over the value of oral argument).

272. In addition to the obvious purposes of written opinions in a system of common law, scholars have long recognized that the written opinion gives litigants an explanation of the result. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Pose a Greater Threat*, 44 AM. U. L. REV. 757 (1995); see also Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1291-92 (1975) (discussing the need for written records of administrative hearings). But see Charles M. Merrill, *Could Judges Deliver More Justice If They Wrote Fewer Opinions?*, 64 JUDICATURE 435 (1981) (arguing that the overwhelming caseload of appellate courts precludes written disposition of every case).

273. The effectiveness of this shortcut has been challenged on the ground of the loss of precedential value of a nonpublished opinion, but opinions are mixed. See RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 120-29 (1985); see also Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS.

Ninth Circuit Judge Stephen Reinhardt has stated: "We have already abandoned oral argument in too many cases. We are resolving an extremely high percentage of our cases through unpublished dispositions, and too often those memoranda represent shoddy, poorly reasoned explanations for our decisions."²⁷⁴

These shortcuts and coping mechanisms, born of an overworked judiciary, impact jurisprudence as well as specific issues of justice. In a speech at Harvard Law School in 1995, Justice Stephen Breyer noted that, since 1950, the caseload of the courts of appeals has tripled from about 100,000 to 300,000, while appellate judgeships have far from proportionately increased.²⁷⁵ Justice Breyer stated that this disproportion of judges to cases prevents federal jurists from accomplishing a minimum level of research and scholarship desired and, overall, damages the United States legal system: "The inexorable march of the numbers has consequences."²⁷⁶

Similarly, Ninth Circuit Chief Judge Clifford Wallace, in calling for a national conference on the state of the judiciary to examine "increased delay and expense," as well as those "negative consequences" that are more subtle, stated: "We have been forced to adopt shortcuts to cope with the rising volume: We hear fewer oral arguments, publish fewer opinions and rely more heavily on law clerks and staff attorneys."²⁷⁷ These consequences, both obvious and subtle, deserve full exploration; a few

J. 405, 411-19 (1981) (asserting that there is little affirmative evidence that nonpublication facilitates decisionmaking); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (arguing that nonpublication is unnecessary and gives unfair advantage to "frequent" litigants who will have access to some unpublished opinions); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 313 (1990) (suggesting that the guidelines for nonpublication are too vague to be applied consistently).

274. Steven Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1520 (1995) (reviewing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994)).

275. Ann Puga, *Breyer Talks of Burden on Higher Courts*, BOSTON GLOBE, Feb. 24, 1995, at 8.

276. *Id.*

277. Wallace, *supra* note 204, at 88.

are discussed below.

1. *Disservice to Senior Judges*

Many of our nation's more than 300 "senior judges," formally retired jurists, some of whom are in their late seventies and eighties, recently have returned to full-time service in an attempt to assist their too few "active judge" brethren.²⁷⁸ Ralph Mecham, the director of the judiciary's Administrative Office, recently praised the work of these retired jurists, emphasizing: "Without their help, the high level of judicial vacancies would severely hamper the federal courts' ability to administer justice in a timely fashion."²⁷⁹ Although the nation remains grateful for this senior service,²⁸⁰ our legal profession and our political leaders should acknowledge that our federal justice system is in a sad state when our most senior jurists, deserving of retirement, are pressured to return to full-time duty. As eighty-five-year-old Southern District of New York Senior District Judge Whitman Knapp, who works a fifty-hour week full-time docket, explained: "It's a pressure on everybody. It's a psychological pressure on the senior judges simply because the regular judges are under such pressure."²⁸¹

A separate question must be raised on behalf of all litigants concerning the quality of justice that is available under a system that works even its most senior jurists into the ground.²⁸² Judicial vacancy rates have reached such proportions that the case-

278. See John F. Rooney, *Senior Judges Tote Heavier Federal Caseload, But Courts Still Short*, CHI. DAILY L. BULL., Apr. 12, 1994, at 1.

279. *Senior Judges Help District Courts Keep Pace*, THIRD BRANCH, May 1994, at 1 (quoting Administrative Office of the United States Courts Director L. Ralph Mecham).

280. See Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409 (1990).

281. Mary B.W. Tabor, *Vacancies on Federal Benches in NY, Elsewhere Creating Judicial Emergencies*, DALLAS MORNING NEWS, Apr. 10, 1994, at A6.

282. However much one admires and respects our senior judges, one must consider the harsh reality that the mind is no less susceptible to deterioration than the rest of the body. Admittedly, at its root this concern implicates the Constitution's guarantees of life tenure of office and salary, but practical implications are also important. See Steve Albert, *Slap On Wrist for Abusive Judge: Ninth Circuit Finds 82-year-old Jurist, Long the Target of Bias Complaints, Fit To Serve, But He Won't Hear Civil Rights Cases Anymore*, RECORDER, Sept. 20, 1994, at 1.

load is becoming unmanageable, notwithstanding the needed assistance of every living federal judge. Consider the analysis presented in the May 1994 issue of *The Third Branch*: "Senior U.S. district court judges can no longer compensate for the lost resources due to judicial vacancies."²⁸³

2. Trial Judges Visiting the Court of Appeals: Appellate Jurist for a Week

Another institutional coping mechanism, used by the federal appellate judiciary to deal with too few appellate judges, is to have both active and senior district-level judges "visit" the courts of appeals. Since the mid-1800s, Congress has authorized district judges to visit other jurisdictions to replace an absent judge²⁸⁴ or simply to assist²⁸⁵ in handling a heavy judicial workload, empowered to "discharge all the judicial duties of a District Judge therein."²⁸⁶ Visiting district judges have proven invaluable in circumstances of rapid caseload growth, such as that which occurred in the Southern District of New York during the first twenty years of this century.²⁸⁷ William Howard Taft, who was to become Chief Justice, advocated the establishment of a group of judges—described at the time as the "Light Horse Calvary" and, alternatively, as a "flying squadron" of jurists—for the specific duty of visiting overburdened districts.²⁸⁸

The flexibility inherent in allowing district judges to visit and perform judicial service as trial judges in jurisdictions other than their own is an important component of a modern federal judiciary. The practice of random elevation of certain trial judges to appellate service, however, is most problematic. This visiting/elevation process enables the appellate courts to have a sufficient number of judges to comprise three-judge appellate panels. Under the procedure, appellate court panels comprised of only one *active* court of appeals judge are too common.²⁸⁹ Obvi-

283. *Senior Judges Help District Courts Keep Pace*, *supra* note 279, at 1.

284. *See* Act of July 29, 1850, 9 Stat. 442 (1850).

285. *See* Act of April 2, 1852, 10 Stat. 5 (1852).

286. *Id.*

287. *See* Act of Oct. 13, 1913, 38 Stat. 203 (1913); PETER G. FISH, *THE POLITICS OF FEDERAL ADMINISTRATION* 14-15 (1973).

288. FISH, *supra* note 287, at 28.

289. Often, the membership of these panels includes one or more senior judges

ously, in times of national judicial gridlock, such a use of district judges also runs the risk of diluting sparse trial court judge power, as trial judges are reluctant to turn down the honor of appellate service, even if it impacts negatively on their own dockets.

Separation of powers concerns also must be considered. District-level judges were nominated by the President and confirmed by the Senate to do only trial-level work. Does not the Chief Circuit Judge, then, abrogate the President's appointment power, or Congress's confirmation authority, by making these temporary appellate elevations? Do trial court judges have the ability to do the qualitatively different appellate work, and will busy visiting district judges have the time and reflective environment in which to write quality appellate opinions upon returning to the district courts? Most problematic, will some district judges be tempted to defer to the reasoning and ultimate vote of the "genuine" appellate court judge of the panel—a judge who perhaps regularly presides over appeals from his temporary brethren's district court?

Whatever the answer to such questions, the issue of whether district court judges should "play appellate judge for a sitting" is a matter that ultimately should be considered on its own merits, rather than accepted as an emergency measure designed to find enough judicial bodies to staff the courts of appeals. Consider the argument made by the first Justices of the Supreme Court against their dual appellate and circuit riding/trial court responsibilities: the Justices warned President Washington that trial judges who also work as appellate jurists and vice versa too often must "correct in one capacity the errors which they themselves [or their trial court brethren] may have committed in another . . . a distinction unfriendly to impartial justice."²⁹⁰

(appellate or district). This practice too often results in a one-judge appellate review reality, as the visiting and senior jurists defer to the reasoning and ultimate "vote" of the one active circuit judge.

290. RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 10 (1989) (quoting Letter of Nov. 7, 1792, to Congress, in 1 AMERICAN STATE PAPERS (CLASS X) MISCELLANEOUS 51-52).

3. *Creating a Shadow Judiciary: Externs, Permanent Law Clerks, and Staff Attorneys*

Another Article III judicial coping technique, known, but seldom publicly challenged by the legal profession, is the abdication of fundamental judicial decisional functions to staff attorneys and "permanent" law clerks. Debate over elbow law clerks' "drafting" of federal judicial opinions has proceeded for years,²⁹¹ certainly fueled by the bold article critical of the practice that young William Rehnquist wrote in 1957, after he completed his service as law clerk to Justice Robert Jackson.²⁹² The fierce competition for "top clerks" may be some indication of the degree to which judges abdicate decisional authority to these freshly minted JDs.²⁹³

The willingness of judges to take volunteer law students (often several at a time) for a summer or semester, to serve as the law clerks' law clerks (described as interns or externs) speaks for itself. While inviting one or two such law students for the intern's educational advancement is commendable, the use of several such students to clear away pending motions from required six-month reports is most problematic.

The increased reliance on central staff attorneys²⁹⁴ to evaluate or "screen" appeals (the very essence of the judicial decisional function) outside even the supervision of a judge,²⁹⁵ and the

291. See J. Daniel Mahoney, *Law Clerks for Better or for Worse?*, 54 BROOK. L. REV. 321 (1988); Heather Bupp-Habuda, *Law Clerk's Ethical Boundaries*, 38 FED. B. NEWS & J. 187 (1991); John G. Kester, *The Law Clerk Explosion*, 9 LITIG. 20 (1983).

292. William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74.

293. For discussion of the competition for the best clerks from the second-year classes at law schools across the nation, see Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991); Abner J. Mikva, *Judicial Clerkships: A Judge's View*, 36 J. LEGAL EDUC. 150 (1986); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765 (1993); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to a Bad Apple*, 101 YALE L.J. 1097 (1992).

294. See David J. Brown, *Facing the Monster in the Judicial Closet: Rebutting a Presumption of Sloth*, 75 JUDICATURE 291 (1992); Donald P. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157 (1984).

295. The circuits vary in their use of such central staff to screen and grade appeals before they reach judicial chambers. See Timothy E. Gammon, *The Central Staff Attorneys' Office in the United States Court of Appeals, Eighth Circuit: A Five*

use of permanent law clerks to work as "assistant judges" rather than as "assistants to the judges," becomes more tempting in times of docket overload.²⁹⁶ Indeed, the employment of permanent law clerks has been rising at an alarming rate. A 1994 Judicial Conference memorandum referencing a report produced for the Judicial Conference's Judicial Resources Committee by the National Academy of Public Administration Association, expresses concern that our overworked federal judges may be tempted to abdicate genuine decisional responsibilities to a "shadow judiciary" of permanent law clerks.²⁹⁷ "Permanent" law clerks have a qualitatively different institutional position than traditional clerks, who, for largely educational purposes, commit to a one- or two-year term in a judge's chambers at a relatively modest salary. Career law clerks also differ substantially from the increasing number of law students who volunteer as "interns." Although judges depend heavily on temporary law clerks for "drafting" orders and decisions,²⁹⁸ the increasing numbers of permanent law clerks often become players in the decisionmaking process, having first-line contact with attorneys and often conducting informal conferences. In such roles, career law clerks often are correctly seen by the federal bar as "junior judges" with commensurately generous salaries.²⁹⁹

Year Report, 29 S.D. L. REV. 457 (1984); Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937 (1980); Donald P. Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253 (1980).

296. See Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981).

297. Memorandum from the Committee on Judicial Resources of the National Academy of Public Administration to All United States Judges 4 (June 24, 1994) (on file with author) [hereinafter Memorandum].

298. See David Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 JUDICATURE 236 (1986).

299. A significant percentage of the permanent law clerks employed by the federal judiciary receive a salary of over \$65,000. In 1989, there were no law clerks above a JSP-13 level; however, by March 1994, 758 such clerks were employed above this level. See Memorandum, *supra* note 297, at 2.

4. *The Subjudge: Vesting Magistrates with Article III Authority*

The third branch also copes with the caseload and high vacancy rates by allowing Article I magistrate-judges to handle increasingly complex and important trial judicatory matters,³⁰⁰ both criminal and civil.³⁰¹ As reported by the judiciary in the fall of 1995, "Magistrate judges presided at 912, or 17.2 percent of the civil trials held in the federal courts for the one-year period ending September 30, 1994 In addition to civil jury trials, magistrate judges conducted 831 bench trials and disposed of 6,092 civil consent cases without trial."³⁰² From 1975 to 1994, the number of full-time authorized magistrate-judges rose from 143 to 406, and the annual number of civil and criminal matters processed by these nonlife-tenured jurists rose from 255,061 to 517,397.³⁰³ Legislation has been proposed that would broaden the statutory authority of magistrate-judges to include their handling certain criminal trials *without* the consent of the criminal defendant.³⁰⁴ If enacted, this legislation would continue a trend in which a variety of cases, especially prisoner petitions for habeas corpus and § 1983 relief, are relegated for de facto resolution to the dockets of these nontenured judicial employees.³⁰⁵

In U.S. District Court in San Jose, California, where the civil docket is said to be "reaching epic levels"³⁰⁶ due to convicted felon Judge Robert Aguilar's multiyear paid leave of absence,³⁰⁷

300. See Brendan L. Shannon, Note, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253 (1991).

301. It is telling that, as the quality of the workload of U.S. magistrates became closer to that of Article III judges, the magistrates' official name was changed to "magistrate-judge." See Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. III, §§ 308, 321, 104 Stat. 5089, 5112, 5117 (1990).

302. *Magistrate Judges Ease Civil Trial Workload*, THIRD BRANCH, Sept. 1995, at 4.

303. See PROPOSED LONG RANGE PLAN, *supra* note 5, at 11.

304. See *supra* note 243 and accompanying text.

305. See Carroll Seron, *Magistrates and the Work of Federal Courts: A New Division of Labor*, 69 JUDICATURE 353 (1986).

306. Howard Mintz, *South Bay Wheel Now Landing on Magistrates*, RECORDER, Mar. 15, 1994, at 3.

307. See *Back to the Bench*, A.B.A. J., July 1994, at 35.

magistrate-judges are being *regularly* assigned responsibility for entire civil cases, just as if they were Article III judges.³⁰⁸ Altering a system under which attorneys had to stipulate in writing to have a magistrate-judge hear the full civil case, the new assignment program requires attorneys affirmatively to "opt out" of the assignment of their cases to the magistrate-judges within thirty days of the assignment.³⁰⁹ The choice can be difficult, especially considering that the magistrate-judge whom counsel insults by "opting out" will be the judicial officer whom counsel must face during discovery.³¹⁰ One of the two active judges in San Jose, Judge James Ware, said of the program: "We don't perceive that there will be any reason to object since you can always opt out. It is a positive for the bar to expand the number of judicial officers hearing cases."³¹¹ Unfortunately, litigants who do not "opt-out" are denied the advantages that Judges Ware and Aguilar personally enjoy³¹²—independence of judicial action guaranteed by life-tenure until impeachment removal.³¹³

Our overworked federal district judges also are less able and willing to give meaningful review to the myriad decisions,

308. Mintz, *supra* note 306, at 3.

309. *Id.*

310. *Id.*

311. *Id.*

312. Indeed, the overwhelming caseload of the Northern District of California may have been one reason that Judge Aguilar was encouraged to return to the bench immediately upon having his felony conviction reversed on a technicality by the en banc Ninth Circuit Court of Appeals. Chief District Judge Thelton Henderson stated that "there is no legal impediment for him having a caseload." *Fellow Judges Allow Aguilar To Return to the Bench*, S.F. CHRON., May 20, 1994, at B3.

According to one observer: "At this point, federal judges and practitioners seem to discount the possibility of impeachment. For one thing . . . his colleagues on the Northern District bench immediately signaled that they were ready to welcome him back to a full docket." Howard Mintz, *It's Not Over Yet for Aguilar*, RECORDER, May 6, 1994, at 1. The Supreme Court's 1995 reinstatement of Judge Aguilar's conviction left his docket of more than 250 civil cases in limbo, as he appeals his conviction on alternative grounds before the Ninth Circuit. See Howard Mintz, *Federal Bench Struggling with Judge Aguilar's Status*, RECORDER, June 23, 1995, at 1; David Savage, *Justices Reinstate Conviction of U.S. Judge in California*, L.A. TIMES, June 22, 1995, at A4.

313. See generally Victor Williams, *Third Branch Interdependence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*, 5 SETON HALL CONST. L.J. 851 (1995) (discussing the relationship between judicial administration and independence).

among them Social Security benefit rulings, that are made by and appealed from non-Article III administrative law judges. As a consequence, other non-Article III personnel—specifically, magistrate-judges—are regularly assigned these cases for de facto disposition.³¹⁴ The development of what might be termed an “Article I loop” undermines fundamental values inherent in an established independent judiciary.

Unfortunately, these magistrate-judges adjudicate cases with the constant knowledge that if they do not specifically please the specified “personnel judges” in their jurisdiction, they will eventually lose their temporary black robes. It is equally unfortunate that many on the judiciary who oppose enlarging their own Article III courts are so eager to enlarge both the number and jurisdiction of nonlife-tenured Article I judges and magistrates.³¹⁵ Proposals to create appellate magistrate positions are

314. As a troubling example of the danger of such political dependence, consider the attempt in the 1980s by the executive branch to influence the administrative law adjudication of Social Security disability benefits. See Michael K. Frisby, *Social Security Tries To Force Denials of Benefits, Panel Says*, BOSTON GLOBE, Mar. 23, 1989, at 23.

In an attempt to save money, Social Security officials have harassed judges who decide disability cases . . . , according to an investigation by a House subcommittee. . . . [A]dministrative judges who are employed by the Social Security Administration charge that the agency has used assignments, transfers and travel arrangements to harass judges who are thought to side with the public. The judges also say the administration has instituted hearing quotas that they say reduce the quality of their work. . . . In President Reagan's first term, the Social Security Administration warned judges who allowed claimants to win 70 percent or more of their cases that steps would be taken against them unless their performance changed.

Id.; see also Deborah Maranville, *Bureaucratic Justice: Managing Social Security Disability Claims*, 69 MINN. L. REV. 325, 334 (1984) (book review) (discussing 1983 book advocating changes in the Social Security Administration's decision process in order to promote fairness and efficiency); *Judge Suing Co-Workers, Government*, UPI, July 1, 1984, available in LEXIS, News Library, Usnwr File (discussing a \$16 million suit filed by an administrative law judge against the federal government concerning social security decisions); *Judges Want End to Quota System*, UPI, Jan. 20, 1983, available in LEXIS, News Library, Usnwr File (discussing administrative law judges' requests for the federal government to drop quotas on social security decisions).

315. For example, Justice Scalia, who opposes increasing the number of Article III judges, proposes to create Article I courts for “large categories of high-volume, relatively routine cases—Social Security disability cases, for example, and freedom of

being taken seriously because the Federal Court Study Committee's Final Report stated that the creation of such junior appellate judgeships deserved careful consideration.³¹⁶ According to one commentator, these new appellate magistrates would "decide non-merits motions relating to time, manner, and place of appeal, including jurisdictional issues" and also would "operate the screening program."³¹⁷ These magistrates also would conduct hearings and make recommendations for consideration by Article III appellate judges, as do trial magistrates for district court judges.³¹⁸

These proposed appellate magistrates presumably would answer the concerns of staff attorney critics by removing screen responsibilities from those attorneys. It is telling, however, that expansion of a subjudiciary of magistrates is being considered as a response to concerns about the authority that is now vested in the shadow judiciary of law clerks and staff attorneys.³¹⁹ One must query how important Article III jurists judge their own life tenure when they are willing to enlarge the ranks and authority of nonlife-tenured magistrates.

information actions" with strictly restricted appeal rights. See Antonin Scalia, Remarks by Justice Antonin Scalia Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), *quoted in* GORDON BERMANT ET AL., *FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES* 11 (1993); *see also* PROPOSED LONG RANGE PLAN, *supra* note 5, at 46-47, 125 (discussing recommended appeal rights for decisions of magistrate-judges).

316. FEDERAL COURTS STUDY COMMITTEE, *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 79-80, 115-16 (1990).

317. See BAKER, *supra* note 29, at 176 (quoting John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. REV. 859, 920).

