
Victor Williams

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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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* Associate Professor of Law, John Jay College of the City University of New York. B.A., Ouachita University (1980); M.A.T., National-Louis University (1982); Ed.M., Harvard University (1984); J.D., University of California—Hastings College of the Law (1990); LL.M., Columbia University School of Law (1994).

1. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 180 (1840).
3. See Janet Seiberg, Court Vacancies Result in Longer Case Dispositions, CONN. L. TRIB., May 9, 1994, at 8.

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ence projects the judiciary's future as grave: "the picture in 2020 can only be described as nightmarish." 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. 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."

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. More than one-third of the more than sixty vacancies that existed in mid-1995 existed for longer than eighteen months.

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. In the

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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

at an all-time low,\textsuperscript{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.\textsuperscript{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,\textsuperscript{19} the pending Comprehensive Antiterrorism Act,\textsuperscript{20} and subsequent national anticrime and reform legislation promised by the Republican Congress's "Contract With America."\textsuperscript{21}

Case overload at both the trial and appellate levels has led inexorably to a state of gridlock.\textsuperscript{22} Federal civil litigants now
must endure years of unavoidable, yet totally unacceptable, delays.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{23} 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, \textit{supra} note 3, at 8.

\textsuperscript{24} See generally Thomas E. Baker, \textit{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).

\textsuperscript{25} 1993 ANNUAL REPORT, \textit{supra} note 10; 1992 ANNUAL REPORT, \textit{supra} note 10.


\textsuperscript{26} Eric Schine & Linda Himelstein, \textit{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.  

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.  

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.  

At the trial level, some judges cope with crushing caseloads by improperly relying on the work of law clerks and magistrate judges, 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.


conference to better define the mission of our national courts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{34} Additionally, the Committee recommends that most diversity of citizenship cases be shifted to our overloaded state court systems.\textsuperscript{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.\textsuperscript{36} Instead of welcoming needed growth and ensuring justice for all,\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{30} See J. Clifford Wallace, Tackling the Caseload Crisis, A.B.A. J., June 1994, at 88.
\item \textsuperscript{31} See Al Karmen, Judicial Vacancies Spur Amendment Call, WASH. POST, June 20, 1994, at A13.
\item \textsuperscript{33} See PROPOSED LONG RANGE PLAN, supra note 5, at 21-38.
\item \textsuperscript{34} Id. at 23-25.
\item \textsuperscript{35} Id. at 29-32.
\item \textsuperscript{36} Id. at 19.
\end{itemize}
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* 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

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-


43. The confederate court has been described as the ancestor of the present United States Supreme Court. See Clinton Rossiter, The Grand Convention 50 (1966).
late cases from 1780 to 1786. The court often was ineffectual in enforcing judgments rendered from state courts of origin because the newly independent states often simply ignored its rulings.

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. This ridiculously cumbersome process was used in settling three disputes between states, including a substantial land conflict between Connecticut and Pennsylvania.

The lack of a functioning national court system fostered interstate rivalries and damaged efforts to promote interstate commerce. 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...

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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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

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\textit{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).

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


\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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

\begin{footnotes}
\item[52] ROSSITER, supra note 43, at 362-63.
\item[53] Id.
\item[54] JONATHAN ELLIOT, 5 DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 158-59 (1941).
\end{footnotes}
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 may 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 sear 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.65

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.”66 Similarly, Nathaniel Gorham later argued that “[i]nferior tribunals are essential to render the authority of the national legislature effectual.”67 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.68

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\textsuperscript{59} and, early in the debates, threatened that the "states will revolt at such encroachments."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{65}

\textsuperscript{59} Id. at 331.
\textsuperscript{60} Id. at 159.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 331.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 332.
\textsuperscript{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. The Convention debated throughout the summer over which of the two political branches should appoint judges. Some delegates, such as Pennsylvanian James Wilson, believed that judicial appointment by the Congress would result in "[i]nterest, partiality, and concealment," and that a "principal reason for unity in the Executive was, that officers might be appointed by a single responsible person." 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."

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. As Thomas Jefferson

in after RECORDS].

66. ELLIOT, supra note 54, at 156-57.
68. ELLIOT, supra note 54, at 155.
69. Id.
70. Id. at 350.
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

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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. 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.

D. Ratification Debates

Even before the Confederation Congress adopted the September 28, 1787, resolution ordering transmission of the proposed Constitution to the states, popular publication of the document's final draft generated strong opposition to the proposed national court system among various newspapers and state legislatures. 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).

ciary were waged in the state ratification conventions by declared anti-federalists. 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," that "State judicatories would be wholly superseded," and that Congress would probably authorize too few judges, resulting in court delays. 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.