318. *Id.*

319. Oakley, *supra* note 317, at 903.

V. A COMPARATIVE VIEW OF LARGE SPECIALIZED COURTS

While riding circuit under Congress's first Judiciary Act,³²⁰ Supreme Court Chief Justice John Jay attempted to describe the developing national court system to citizens of the new republic because "no tribunals of the like kind and extent had heretofore existed in this country."³²¹ Charging grand juries in his circuit's jurisdiction, Chief Justice Jay made reference to the ever-evolving nature of the national court system, stating: "the expediency of carrying justice, as it were, to every man's door, was obvious; but how to do it in a expedient manner was far from being apparent."³²² As the American legal profession, indeed the entire American economy, attempts to enter and succeed in a global marketplace, perhaps a comparative vision of the most "expedient manner" by which our national court system may be structured and staffed for the twenty-first century is appropriate.³²³

A. German Subject Matter Specialization

Virginia Law Professor Daniel J. Meador is the foremost academic voice in the debate over establishing a subject-matter-specialized appellate court system.³²⁴ In a 1983 law review article, Professor Meador introduced a compelling comparative perspective to the court structure debate by describing and analyzing the specialized court system of the Federal Republic of Germany.³²⁵ Professor Meador prefaced this work by correctly

320. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789). See generally Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) (discussing the legislative history of the Judiciary Act, including its passage through Congress and the changes made during the legislative process).

321. 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 387, 390-91 (Henry P. Johnston ed., 1971) (Charge to Grand Juries).

322. *Id.*

323. See Paul E. Geller, *Staffing the Judiciary and "Tastes" in Justice: A Commentary on the Papers by Professors Bell and Clark*, 61 S. CAL. L. REV. 1849 (1988); John H. Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865 (1988).

324. See Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REF. 471 (1983); Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617.

325. See Daniel J. Meador, *Appellate Subject Matter Organization: The German*

predicting the significant increase that has occurred in the federal caseload during the last decade and by challenging "American judicial architects" to build a structure and establish a procedure that will accommodate the certain increased number of appellate judges and ensure stability and jurisprudential uniformity.³²⁶ The article remains important; indeed, together with other comparative commentary, it deserves careful reconsideration and review as a continuation of its stated purpose to "dispel some of the mythology and theoretical objections [to specialization] that are found in the American legal world."³²⁷

One could emphasize the many fascinating similarities and differences that exist between the United States' adversarial judicial system and Germany's inquisitorial legal systems. Particularly interesting, for example, is the difference between American courts' use of juries, with the possibility of jury nullification, and the German courts' use of lay judges, with the possibility of appellate review of acquittals.³²⁸ Generally, in both the United States and Germany, all branches of government strongly adhere to the rule of law, to written guarantees of individual liberties, and to a hierarchy of legal process effectuated by litigation through a series of appellate courts.³²⁹ Germany's unitary federalism, however, may be fairly described as "virtually another form of government" from the United States' federalism.³³⁰ The bulk (up to ninety-five percent) of German law is federal code-based;³³¹ in the United States, fed-

Design from an American Perspective, 5 HASTINGS INT'L & COMP. L. REV. 27 (1983).

326. *Id.* at 28.

327. *Id.* at 29. For a more recent related article by Professor Meador, see Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763 (1995). Originally presented as the first annual Meador Lecture at the University of Alabama Law School, this article discusses the transformation of authority from state to federal courts from a comparative perspective. *Id.*

328. See IAN S. FORRESTOR & HANS-MICHAEL ILGEN, *THE GERMAN LEGAL SYSTEM* 1 (1972).

329. *Id.*

330. See generally Richard Davis & D. Jeffrey Burnham, *The Role of the Federal Judiciary in the Development of Federalism in West Germany and the United States*, 12 B.C. INT'L & COMP. L. REV. 63 (1989) (examining the role of the federal judiciary in the early development and definition of federalism in West Germany and the U.S.).

331. Meador, *supra* note 325, at 29-31. In the last quarter of the nineteenth

eral law is a mixture of statutory and common law. Also, Germany has a single national judicial structure; the system is composed of at least three levels of review, with courts having limited geographic jurisdiction (i.e., local/state, regional, and national).³³²

What makes study of the German judicial system important for purposes of a comparative review are the facts that subject matter specialization is the foundation of the judicial structure and that extraordinary efficiency is achieved by having large numbers of judges operate in such a specialized system.³³³ This specialization and efficiency have survived³³⁴ and, indeed, assisted the legally exacting reunification of East and West Germany.³³⁵ It remains to be seen, however, what impact the unification of Europe will have on the member states' national court systems.³³⁶

Considering all local, state, and federal jurists, Germany has about twice as many judges, overall, as does the entire United States (state and federal combined); by comparison, Germany's population is approximately one-quarter of that of the United States.³³⁷ Germany's courts are divided into six specific, formal subject matter jurisdictions—constitutional, financial, social, ad-

century, five major codes introduced nationwide uniformity to German law. These codes, although since modified, remain in effect today.

332. See FORRESTER & ILGEN, *supra* note 328, at 10.

333. See HERBERT J. LIEBESNY, *FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS* 295-98 (1981).

334. See Johnathon J. Doyle, *A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court's "Land Reform" Decision of April 23, 1991*, 13 MICH. J. INT'L L. 832 (1992).

335. See Mary Lovik, *The Constitutional Court Reviews the Early Dissolution of the West German Parliament*, 7 HASTINGS INT'L & COMP. L. REV. 79 (1983); *A Symposium On Developments in East European Law*, 13 MICH. J. INT'L L. 741 (1992); see also Jörg Kirchner & Arthur L. Marriott, *International Arbitration in the Aftermath of Socialism: The Example of the Berlin Court of Arbitration*, J. INT'L ARB., Mar. 1993, at 5 (discussing the hostility of the former West German arbitral establishment toward the former East German Berlin court).

336. See, e.g., E. R. Lanier, *Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities As Lawful Judge*, 11 B.C. INT'L & COMP. L. REV. 1 (1988) (discussing the evolution of the jurisdictional relationship between the courts of West Germany and the European Community).

337. ERIKA S. FAIRCHILD, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 172 (1994).

ministrative, labor, and ordinary.³³⁸

Constitutional jurisdiction is allocated to one supreme judicial institution, established solely for reviewing constitutional claims.³³⁹ Often termed the highest court in Germany, the one Federal Constitutional Court has the final word in interpreting the German Constitution; it protects basic human rights, articulates some criminal procedure norms, maintains the federal balance, and balances the powers between the executive and legislature.³⁴⁰ The Federal Constitutional Court (*Bundesverfassungsgericht*) has authority equal to that of the executive or the legislature and may overrule legislation enacted by either of those bodies by declaring it at variance with the Constitution.³⁴¹ Structurally, the high constitutional court sits in two "senates" or divisions, each composed of eight judges.³⁴²

The Federal Constitutional Court hears direct inquiries from pluralities of the legislature and rules on constitutional questions arising in each of the other five specialized court divisions.³⁴³ Upon resolving constitutional issues arising in cases from other divisions of the court, the Constitutional Court remands the case for implementation or enforcement by the division of origin.³⁴⁴ Additionally, any individual can lodge a "complaint" directly with the Federal Constitutional Court, "alleging an infringement of his constitutional rights through an act of public authorities,"³⁴⁵ in other words, a violation of the Basic Law.³⁴⁶ The court presides over such fundamental cases involv-

338. PETER DE CRUZ, *A MODERN APPROACH TO COMPARATIVE LAW* 76-78 (1993).

339. *Id.* at 78. In a thoroughly comprehensive pamphlet on the German Constitutional Court, Notre Dame University Professor Donald Kommers portrays the court as eager to protect the rights of citizens and most willing to involve itself in "political questions." See DONALD KOMMERS, *THE FEDERAL CONSTITUTIONAL COURT* (1994).

340. DE CRUZ, *supra* note 338, at 78; FAIRCHILD, *supra* note 337, at 171.

341. See DE CRUZ, *supra* note 338, at 78 ("The Constitutional Court may declare any law or judgment null and void.").

342. FORRESTER & ILGEN, *supra* note 328, at 14.

343. Meador, *supra* note 325, at 34. See generally DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1989) (describing the role of the Federal Constitutional Court in the development of West Germany's constitutional law).

344. FAIRCHILD, *supra* note 337, at 171.

345. DE CRUZ, *supra* note 338, at 78.

346. See Michael Singer, *The Constitutional Court of the German Federal Repub-*

ing public institutions.³⁴⁷ Additionally, "[t]here is always a possibility to challenge a new law or a final judgment as unconstitutional if it is [a] case of human rights."³⁴⁸

Unlike the Federal Constitutional Court, each of the five other specialized jurisdictions is multi-tiered, consisting of trial-level and two or more appellate-level courts.³⁴⁹ All five jurisdictions have trial and intermediate level courts in each of the eleven state political units (*Länder* or *Land*).³⁵⁰ Courts of last resort, or federal supreme courts, for each of the subject matter jurisdictions are dispersed in various cities throughout the nation.³⁵¹

Three of the specialized court divisions—Financial, Social, and Administrative—judicially process claims and disputes that arise between members of German society and the government.³⁵² The Financial Jurisdiction oversees tax conflicts between the government and its citizens.³⁵³ The court has two levels; tax trial courts (*Finanzgericht*) are located in each state, and a supreme federal tax court (*Bundesfinanzhof*) is located in Munich.³⁵⁴ The Social Jurisdiction, the newest of the specialized court divisions, handles cases involving health insurance, social security, unemployment compensation, and other social programs.³⁵⁵ The division consists of three levels.³⁵⁶ Decisions of trial-level Social Jurisdiction courts (*Sozialgericht*), located in each state, may be appealed first to regional intermediate social courts (*Landsozialgericht*) and, finally, to the one supreme federal social court (*Bundessozialgericht*) located in Kassel.³⁵⁷

The Administrative Jurisdiction division courts address all public-law issues and government-individual disputes, other

lic: Jurisdiction Over Individual Complaints, 31 INT'L & COMP. L.Q. 331 (1982).

347. See Eric Barendt, *The Influence of the German and Italian Constitutional Courts on Their National Broadcasting Systems*, 1991 PUB. L. 93.

348. DE CRUZ, *supra* note 338, at 78.

349. Meador, *supra* note 325, at 31.

350. DE CRUZ, *supra* note 338, at 76-77.

351. Meador, *supra* note 325, at 31-35.

352. *Id.* at 31-32.

353. *Id.* at 32.

354. *Id.* at 32-33.

355. *Id.* at 32.

356. *Id.*

357. *Id.* at 32-33.

than social and financial conflicts, that are regulatory in nature.³⁵⁸ The Administrative Jurisdiction is tri-level; the administrative supreme court (*Bundesverwaltungsgericht*) sits in Berlin, and regional intermediate administrative appellate courts (*Oberverwaltungsgericht*) and administrative trial courts (*Verwaltungsgericht*) are located throughout the nation.³⁵⁹

Private employment disputes, including those arising under collective bargaining agreements, are handled by Labor Jurisdiction courts.³⁶⁰ Labor courts are also tri-level, consisting of trial courts (*Arbeitsgericht*), intermediate appellate courts (*Landarbeitsgericht*), and one supreme court (*Bundesarbeitsgericht*).³⁶¹ Like the Social Jurisdiction supreme court, the Labor Jurisdiction supreme court is based in Kassel.³⁶²

Ordinary Jurisdiction is the largest and broadest of Germany's specialized court divisions and the jurisdiction with which the average German is most likely to have contact.³⁶³ The cases it handles cover a variety of subject matters, including all criminal and all remaining civil prosecutions.³⁶⁴ Structural divisions within the Ordinary Jurisdiction effectuate further specialization.³⁶⁵ The lowest level of ordinary courts consists of 800 county trial courts (*Amtsgericht*) dispersed throughout the nation.³⁶⁶ Each level of the hierarchy above the county trial court level is formally separated into subject matter panels.³⁶⁷

Just above the county court level are second-level trial courts and first-level appellate courts (*Landgericht*).³⁶⁸ These courts, ninety-three in number, handle more substantial civil cases³⁶⁹

358. FORRESTER & ILGEN, *supra* note 328, at 15.

359. Meador, *supra* note 325, at 32-33.

360. DE CRUZ, *supra* note 338, at 78.

361. Meador, *supra* note 325, at 32-33.

362. *Id.* at 32.

363. DE CRUZ, *supra* note 338, at 77.

364. *Id.*

365. *Id.* at 77-78.

366. Meador, *supra* note 325, at 35.

367. *Id.* at 31-36.

368. *Id.* at 36.

369. *Id.*; see Christopher E. Hauschka, *Central Issues of Business Litigation in West German Civil Courts*, 19 CAL. W. INT'L L.J. 47 (1988-1989) (describing procedures and proceedings in German civil courts).

and more serious criminal prosecutions than do the county courts.³⁷⁰ Sitting in special subject matter (i.e., commercial, admiralty, and criminal) three-judge chambers,³⁷¹ the *Landgericht* handle the more significant trials and serve as the first level of review for the county trial court cases.³⁷²

Above this level of courts is an intermediate level of appellate courts (*Oberlandesgericht*).³⁷³ Numbering nineteen in all, these courts review decisions of the second-level trial courts and directly review some county trial court cases.³⁷⁴ These courts have final review over pure state cases and federal cases in which the amount in controversy does not exceed a stated amount.³⁷⁵ They also exercise original authority over very serious crimes, such as treason.³⁷⁶ The *Oberlandesgericht* average seventy-two judges each, with some having as many as 149 judges.³⁷⁷ The total number of judges on this single court level of the Ordinary Jurisdiction exceeds 1300.³⁷⁸ In each *Oberlandesgericht*, a work distribution plan (*Geschäftsverteilungs plan*) divides the jurists into semipermanent divisions of civil, criminal, and special cases.³⁷⁹

This subject matter division of the appellate caseload according to work is replicated in the ordinary supreme court (*Bundesgerichtshof*).³⁸⁰ The *Bundesgerichtshof* has eleven civil divisions, five criminal divisions, and seven specialty divisions.³⁸¹ Sitting in Karlsruhe, the ordinary supreme court works in separate "senates"—ten civil and five criminal.³⁸² The subject matter specialization and generously sufficient number of judges allow the judges of the highest Ordinary Jurisdiction

370. Meador, *supra* note 324, at 36.

371. FORRESTER & ILGEN, *supra* note 327, at 12.

372. Meador, *supra* note 324, at 36.

373. *Id.*

374. *Id.*

375. *Id.*

376. FORRESTER & ILGEN, *supra* note 327, at 13.

377. Meador, *supra* note 324, at 36-38.

378. *Id.*

379. *Id.* at 44-49.

380. *Id.*

381. *Id.*

382. DE CRUZ, *supra* note 337, at 78.

court to adjudicate a great number of cases efficiently, some on de novo and others on revision review.³⁸³ This level made nearly 6000 total dispositions in 1978.³⁸⁴

B. French Specialization

A discussion of subject matter specialization of the French judicial system naturally begins with the unique division of the public law/administrative courts (*ordre administratif*) from private law/nonadministrative or ordinary courts (*ordre judiciaire*).³⁸⁵ Even before this division is addressed, however, the independent Constitutional Council (*Conseil constitutionnel*),³⁸⁶ which has authority to preview the constitutionality of prospective legislation, deserves special note.³⁸⁷ As described by Professor René David, in addition to various other duties,

[t]he Constitutional Council determines the constitutionality of statutes *prior to their taking effect* whenever the law is an "organic statute" by virtue of its object, and whenever the council is requested to do so by the President of the Republic, the Prime Minister, the President of the Senate, or the President of the National Assembly. Its decisions are final, unappealable, and binding on all branches of government and all administrative and judicial officials.³⁸⁸

As described more fully below, only the Council of State, the head of the administrative system, has the authority to determine the unconstitutionality or illegality of executive actions.³⁸⁹ The changing nature of this court has been of signifi-

383. Meador, *supra* note 325, at 41-44.

384. *Id.* at 43.

385. See MARTIN WESTON, AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM 67-71 (1991). Professor Weston provides an excellent linguistic roadmap to understanding the French judicial system. It is helpful to know that lower courts are called *tribunaux* and deliver *jugements*, whereas higher courts are usually termed *cours* and deliver *arrêts*. *Id.* at 66. Also, it is helpful to know that the French have several different uses for the word law; "a law" (i.e., statute) is *une loi*, "the law" is *la justice*, and the "academic law" is *le droit*. *Id.* at 46.

386. *Id.* at 99.

387. See RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY 19-30 (Michael Kindred trans., 1972).

388. *Id.* at 29-30 (footnote omitted).

389. *Id.* at 30. Notwithstanding the Council of State's exclusive jurisdiction, in Ju-

cant interest,³⁹⁰ particularly recently, when the Constitutional Council severely restricted proposed legislation that would have criminalized certain use of foreign languages and established a French "language police."³⁹¹

The administrative courts, which are more accurately thought of as a part of the executive, have exclusive jurisdiction over cases involving the state, a state employee, or a corporation as a party.³⁹² Over the last decade, there has been a growing understanding of the importance of *le droit administratif* in the legal developments of other countries, in and out of Europe and the European Community.³⁹³ At the lowest level of this system are administrative trial courts (*tribunaux administratifs*), dispersed throughout the nation's regions.³⁹⁴ In 1987, a level of appellate administrative courts (*Cours Administratives d'Appel*) was established to review decisions of the trial courts.³⁹⁵ These appellate courts review authority of laws issues (*annulment jurisdiction*), and exercise full authority (*pleine jurisdiction*) over cases in which individuals allege injury at the hands of a public servant.³⁹⁶

At the apex of this administrative governmental division is the Council of State (*Conseil d'Etat*),³⁹⁷ which has been de-

ly 1971, the Constitutional Council declared an executive regulatory law on associations unconstitutional and violative of the principle of freedom of association. *Id.*

390. See, e.g., David Pollard, *France's Conseil Constitutionnel—Not Yet a Constitutional Court?*, 23 IRISH JURIST (n.s.) 2 (1988) (examining a proposal to give citizens access to the Council for constitutional questions).

391. See *French Council Eases Language Ban*, N.Y. TIMES, July 31, 1994, § 1, at 12; *Panel Rules French Law Against Foreign Words Is Unconstitutional*, L.A. TIMES, July 31, 1994, at A9; see also Michael Durham, *Tout Va Bien That Ends Well*, OBSERVER, July 31, 1994, at 1 (stating that "France's Constitutional Council . . . severely reduced the impact of the Loi Toubon," the proposed legislation).

392. DE CRUZ, *supra* note 338, at 65.

393. For an expansive analysis of the importance and influence of *le droit administratif*, see L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 252-70 (4th ed. 1993).

394. Meador, *supra* note 325, at 41; see Alain Plantey, *Evidence Before French Administrative Courts*, 44 ADMIN. L. REV. 15 (1992).

395. BROWN & BELL, *supra* note 393, at 50. Both judicial tiers of the one administrative body are under the supervision of the Secretary-General of the Council of State. *Id.* at 85.

396. DE CRUZ, *supra* note 338, at 70.

397. BROWN & BELL, *supra* note 393, at 59-83.

scribed as "the central organ of the executive."³⁹⁸ With predominantly executive/managerial responsibilities vested in four administrative sections,³⁹⁹ the judicial role of the *Conseil d'Etat* is vested in the fifth section of the Council—the *Section du Contentieux*.⁴⁰⁰ The judicial body is subdivided into ten *Sous-sections*, each proceeding independently and in the name of the entire Council.⁴⁰¹ Three *Sous-sections* are assigned exclusively to adjudicate financial matters.⁴⁰²

While the administrative courts are executive branch organs, the ordinary courts (*ordre judiciaire*) are purely judicial in nature; that is, the latter courts are the French judiciary.⁴⁰³ In 1958, General de Gaule undertook a general reform of the judicial/procedural system aimed at making the judicial system more efficient.⁴⁰⁴ The resulting expansion and specialization of the *ordre judiciaire* was significant. The lowest level courts, the first instance courts (*tribunaux d'instance*), operate in separate criminal (*tribunaux de police*)⁴⁰⁵ and civil divisions. The civil function is further divided into special first instance or specialty courts, including commerce (*tribunal de commerce*), labor (*conseil des prud'hommes*), social security, and landlord-tenant tribunals.⁴⁰⁶

Courts in the next level of the French judicial system are superior trial courts (*tribunaux de grande instance*), which have authority over more substantial and serious litigation.⁴⁰⁷ These grand trial courts are separated into a civil division, which presides over cases in which the amount in controversy exceeds a set amount of francs, and a criminal division (*tribunaux correctionnels*), which presides over trials of more

398. DE CRUZ, *supra* note 338, at 70.

399. BROWN & BELL, *supra* note 393, at 61.

400. *Id.* at 71-73.

401. *Id.*

402. *Id.*

403. DE CRUZ, *supra* note 338, at 65-68.

404. See Pollard, *supra* note 390.

405. See GEORGE E. GLOS, *COMPARATIVE LAW* 135 (1987).

406. MARY A. GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 122-23 (2d ed. 1994).

407. DE CRUZ, *supra* note 338, at 66.

serious felonies.⁴⁰⁸

Separate criminal trial courts (*cour d'assises*) have complete original criminal jurisdiction over serious felony cases.⁴⁰⁹ Each of these purely criminal courts is staffed by three professional judges and nine lay judges/jurors.⁴¹⁰ These twelve individuals adjudicate guilt and impose sentences with a majority of eight votes.⁴¹¹

Above the superior court and specialized criminal trial court level are two levels of French appellate courts. These courts serve different review purposes, although their specialized structure is similar. The first level of appellate review is conducted by one of thirty-three courts of appeals (*cours d'appel*).⁴¹² The thirty-three courts are divided into subject matter divisions (i.e., civil, criminal, social, commerce, and juvenile) and hear de novo appeals from the *tribunaux* courts.⁴¹³

The second level of appellate review is conducted by the country's highest level court, the Supreme Court (*Cour de cassation*).⁴¹⁴ In contrast with the *cours d'appel*, the *Cour de cassation* reviews cases only for legal error.⁴¹⁵ When error is found, the *Cour de cassation* usually does not substitute its own verdict for that of the lower court; instead, the verdict is quashed, and the case is remanded for further proceedings.⁴¹⁶ Maximum access to the Supreme Court is assured by generous staffing and

408. GLOS, *supra* note 405, at 135.

409. *Id.* at 136-37. To one who first views the French criminal justice system, the overlapping jurisdiction of the superior courts and the *cour d'assises* may be confusing and bear closer examination. *See id.*

410. FAIRCHILD, *supra* note 337, at 169.

411. *Id.*

412. DE CRUZ, *supra* note 338, at 66.

413. *Id.*

414. *Id.* at 67.

415. *Id.* *See generally* Leila S. Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994) (tracing the development of crimes against humanity in the French court system).

416. DE CRUZ, *supra* note 338, at 67. If on remand the lower court takes the same position as it originally took, the *Cour de cassation* will institute a type of quasi-en banc or Plenary Assembly (*Assemblée plénière*), composed of representatives of all five divisions, to remand for a third (and final) time. *Id.* Recent reforms allow a Division, or the *Assemblée plénière* of the Supreme Court, to render a final judgment if no other issues are to be decided on remand. *Id.*

operational efficiency. The Supreme Court has 127 judges who sit in six "chambers" or divisions (including three general private-law divisions, one commercial/financial division, one social division, and one criminal division) on panels of five to eight judges.⁴¹⁷

C. Comparative Lessons

Under the German and French legal systems, maximum efficiency is obtained through subject matter specialization at all levels and by generous court staffing.⁴¹⁸ Access to the courts by individual litigants is maximized and uniformity of laws is achieved,⁴¹⁹ resulting in better protection of the rights of individual litigants.

The elementary view of the French justice system demonstrates the wisdom of formally splitting the public administrative process from private-law courts.⁴²⁰ The further division of the private-law courts according to subject matter (from the lowest tribunals through the highest court) allows substantial numbers of judges to operate with optimum efficiency.⁴²¹ The relegation of criminal cases to separate courts, such as the *cour d'assises*, deserves closer attention.⁴²² Moreover, beyond its specialized structure, the French criminal justice system offers a variety of comparative lessons from which the United States can learn, especially in an age of radical and frequent acts of crimi-

417. LIEBESNY, *supra* note 333, at 293-94.

418. *See supra* parts V.A-B.

419. *See* Meador, *supra* note 325, at 56-58 (discussing subject matter specialization and uniformity of laws).

420. *See generally* STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION* (1990) (discussing the advantages and disadvantages of specialized administrative tribunals).

421. One of the most interesting aspects of this structure of specialization is the institutionalization of a special court to decide disputes over court jurisdiction. The Jurisdiction Disputes Court (*Tribunal des conflits*) decides whether the administrative or private court system has jurisdiction when a private court has previously held that jurisdiction is proper in that court. If the ruling is contested, the Jurisdiction Disputes Court decides jurisdiction and issues a final ruling. DE CRUZ, *supra* note 338, at 71.

422. *See* Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care*, 78 CAL. L. REV. 539 (1990).

nal jury nullification.⁴²³

The German justice structure is also exemplary. The structure demonstrates that with subject matter specialization, a judicial system (trial and appellate) staffed by thousands of judges can be effective, efficient, and fair, without being bureaucratic. As Professor Meador stated in concluding his 1983 article:

While the German plan cannot be copied precisely in an American court, it does provide a useful source of ideas for experimentation. Moreover, the German experience does provide evidence that this style of organizing appellate business is an effective way of accommodating large numbers of judges within a single court. As the volume of cases and the number of judges continue to grow in the United States, we may come increasingly to see this as the promising method of preventing doctrinal chaos in the legal system. Certainly it is worth a try.⁴²⁴

The court systems of both France and Germany are, first and foremost, protective of individual litigants' rights of access to the courts and efficient civil and criminal justice. It is important, therefore, that contemporary debate on the values of federal court expansion and specialization prominently reference comparative lessons to be learned.⁴²⁵ Any number of other national court systems, both civil- and common-law-based, could be cited as examples of successful subject matter specialization.⁴²⁶ In each comparative example, one would find that the specialization models correspond to the unique needs and particular

423. See *id.* Professor Frase concludes that there are a number of desirable features of the French system, such as "more careful selection, training, and supervision of police, prosecutors, and judges." *Id.* at 542.

424. Meador, *supra* note 325, at 58. One should note that Professor Meador concentrates on the value of specializing the United States' appellate court structures; he does not specifically argue for subject matter specialization of federal district courts. See *id.* at 29.

425. See Bryant G. Garth, Book Note, 30 AM. J. COMP. L. 684 (1982) (reviewing HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE* (4th ed. 1980)) (criticizing the author for his failure to consider political developments in his discussion of foreign legal systems).

426. See generally GLOS, *supra* note 405 (comparing the legal systems of several countries).

conditions of the society involved. In applying those comparative lessons, one must consider the unique societal needs of the United States and specific contemporary demands placed on our presently constructed federal court system.

In the United States, escalating federal criminal caseloads and effective national criminal justice must be seen as the most obvious needs and most demanding institutional concerns of our federal courts. Five times more civil cases than criminal cases are filed in this nation's federal district courts.⁴²⁷ From July 1991 to June 1992, however, in thirty-seven of the ninety-four federal district courts, more than half of the trials were criminal trials, bringing the national average of federal criminal cases tried to 46.4% of all cases tried.⁴²⁸ In fiscal year 1992, eighty-six percent of all cases tried in California's federal district courts were criminal.⁴²⁹ In North Carolina, criminal trials accounted for 84.8% of all cases tried in federal district court;⁴³⁰ New Mexico's federal trials were 76.4% criminal;⁴³¹ Arizona's federal trials were 74.4% criminal;⁴³² and U.S. district courts in Florida, Idaho, Iowa, Oregon, Tennessee, and Washington all devoted over sixty percent of their trial time to criminal prosecutions.⁴³³ Federal court administrators must cope with the fact that, over the last decade, criminal cases have become increasingly complex and time consuming,⁴³⁴ "result[ing] in major concerns, especially over the large portion of the available judicial resources consumed by the criminal dockets."⁴³⁵ Even with only a modest enforcement of the Violent Crime Control and Law Enforcement Act,⁴³⁶ criminal prosecutions, and re-

427. *Criminal Trials Dominate U.S. District Court's Workload*, THIRD BRANCH, Dec. 1992, at 5.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Criminal Trials Dominate District Courts' Workload*, THIRD BRANCH, Sept. 1993, at 4. For instance, multi-defendant cases have grown 70% since 1980. *Id.*

435. *Id.*

436. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 8, 16, 18, 20, 21, 26, 28, 31, 42 U.S.C.).

sulting criminal trials, will increase. America's unique societal concerns for safety and the federal courts' present lack of sufficient resources to sustain an effective federal criminal justice system requires consideration of whether court specialization, into civil and criminal divisions, would be appropriate.

The time has come for national debate on specialization of the federal judiciary.⁴³⁷ Such a debate, which should take into consideration the structures of foreign judicial systems, must respond to the status quo bias of the Judicial Conference's Committee on Long Range Planning.⁴³⁸ Debate would add a needed dimension to Ninth Circuit Chief Judge Clifford Wallace's proposal for a three-branch conference on the federal courts.⁴³⁹ Most importantly, such a comparative debate would provide a more prominent voice for nonrobed citizens—particularly practicing attorneys, concerned citizens, and American businesses—in the future size and design of their national court system.⁴⁴⁰ As Ninth Circuit Judge Stephen Reinhardt stated in calling for a substantial increase in the size of the federal judiciary:

[T]he problem of the future of our nation's federal courts is far too important to be left to judges. It is the people and their elected representatives who must determine what the size of our courts will be, what role they will play in our system of government, whose needs they will serve, what kinds of cases can be brought in the federal courts.⁴⁴¹

Even if our present federal judiciary were fully staffed and a

437. The *Brooklyn Law Review* recently published a symposium issue on specialization. See Symposium, *The Sixth Annual Abraham L. Pomerantz Lecture*, 61 BROOK. L. REV. 1 (1995).

438. See Steve Albert, *The More Things Stay the Same, The More the Federal Courts Like It*, RECORDER, Nov. 15, 1994, at 2 (discussing the Committee's recommendation that no major changes be made to the federal court system).

439. See *supra* notes 204-05 and accompanying text.

440. For recent commentary on the future of federal courts as a field of scholarship and study, see Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993 (1994); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994); Judith Resnick, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021 (1994).

441. Stephen Reinhardt, *Whose Federal Judiciary Is It Anyway?*, Address at Loyola Law School (Apr. 26, 1993), in 27 LOY. L.A. L. REV. 1, 5 (1993).

few additional judges were added in our most overcrowded jurisdictions, our nation's judges still would fail in their good faith attempt to adjudicate the civil actions and criminal prosecutions of a nation of over 250,000,000 people.⁴⁴² The 104th Congress should create a significant number of new trial and appellate judgeships for our most overcrowded jurisdictions. After providing these needed judges, Congress and the President must honor their unique responsibility to sustain adequately the nonpolitical third branch of government by remodeling our generalized court system. A dynamic, well-maintained national court system is a basic component of our Republic's governmental structure; every litigant in each of the ninety-four federal trial court jurisdictions and thirteen appellate circuits⁴⁴³ deserves equal access to justice.

The comparative lessons and the value and wisdom of a large, specialized judiciary will have to be learned and promoted by the public and the bar, for it is clear that the impetus for change will not come from within the ranks of the federal judiciary. Again, as Judge Reinhardt stated:

[I]f those who oppose an elitist federal court system are to prevail, they will in all likelihood have to overcome the influence of the judicial establishment

I can assure you that the advocates of a minimalist federal court system—the “jewel” advocates—are well aware of the effect their proposal[s] to freeze the judiciary size at 1000] would have if adopted. The freeze would not just be on the number of judges. . . . It would also be on our access to our courts, and thus on our liberties and freedom.⁴⁴⁴

Judge Reinhardt is most concerned that judicial gridlock and judicial leaders' desire to “remain elite” will jeopardize the

442. See Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52. Judge Reinhardt submits that even if the size of the circuit courts were doubled, the present caseload “would be more than enough to keep us busy The only difference would be that far more of the cases we are now handling would receive the full attention they deserve, and the quality of justice in our courts would be substantially improved.” *Id.* at 53.

443. For a map depicting each of the jurisdictions and circuits, see FEDERAL JUDICIAL CENTER, *CREATING THE FEDERAL JUDICIAL SYSTEM* 29 (1989).

444. Reinhardt, *supra* note 441, at 5.

"kinds of cases that affect individual rights and involve the problems of the poor, the oppressed, the disabled and the victims of discrimination."⁴⁴⁵ Unfortunately, Judge Reinhardt's simple call "that Congress double the size of the courts of appeals"⁴⁴⁶ appears to be a lone voice on the federal bench.⁴⁴⁷

VI. THE JUDICIARY'S SMALL, ELITIST GENERALIZED VISION

A. *Judicial Resistance to Increasing the Judiciary's Number*

Despite the fact that additional judges are required to ensure equal access to justice, during the last few years, leaders of the federal bench have argued strongly against the creation of a significant number of additional judgeships.⁴⁴⁸ Some judges express concern that the unique nature and special personality of the federal judiciary will be diluted by an increase in the size of the judiciary above 1000 judges.⁴⁴⁹ Chief Justice Rehnquist cautioned against "the long term implications of expanding the federal judiciary," referencing other jurists' concerns that "a federal judiciary rising above 1,000 members will be of lesser quality . . . and end up being divided into an almost unmanageable number of circuits or plagued by appellate courts of unmanageable size with an increasingly incoherent body of federal law."⁴⁵⁰ Similarly, Justice Antonin Scalia has expressed a view that the federal courts should be reserved only for the important cases and has opposed court growth. Justice Scalia has stated

445. Reinhardt, *supra* note 442, at 52.

446. *Id.* at 53.

447. *See id.* at 54. Judge Reinhardt acknowledges that even members of his own court would disagree with his bleak descriptions of the federal judiciary. *Id.*; *see also infra* notes 450-51 and accompanying text (discussing Chief Justice Rehnquist's and Justice Scalia's views).

448. *See* Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70. For an historical perspective on judicial resistance to an increase in the size of the courts, *see* HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

449. *See, e.g.*, Marcia Coyle, *Some Judges Seek Cap on Ranks*, NAT'L L.J., May 31, 1993, at 9.

450. William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1992, at 2.

that increasing the "number of federal judges . . . helps the docket [but] aggravates . . . the problem of image, prestige and (ultimately) quality."⁴⁵¹

Second Circuit Chief Judge Jon O. Newman is the leading judicial advocate for a 1000-judge moratorium on the growth of our federal judiciary. As early as 1989, in a *University of Chicago Law Review* article,⁴⁵² Chief Judge Newman warned that increasing the size of the federal judiciary to keep apace with the increased federal caseload would lead to "appointments of inadequate distinction"⁴⁵³ and a federal judiciary "indistinguishable from the judiciary of most states."⁴⁵⁴ Chief Judge Newman repeated his concerns in a 1991 speech to the Connecticut Bar Association⁴⁵⁵ and expanded and clarified his position in both a 1993 article in *Judicature*⁴⁵⁶ and a commentary in the *New York Times*.⁴⁵⁷

Written in response to this Author's article suggesting an increase in the size of the judiciary,⁴⁵⁸ Chief Judge Newman's *Judicature* work began by stating that "the current trend to increase [the judiciary's] size beyond tolerable limits" is the "most serious threat to the proper functioning of the federal judiciary."⁴⁵⁹ Chief Judge Newman is adamant regarding the dangers presented by a larger judiciary:

The line must be held at 1,000 because once that number is exceeded, it will be only a matter of time until the federal judiciary grows to 2,000, 3,000, and then 4,000. Growth of

451. GORDON BERMANT ET AL., *supra* note 315, at 11 (quoting Justice Antonin Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents 11 (Feb. 15, 1987) (manuscript)).

452. Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals To Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989).

453. *Id.* at 764.

454. *Id.* at 767.

455. Jon O. Newman, *Size of the Federal Judiciary Threat to Quality*, CONN. L. TRIB., Nov. 4, 1991, at 3.

456. Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1992-1993).

457. Jon O. Newman, *Are 1,000 Federal Judges Enough?*, N.Y. TIMES, May 17, 1993, at 17.

458. Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1992-1993).

459. Newman, *supra* note 456, at 187.

such magnitude will seriously impair the federal judiciary's ability to perform the vital tasks assigned to it under our system of government.

... A federal judiciary rising above 1,000 and heading for 3,000 judges will be of lesser quality and dominated by a burgeoning bureaucracy of law clerks, staff counsel, magistrate judges, and other ancillary personnel. It will be divided into an unmanageable number of circuits or plagued by appellate courts of unmanageable size, with an incoherent body of federal law and a Supreme Court substantially incapable of maintaining uniformity of federal law.⁴⁶⁰

Many of Chief Judge Newman's arguments against increasing the size of the judiciary also could be offered in support of adding more federal judges. For example, without additional judges, the court system certainly will not be able "to perform the vital tasks assigned to it under our system of government."⁴⁶¹ The dynamic nature of the nation's population and economy guarantees tremendous civil litigation growth in our federal courts during the next decade. Congress's 1994 crime control efforts⁴⁶² and 1995 antiterrorism legislation⁴⁶³ guarantee a corresponding increase in federal criminal prosecutions during the next few years. Any number of additional legislative provisions currently pending in Congress could significantly increase the judiciary's workload. To avoid delays in, and an irreversible deterioration of, national justice and national law, an immediate expansion in the size of the judiciary is required. Expansion is the solution; status quo notions of slow growth and no growth are the true threats to the future quality of federal justice.

Judicial coping mechanisms already are too common during these times of case overload.⁴⁶⁴ It is the small, elitist vision of a federal judiciary that causes the present dependence on a "burgeoning bureaucracy of law clerks, staff counsel, magistrate

460. *Id.* at 187, 194.

461. *Id.* at 187.

462. *See infra* part VII.C.2 (discussing the provisions of the Violent Crime Control and Law Enforcement Act of 1994).

463. *See supra* notes 262-63 and accompanying text.

464. *See supra* part IV.C.

judges, and other ancillary personnel.”⁴⁶⁵ Only by increasing the number of Article III judges can we avoid having important issues of procedural justice and substantive law rendered by a burgeoning “shadow judiciary”⁴⁶⁶—staff attorneys, law clerks, and other non-Article III magistrate personnel. The National Association of Public Administrators’ report on the dangers of permanent law clerks abrogating judicial decisional authority by serving as “assistant judges”⁴⁶⁷ and the pending legislative effort to grant magistrates *carte blanche* authority to conduct designated criminal trials without criminal defendants’ consent⁴⁶⁸ are only the most recent warnings of the development of a “shadow judiciary.”⁴⁶⁹

A restructuring and concurrent expansion of our national houses of justice can address these and other concerns, such as court structure, circuit sizes, and uniformity of federal law. At the appellate level, such an expansion and remodeling would foreclose discussion of substituting discretionary review for the present statutory right of appeal.⁴⁷⁰ Limiting available justice to the certiorari discretion of the overworked courts of appeals should not be an option of “last resort,” as described by the Federal Courts Study Committee.⁴⁷¹ Indeed, it should not be an option at all.⁴⁷²

As noted above, only Ninth Circuit Judge Stephen Reinhardt

465. Newman, *supra* note 456, at 194.

466. Memorandum, *supra* note 297, at 1.

467. *Id.* at attach. I.

468. See *Federal Courts Improvement Act Transmitted to Congress*, *supra* note 240, at 9 (discussing provisions of the Act); *supra* notes 241-42 and accompanying text.

469. Memorandum, *supra* note 297, at 1.

470. For a discussion regarding the proposed elimination of absolute right of appeal, see Donald P. Lay, *The Federal Appeals Process: Whither We Goest? The Next Fifty Years*, 15 WM. MITCHELL L. REV. 515, 532-33 (1989); Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151, 1155-58 (1981); Linda Greenhouse, *Rehnquist Asks Limit to Automatic Appeals*, N.Y. TIMES, Sept. 16, 1984, (Magazine), 27.

471. FEDERAL COURTS STUDY COMMITTEE, *supra* note 316, at 91. While recognizing discretionary appeal would be a major change, the Committee recommended the option be studied. *Id.*

472. See generally Judith Resnick, *Precluding Appeals*, 70 CORNELL L. REV. 603 (1985) (discussing the Supreme Court’s preclusion jurisprudence and suggesting alternatives to abolishing appeal as a matter of right).

advocates adding more judges to the federal court system.⁴⁷³ He deems the argument "that we must remain small so that the quality of judges will remain high" as "wholly meritless."⁴⁷⁴ In a recent speech describing a "major battle" that is underway "over the heart and soul of our federal judicial system,"⁴⁷⁵ Judge Reinhardt asked a group of law students:

Whose courts are they? What is the purpose of federal courts? Are they there to serve the judges or the people? All the people or just a few? . . . Will they grow so that they can serve the needs of an expanding population with expanding rights, or will they be frozen in size and the number of judges capped at the number now serving?⁴⁷⁶

Rejecting the arguments of his court brethren who would freeze the federal judiciary at 1000 judges in number, Judge Reinhardt candidly stated:

At the heart of the freeze movement is judicial elitism. It is the view that federal courts and federal judges are too important for routine matters that only affect ordinary persons.

The essential flaw in the approach of the judicial elitists is that they believe the courts are there to satisfy their intellectual desires, to provide them with intellectual stimulation—rather than to serve the needs of the public, to promote the public welfare.⁴⁷⁷

Judge Reinhardt describes those in the freeze movement as varied in philosophy, both liberal and conservative.⁴⁷⁸ He describes the liberal and moderate judges as "victims of nostalgia for days they never knew" and of being "comfortable with the way courts have always operated, . . . [and] fear[ing] change. They yearn for the days, long gone if they ever existed, when a federal judge could walk down the street and be recognized and

473. See Henry Weinstein, *Federal Judge Takes Issue With Limiting Court Expansion*, L.A. TIMES, Apr. 26, 1993, at A3; *supra* note 442 and accompanying text.