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." 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." James Madison, John Marshall, and Edmund Randolph


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

82. Id. (quoting PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-88, at 154 (John B. MacMaster & 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 HUGH B. GRISBEY, 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

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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.


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.”

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,” 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.” Article I affirms this congressional authority: the Congress has the power “[t]o constitute Tribunals inferior to the supreme Court.”

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. 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

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.ُ

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.ُ The Framers envisioned that changing national concerns and circumstances might require future Congresses “from time to time to ordain and establish” distinctive “inferior Courts.”ُ 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.ُ 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.ُ

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:

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97. Id.
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).
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.\textsuperscript{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.\textsuperscript{106} Indeed, a five-year retrospective report shows that criminal appeals increased over thirty percent in the five-year period between 1989 and 1993,\textsuperscript{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.\textsuperscript{108} Individuals accused of federal crimes will look to a federal court system that already is strained to the breaking point for criminal justice.\textsuperscript{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.\textsuperscript{110} The problem, stemming from general political branch acceptance

\begin{itemize}
  \item \textsuperscript{105} Garry Sturgess, \textit{Another Clash over Criminal Caseload}, \textit{LEGAL TIMES}, Apr. 1, 1991, at 7.
  \item \textsuperscript{107} \textit{U.S. Courts: Caseload on the Rise}, \textit{LEGAL INTELLIGENCER}, Sept. 9, 1994, at 1.
  \item \textsuperscript{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 \textit{generally} Mark Curriden, \textit{Drug Courts Gain Popularity}, \textit{A.B-A. J.}, May 1994, at 16 (discussing the drug courts’ emphasis on intervention and treatment).
\end{itemize}
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. 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."

A. George Bush's Failed Four Years

President George Bush declined to assert his appointment authority vigorously, 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. It took the Bush Administration, on average, more than one year to make judicial selections. While encouraging federal prosecutors to escalate the Administration's war on crime through increased federal prosecutions, 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.
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. 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.

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." The judicial work of many other federal courts across the nation was similarly impaired, but the metropolitan areas were especially hard hit.

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 powers and handed over 100 empty judgeships to Democrat President-elect Clinton on January 20, 1993.

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

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. 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.

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, has further retarded President Clinton’s judge-picking efforts. 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.
130. Id.
be filled by May or June 1994. As of that date, however, over 100 vacancies remained. 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."

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. The Clinton Administration appears plagued by a pattern of appointment delinquency. 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. 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."


135. See 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.

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


\(^{139}\) See Senior Judges Help District Courts Keep Pace, THIRD BRANCH, May 1994, at 1.


\(^{141}\) Id.

\(^{142}\) Henry J. Reske, Keeping Pace with Judicial Vacancies, A.B.A. J., July 1994, at 34.
diversity on the bench.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{148}

\begin{itemize}
\item[146.] Id.
\item[147.] Id.
\end{itemize}
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. 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. 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-


ruary 1994 to the understaffed Second Circuit.\textsuperscript{151} Hearings were conducted shortly before the Senate took its Fourth of July, 1994 recess;\textsuperscript{152} however, definitive action was not taken on the nomination until late July 1994.\textsuperscript{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.\textsuperscript{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.\textsuperscript{155}

\textsuperscript{151} Id.
\textsuperscript{152} David Lightman, Yale Dean Wins Praise at Hearing, HARTFORD COURANT, June 30, 1994, at A4.
\textsuperscript{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.
\textsuperscript{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. A pending bill introduced by Senator Burns and Washington Senator Slade Gorton renews an old debate 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. Senator Burns pledged to stop all confirmation action for Ninth Circuit judgeships until "this miscarriage of justice is corrected"; during the summer of 1995, two Clinton nominees for appellate judgeships languished as a consequence.

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. In these senatorial circuses, select nominees...
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

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


165. Id. at 17.
than issues or qualifications.\footnote{166}{Id. at 14.}

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."\footnote{167}{Id. at 30.} 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."\footnote{168}{Id. at 22.} 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."\footnote{169}{Id. at 206.}


Central to the book's deficiency\footnote{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.} is Professor Carter's substantial overstatement of the role the Senate should play in the appointment process\footnote{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).} and his lack of appreciation for the constitutional authority of the executive branch in selecting and commissioning appointees.\footnote{173}{CARTER, supra note 164, at 33.} 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."\footnote{174}{Id. at 37.} Indeed, he even criticizes the "tradition of deference," by which a President selects his own administra-
tion team.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{175} Id. at 31-37.
\textsuperscript{176} Id. at 187-206.
\textsuperscript{177} Id. at 7.
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."  