474. Reinhardt, *supra* note 442, at 52.

475. Reinhardt, *supra* note 441, at 1.

476. *Id.*

477. *Id.* at 3.

478. *Id.*

greeted by an admiring populace."⁴⁷⁹

Answering Chief Judge Newman's concern over creating a judicial bureaucracy, Judge Reinhardt reinforces the point, made above, that bureaucratization of the judiciary will occur only "when there are too few judges, not too many," and that, with too few judges, the courts "lean too heavily on staff, enact procedures that result in the arbitrary classification of cases that receive second class treatment, and then dispose of them by shortcuts taken behind closed doors."⁴⁸⁰

If judicial numbers count, as they seem to, Chief Judge Newman is winning this "great battle," which so far "has been waged behind closed [judicial] doors."⁴⁸¹ A recent Federal Judicial Center survey of the entire federal judiciary on the wisdom of a "cap" on the number of Article III judges found that "[a] majority of active district judges and more than 40% of active appellate judges strongly or moderately opposed a cap, while a quarter of active district judges and a third of active appellate judges strongly or moderately supported" such a definite numerical limit.⁴⁸² The U.S. Judicial Conference has not accepted fully Chief Judge Newman's proposal for a 1000-judge limit on the size of the federal judiciary. In September 1993, however, the Judicial Conference reaffirmed its previous position favoring "maintaining a relatively small Article III judiciary."⁴⁸³

As a practical demonstration of its reluctance to allow growth of the judiciary, the Judicial Conference rejected the Ninth Circuit's recent request for ten additional permanent judgeships.⁴⁸⁴ Instead, the Conference agreed only to request "temporary" judgeships from Congress. These "temporary" life-tenured judgeships would expire with the death or retirement of the first appointed judge, if occurring five or more years after the

479. *Id.*

480. *Id.* at 4.

481. *Id.* at 1.

482. See BERMANT ET AL., *supra* note 315, at 15.

483. *Id.* at 14 (quoting REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Sept. 12, 1990, at 93).

484. The short-term caseload problem of the Ninth Circuit will be worsened by the loss of two additional active judges to senior status. See Steve Albert, *Ninth Circuit's Norris, Nelson Decide To Take Senior Status*, RECORDER, June 21, 1994, at 3.

effective date of the title.⁴⁸⁵ At the same time, the Judicial Conference adopted a carefully controlled growth policy for the federal courts.⁴⁸⁶

As judicial gridlock worsened in 1993, however, even Chief Judge Newman requested two additional judges for the Second Circuit. Interestingly, his request to the U.S. Court's Administrative Office was styled as one for "temporary" Article III judgeships.⁴⁸⁷ Asserting that his request for only two additional judges was not inconsistent with his previous positions taken as the leading judicial opponent of national federal court growth, Chief Judge Newman acknowledged that his circuit's need for more judges will only increase in the future.⁴⁸⁸ If approved by the Judicial Conference and enacted into legislation by Congress, the request would be the first expansion of the Second Circuit's size in a decade.⁴⁸⁹

B. Judicial Resistance to Specialized Courts

As Congress ponders the caseload of the federal judiciary of the twenty-first century, it must reconsider the "Old General

485. See 28 U.S.C. § 133 (1988).

486. *Judicial Conference Endorses Carefully Controlled Court Growth*, THIRD BRANCH, Oct. 1993, at 1. The Judicial Conference voted to:

[1.] Reaffirm the federal Judiciary's historical commitment to the principle that its jurisdiction should be limited, complementing and not supplanting that of the state courts.

[2.] Endorse the principle that the size of the Article III Judiciary should be limited to the number necessary to exercise such jurisdiction, thus allowing a policy of carefully controlled growth.

[3.] Reaffirm its previous position favoring a relatively small Article III Judiciary but opposing any efforts to set a maximum limit on the number of judgeships.

Id.

487. Deborah Pines, *Circuit Court Seeks 2 Temporary Judges*, N.Y. L.J., Mar. 22, 1994, at 1.

488. *Id.* The request letter stated:

It is with considerable reluctance that we make this request. We are impelled to do so, however, by the recent growth in our filings and the expectation that, by the time any additional judgeships might realistically be filled, such growth will continue to a level beyond the capacity of our current complement of judges.

Id.

489. *Id.* at 2.

Store" model of our federal courts, under which every judge regularly hears a hodgepodge of cases—from civil antitrust, to felony homicide, to congressional apportionment, to securities violations, to criminal cocaine importation—and consider the efficiency and results that may be achieved with a court structure divided into specialized judicial functions. Congress must consider seriously whether the national judiciary, like the legal profession, should divide and specialize its sundry jurisdictional duties at the trial and appellate levels. This consideration should focus primarily on the best interests of litigants, not on the whims and preferences of the jurists presently staffing our existing judicial structure.⁴⁹⁰

In past years, proposals for subject matter specialization of our federal appellate courts, however limited in scope,⁴⁹¹ critical in analysis,⁴⁹² or carefully explicated,⁴⁹³ have been vigorously rebuffed.⁴⁹⁴ Critics of specialization often cite the inauspicious weakness of the nation's Commerce Court, created in 1910 for the sole purpose of reviewing Interstate Commerce Commission orders, as a prime example of the dangers inherent in constricting the courts' generalized jurisdiction.⁴⁹⁵

The judiciary's commitment to maintaining the third branch's status quo is exercised most vigorously in opposition to calls for court specialization.⁴⁹⁶ The circular reasoning of the judiciary

490. Some specialization suggestions in the past have even considered establishing multiple court systems, so as to give litigants a choice between specialized and general jurisdiction. See Ellen R. Jordan, *Should Litigants Have a Choice Between Specialized Courts and Courts of General Jurisdiction?*, 66 JUDICATURE 14 (1982).

491. See Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 651 (1981); Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1 (1987).

492. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

493. See PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 167-84 (1976); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981).

494. See Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 639-40 (1974); Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 268 (1980); Simon H. Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425, 426 (1951).

495. See George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964).

496. Consider the following remarks Judge Patrick Higginbotham made to a meet-

has become obvious: increasing the number of federal judges is not an option because the additional judges would create courts of unmanageable size and conflicting law; the creation of smaller, specialized courts to provide consistency of law is per se not acceptable to the existing judiciary; therefore, the judiciary must remain limited in size.

A 1993 Federal Judicial Center (FJC) study⁴⁹⁷ reported strong opposition to specialization of federal appellate review among federal judges.⁴⁹⁸ The report chronicles judicial antagonism to specialized Article III courts, including contentions that appointments to such courts would be politicized, that special interests or industries could unfairly influence the specialized appointment process, and that "repeat player" litigants would have an advantage in such courts.⁴⁹⁹

One of the most frequently expressed judicial concerns with specialization is that of resulting docket boredom. Judges suggest that their jobs would become unattractive if they were given specialized (i.e., limited) responsibilities; a narrow jurisdictional range might lead to judicial "monotony."⁵⁰⁰ Indeed, responding to an FJC survey, fifty-eight percent of the participating appellate judges either strongly or moderately opposed the

ing of the ABA's Young Lawyers Division:

I fear, however, courts of specialization. Virtually all substantive areas of federal judicial decision making, including the area of patent law, implicate broad underlying social concerns and tension. Courts of specialization, in my judgment, tend to become technically parochial. That is, there is a higher risk with specialized courts than with courts whose judges are trained as generalists that "technical" decision making will be cut loose from its social moorings, and drift and founder on byzantine and esoteric substantive law. This risk of intellectual inbreeding would be aggravated by its geographical concentration in Washington, D.C. The very nature of the Article III judicial duty calls for judges who are generalists with some insight into the social consequences of their decisions; courts of specialization displace this quality.

Higginbotham, *supra* note 494, at 268.

497. The study was conducted, and the report was prepared, pursuant to section 302(c) of the Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5104.

498. See STRUCTURAL AND OTHER ALTERNATIVES, *supra* note 11, at 83-87.

499. *Id.* at 84-85.

500. See *id.*

idea of creating Article III specialty courts.⁵⁰¹ According to the FJC's report on the survey:

[S]ome believe specialized courts result in lessened prestige for their members. The status of the federal judge, it is argued, derives in part from the generalist nature of the position. The actual risk of boredom and the presumption of boredom by those who would not consider sitting on a specialized court could result in a court of diminished stature and, ultimately, diminished quality.⁵⁰²

The results of the survey, which reported that the judges' true objection was "not to specialization as a way of deciding cases," but only to a specialized Article III judiciary, perhaps further reflects this underlying judicial concern with job satisfaction, status, and prestige.⁵⁰³

C. Judicial Resistance to Federal Crime Control by Lobbying Congress and Constitutional Interpretation: An Alternative Analysis of United States v. Lopez

1. Lobbying Against Federal Crime Control

Citing allegiance to federalism constructs,⁵⁰⁴ judicial commentators have demanded for years that criminal prosecutions be left to the protected province of the states.⁵⁰⁵ Chief Justice Rehnquist made this argument in 1992 to a meeting of the

501. *Id.* at 84 n.158.

502. *Id.* at 85.

503. *Id.* Notwithstanding judicial opposition to specialization, the independent Federal Courts Study Committee favored further consideration of appellate "national subject matter courts." FEDERAL COURTS STUDY COMMITTEE, *supra* note 316, at 120. The Report stated: "[n]ational tax, admiralty, criminal, civil rights, labor, administrative and other subject-matter courts could relieve the regional courts of appeals of some of their current caseload and eliminate intercourt conflicts in those areas of the law." *Id.* The Committee specifically disfavored a separate administrative law court, however. *Id.* at 72-73.

504. See Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117 (1987).

505. See *Judicial Conference Opposes Expanded Role for Federal Courts*, THIRD BRANCH, Oct. 1991, at 1, 3; see also *Groups Oppose Federalization of Homicide Cases*, THIRD BRANCH, Oct. 1991, at 5 (arguing that federal jurisdiction over certain crimes involving weapons carried over state lines would be inconsistent with federalism).

American Bar Association: "To shift large numbers of cases presently being decided in the state courts to the federal courts for reasons which are largely symbolic would be a disservice to the federal courts and more importantly, to the whole concept of federalism."⁵⁰⁶

True to form, federal judges have been among the strongest critics of Congress's latest effort to "federalize crime."⁵⁰⁷ For example, Seventh Circuit Judge William Bauer complained that Congress was "overburdening the judiciary" with the latest crime legislation.⁵⁰⁸ A recent report released by the Criminal Law Committee of the Judicial Conference of the United States stated the federal judiciary's official opposition to the 1994 federal anticrime act: "In short, the character, purpose, management and operation of a branch of the U.S. government—the judiciary— would be significantly redefined to the detriment of a rational national crime control effort."⁵⁰⁹ The report also acknowledged that the nation's federal courts simply "do not have the resources to deal with the anticipated massive increases in [criminal] cases."⁵¹⁰ More recently, Chief Justice Rehnquist expressed similar concerns: "Most federal judges have serious concerns about the numbers and types of crimes now being funneled into the federal courts. . . . [C]ontinuation of the past decade's trend toward large-scale federalization of the criminal law has the enormous potential of changing the character of the federal judiciary."⁵¹¹

A 1992 FJC survey of federal judges supports Chief Justice Rehnquist's reading of the views of his inferior judges. Of re-

506. *Chief Justice Addresses ABA Midyear Meeting*, THIRD BRANCH, Feb. 1992, at 1.

507. See John F. Rooney, *Federal Judges Launch New Salvo at Crime Bill*, CHI. DAILY L. BULL., Mar. 14, 1994, at 1.

508. *Id.*

509. *Id.* at 20 (quoting background paper of the Criminal Law Committee of the U.S. Judicial Conference).

510. *Id.* at 1 (quoting background paper of the Criminal Law Committee of the U.S. Judicial Conference).

511. Schwarzer & Wheeler, *supra* note 12, at 652 (quoting William H. Rehnquist, *supra* note 7, at 6-7); see also William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships* (Apr. 1992), in 78 VA. L. REV. 1657, 1660 (1992) (stating that benefits can be derived from improving the relationship between state and federal courts).

sponding judges, 91.5% of active district judges and eighty-nine percent of active circuit judges favored "narrowing of federal criminal jurisdiction to reduce prosecution of "ordinary" street crime in federal courts."⁵¹² Although federal judges cast their opposition to an increased national campaign against violent crime in terms of respect for federalism, perhaps their own personal interests and job preferences, rather than notions of "federalism," are being protected. In fact, state and local officials are uniformly grateful for national assistance in the fight against violent crime.⁵¹³

Certainly, the federal judiciary has every right and responsibility to request sufficient resources to perform the jurisdictional job assigned it by Congress. Should federal judges, however, actively lobby Congress against crime control provisions in pending legislation for the purpose of protecting their personal job assignment preferences? Consider the following August 1, 1994, memorandum from District Judge Maryanne Trump Barry, Chairman of the Criminal Law Committee of the Judicial Conference, commenting on passage of the Violent Crime Control Act through the House-Senate conference committee. Judge

512. See Schwarzer & Wheeler, *supra* note 12, at 652 n.3 (quoting FEDERAL JUDICIAL CENTER, PLANNING FOR THE FUTURE: FIRST REPORT OF RESULTS FROM A SURVEY OF UNITED STATES JUDGES 11 (1992) (unpublished report, on file with the Federal Judicial Center)).

513. Consider this frank response to the "federalism" argument, published in debate format by two directors from the Federal Judicial Center:

Opposition to expansion of federal jurisdiction comes mostly from federal judges and reflects primarily their interests. Rarely are state or local officials or the bar heard to complain when Congress expands federal jurisdiction. On the civil side, one hears no pleas for limiting the jurisdiction of federal courts or the access of litigants to them. When new causes of action and other remedies are created by Congress, it is in response to public, and often powerful, demand, as in the case of civil rights laws. The bar's support for diversity jurisdiction is unwavering, and even many state court judges favor the relief it affords them.

While one may take issue with the particulars of federal sentencing law and policy, there is no public opposition to the federal government's vigorous participation in the fight against crime, particularly crime involving drugs or violence. It is extremely rare that federal prosecutions of local crime are undertaken over the objections of local prosecutors. Generally, federal activity augments and is conducted in cooperation with state law enforcement activity.

Id. at 670-71.

Barry stated:

I cannot tell you how awful this process has been, particularly in terms of the brush fires which had to [sic] put out at a moment's notice—just ten days ago, e.g., out of nowhere the D'Amato amendment again reared its ugly head with a *real* move to have it in the bill. Congressman Hughes, a good friend of the federal judiciary, came to us for ammunition including a letter from me, and D'Amato did not make it into the bill.

...
And I believe we won the crime bill itself and, more particularly, on the two provisions of most interest to the federal judiciary and as to which the Judicial Conference has taken positions. First, of course, the D'Amato amendment, which we opposed, did not get into the bill. Second, a safety valve from mandatory minimum sentences, which we supported, *is* in the bill, *and is retroactive*. I can't tell you how delighted I am with the safety valve—we've tried before and were unsuccessful and no one gave even a non-retroactive safety valve much of a chance in these "war on crime" days.⁵¹⁴

Even accepting that the judiciary has a good faith interest in lobbying Congress regarding their criminal jurisdiction charge,⁵¹⁵ should not their personal preferences against forced participation in the nation's "war on crime" be presented frankly, rather than masked in "federalism" terms? The judiciary's defeat of the "ugly head[ed]" D'Amato amendment,⁵¹⁶ which sought to bring the force of the national government to bear against the most egregious felony firearm homicides, should be described candidly, not cloaked as a victory for federalism.

Interestingly, state governments did not express concern that the 1994 federal crime legislation violated their sovereignty. Rather, for some time, they have been urgently seeking

514. Memorandum from Judge Maryanne T. Barry to Members of the Committee on Criminal Law on the Crime Bill and Testimony Before Budget Committee 1-2 (Aug. 1, 1994) (on file with Author).

515. Judge Barry has been public in her opposition to the creation of additional federal crimes. See Maryanne T. Barry, *Don't Make a Federal Case of It*, BALT. SUN, Mar. 14, 1994, at 9A.

516. *Id.*

relief and assistance from the national government in their attempts to confront the scourge of violent crime plaguing their citizens, especially because state courts systems face equal or greater criminal and civil case overloads than does the federal judiciary.⁵¹⁷

2. United States v. Lopez⁵¹⁸: *Terminating Congressional Jurisdiction To Fight Crime As a Method of Controlling Federal Criminal Caseloads*

U.S. District Judge Jim Carrigan, sitting in Denver, Colorado, was one of several federal jurists publicly to question the jurisdictional basis for federal involvement in crime control, citing the federal law that restricts firearm possession in a school zone: "Under what power does Congress act in regulating guns in school zones? . . . Nothing in the statute hints at any basis for federal jurisdiction, isn't regulation of schools and school neighborhoods a matter of local and state concern?"⁵¹⁹ Judge Carrigan framed his concern with national crime control efforts as one involving the future of federalism: "Shall the constitutional concept of a central government of limited powers pass into history?"⁵²⁰ In April 1995, the Supreme Court agreed with Judge Carrigan, and, for the first time in almost sixty years, the high Court declared a law unconstitutional as exceeding the powers of the Congress to regulate interstate commerce.⁵²¹

The United States Congress certainly thought that it was properly exercising its legislative powers when it passed the Gun-Free School Zones Act in 1990.⁵²² In a bipartisan effort to confront the criminal violence in America's schools that each year leaves hundreds of children injured and dead, Congress and

517. The Chief Judge of New York's highest court made this point well in criticism of the Proposed Long Range Plan's proposed shifting of diversity of citizenship cases to the state courts. See Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1994, at A29.

518. 115 S. Ct. 1624 (1995).

519. *Judge Carrigan's Warning*, ROCKY MTN. NEWS, Mar. 8, 1994, at A33.

520. *Id.*; see also Jim R. Carrigan & Jessica B. Lee, *Criminalizing the Federal Courts*, TRIAL, June 1994, at 50 (discussing the criminalization of the federal courts).

521. *Lopez*, 115 S. Ct. 1624.

522. 18 U.S.C. §§ 921(a)(25), 922(q) (1988 & Supp. V 1993).

the Bush Administration enacted a modest act making possession of a firearm within 1000 feet of a school a federal felony.⁵²³ As had been the course since the 1930s, Congress answered a grievous national concern with a narrowly tailored national law restricting gun possession.⁵²⁴ Pursuant to the Commerce Clause,⁵²⁵ the Supreme Court previously had upheld Congress's similarly broad exercise of authority to regulate trade unions,⁵²⁶ to restrict how much wheat an individual citizen might grow for his or her own personal consumption,⁵²⁷ and to forbid racial discrimination by restaurants⁵²⁸ and hotels.⁵²⁹

In October 1994, Chief Justice William Rehnquist publicly expressed his concern and dismay at such congressional action, "which started more than a century ago and continues apace today,"⁵³⁰ during a Wake Forest University commencement address. Upon accepting an honorary doctor of laws degree,⁵³¹ Chief Justice Rehnquist targeted recent crime control efforts of the Congress in his address and specifically outlined provisions of the Violent Crime Control Act that violated his notions of federalism. He stated:

Many observers, of whom I am one, have doubt as to the wisdom of some of these provisions. . . . This is the same sort of approach that Congress took initially with the regulation of the railroads a century ago, with the prohibition of child labor and the enactment of federal minimum wage and maxi-

523. The law stated that it was an offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* § 922(q)(1)(A). The statute defines a school zone as "in, or on the grounds of, a public, parochial or private school" or alternatively "within a distance of 1,000 feet from the grounds of a public, parochial or private school." *Id.* § 921(a)(25).

524. For a more general discussion of the problem of gun violence, see Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995).

525. U.S. CONST. art. I, § 8, cl. 3.

526. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

527. *Wickard v. Filburn*, 317 U.S. 111 (1942).

528. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

529. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

530. William H. Rehnquist, Convocation Address, Wake Forest University (Oct. 25, 1994), in 29 WAKE FOREST L. REV. 999, 999 (1994).

531. *Id.*

mum hour laws in the early part of this century, and with the enactment of federal civil rights laws in the second half of the century.⁵³²

Considering Chief Justice Rehnquist's publicly expressed views, it was somewhat curious that court-watchers and commentators expressed such surprise when Chief Justice Rehnquist, writing for a five-member majority, issued its ruling in *United States v. Lopez*⁵³³ in April 1995, nullifying the Gun-Free School Zones Act.⁵³⁴

The *Lopez* majority opinion first discussed what Chief Justice Rehnquist termed "first principles"⁵³⁵—the limited powers of national government and federalism⁵³⁶ and the history of the Court's Commerce Clause interpretation.⁵³⁷ The majority then delineated three varieties of activities that Congress may regulate pursuant to the Commerce Clause: (1) "the use of the channels of interstate commerce," (2) the instrumentalities of interstate commerce, and (3) activities having a *substantial* relation to interstate commerce.⁵³⁸ Acknowledging that "our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it," Chief Justice Rehnquist concluded that the "proper test" was "substantially affects."⁵³⁹ The majority then

532. *Id.* at 1005.

533. 115 S. Ct. 1624 (1995).

534. See Aaron Epstein, *Top Court Overturns Ban on Guns at Schools*, RECORD, Apr. 27, 1995, at A1; William H. Freivogel, *Uncertainty Surrounds Court Ruling on Commerce; But Experts Agree Ruling Limits Congress, May Jeopardize Laws*, ST. LOUIS POST-DISPATCH, May 2, 1995, at B11; Bennett L. Gershman, *Judicial 'Conservatism'*, N.Y. L.J., June 21, 1995, at 2; Linda Greenhouse, *High Court Kills Law Banning Guns in a School Zone*, N.Y. TIMES, Apr. 27, 1995, at A1; Linda Greenhouse, *States' Rights; High Court Re-Examines A Long-Standing Basis for Federal Powers*, N.Y. TIMES, Apr. 30, 1995, § 4, at 2; Frank J. Murray, *High Court Rejects Law on Gun-Free School Zones; Curbs Congress' Reach in Local Matters*, WASH. TIMES, Apr. 27, 1995, at A1.

535. *Lopez*, 115 S. Ct. at 1626.

536. *Id.*

537. *Id.* at 1626-30.

538. *Id.* at 1630.

539. *Id.* Justice Thomas concurred in a separate opinion to state his belief that the "substantial effects test" is flawed because of the aggregation principle, and to state more broadly his "original understanding" of the Commerce Clause's very specific limits. *Id.* at 1642 (Thomas, J., concurring).

applied its new test to declare the Gun-Free School Zones Act unconstitutional.⁵⁴⁰

The remainder of the majority opinion is merely dressing for this act of nullification.⁵⁴¹ Refusing seriously to address the government's numerous arguments about how school zone gun possession affects interstate commerce,⁵⁴² the opinion firmly refused to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."⁵⁴³

In a separate concurring opinion, Justices Kennedy and O'Connor wrote what is certainly the most curious language of the *Lopez* decision.⁵⁴⁴ After rehashing a long history of federalism, Justice Kennedy expressed his and Justice O'Connor's policy belief (opposed to that of a unanimous Congress and President) that local and state governments can better deal with the problem of guns in schools.⁵⁴⁵ The opinion specifically noted that "over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds," and that "[o]ther, more practicable means to rid the schools of guns may be thought . . . preferable" by the states.⁵⁴⁶ Amazingly, Justice Kennedy gave numerous examples of "more practicable means" to rid schools of guns that are supposedly foreclosed by the federal statute:

These might include inducements to inform on violators where the information lead to arrests or confiscation of the guns, programs to encourage the voluntary surrender of guns with some provision for amnesty, penalties imposed on parents or guardians for failure to supervise the child, laws providing for suspension or expulsion of gun-toting students, or programs for expulsion with assignment to special facilities.⁵⁴⁷

540. *Id.* at 1630-31.

541. *See id.* at 1631-34.

542. *Id.*

543. *Id.* at 1634.

544. *Id.* at 1634-42 (Kennedy, J., concurring).

545. *Id.* at 1638-42 (Kennedy, J., concurring).

546. *Id.* at 1641 (Kennedy, J., concurring).

547. *Id.* (Kennedy, J., concurring) (citations omitted).

Justice Kennedy had expressed such a policy belief before *Lopez*, albeit in more direct form. In 1994, testifying before the Senate Appropriations Committee, Justice Kennedy warned Congress against turning the federal judiciary into "police courts" by passing additional crime control legislation.⁵⁴⁸ He stated: "You said the magic words: Police courts. . . . We're concerned that's going to be the effect of a number of these proposals."⁵⁴⁹

In embracing a "substantial" relation or effects test and rejecting the government's argument (supported by a number of amicus briefs) that violent crime can affect the economy, the *Lopez* majority ensured the interpretive result of nullification of the Gun-Free School Zones Act. Equally important, the test adopted ensured for all federal judges a job satisfaction result—an end to further federal prosecutions under the Act, which would have merely clogged up the nation's federal courts and forestalled consideration of more attractive, or personally gratifying, cases.⁵⁵⁰ Years of active lobbying efforts by judicial leaders against congressional passage of additional federal crimes failed with the passage of the Violent Crime Control Act; thus, the Supreme Court's five-member majority took the policy, and the law, into their own hands with *Lopez* to ensure that their elite federal courts would not become police courts.⁵⁵¹

An interesting aspect of *Lopez* is that neither the Government/Solicitor General, nor the amici supporting the law, made

548. See *McNeil/Lehrer NewsHour: Crime Stopper?* (PBS television broadcast, Mar. 10, 1994), available in LEXIS, Nexis Library, Script File (transcript no. 4881) [hereinafter *Crime Stopper?*].

549. Mary Deibel, *Justices Fear Effects of Crime Legislation; Federal Courts Could Become "Police Courts,"* S.F. EXAMINER, Mar. 4, 1994, at A9 (quoting Kennedy, J.).

550. For a traditional analysis of the *Lopez* decision, see Erwin Chemerinsky, *Changing Course: Lopez Limits Congressional Powers*, TRIAL, June 1995, at 86.

551. The decision also prompted a legislative response from Senator Herb Kohl to reinstate the law with the introduction of the Gun-Free School Zones Act of 1995 in S. 890, 104th Cong., 1st Sess. (1995). The new act would require that the government prove in each prosecution that the gun involved traveled in or affected interstate or foreign commerce. The proposal faces opposition. See Herb Kohl, *Guns in Schools: Congress Can't Just Turn Its Back*, WASH. POST, May 9, 1995, at A19; Carrie A. Liberante, *Gun-Free School Zone Bill Facing Resistance*, CAPITAL TIMES, July 19, 1995, at C2; *Making School a Fed-Free Zone*, WASH. TIMES, May 11, 1995, at A19 (reprinting a memo released by the New Citizenship Project).

alternative arguments in addition to the Commerce Clause argument.⁵⁵² For example, they could have argued that congressional jurisdiction for the Gun-Free School Zones Act and other substantial criminal legislation could be found, explicitly or implicitly, within the text and history of the Constitution, a document written to "insure domestic Tranquility" and "provide for the common defence,"⁵⁵³ and containing, in Article IV, Section 4, a specific guarantee that the national government will protect the states from "domestic Violence."⁵⁵⁴ When Constitutional Convention Delegate James Madison successfully presented the Virginia Plan to the convention as a first draft of the document, he explained that federal court "jurisdiction shall extend to all cases arising under the Nat'l laws: And to such other questions as may involve the Nat'l peace and harmony."⁵⁵⁵

How can the rampant violence perpetrated on American children,⁵⁵⁶ specifically in or near their schools, *not* be considered "a question involving the national peace and harmony" subject to the jurisdiction of the Congress?⁵⁵⁷ Homicide is the leading

552. That is not to say that the Government should be faulted for believing that the Gun-Free School Zones Act and the specific prosecution of Alfonzo Lopez for bringing a .38-caliber handgun with ammunition into Edison High School in San Antonio was not clearly within the ambit of modern Commerce Clause jurisprudence. Justice Breyer's dissent, joined by Justices Ginsburg, Souter, and Stevens, argued clearly that it was; Breyer applied a "rational basis" test for judging whether a law affects interstate commerce. *United States v. Lopez*, 115 S. Ct. 1624, 1658 (1995) (Breyer, J., dissenting). He had no difficulty judging guns as inherently a part of such commerce and understanding that guns near school zones have a clear economic impact. *Id.* at 1657-62 (Breyer, J., dissenting). Similarly, Justices Stevens and Souter penned separate dissents to state their disagreement with the majority's result. *See id.* at 1651 (Stevens, J., dissenting); *id.* at 1651-57 (Souter, J., dissenting). Justice Stevens agreed with "Justice Souter's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process." *Id.* at 1651 (Stevens, J., dissenting).

553. U.S. CONST. pmbl.

554. *Id.* art. IV, § 4.

555. 2 RECORDS, *supra* note 65, at 46 (Madison).

556. *See* Philip J. Hilts, *More Teen-Agers Being Slain by Guns*, N.Y. TIMES, June 10, 1992, at A19.

557. *See* Debbie Howlett, *Handgun Crimes Hit Record*, USA TODAY, May 16, 1994, at 1A (stating that handgun use in violent crime in 1992 was 40% higher than the average of the previous five years); Tony Mauro, *200 Million Guns Can't Be Ignored*, USA TODAY, Dec. 29, 1993, at 1A, 2A (stating that, in America, a

cause of death across the nation in inner cities.⁵⁵⁸ The Center for Disease Control reports that the youth homicide rate nearly doubled between 1984 and 1991 due to firearm deaths,⁵⁵⁹ and the National Education Association estimates that 100,000 students bring guns to school each day across America.⁵⁶⁰

A disturbing irony of *Lopez* is found in its timing; the Supreme Court told the American people that their Congress did not have the power to criminalize schoolyard firearm possession within a week of the bombing of a federal building in Oklahoma City.⁵⁶¹ The city, state, and nation were relieved and comforted by the national response to this criminal act that happened on federal property; Americans were proud of the prompt, professional federal law enforcement activities following the devastation. Few citizens would question that such a federal response and federal prosecution would have been proper had the crime not taken place on federal property, but rather had occurred at a *local* public day care or a *local* parochial school, even if all the incidents and effects of the crime and the criminal actors had been purely *intrastate* in nature. *Lopez* certainly questions the authority of Congress to criminalize "local bombings," "local terrorism," and "local crime" that fail the new interstate commerce test.⁵⁶² As Chief Justice Rehnquist might state:

handgun is used to injure or kill once every 20 seconds).

558. See *Mowing Down Our Children*, N.Y. TIMES, Nov. 9, 1992, at A16; *A Murderous Double Standard*, N.Y. TIMES, Sept. 23, 1993, at A26.

559. See Bo Emerson, *A Deadly Epidemic*, ATLANTA J. & CONST., Sept. 3, 1993, at G1; see also B. Drummond Ayres, Jr., *Children Frightened by Gunfire Plead with Congress for an End to Violence*, N.Y. TIMES, Feb. 4, 1994, at A12 (discussing the impact of violent crime on children); Bob Herbert, *Reading, Writing, Reloading*, N.Y. TIMES, Dec. 14, 1994, at A23 (discussing the economics of marketing firearms to children).

560. See Karen Brandon, *Violence Tackled at 'Safety Summit'*, CHI. TRIB., Apr. 10, 1995, at 3.

561. See Jesse Katz & Lianne Hart, *Car Bomb Shreds Federal Building in Oklahoma City*, L.A. TIMES, Apr. 20, 1995, at A1.

562. See Joan Biskupic, *Ban on Guns Near Schools Is Rejected; Congress Exceeded Commerce Power, High Court Holds*, WASH. POST, Apr. 27, 1995, at A1; Catalina Camia, *High Court Strikes Down Law Banning Guns Near Schools; Decision in Texas Case Could Affect Federal Firearms Measures*, DALLAS MORNING NEWS, Apr. 27, 1995, at A1; *High Court Overturns School Gun Law; Other Legislation Now in Question*, STAR TRIB., Apr. 27, 1995, at A1.

The possession of a gun [or bomb] in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent [bomber] was a local [work-study] student at a local school [and fertilizer plant]; there is no indication that he had recently moved in interstate commerce.⁵⁶³

Of course, the distinction between local and national concern may depend on one's security perspective. In addition to preparing to announce the *Lopez* decision, the federal judiciary had another response immediately after the bombing: "The day after the Oklahoma City bombing, Administrative Office Director L. Ralph Mecham directed staff to prepare a request for additional funding for security, which the Executive Committee of the Judicial Conference endorsed."⁵⁶⁴ The funding would provide for a variety of security equipment, such as x-ray machines, and would employ additional staff to conduct entry screening, in addition to adding 400 court security officers for protection.⁵⁶⁵ Firearms at federal buildings thus appear to be a genuine national concern, while the over 100,000 guns that enter our nation's schools each day are only a "local" matter.⁵⁶⁶

D. Implementing the Judicial Leaders' Small, Elitist, Generalist Vision: A Preliminary Review of the U.S. Judicial Conference's Long Range Planning Committee's Proposed Long Range Plan for the Federal Courts

The 1990 Federal Courts Study Committee made an administrative recommendation that the federal judiciary establish a "permanent capacity to determine long-term goals and develop strategic plans by which they can reach those goals."⁵⁶⁷ The Report further stated: "The volatility of change throughout our society requires the federal courts to have also a more systematic capacity to anticipate broader societal changes and plan for

563. *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995).

564. *Security Review Slated for Courts*, THIRD BRANCH, May 1995, at 3.

565. *Id.*

566. See James Podgers, *Rethinking the Commerce Clause: Arson Rulings Illustrate Lower Court Quandary over Congressional Power*, A.B.A. J., Dec. 1995, at 44.

567. FEDERAL COURTS STUDY COMMITTEE, *supra* note 316, at 147.

more distant horizons.”⁵⁶⁸ The Judicial Conference immediately responded to this challenge by creating the Committee on Long Range Planning, composed of a magistrate judge, a bankruptcy judge, three district judges, and four appellate judges. A Long Range Planning Office also was established by the Administrative Office to assist the Committee’s work.

The design and incredible labors of the planning exercise, self-described by the Committee in its 1995 Proposed Plan, unfortunately were far more grand and impressive than its proposed future for the federal judiciary.⁵⁶⁹ After the Committee issued a Draft Report for public comment in November 1994, three public hearings were conducted across the country, at which seventy-four individuals made presentations.⁵⁷⁰ Additionally, written comments were solicited.⁵⁷¹ The *Proposed Long Range Plan for the Federal Courts* (Proposed Plan or Plan) was submitted to the Judicial Conference on March 15, 1995.⁵⁷² The Judicial Conference members were given the opportunity to review the report and defer approval while requesting further study on any of the Proposed Plan’s 101 recommendations. Further action was scheduled for the Conference’s September 1995 meeting.⁵⁷³

Although comprehensive in detailing present case overload⁵⁷⁴

568. *Id.* at 146.

569. The labors included various stages of meetings with other federal and state jurists, executive officials, legislative leaders, professional associations, and academics; reviewing the past work accomplished by other commissions addressing the work of the federal courts and of hundreds of pieces of correspondence sent by parties interested in the process; carefully considering the special reports from 13 standing committees of the judicial conference; analyzing reports and research papers prepared by staff and consultants of the Administrative Office; and taking up a specific charge given by the full Judicial Conference to address the issue of a “cap” on the number of Article III judges. PROPOSED LONG RANGE PLAN, *supra* note 5, at 151-58.

570. *Id.* at 158.

571. *Id.*

572. *Id.*

573. For a list of the recommendations that were not identified for further study and thus were deemed “approved” by the Conference, see *Notices: Judicial Conference of the United States: Proposed Long Range Plan for the Federal Courts*, 60 Fed. Reg. 30,317 (1995). See also Robb M. Jones, *The Future of the Federal Courts*, JUDGES J., Fall 1995, at 17 (giving an overview of the Long Range Plan); *A New Approach to Long-Range Planning for the Federal Courts*, 79 JUDICATURE 4 (1995) (critiquing the Long Range Plan).

574. PROPOSED LONG RANGE PLAN, *supra* note 5, at 9-15.

and predicting future judicial gridlock⁵⁷⁵ (including the consequences of appointment delays⁵⁷⁶), the resulting Proposed Plan demonstrates the judiciary's firm commitment to a small, generalist, elitist national court system. The final version of the Long Range Plan, when publicly reported by the full Judicial Conference,⁵⁷⁷ will deserve a detailed analysis of each recommendation, suggestion, and all commentary.⁵⁷⁸ Presently, the Proposed Plan serves as disturbing evidence that the jurists constituting the Committee, with support from a bureaucracy of third branch officials, external consultants, and co-opted academics, are willing to ration justice severely in order to keep their own numbers limited and their jurisdiction generalized. The Proposed Plan boldly demands that Congress and the President limit the role of the national government in addressing violent crime⁵⁷⁹ and eliminate access to justice to a wide

575. *Id.* at 17-20, 137-50.

576. The Proposed Plan suggests that retiring judges should give advance notice, *id.* at 94 (Recommendation 69), promotes a timely and efficient selection and appointment process, *id.* at 94-95 (Recommendation 70), and recommends a statutory benchmark for timely appointments, *id.* at 95 (Recommendation 71). Most interestingly, the Proposed Plan represents the first time that the judiciary has publicly supported use of the President's recess appointment power pursuant to Article II, Section 2, Clause 3, even while acknowledging past Senate disapproval of such appointments. *Id.* at 95-96 (Recommendation 72).

While supporting recess appointments by the President alone, other provisions of the Proposed Plan reinforce state-based selection of judges: "judges in the district courts should continue to be drawn from the states they are appointed to serve or at least endorsed by representatives of those states." *Id.* at 48 (Recommendation 25). The state-based selection of national judges has been the foundation of "senatorial courtesy," a tradition used over the years to weaken the Executive's appointment authority. *See supra* notes 114, 138, and accompanying text; *infra* notes 619-20 and accompanying text.

577. Each page of the Proposed Plan includes the following disclaimer: "The Committee on Long Range Planning has proposed this *Long Range Plan* for consideration by the Judicial Conference of the United States. None of the recommendations presented herein represents the policy of the Judicial Conference unless approved by the Judicial Conference." PROPOSED LONG RANGE PLAN, *supra* note 5; *see also Judicial Conference Acts on Long Range Plan Recommendations*, THIRD BRANCH, June 1995, at 6 (stating that the Judicial Conference had approved 64 of the Proposed Long Range Plan's recommendations).

578. *See Busy Conference Discusses Plan*, THIRD BRANCH, Oct. 1995, at 1; *Conference Acts on Long Range Plan*, THIRD BRANCH, Oct. 1995, at 4.

579. PROPOSED LONG RANGE PLAN, *supra* note 5, at 23-27 (Recommendations 2-5).

range of civil litigants.⁵⁸⁰ Further, the Plan promotes the formal institutionalization of various judicial shortcuts that threaten both judicial independence and excellence.⁵⁸¹

The Proposed Plan's most radical and sweeping recommendations demand that Congress severely limit federal criminal jurisdiction to prosecutions "only in those instances in which state court prosecution is not appropriate or where federal interests are paramount."⁵⁸² The Proposed Plan declares that federal court criminal jurisdiction should be limited to five specific offense types or categories,⁵⁸³ and it further recommends that Congress comport to this list as it engages in a "thorough revision of the federal criminal code" that should include "sunset provisions to require periodic reevaluation" of federal crimes.⁵⁸⁴

Additionally, the Proposed Plan directs Congress and the President to cooperate better with the states "to determine whether offenses should be prosecuted in the federal or state

580. *Id.* at 27-36 (Recommendations 6-12).

581. *Id.* at 32-33 (Recommendations 9-10).

582. *Id.* at 23 (Recommendation 2).

583. The five offense categories are as follows:

(a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity.

. . . .
(b) The proscribed activity involves substantial multistate or international aspects.

. . . .
(c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered.

. . . .
(d) The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter.

. . . .
(e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.

Id. at 24-25 (Recommendation 2) (commentary omitted).

584. *Id.* at 25 (Recommendation 3).

systems,"⁵⁸⁵ and specifically suggests that 18 U.S.C. § 3231, which makes federal crimes an exclusively federal matter, be repealed and replaced with a statute granting state courts concurrent jurisdiction over certain crimes.⁵⁸⁶ Finally, the Proposed Plan suggests that the executive branch should develop standards for the Justice Department to make "prosecutorial guidelines" that comport with the Plan's stated circumscribed view of federal criminal jurisdiction, and specifically asserts that the potential for harsher federal sentencing should not be a sufficient basis for federal, rather than state, criminal statutes.⁵⁸⁷

With respect to the civil side of the federal docket, the Proposed Plan demands that Congress "exercise restraint in the enactment of new statutes" that would add to the judiciary's civil jurisdiction, and states that Congress should only enact new legislation when necessary "to further clearly defined and justified federal interests."⁵⁸⁸ The Proposed Plan then lists six appropriate subjects for federal civil jurisdiction.⁵⁸⁹ The Proposed Plan specifically targets general diversity of citizenship jurisdiction for elimination⁵⁹⁰ and directs Congress to limit di-

585. *Id.* at 26 (Recommendation 4).

586. *Id.*

587. *Id.* at 27 (Recommendation 5).

588. *Id.* (Recommendation 6).

589. According to the Plan:

Federal court jurisdiction should extend only to civil matters that—

(a) arise under the United States Constitution;

.....

(b) deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests;

.....

(c) involve the foreign relations of the United States;

.....

(d) involve the federal government, federal officials, or agencies as plaintiffs or defendants;

.....

(e) involve disputes between or among the states; or

.....

(f) affect substantial interstate or international disputes.

Id. at 27-29 (Recommendation 6) (commentary omitted).

590. *Id.* at 29 (Recommendation 7) (excepting cases involving aliens, interpleader,

versity jurisdiction pending total elimination by not allowing in-state plaintiff jurisdiction, by considering elimination of federal appellate review of such cases, and by imposing a stricter (higher) amount in controversy requirement that does not include a punitive damages assessment.⁵⁹¹

The Proposed Plan contends that Congress should eliminate federal court jurisdiction over a wide range of "disputes that primarily raise questions of state law or involve workplace injuries."⁵⁹² This jurisdiction-stripping measure would target all work-related personal injury actions brought in federal court under the Federal Employers Liability Act and the Jones Act.⁵⁹³ Additionally, the Proposed Plan would bar from federal courts routine claims for benefits brought pursuant to the Employee Retirement Income Security Act of 1974.⁵⁹⁴ The Proposed Plan also recommends that any future national benefits programs (such as a national health insurance plan) should designate a state court forum for review.⁵⁹⁵

Besides advocating stripping the federal courts of significant criminal and civil jurisdiction, the Proposed Plan formally seeks to institutionalize a number of the judicial shortcuts, such as those discussed above, that have been developed to cope with judicial gridlock.⁵⁹⁶ The Proposed Plan encourages longer and more intense service from senior judges ("as much as possible"⁵⁹⁷) and favors using additional permanent clerks to screen certain pro se claims.⁵⁹⁸ The Plan also advocates either replacing appeals of right with discretionary review for decisions of Article I courts that have received initial review in the district court, or allowing review of such decisions only by the courts of appeals.⁵⁹⁹

and cases in which the petitioner has a clear need for a federal forum).

591. *Id.* at 29-32.

592. *Id.* at 34-35 (Recommendation 12).

593. *Id.* at 35.

594. *Id.* at 35-36.

595. *Id.* at 35.

596. *See supra* notes 574-76 and accompanying text.

597. PROPOSED LONG RANGE PLAN, *supra* note 5, at 91-92 (Recommendations 65-66); *see id.* at 77 (Recommendation 52b (1-4)) (explaining four ways in which senior judges can increase their involvement in governance).

598. *Id.* at 61 (Recommendation 35d).

599. *Id.* at 44-47 (Recommendations 21-24). Additionally, Recommendation 22 de-

The most disturbing of these shortcuts involves granting greater power to subjudges—nontenured agency judges and Article I court judges: "Where constitutionally permissible, Congress should assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding."⁶⁰⁰ The Proposed Plan specifically seeks to expand the authority of magistrates: "Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy."⁶⁰¹ The Proposed Plan's commentary calls for the "extensive use" of existing magistrates, urges the recall of retired magistrates in order to "conserve the increasingly scarce time of district judges," and recommends an expanded "role of the magistrate judge in the area of felony criminal trials."⁶⁰² A separate recommendation seeks to empower magistrate judges with "limited contempt power to punish litigants or counsel directly for misbehavior, disobedience or resistance to a lawful order."⁶⁰³ This direct authority to punish fellow members of the bar would amend 28 U.S.C. § 636(e), which presently requires magistrate judges to certify the alleged contempt to a district court judge.⁶⁰⁴

Reaffirming judicial resistance to subject-matter-specialized federal courts, the Proposed Plan, in two separate recommendations, explicitly rejects specialization for both appellate and trial courts. Alleging, but not referencing, "well known dangers of judicial specialization," the Proposed Plan states: "The federal appellate function should be performed primarily in a generalist court of appeals established in each regional judicial circuit,"⁶⁰⁵

tails the special considerations and plans necessary for bankruptcy judges. *Id.* at 45 (Recommendation 22).

600. *Id.* at 33 (Recommendation 10).

601. *Id.* at 93 (Recommendation 67). Local districts, however, should retain flexibility in deciding how to best use magistrate judges in light of local conditions and changing caseloads. *Id.*

602. *Id.*

603. *Id.* (Recommendation 68).

604. *Id.* at 93-94.

605. *Id.* at 41 (Recommendation 17) (allowing also for the appellate function to be performed in a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain unspecified subject matter areas).

and "the primary trial forum for disputes committed to federal jurisdiction should be a generalist district court."⁶⁰⁶

Similarly, reaffirming judicial leaders' desire to keep their numbers few, the Proposed Plan warns generally that "federal law would be babel"⁶⁰⁷ with a large judiciary and details specifically the harm that would be incurred by growth at the trial⁶⁰⁸ and appellate levels.⁶⁰⁹ The Plan, however, cautiously avoids discussing the controversial and more blatant "fixed numerical limits"⁶¹⁰ idea for the judiciary's future size.⁶¹¹ The Proposed Plan thus demonstrates the circular logic of the judicial leaders' opposition to both specialization and a large judiciary. Their argument is simple: we want to remain generalist because of "well known dangers of judicial specialization";⁶¹² if we remain generalist and allow our numbers to increase, our courts will cease to be unified and the resulting law will be "babel"; therefore, Congress should strip the third branch of criminal and civil jurisdiction, as we recommend, so that we may remain a generalist, elite number.

Irrespective of individual judges' opinions concerning the wisdom of adding members to their fraternity or specializing the generalized judiciary, litigants and lawyers know that the nation needs significantly more federal judgeships now and that the

606. *Id.* at 47 (Recommendation 25) (excepting contexts such as bankruptcy proceedings, international trade matters, and claims against the federal government).

607. *Id.* at 19.

608. *Id.* at 18.

609. *Id.* at 41-42 (Recommendation 18).

610. *Id.* at 42.

611. The Proposed Plan's commentary considers growth especially bad for the appellate courts:

Unrestrained growth has a different effect on the courts of appeals than on the district courts. The effectiveness, credibility, and efficiency of a court of appeals is intricately linked to its ability to function as a unified body. . . . Rather, a "court" is a cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading, and being persuaded. The court becomes an institution—an incorporated real body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring predictability), and adjudicating cases in like manner.

Id. at 42.

612. See *supra* note 605 and accompanying text.

courts will need substantially more judges as we enter the next century.⁶¹³ The appeal for more judges operating in a contemporary, specialized judicial structure must be made directly to Congress,⁶¹⁴ the branch of the government that is constitutionally charged to "from time to time ordain and establish"⁶¹⁵ the nation's lower court system.

VII. A PRELIMINARY BLUEPRINT FOR REMODELING AMERICA'S NATIONAL JUDICIARY

A. Assertive Executive Appointment Action: Implementing a National Selection Process and Commissioning Recess Appointees

Before cooperating with Congress to implement a program of expansion and specialized restructuring of the federal courts, the President should take immediate steps to fill all existing trial and appellate court vacancies. In doing so, he or she should remember that it is the duty of the Executive, and of the Executive alone, to select and appoint federal judges; the Senate's role is limited to a simple "yes" or "no" vote on the President's choice.⁶¹⁶ Despite the fact that over ninety-eight percent of inferior court decisions are not reviewed by the Supreme Court, President Clinton, as noted above, has followed the lead of George Bush in neglecting lower court appointments.⁶¹⁷ Like Bush's, Clinton's selection process has been painfully slow and largely defaults choice to the political preferences of the senators of the state in which vacancies happen to occur.⁶¹⁸ By extending this practice of "senatorial courtesy" and, thus, expanding the Senate's "yes or no" role in the appointment process, President Clinton encourages senators to give away judgeships much

613. See Deborah Pines, *6 Suburban Bars Ask U.S. Court for More Judges*, N.Y. L.J., May 23, 1994, at 1; Bruce Vielmetti, *U.S. Courts Slow But Needn't Be*, *Report Suggests*, ST. PETERSBURG TIMES, Feb. 15, 1993, (Business), at 8.

614. See Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991).

615. U.S. CONST. art. III, § 1.

616. *Id.* art. II, § 2, cl. 2.

617. See *supra* part III.B.

618. See Naftali Bendavid, *Avoiding the Big Fight; Seeking Diversity; Not Confrontation; Missed Opportunity To Reshape the Bench?*, LEGAL TIMES, Sept. 11, 1995, at 1.

like patronage jobs.⁶¹⁹

In an act of real political courage, and as a needed exercise of genuine executive authority, the President should abandon the practice of "senatorial courtesy" and the provincial practice of state-based federal judicial selection. The Executive can best achieve excellence and intellectual diversity on our national courts by creating an efficient national selection model. The creation of a national selection process effectively would end the nonconstitutional practice of "senatorial courtesy."⁶²⁰

In fact, judges chosen by the President through a national selection process would be better insulated from the provincial passions, prejudices, and politics of any given home state. Indeed, in direct contrast with the present state-based selection system, a national selection process could invoke a presumption *against* selecting a federal judge to sit in a locale or state with which he or she has substantial professional or personal ties. The national judiciary was established by the Framers over strong "states' rights" objections by the anti-federalists.⁶²¹ The creation of a national selection process for these national judges is consistent with the historical reasons for, constitutional basis of, and contemporary design needed for our national court system.

Such a selection process would allow the President to keep a full slate of national judicial nominees to present for Senate confirmation. Under such a system, the Senate should not expect to take a recess before acting on those nominations; rather, the Senate should be prepared to stay in session year-round to take

619. Senatorial courtesy has been grossly enlarged in the last half of this century, from the power to reject a nominee for a federal court position in any given state to the power to select. As one commentator stated in 1960, "[o]ver the years it has become traditional for senators of the president's political party to recommend nominations for federal judicial vacancies occurring in the districts of their states." Lawrence E. Walsh, *The Federal Judiciary . . . Progress and the Road Ahead*, 43 J. AM. JUDICATURE SOC'Y 155, 156 (1960).

620. See generally Sandra E. Strippoli, Note, *Senatorial Courtesy: Not in the Public Interest, Justiciable and Unconstitutional*, 15 RUTGERS L.J. 957 (1984) (analyzing the practice and abuse of senatorial courtesy at the state government level in New Jersey).

621. See generally Akhil R. Amar, *Anti-Federalists, "Federalist Papers" and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y 111 (1993) (giving detailed history of debates on the national judiciary at the Constitutional Conventions).

swift confirmation action on each such nomination.

In the absence of Senate diligence, the President should be prepared to recess-commission judges, in order to ensure the continued functioning of the national justice system.⁶²² The U.S. Constitution grants the President such appointment authority: "The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."⁶²³ This underutilized appointment authority holds promise for an end to the confirmation mess⁶²⁴ and can be an effective method for keeping the federal judiciary fully staffed.

Second Circuit Chief Judge Jon Newman's recent proposal of a constitutional amendment to allow the federal judiciary to appoint its own judges in the face of appointment delay reflects the serious nature of the vacancy problem.⁶²⁵ Obviously, such a proposal's worth is found in its shock value: it would be an error to amend the Constitution in this manner.⁶²⁶

The constitutional system for exclusive executive choice in appointments, combined with the recess appointment authority, remains a perfectly good constitutional system.⁶²⁷ In considering Senate delay, one must remember that any president retains the constitutional privilege to fill the judiciary and run his or her administration with a government of recess-appointees. Although such action should not be instituted carelessly, recess-appointments require neither the advice nor the consent of a

622. For a recent student note on the practicalities of the use of recess appointment power, see Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204 (1994).

623. U.S. CONST. art. II, § 2, cl. 3.

624. See *supra* part III.

625. Chief Judge Newman's proposal suggests that if a judicial vacancy is not promptly filled (within one year), the sitting judges would make the selection themselves. See Mordecai Rosenfeld, *Reproducing Federal Judges*, N.Y. L.J., July 6, 1994, at 2.

626. For a harsh criticism of Chief Judge Newman's suggestion, see *id.* But see Elliot Golden, *Essay on Selecting Judges Is Misleading*, N.Y. L.J., July 12, 1994, at 2.

627. See generally John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process; A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993) (criticizing and pointing out factual errors in Strauss's and Sunstein's sweeping proposals for the reform of Appointment Clause powers).

recalcitrant Senate. The simple, and only proper, solution is for all future chief executives to take seriously their constitutional duty to appoint all federal judges—to view the selection and appointment of lower court jurists as being just as important as selecting Supreme Court Justices.

B. Expanding and Remodeling Our National Houses of Justice

Congress should be encouraged to authorize immediately additional trial and appellate level judgeships for our most overcrowded jurisdictions. Only with an increased number of judges can the court system hope to cope adequately or adeptly with the increased caseload that is certain to follow even a modest enforcement of recent federal crime control legislation.⁶²⁸

Ensuring such immediate relief to our most overburdened judges should be followed with plans for a fundamental expansion of the federal judiciary. One only has to look at the numbers to see that such an expansion of the federal courts is required. Today, there are 649 district court judges attempting to adjudicate all the civil litigation, commercial disputes, administrative actions, and criminal prosecutions of a nation of over 250 million people.⁶²⁹

At the appellate level, the numbers are even more revealing. As Professor Thomas E. Baker reports in *Rationing Justice on Appeal*, in 1950, there were sixty-five appellate judges deciding 2355 appeals, or thirty-six annual appeals per judge; in 1990, there were 156 appellate judges deciding 38,520 appeals, or 245 appeals per judge.⁶³⁰ It is no wonder, then, that it takes 255% longer to decide an orally argued case in 1990 than 1950.⁶³¹

The judiciary's own projections for the future growth of their caseload is demonstrative of the need for more judges. The Long Range Planning Committee's Proposed Plan conservatively estimates that, by the year 2020, the annual number of district

628. As a related area of concern, security in our federal courts deserves attention. See *Court Security: How Safe Are the Federal Courts?*, THIRD BRANCH, Sept. 1993, at 1.

629. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 9 (114th ed. 1994).

630. BAKER, *supra* note 29, at 45.

631. *Id.* at 46-47.

court cases commenced will rise to over one million—1,109,300 from the present level of 276,636—and that is only if the federal courts' civil and criminal jurisdiction grows at the same rate as it has over the last fifty-three years.⁶³² The annual appellate caseload will rise to approximately 325,100 from the present level of 50,224.⁶³³ More startling than these numbers is the judiciary's desire to strip their courts of jurisdiction so as to ensure their continued smallness.

Ninth Circuit Judge Stephen Reinhardt has clearly sounded the alarm that the consequences of the judiciary's "fetish for smallness are beginning to border on the disastrous."⁶³⁴ Under the Framers' design, the guarantees of individual liberty and fundamental rights, both constitutional and statutory in origin, are meant to be enforced by independent, life-tenured Article III judges. As Judge Reinhardt argues, "we must have enough judges to give every case that comes before us the scrutiny and consideration it deserves."⁶³⁵

We need more judges today in order to break the present gridlock that leaves civil litigants waiting years in queues, outside our federal courthouses, on increasingly dangerous streets. We need substantially more judges for the future to ensure that justice is available to all. In honor of George Washington's avowed mission to develop a federal "judicial system as perfect as possible in its formation,"⁶³⁶ the President and Congress should work together to expand the size and restructure the generalized nature of our federal judiciary.

Applying comparative lessons, the federal judiciary could be effectively specialized in any number of subject matter categories at the appellate level, with commercial courts of appeals, labor courts of appeals, Social Security courts of appeals, and

632. PROPOSED LONG RANGE PLAN, *supra* note 5, at 18 ("present level" refers to the 1993 data used by the Committee on Long Range Planning throughout the Proposed Plan).

633. *Id.*

634. Reinhardt, *supra* note 274, at 1520.

635. *Id.* at 1521.

636. Potter Stewart, *Retirement Press Conference*, 55 TENN. L. REV. 21 (1981) (referring to comments made by George Washington in the creation of the Judiciary Act of 1789).

regulatory courts of appeals. Additionally, the Supreme Court's increasingly shrinking docket recently has raised the need for third-tier national (junior supreme) courts to provide greater national law consistency.⁶³⁷

Past specialization success has been achieved by the United States Court of Custom,⁶³⁸ the United States Tax Court,⁶³⁹ the Court of International Trade,⁶⁴⁰ the Emergency Court of Appeals,⁶⁴¹ the Temporary Court of Emergency Appeals,⁶⁴² and the Court of Appeals for the Federal Circuit.⁶⁴³ As discussed above, a strong per se prejudice, especially among federal judges, continues to exist against further Article III specialization;⁶⁴⁴ however, there have been and remain proponents for a move away from generalized federal court jurisdiction.⁶⁴⁵

637. See Victor Williams, *Punitive Damages in Arbitration: Mastrobuono and the Need for Creation of a National Court of Commercial Appeals*, 100 COM. L.J. 281 (1995).

638. See Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Nathaniel L. Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996, 1008-09 (1974).

639. See HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* (1979).

640. See John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?*, 32 HOUS. L. REV. 67 (1995).

641. See NATHANIEL L. NATHANSON, *THE EMERGENCY COURT OF APPEALS*, IN OFFICE OF PRICE ADMINISTRATION, *PROBLEMS IN PRICE CONTROL: LEGAL PHASES* (1947).

642. See Note, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 MINN. L. REV. 1247 (1980). For blunt criticism of this court, see James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113.

643. See Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992). For jurisdictional statements of the Federal Circuit, see 28 U.S.C. §§ 1292(c), 1292(d), 1295 (1988 & Supp. V 1993).

644. For the most balanced judicial analysis of specialization, see POSNER, *supra* note 448, at 147-60; Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983).

645. See Erwin N. Griswold, *Cutting the Cloak To Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U. L. REV. 787 (1983); Clement F. Haynsworth, Jr., *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974). Preeminent among those academics willing to contest the prevailing judicial prejudice against specialized jurisdiction is Virginia Professor Daniel Meador. See, e.g., Daniel J. Meador, *A Challenge to Judicial-Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L.

The legal profession long ago abandoned its sentimental attachment to the generalist practice of law; specialties and subspecialties are now the norm of the bar even as the bench revels in its generalist traditions.⁶⁴⁶ Specific arguments against specialization, such as loss of the supposed benefits of general jurisdiction "percolation" of issues,⁶⁴⁷ and fear of "capture" of subject matter litigation by one side,⁶⁴⁸ become less compelling with time. In 1989, after weighing the arguments for and against specialization, the ABA Standing Committee on Federal Judicial Improvements favored specialization and reasoned "that cases of nationwide significance should be subject to review by a single, national forum."⁶⁴⁹ Justice Antonin Scalia, not a proponent of court growth, has recognized that the time for federal court specialization may be at hand: "A nation of a quarter-billion people that no longer distributes the bulk of its judicial business regionally, through separate state systems, must simply consider distributing it through subject matter."⁶⁵⁰

A subject matter restructuring proposal for both the trial and appellate level that deserves immediate study and eventual implementation is the formal division of the criminal and civil functions of the federal judiciary and the establishment of a junior criminal supreme court. The prosecutions resulting from the Violent Crime Control and Law Enforcement Act of 1994, and other pending and future national efforts to combat violent crime, mandate the creation of such criminal courts.⁶⁵¹ To allow the federal judiciary to provide effective civil and criminal justice into the twenty-first century, U.S. District Criminal Courts, U.S. Courts of Criminal Appeals, and a third-tier U.S.

REV. 603 (1989).

646. See BAKER, *supra* note 29, at 262.

647. *Id.*

648. See Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts To Shape Judicial Policy?*, 74 JUDICATURE 217 (1991).

649. AMERICAN BAR ASSOCIATION STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 21 (1989).

650. Gary A. Hengstler, *Scalia Seeks Court Changes—Discounts Intercircuit Panel in Favor of Special Courts*, A.B.A. J., Apr. 1, 1987, at 20, 20.

651. See Zachary R. Dowdy, *U.S. Prosecutors Hit the Streets with Police*, BOSTON GLOBE, July 15, 1995, at 17 (illustrating the effects of recent anticrime statutes).

National Court of Criminal Appeals should be established as Article III courts, separate from the existing federal court structure.

C. Policy and Theory Supporting a Separate System of Federal Criminal Courts

1. Advisory Committee Recommendations

Under the Civil Justice Reform Act of 1990,⁶⁵² each federal court jurisdiction was required to empanel an "advisory group," comprised of local attorneys and other professionals, to evaluate the efficiency of the federal court.⁶⁵³ The Act further directed each jurisdiction to use these external advisory committee evaluations to prepare a court plan for reducing civil justice delays and expenses.⁶⁵⁴ The Act required court reports to be submitted to the Administrative Office by early 1994.⁶⁵⁵

Interestingly, the Advisory Committee reports from the Central District of California and the Middle District of Florida each recommend a division of the courts' civil and criminal judicial functions. In the Central District of California, whose federal courts in Los Angeles and Santa Anna have the most civil filings of any jurisdiction in the nation, the advisory group termed the criminal-civil division "as an important step toward easing cost and calendar burdens."⁶⁵⁶ Indicative of the status quo entrenchment of the federal judiciary, the court plans of the Central District of California and the Middle District of Florida did not adopt the civil-criminal division recommendations of their advisory groups.⁶⁵⁷

652. 28 U.S.C. §§ 471-482 (Supp. V 1993).

653. *Id.* §§ 472, 478.

654. *Id.* § 472.

655. Pub. L. No. 101-650, § 103(b), as amended by Pub. L. No. 102-572, tit. V, § 505, Oct. 29, 1992, 106 Stat. 4513.

656. See Henry Weinstein, *Split of Area's U.S. Court, Civil, Criminal Branches Urged*, L.A. TIMES, Mar. 23, 1993, at A3.

657. *Id.*

2. *The Reality of American Violent Crime and Recent Congressional Responses*

Recent Justice Department statistics indicate that reported crime has declined in recent years;⁶⁵⁸ yet, for good reason, the American people remain terrified of criminal violence. Although overall crime statistics fluctuate from year to year, occurrence of the most violent of criminal offenses has consistently and dramatically increased over time.⁶⁵⁹ In the last four decades, the average rate of per capita violent crime has quadrupled in the United States.⁶⁶⁰

Workplace violence has become common, extending into law firms and federal courthouses. In fact, the Occupational Safety and Health Administration (OSHA) ranks homicide as the third leading cause of workplace death in America.⁶⁶¹ Federal judges should not need to be reminded that criminal violence brutalizes the most vulnerable and least wealthy among us. Violence is both terrorizing and corrupting our nation's children,⁶⁶² and crime so frightens our nation's elderly and disabled that many have become prisoners in their own homes.⁶⁶³

658. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-148211, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 363 (1993) (showing a decline of 3.3% between 1991 and 1992); Adam Walinsky, *The Crisis of Public Order*, ATLANTIC MONTHLY, July 1995, at 39.

659. Walinsky, *supra* note 658, at 39, 44.

660. *Id.*

661. *Job Safety, Vehicle Crashes Top Worker Risks; Homicides Emerge As Major Threat*, Daily Rep. for Execs. (BNA), Nov. 30, 1993, available in LEXIS, News Library, Curnws File.

662. Recent Justice Department statistics indicate that juveniles comprise only 10% of the population, yet are 23% of all violent crime victims. See Carl Weiser, *Stats Confirm Juvenile Violence, But What's Answer?*, GANNETT NEWS SERVICE, July 28, 1994, available in LEXIS, News Library, Curnws File. A Senate Juvenile Justice Subcommittee found that murder arrests for children increased 50% from 1982 to 1991 and that arrests for weapon offenses increased by 100% in the same period. *Id.* U.S. Representative Charles Schumer, former Chairman of the House Judiciary Crime Subcommittee, recently spoke of the danger of a morally numbing effect of such crime statistics: "Disturbing figures about violence in America are released so often we treat them as if they were a box score from yesterday's baseball game. Our country has to take radical action to counter this trend of violence." *Id.* For an illustration of this violence, see John W. Fountain, *Boy Shot in Gang Fight Dies; He's 81st Victim of a Deadly July*, CHI. TRIB., Aug. 2, 1994, at 1.

663. See Peter J. Howe, *Target: Crime Against Elders; Weld To Propose Stiffer*

Homicide now causes the deaths of children both in American inner cities and nationwide. School violence has reached epidemic proportions, sparing not even students of Harvard and Yale.⁶⁶⁴ We are a people so desensitized by the "normal" crime that kills a classroom of children every two days in America that it takes the intensity of the Oklahoma City federal building bombing to touch our hearts and open our minds. This hateful and vicious act, which spread shock, grief, and terror across the country, compels us as a nation to judge national violence, organized and chaotic, to be the ultimate civil rights violation against individuals.⁶⁶⁵

The objective and situs of the Oklahoma City criminal attack, to instill terror in America's heartland, necessitates us to regard the "insurance of domestic peace" as a national security issue just as crucial as international peace. For, just as violent crime destroys the life of the individual victim and devastates the lives of the victim's family and friends, crime also debilitates the moral, political, and economic foundations of the Republic.

One should not be surprised that even in these political times of devolution and neofederalism, the national legislature has begun to take seriously its national obligation to help ensure the safety and domestic security of Americans. The Violent Crime Control and Law Enforcement Act of 1994⁶⁶⁶ allows for federal prosecution of gang crimes, bans nineteen types of semi-automatic assault weapons, imposes a "three strikes and you are in for life" sentencing provision, increases from two to sixty the number of federal crimes punishable by death (including fatal carjackings and drive-by shootings), creates a number of new death penalty offenses, creates a new federal crime for possession of a handgun by a juvenile, and requires the prosecution of juveniles as young as thirteen as adults when charged with gun

Penalties, BOSTON GLOBE, July 18, 1994, at 15.

664. *Life and Death on America's Campuses*, PHOENIX GAZETTE, June 1, 1995, at B8.

665. For a discussion of the impact of the Oklahoma City bombing, see *Judicial Family Responds to Crisis in Oklahoma City*, THIRD BRANCH, May 1995, at 1.

666. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 8, 16, 18, 20, 21, 26, 28, 31, 42 U.S.C.).

crimes.⁶⁶⁷ In addition to expanding the federal effort to challenge violent crime, the new law creates and expands a number of "white collar" crimes; among other things, the law prohibits computer abuse, insurance fraud, and bank fraud, and commits federal law enforcement resources to help to reduce fine art theft.⁶⁶⁸

The new legislation also confronts violence against women by creating a federal crime for interstate stalking and spousal abuse.⁶⁶⁹ It also provides a new civil remedy for gender-based crimes of violence.⁶⁷⁰ Even the most timid efforts by federal prosecutors to enforce the new criminal laws certainly will overwhelm our federal trial and appellate court dockets and seriously threaten the ability of civil litigants to obtain justice.⁶⁷¹ The recent antiterrorism legislation,⁶⁷² developed as a result of the Oklahoma City bombing,⁶⁷³ promises additional work for our federal courts, if enacted.

Other federal anti-crime legislation has been promised by the Republican Congress in their Contract with America.⁶⁷⁴ The final version of these landmark pieces of legislation will determine the future direction of the workload of the federal courts. As Circuit Judge Stephen Reinhardt has noted, reform proposals based on a future congressional restriction of criminal jurisdiction are "wholly illusory or fanciful at best and dishonest or deceptive at worst. Criminal law has already been federalized . . . [I]t would be ludicrous to premise a reform plan upon the naive belief that Congress is going to heed calls to reduce

667. See Carolyn Skorneck, *Lawmakers Forge \$33B Anti-Crime Bill*, RECORD, July 29, 1994, at A1; see also Katharine Q. Seelye, *Accord Reached on Sweeping Bill To Battle Crime*, N.Y. TIMES, July 29, 1994, at A1 (highlighting the bill's main provisions).

668. Violent Crime Control and Law Enforcement Act of 1994 §§ 290001, 320603, 320606, 320902.

669. *Id.* § 40221.

670. *Id.* § 40302.

671. Skorneck, *supra* note 667, at A1.

672. S. 735, 104th Cong., 2d Sess. (1995); H.R. 1710, 104th Cong., 2d Sess. (1995).

673. S. 735; H.R. 1710.

674. Andrew Mollison, *Republicans Get 'Marching Orders' for Coming Battles on Capitol Hill*, ATLANTA J. & CONST., Sept. 7, 1995, at A7.

the federal courts' federal criminal jurisdiction."⁶⁷⁵ Separate federal criminal courts are a practical necessity to ensure efficient, competent, and fair adjudication of the certain increased number of prosecutions of the certain increased number of federal crimes.

3. Creation of Separate Criminal Courts As Mandated by the National Government's Constitutional Duty To "Establish Justice," "Insure Domestic Tranquility," and Enforce the "Protection Against Violence Clause"

Judicial concern over Congress's failure to provide substantial additional judicial resources as a part of the crime control effort is understandable. Philosophical arguments advanced by judges against an increased federal response to violent crime, however, might be judged as elitist, or even callous, when considering the present level of violence across America. Notwithstanding the Supreme Court's 1995 decision in *United States v. Lopez*,⁶⁷⁶ which, as noted, radically altered the Court's historic Commerce Clause interpretation,⁶⁷⁷ both explicit and inherent powers of the national government to maintain national law and order exist. A corresponding constitutional duty exists to maintain an orderly, functioning national criminal justice system.

The federal government's constitutional role in ensuring "domestic Tranquility" was a central concern of the Constitution's Framers. Developing the capacity for a national response to insurrections and criminal violence, typified at the time by the Vermont Uprisings⁶⁷⁸ and the Shays Rebellion,⁶⁷⁹ was a cen-

675. Reinhardt, *supra* note 274, at 1515.

676. 115 S. Ct. 1624 (1995).

677. *See supra* part VI.C.2.

678. *See* RICHARD B. MORRIS, BASIC DOCUMENTS ON THE CONFEDERATION AND THE CONSTITUTION (1970).

679. *See* DAVID P. SZATMARY, SHAY'S REBELLION (1980); *see also* CHRISTOPHER COLLIER & JAMES L. COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787 (1986).

To men like Madison and Washington, Shays' Rebellion was an imperative. It hung like a shadow over the old Congress, and gave both impetus and urgency to the Constitutional Convention. It was the final, irrefutable piece of evidence that something had gone badly wrong. For some time these men had known the deficiencies of the American govern-

tral concern of the 1787 Constitutional Convention.⁶⁸⁰ The Framers expressly imposed a duty on the national government to protect the internal safety and security of the new nation's citizens. As John Jay, then the Confederation Congress's Foreign Secretary, commented: "Justice must have a sword as well as a balance."⁶⁸¹ The Framers understood the importance of having the constitutional capacity for a national response to widespread criminal violence. Remembering Daniel Shay's proclamation to his riotous mobs to "[c]lose down the courts,"⁶⁸² the Framers were careful to ensure that capacity by, *inter alia*, envisioning federal courts in which to adjudicate national criminal actions.

Among the purposes for the new Constitution, as declared in its Preamble, were the establishment of justice and insurance of domestic tranquility.⁶⁸³ In the same section that authorizes Congress to "constitute Tribunals inferior to the supreme Court,"⁶⁸⁴ the Constitution explicitly grants Congress the power to raise revenue for the specific purpose of providing "for the common Defence" of the states.⁶⁸⁵ The Constitution also bestows upon Congress the authority to "call forth the Militia to execute the Laws of the Union and to suppress Insurrections," in addition to the power to protect against foreign invasions.⁶⁸⁶ In addition, it grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution into the Government of the United States, or in any Department or Officer thereof."⁶⁸⁷

Another explicit textual dedication of this national constitutional responsibility, which this Author recently labeled the

ment must be remedied. Shays' Rebellion made it clear to them that it must be done *now*.

COLLIER & COLLIER, *supra*, at 13.

680. See *supra* notes 678-79 and accompanying text.

681. RICHARD B. MORRIS, WITNESS AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION 177 (1985).

682. *Id.* at 172.

683. U.S. CONST. pmbl.

684. *Id.* art. I, § 8, cl. 9.

685. *Id.* art. I, § 8, cl. 1.

686. *Id.* art. I, § 8, cl. 15.

687. *Id.* art. I, § 8, cl. 18.

Constitution's "Protection Against Violence Clause,"⁶⁸⁸ appears in Article IV, Section 4, Clause 3. That clause provides, in relevant part: "The United States shall protect . . . each of [the states] . . . against domestic violence."⁶⁸⁹ Contemporary constitutional scholars largely have either ignored this important textual language, or they have merged it into the Guarantee of a Republican Form of Government Clause of the same Article IV, Section 4, and thereby have avoided analyzing it separately.⁶⁹⁰ This textual charge to the "United States," however, is unequivocal in demanding protection of the citizens and residents of the states from uprisings, commotions, and, yes, from criminal violence, upon "application" of assistance requests from the states.

The inclusion of the "Protection Against Violence Clause" in the main text of the document was in direct reaction to constitutional convention delegates' concerns with violent uprisings and internal disorder. During the debates, William Randolph stated that Article IV, Section 4 was to have two different purposes: "The Resoln. has 2. Objects. I. to secure Republican Government. 2. to suppress domestic commotions."⁶⁹¹ Randolph "urged the necessity of both these provisions."⁶⁹²

James Madison, in *The Federalist*, argued for ratification of the new Charter and specifically referenced this national promise of domestic security: "We have seen the necessity of the Union . . . as the conservator of peace among ourselves."⁶⁹³ Surely, James Madison would have seen the present level of violent

688. See Victor Williams, *Founders Mandated Federal Role in Crime Control*, NAT'L L.J., Nov. 8, 1993, at 15.

689. In full, Article IV, Section 4 states:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. IV, § 4.

690. See POSNER, *supra* note 448, at 178; WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972); Hans A. Lind, *When Is Initiative Law-making Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159 (1989); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

691. 2 RECORDS, *supra* note 65, at 47.

692. *Id.*

693. THE FEDERALIST No. 14, at 140 (James Madison) (Issac Kramnick ed., 1987).

crime in America, especially violence that is directed against our children, as violative of the notion of "peace among ourselves."

Both as President of the Constitutional Convention and as the nation's first Chief Executive, George Washington took most seriously the duty of all three branches of the national government to maintain an orderly and safe society. In his November 19, 1794, speech to a joint session of Congress, President Washington announced with "deepest regret" that "some of the citizens of the United States have been found capable of an insurrection."⁶⁹⁴ Describing how the violence in the western counties of Pennsylvania had endangered the national peace, Washington began by acknowledging the role of the federal courts in maintaining civil order:

Upon the testimony of these facts, an associate justice of the Supreme Court of the United States notified me, that "in the counties of Washington and Allegheny, in Pennsylvania, laws of the United States were opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceeding, or by the power vested in the marshall of the district."⁶⁹⁵

The new national government, led by the newly created federal courts, took a front-line position in the implementation of law and order. There were no rambling "federalism" discussions regarding whether it would have been better for the state government of Pennsylvania to exercise its police powers, or jurisdictional questions raised as to whether the national government should be suppressing rampant violence. Rather, criminals and their victims alike were viewed as "citizens of the United States." Washington and others looked to the national judiciary *first* to ensure "domestic Tranquility" and "establish Justice." This role of the federal courts was to provide national justice "a sword as well as a balance."⁶⁹⁶

When the fledgling federal courts proved too feeble to match the gross act of violence, President Washington made the difficult decision to call out the militia and personally led them west

694. 12 WRITINGS OF GEORGE WASHINGTON, *supra* note 100, at 44.

695. *Id.* at 46.

696. MORRIS, *supra* note 681, at 177.

to restore order and law:

[T]he judiciary was pronounced to be stripped of its capacity to enforce the laws; crimes, which reached the very existence of social order, were perpetrated without control; the friends of government were insulted, abused, and overawed into silence or an apparent acquiescence; and to yield to the treasonable fury of so small a portion of the United States would be to violate the fundamental principle of our constitution, which enjoins, that the will of the majority shall prevail.⁶⁹⁷

President Washington's success in restoring peace to Pennsylvania was due, as reported by him to the Congress, "to the character of our government, and to its stability, which cannot be shaken by the enemies of order."⁶⁹⁸

The establishment and regular maintenance of a strong, fully functioning federal criminal court system by the political branches of government is essential to fulfill the government's constitutional obligation to preserve societal order in this violent age. Certainly, the burdens that are placed on the national court system by an increasing number of federal criminal prosecutions are real, and such burdens certainly will be increased by additional federal criminal legislation. Considering the societal need for protection from crime, those burdens are justified. It is in accordance with James Madison's articulation of the jurisdictional scope and political function of the new national court system "that the jurisdiction shall extend to all cases arising under the Nat.l laws: And to such other questions as may involve the Nat.l peace and harmony."⁶⁹⁹

As noted above, recent crime statistics indicate that it is children who bear the greatest burden of violence.⁷⁰⁰ Certainly, President Washington would not have hesitated to call these crimes against our children "crimes, which [have] reached the very existence of social order."⁷⁰¹ The constitutional preamble

697. 12 WRITINGS OF GEORGE WASHINGTON, *supra* note 100, at 46.

698. *Id.* at 44.

699. 2 RECORDS, *supra* note 65, at 46 (Madison).

700. See *supra* notes 664-65 and accompanying text.

701. 12 WRITINGS OF GEORGE WASHINGTON, *supra* note 100, at 46; see *supra* text accompanying note 697.

mandate both to "establish Justice" and "insure domestic Tranquility," textualized in the main document by the "Protection Against Violence Clause" of Article IV, Section 4, compels the political branches to work together to establish a federal criminal court system that is capable of adjudicating the nation's present federal crime control laws and to assist further "the National peace and harmony."⁷⁰²

4. Creation of Separate Criminal Courts As Necessary to the Protection of the Constitutional Rights of Criminal Defendants

Pursuant to its constitutional responsibility, Congress should split the federal courts into formal civil and criminal functions at both the trial and appellate levels and establish U.S. District Criminal Courts, U.S. Courts of Criminal Appeals, and a National Court of Criminal Appeals. Such a separation of criminal and civil processes is required to ensure the speedy and fair adjudication of federal criminal cases.

These new federal criminal courts should be authorized to adjudicate all criminal cases and criminal-justice-related *Bivens* claims⁷⁰³ and § 1983 suits,⁷⁰⁴ in addition to all § 2255 (federal-based)⁷⁰⁵ and § 2254 (state-based)⁷⁰⁶ habeas corpus actions. Severing criminal cases and criminal-justice-related actions from the civil docket eventually would promote the development of a motivated and experienced bench of expert criminal procedure and criminal law jurists.⁷⁰⁷ In the single area of federal criminal sentencing, the development of an expert federal bench would ensure the very consistency and precision that the U.S. Sentencing Guidelines are meant to provide criminal defendants and the criminal justice system.

702. Before the 1995 *Lopez* decision, the Commerce Clause was the traditional basis of congressional jurisdiction. See *Perez v. United States*, 402 U.S. 146 (1971).

703. See *Bivens v. Six Unnamed Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

704. See 42 U.S.C. § 1983 (1988).

705. See 28 U.S.C. § 2255 (1988 & Supp. IV 1992).

706. See *id.* § 2254.

707. The creation of federal criminal courts also would ensure that an upswing in criminal prosecutions would never again hold the nation's important civil litigation hostage.

This suggestion is not meant to disparage the criminal adjudication skills of the present federal judiciary; rather, attempting to build an expert federal criminal bench is proffered as a reality-based solution to the significant increase in criminal actions that has occurred over the last ten years and to the substantial increase in federal prosecutions that will come with enforcement of the new crime control laws. As a constitutional matter, one must consider that many of the amendments suggested during and immediately after ratification of the Constitution directly related to the national courts' conduct of criminal trials. Of the 173 amendments proposed in the first Congress's first session, thirty-six concerned trial by jury and other rights of criminal defendants.⁷⁰⁸ Half of the amendments that were ratified and became the heart of the Bill of Rights addressed the rights of criminal defendants.⁷⁰⁹ The constitutional criminal procedure principles that are embodied in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments, however, are only as meaningful as the national criminal court system is well-ordered and efficient. Those fundamental criminal procedural rights are only as authoritative as federal court judges are motivated, interested, learned, and experienced in criminal law, criminal procedure, and constitutional adjudication of criminal defendants' rights and liberties.⁷¹⁰

Indeed, as federal criminal defendants' constitutional rights are reduced in practice by an overworked federal court system, the jurisprudence of criminal procedure "exceptions" grows larger.⁷¹¹ Constitutional criminal procedure values are diminished as the judiciary attempts to keep the overloaded justice system afloat. As a prime example of this phenomenon, consider how

708. See PAUL M. BATOR ET AL., HART AND WESCHLER'S THE FEDERAL COURT AND THE FEDERAL SYSTEM 20-21 (3d ed. 1988).

709. See generally BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971) (presenting the history of the federal Bill of Rights in documentary form).

710. See Symposium, *The American Criminal Justice System Approaching the Year 2000*, 35 WM. & MARY L. REV. 1 (1993).

711. See generally William D. Anderson, Jr. et al., Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 597, 841 (1994) (describing the federal criminal rights given under Rule 5(c) of the Federal Rules of Criminal Procedure).

the entire federal criminal justice process encourages, entices, cajoles, and even demands criminal defendants to plead guilty.⁷¹² The time and resource savings occasioned by guilty pleas to the strained national justice system are significant; however, the constitutional cost to the criminal defendant is total⁷¹³—a voluntary guilty plea automatically voids a defendant's important and legitimate Fourth, Fifth, and Sixth Amendment claims.⁷¹⁴ The most egregious constitutional violations are automatically "cured," swept under the criminal justice rug.⁷¹⁵

Federal courts collaterally review the criminal actions of the states for violations of national criminal justice protections and proscriptions of the Constitution. The obligation of the political branches to "ordain and establish" an efficient and competent system of national courts has become an important and pressing constitutional duty.⁷¹⁶ The whole of the national criminal justice system's (state and federal) enforcement of fundamental constitutional values ultimately depends on the capacity of the lower federal court system to conduct meaningful habeas review.⁷¹⁷ For example, a substantial number of federal trial court jurisdictions relegate their § 2254 (state habeas) cases to a separate docketing status;⁷¹⁸ and, in practice, too many Article III district judges relegate de facto, final decisionmaking authority in state habeas cases, *Bivens* claims, and § 1983 state prison-

712. This pressure is brought to bear throughout the process—from the arresting officer, to the prosecutor, to probation officials who calculate guideline sentence reductions for "acceptance of responsibility," and, unfortunately, even from some judicial officers.

713. See Priscilla Budeiri, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157 (1981).

714. See Rosemary Gordon, *Appealing a Guilty Plea*, 65 MICH. B.J. 72 (1986).

715. See James Eisenstein, *Keeping an Eye on Prosecutors*, 66 JUDICATURE 165 (1982) (reviewing ABRAHAM GOLDSTEIN, *THE PASSIVE JUDICIARY* (1982)).

716. Evan T. Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151 (1994).

717. See, e.g., Robert D. Davidson, *Federal Habeas Corpus: The Effect of Holding State Capital Collateral Proceedings Before a Judge Running for Re-election*, 8 NOTRE DAME J.L. ETHICS & PUB. POLY 317 (1994); Margery M. Koosed, *Habeas Corpus: Where Have All the Remedies Gone?*, 29 TRIAL 70 (1993).

718. Once habeas corpus was regarded much more highly. See Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952).

er claims to the increasing workload of the magistrates.

This institutional banishment of prisoner cases to non-Article III personnel is extremely problematic.⁷¹⁹ Legal observers have made good faith arguments in support of the need for reform of prisoner cases flooding the federal courts.⁷²⁰ Regardless, tenured Article III judges should be available to process those petitions that legitimately seek to enforce constitutional and statutory protections of fundamental liberties. Senator Joseph Biden has described the federal judiciary as being a "superior forum . . . because of the institutional independence enjoyed by federal judges and [their ability] to ensure consistent enforcement of constitutionally protected rights [and] . . . to speak with the voice of the entire nation."⁷²¹ This life-tenured "superior forum" does not include magistrates, agency judges, staff attorneys, permanent law clerks, or other shadow judiciary personnel.

Additionally, our constitutional criminal procedure rights are national rights that require uniform interpretation and enforcement. Separate federal criminal courts, especially a National Court of Criminal Appeals, will better "speak for the entire nation" in preserving and protecting those rights. Certainly, without a National Court of Criminal Appeals, the U.S. Supreme Court's "incredible shrinking docket,"⁷²² which produced fewer than ninety published opinions during the Court's 1993 and 1994 Terms, will increasingly diminish such uniformity.⁷²³

719. For a somewhat dated empirical assessment of the increasing role of magistrates in criminal justice issues, see CARROLL SERON, *THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS* 6-9, 14-20, 77 (1983).

720. For an excellent analysis of the prisoner suit debate presented in a two-part report, see Howard Mintz, *The Paper from the Pen*, *RECORDER*, July 25, 1995, at 11; Howard Mintz, *Fighting over Solution*, *RECORDER*, July 26, 1995, at 1.

721. Scharzer & Wheeler, *supra* note 12, at 681 (alteration in original) (quoting Senator Joseph R. Biden, Address Before the Third Circuit Judicial Conference 26 (Apr. 19, 1993) (transcript on file with the Federal Judicial Center)).

722. Tony Mauro, *Long-Winded Short Days: The 1993 Court's Hits and Misses*, *CONN. L. TRIB.*, Jan. 10, 1994, at 16.

723. See Deborah Pines, *Thomas Predicts Increased Output by Justices*, *N.Y. L.J.*, June 21, 1994, at 1.

5. *Responding to Judicial Criticism*

The first volleys of damning criticism of the idea of creating separate criminal courts likely will come from members of the existing judiciary, who will express federalism concerns about the growing national role in fighting crime. Justice Anthony Kennedy's testimony before the Senate Appropriations Committee, warning Congress against turning the federal judiciary into "police courts" by passing additional crime control legislation, is an example of such criticism.⁷²⁴ Responding to Senator Earnst Hollings's statement about not wanting to turn the federal courts into police courts, Justice Kennedy stated: "You said the magic words: Police courts. . . . We're concerned that's going to be the effect of a number of these proposals."⁷²⁵

The Judicial Conference repeatedly has expressed concern about the federalization of criminal law and has lobbied against specific criminal legislation, such as the Violence Against Women Act.⁷²⁶ Proponents of the legislation, which created new federal crimes and sentences for those who attack women and established a civil rights cause of action against gender-based offenders,⁷²⁷ effectively argued that the bill was a classic example of contemporary national legislation.⁷²⁸ Congress often has passed national civil rights legislation when the states have refused to take responsibility.⁷²⁹

The federal judiciary, however, warned that the Violence Against Women Act would flood the federal courts with "domestic relations" cases. As early as 1991, the Judicial Conference said that the legislation would "significantly threaten the ability of the federal courts to administer this Act, and other Acts of

724. See *Crime Stopper?*, *supra* note 548.

725. Deibel, *supra* note 549, at A9 (quoting Kennedy, J.).

726. Naftali Bendavid, *Will Federalizing Domestic Violence Really Help Women?*, *RECORDER*, June 21, 1994, at 1.

727. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 8, 16, 18, 20, 21, 26, 28, 31, 42 U.S.C.).

728. See Bendavid, *supra* note 726, at 1.

729. *Id.* As Sally Goldfarb of the NOW Legal Defense and Education Fund stated: "As a society, we already have a policy that crimes motivated by group prejudice are more blameworthy than crimes that are not. . . . [I]t's not radical. It's not unprecedented." *Id.*

Congress, promptly, fairly, and in accordance with their objectives.⁷³⁰ The judiciary's Administrative Office later threatened that the Act would result in a fifty percent increase in civil rights actions.⁷³¹ If this is the judicial response to obviously needed increased federal criminal and civil rights legislation for the protection of America's women (who are, as Representative Patricia Schroeder said, "not safe on the streets, but also not at home"⁷³²), the reaction by judges to separating criminal courts/processes from civil courts/processes will likely be severe.

The response to this judicial criticism, however, is found in the Constitution itself: the national government was established to protect citizens from both external and internal dangers. The jurisdiction for the new federal judiciary was framed in the Virginia Plan as being an answer to "questions which may involve the national peace and harmony."⁷³³ As discussed above, the Constitution grants both explicit and inherent authority to the political and judicial branches to maintain domestic tranquility.⁷³⁴ Additionally, the Constitution's "Protection Against Violence Clause"⁷³⁵ mandates that the national government be prepared, upon request from a state, to protect citizens against "domestic violence." The "federalization" of criminal prosecutions, including actions to fight violence against women, represents a long-delayed national response to the most serious, most profound social, economic, and legal problems facing this nation.

Many judges now serving on the federal bench are also likely to oppose vigorously the creation of U.S. District Criminal Courts, U.S. Courts of Criminal Appeals, and a National Court of Criminal Appeals, simply because they are comfortable with the status quo of the present court structure. Restating the well-worn arguments regarding the job satisfaction inherent in a generalized docket, the judiciary will contend that a purely criminal bench will carry less prestige and, therefore, attract judicial

730. 1991 U.S. JUDICIAL CONFERENCE REPORT 57.

731. *See First Session of New Congress Draws to a Close*, THIRD BRANCH, Dec. 1993, at 1.

732. Bendavid, *supra* note 726, at 1.

733. CLINTON ROSSITER, 1787 THE GRAND CONVENTION 361-63 (1966).

734. *See supra* notes 688-798 and accompanying text.

735. U.S. CONST. art. IV, § 4.

candidates of lesser quality.

Respondents to such criticism have to articulate the systemic benefits inherent in having jurists on the bench who really desire to serve as criminal court judges. Criminal defendants deserve, at least, to appear before judges who are interested in the criminal process; they certainly have the right not to appear before judges who feel that "ordinary" criminal cases are below them. Understandably, most judges like to have an interesting mix of cases on their dockets, including the occasional criminal case, in order to keep their judicial duties interesting. The federal court system exists for many contemporary reasons and purposes; however, the personal jurisdictional preferences of individual federal jurists should only be considered ancillary in making future structural modifications to the judiciary.

Rather, Congress should listen closely as the public pleads for crime control measures, such as violence against women legislation.⁷³⁶ Additionally, Congress should hear the many litigants and lawyers who are increasingly requesting more judges and suggesting a division of courts' civil and criminal functions.⁷³⁷ As noted above, two advisory committee reports recently filed with the Administrative Office pursuant to the Civil Justice Reform Act of 1990 recommend formal separation of the criminal from the civil functions in the federal courts.⁷³⁸

The cost of establishing a separate federal criminal court system certainly will be used against the idea. During times of staggering deficits, the answer "we can not afford it" is a powerful, albeit simplistic, argument against any significant expenditure of governmental resources. Perhaps some perspective would be useful in considering the cost of national justice in general, and of establishing separate criminal courts in particular. The third branch of the United States government, which consumes only two-tenths of one percent (.0002) of the entire federal budget,⁷³⁹ is an absolute bargain. Ninth Circuit Judge

736. A woman is a victim of domestic violence every 16 seconds in America. See *Patterns of Abuse*, NEWSWEEK, July 4, 1994, at 26; *When Violence Hits Home*, TIME, July 4, 1994, at 18.

737. Pines, *supra* note 613, at 1.

738. See *supra* part VII.C.1.

739. GORDON BERMANT ET AL., *supra* note 315, at 35-36. The total cost of sup-

Stephen Reinhardt advanced the argument that the federal courts are a bargain when he proposed doubling the size of the Court of Appeals:

Finally, let me add one word about cost. Doubling the size of the judiciary will cost a small amount of money. That is true. But the price is right. The annual cost of operating the federal court system is less than the cost of building one space shuttle, only slightly more than one stealth bomber. Doubling our size would be a drop in the bucket. And the benefits to our criminal and civil justice system would be enormous. Even in an age of deficit reduction, court expansion is a winner.⁷⁴⁰

Regardless of the obvious fact that our judiciary is a bargain, the failure to expand and remodel the federal judiciary will have resulting direct fiscal costs, and indirect social costs, that should not be acceptable to the nation. The fiscal costs alone, when judicial gridlock results in civil justice delays to American businesses, exceeds many times the cost of expanding and restructuring the federal courts. The societal costs when a violent criminal is not prosecuted to the fullest extent of the law, or when a criminal defendant does not receive the full benefit of his constitutional protections, cannot be calculated.

D. Structuring and Staffing U.S. District Criminal Courts, U.S. Courts of Criminal Appeals, and a U.S. National Court of Criminal Appeals

The structure of the newly created federal criminal courts should follow existing district and circuit jurisdictional boundaries in order to ensure the most efficient use of buildings and

porting one federal judge, including salary, benefits, chambers personnel, and all court operations, is \$696,000 for a district judge and \$814,000 for a circuit judge. *Id.* Apart from start-up costs for physical resources and ancillary personnel, the cost of establishing a federal criminal court system staffed by 500 judges (375 trial judges and 125 appellate judges) would be less than \$400 million. Other judicial costs relating to increasing the national effort against crime and increasing the number of federal prosecutions, such as those for probation and pretrial services, will be incurred regardless of whether adequate numbers of judges are available to conduct criminal and civil trials.

740. Reinhardt, *supra* note 441, at 7.

other physical resources. The nature of criminal trials is such that, once criminal trial judges are appointed and in place in a given trial jurisdiction, subsequent criminal calendars can be processed by the new criminal court. Correspondingly, once a circuit's criminal courts are established, all new criminal appeals filed can be assigned to three-judge criminal court division panels. As stated above, the jurisdiction of the criminal district courts and courts of criminal appeals would include all federal criminal cases and both state and federal habeas corpus petitions.⁷⁴¹

Staffing of the new criminal courts should begin with the voluntary transfer of judges who presently sit on existing generalized district courts and courts of appeals. A preliminary survey of federal court judges could be easily accomplished to predict the percentage of the present judiciary that might be interested in transferring to the Article III criminal court positions. Staffing the remaining judicial positions will require dedicated and assertive executive appointment action. The necessity of a firm presidential commitment to appointing quality, nonpartisan individuals to the new criminal courts cannot be overemphasized.⁷⁴² The President could begin the appointment process by selecting the best and brightest from the state criminal court trial and appellate benches. The best of our federal magistrate judges, prosecutors, and defense attorneys also may provide a

741. See *supra* notes 704-07 and accompanying text.

742. Greater emphasis must be given to education and training of new trial judges, far beyond the present new judge workshops of a couple weeks duration. As Judge Jerome Frank stated in *Courts on Trial*:

I suggest that we should at once set about contriving methods of avoiding the avoidable tragedies caused by lack of systematic training of trial judges. . . . Such a man should be specially educated for that job. . . . He should be shown, in great detail, the problems, related to the facts, which confront a trial judge He should learn all that is now known about psychological devices for testing the trustworthiness of witnesses as to their individual capacities for observation, memory and accuracy in narrating what they remember. He should be taught to be alert to the possibilities of using such devices, as they become improved, in trials. . . . In short, he should not be naively intuitive. His should be a carefully trained intuition.

JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 247 (1973).

ready pool of potential Article III appointees.⁷⁴³

The creation of the U.S. National Court of Criminal Appeals, as the first of several such subject-matter-specialized junior supreme courts,⁷⁴⁴ would provide uniformity of national law in all areas of criminal procedure, a uniformity that is long overdue.⁷⁴⁵ The problem of national law inconsistency and the cost of national law conflicts in all subject matter areas have been recognized for years.⁷⁴⁶ Similar proposals for the establishment of a generalist intermediate court of appeals and nonregional subject matter courts, however, have been met with vigorous opposition.⁷⁴⁷

As a criminal court variant of the junior supreme court that was proposed in the early 1970s by the Commission on Revision of the Federal Court Appellate System (the Hruskra Commis-

743. As relevant collateral changes to the national criminal justice system, Congress should establish a federal public defender's office and provide increased resources for the criminal divisions of U.S. Attorneys' offices for each federal trial court jurisdiction. The present system of ad hoc criminal attorney appointments for indigent criminal defendants is far too inefficient and expensive. The quality of representation provided by the Criminal Justice Act ad hoc appointment is too often just above ineffective. If federal prosecutors are to enforce new crime control legislation effectively, they will require generous increases in resources. Although federal community defender programs are superior to CJA appointments, they do not offer the independence of a fully funded federal public defender.

744. For a parallel discussion and design of a National Court of Commercial Appeals, see Williams, *supra* note 637.

745. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

746. See Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1407 (1987).

747. For a small sample of academic commentary critical of past suggestions for circuit conflict institutional measures, see William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987); Eugene Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951 (1973); Luther M. Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976). For support of circuit conflict institutional measures, see Charles R. Haworth & Daniel J. Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REF. 201 (1978); A. Leo Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal?*, 39 WASH. & LEE L. REV. 1 (1982); S. Jay Plager, *The United States Court of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990).

sion),⁷⁴⁸ the National Court of Criminal Appeals would be composed of seven permanent judges, separately appointed to the court.⁷⁴⁹ The National Court of Criminal Appeals, proposed here, would serve as a second level of appellate review and function independently from both the Court of Criminal Appeals and the Supreme Court. The National Court of Criminal Appeals would be staffed, budgeted, and disciplined just like other Article III inferior courts. Structural and jurisdictional independence would distinguish the National Court of Criminal Appeals from all previously proposed intercourt panels⁷⁵⁰ and third-tier intermediate court models.⁷⁵¹

The jurisdiction of the National Court of Criminal Appeals would include "transfer jurisdiction" from, and discretionary "certiorari review" of decisions of, the various circuits of the U.S. Court of Criminal Appeals. The intermediate level appellate court transfer jurisdiction would allow the lower appellate criminal circuits the option to transfer select cases that raise issues of significant circuit conflicts or require a clarification of national law. This jurisdiction would ensure full and equitable resolution of criminal/habeas cases in accordance with a genuinely national jurisprudence.

The National Court of Criminal Appeals' certiorari jurisdiction would place criminal justice jurisdiction directly between the criminal circuit courts and the U.S. Supreme Court. Additionally, the National Court of Criminal Appeals would have certiorari jurisdiction over criminal cases appealed from the states' supreme courts or courts of last resort. The certiorari process

748. See *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975).

749. See Roman L. Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579.

750. See Warren E. Burger, *The Time Is Now for the Intercircuit Panel*, A.B.A. J., Apr. 1985, at 86; Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?*, 11 HASTINGS CONST. L.Q. 375 (1984).

751. See Kevin L. Domec, *Congressional Prerogatives, the Constitution and a National Court of Appeals*, 5 HASTINGS CONST. L.Q. 715 (1978); James A. Gazell, *The National Court of Appeals Controversy: An Emerging Negative Consensus*, 6 N. ILL. U. L. REV. 1 (1986); Maurice Rosenberg, *Enlarging the Federal Courts' Capacity To Settle the National Law*, 10 GONZ. L. REV. 709 (1975); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913 (1983).

would terminate with the National Court of Criminal Appeals; however, the nation's highest court would retain a discretionary review jurisdiction over decisions of the National Court of Criminal Appeals, thus honoring the Constitution's demand for "one supreme Court."⁷⁵² The National Court would reduce the potential workload of the U.S. Supreme Court, and, by consistently sitting en banc like the Supreme Court, it would provide much needed consistency of national criminal law and procedure issues.⁷⁵³

VIII. CONCLUSION

Our national courts must be cherished as our national houses of justice, into which citizens enter expecting safe, timely, and fair adjudication of their controversies. Under our constitutional system, the political branches are responsible for creating, structuring, staffing, and fiscally sustaining these houses of justice, so that the laws may be enforced and citizens' constitutional rights upheld. The nation's inferior court system was designed to be an evolving organ of our government, able to be altered as needed to enforce the laws that the political branches enact and to meet the needs and demands of the republic. The civil dockets of the national courts have increased substantially over the last three decades, as the United States has developed a truly national, and now international, economy. If the federal judiciary is to be able to continue providing its past high level of service into the next century, Congress and the President must take immediate action to fully staff and generously fund our national courts.

Particularly, the President must exercise his unique appointment responsibilities fully and aggressively. By implementing a national selection process, the President can avoid undue reliance on the nonconstitutional process of "senatorial courtesy." Additionally, in response to dilatory Senate confirmation, every Executive should be prepared to exercise his or her authority to recess-appoint judges in order to keep the national courts opera-

752. U.S. CONST. art. III, § 1.

753. For alternative commentary questioning the extent of circuit conflict in the existing court system, see Hellman, *supra* note 750, at 375.

tional. For the long-term welfare of the United States, the political branches, together with the legal profession and the public, should begin a substantial expansion and restructuring of the federal judicial system. As the United States begins to compete more fully in a world economic arena, a comparative vision of specialized court structures is appropriate. German, French, and many other court systems have achieved unparalleled success with large judiciaries organized according to subject matter functions.

The "old general store" model for our national court system is inefficient and is becoming ineffectual. The time has come to implement subject matter specialization at both the trial and appellate levels of our federal judiciary. We must make changes for the future of our national courts, notwithstanding the strong objections of this generation's federal judiciary.

As a starting point for this specialization, Congress should create separate federal criminal courts—U.S. District Criminal Courts, U.S. Courts of Criminal Appeals, and a U.S. National Court of Criminal Appeals. Such action is necessary to ensure that the next century's national judiciary will be as President Washington hoped—"as perfect as possible in its formation."⁷⁵⁴

Recently, Congress and the President have begun to take more seriously the national government's fundamental responsibility to "insure domestic Tranquility."⁷⁵⁵ In the near future, the national government will provide additional relief from the increasing scourge of violent crime, which strikes fear into the minds and hearts of citizens and terrorizes a generation of children. As the government fulfills its responsibility to protect its citizens, the political branches will continue to increase the criminal jurisdiction of the federal courts.

Notwithstanding the vocal "federalism" objections of many sitting on the national bench, the alteration of the jurisdictional role of the federal judiciary is consistent with the Framers' vision of an evolving institution charged with maintaining the "national peace and harmony."⁷⁵⁶ As Felix Frankfurter and

754. Stewart, *supra* note 636, at 21.

755. U.S. CONST. pmbl.

756. ELLIOT, *supra* note 54, at 305.

James Landis skillfully stated:

So-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. . . . The Judiciary Acts, the needs which urged their enactment, the compromises which they embodied, . . . the changed conditions which in turn modified them, are the outcome of continuous interaction of traditional, political, social and economic forces. In common with other courts, the federal courts are means for securing justice through law. But in addition and transcending this in importance, the legislation governing the structure and function of the federal judicial system is one means of providing the accommodations necessary to the operation of a federal government.⁷⁵⁷

Few contemporary concerns are more basic to the "operation" of this national government and to the construct of "justice through law" than providing a competent, reliable criminal justice system to adjudicate impartially prosecutions resulting from the national effort to lessen the worsening level of criminal violence.

The contemporary establishment of separate federal criminal courts will help ensure that national justice incorporates what John Jay deemed essential—both a true balance and a swift, certain sword.⁷⁵⁸ The future expansion and specialization of the entire U.S. national court system will ensure the most fundamental of civil liberties—access to justice. Such restructuring will help guarantee the historic promise made by King John in our antecedent constitutional charter, the Magna Carta: "[T]o no one will we deny or delay right or justice."⁷⁵⁹

757. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 38 HARV. L. REV. 1005, 1006 (1925).

758. See *supra* note 681 and accompanying text.

759. MAGNA CARTA 327 (James C. Holt trans., 1965).