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. With this nomination, as Professor Carter details, the Administration did not even allow the victim to respond to maligning critics or, more generally, to express her "disappointment." 

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." 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.

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.").


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. In 1995, President Clinton's troubled nomination and the Senate's procedural defeat of Dr. Henry Foster for U.S. Surgeon General served as an excellent example of the need for assertive executive energy in selection, confirmation, and appointment. 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. 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.


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-
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neglects the history of the Constitution by articulating a strong Senate role in the appointment process. 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. 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. Although the recess appointee is a truly temporary judge, 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.

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.


192. Id. at 114-17.


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. 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. 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. 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.
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."

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. 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.

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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.  

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." 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."  

Acknowledging that "the federal judiciary is fast approaching a crisis point," 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.  

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.  
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.  

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. Between 1980 and 1990, criminal drug prosecutions increased by 300% in the district courts and seventy-five percent in the courts of appeals. More recently, an avalanche of all types of criminal prosecutions and appeals has virtually buried federal court dockets. 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; criminal appeals exceeded 10,000, an increase of 400% since 1988.

Pursuant to the Speedy Trial Act, 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. 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.
211. See STRUCTURAL AND OTHER ALTERNATIVES, supra note 11, at 27.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{216} Although the total number of initial bankruptcy court filings decreased mid-decade, recent statistics show bankruptcy filings are on the rise.\textsuperscript{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.\textsuperscript{218}

This breakdown of national justice injures civil litigants who have neither the resources nor the time to play the waiting game.\textsuperscript{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.\textsuperscript{220} Mr. Krazier's widow remains convinced that the “bitter, nerve wracking ordeal of waiting for the trial” result-

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\textsuperscript{215} In the internationally important jurisdiction of the Southern District of New York, caseload delays have had an especially harmful impact. See Deborah Pines, \textit{New Judges To Attack Federal Civil Backlog}, N.Y. L.J., June 23, 1994, at 1.
\textsuperscript{216} See Miles Magiure, \textit{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.
\textsuperscript{217} \textit{Bankruptcy Filings Rise in Second Quarter of FY 95}, THIRD BRANCH, July 1995, at 12.
\textsuperscript{220} Dan Herbeck, \textit{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.
\end{flushleft}
ed in her husband’s death. 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 Act and the 1992 Americans With Disabilities Act 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. 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. 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 projections and budget cuts by Congress, and crucial

221. Id.
reductions in needed spending.\textsuperscript{228} In June 1994, the House Appropriations Committee cut more than $210 million from the judiciary's modest budget request for fiscal year 1995.\textsuperscript{229} Most problematic and ironic, as Congress finalized details of the 1994 Violent Crime Control Act,\textsuperscript{230} the House appropriated $30 million less for defender services than for fiscal year 1994.\textsuperscript{231}

This action continued a four-year pattern of judicial budget cuts, which hit defender services especially hard.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{235} As the ABA

\begin{itemize}
\item \textsuperscript{228} See Judicial Conference Approves Cost-Cutting Measures, THIRD BRANCH, Apr. 1993, at 1; Judiciary Faces Brod Spending Reductions, THIRD BRANCH, Jan. 1993, at 1.
\item \textsuperscript{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].
\item \textsuperscript{231} Budget Passed by House, supra note 229, at 2.
\item \textsuperscript{232} See Eva M. Rodriguez, Budget Crunch Said To Imperil Civil Jury Trials, LEGAL TIMES, Apr. 5, 1993, at 1.
\item \textsuperscript{233} Judiciary Appeals Budget to Congress, THIRD BRANCH, Sept. 1992, at 1.
\item \textsuperscript{234} 102nd Congress Adjourns: Results Are a Mixed Bag for the Judiciary, THIRD BRANCH, Oct. 1992, at 1.
\item \textsuperscript{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:

\begin{quote}
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
\end{quote}
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.”

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.238 As it cut the judiciary’s 1995 budget, the House of Representatives continued work on a proposed “Judicial Improvements Act.”239 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 RENHQUIST, 1992 YEAR-END REPORT ON THE FEDERAL JUDICIARY.

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.\textsuperscript{241} Instead, it seeks only to patch up the overworked system.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\item[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 \textit{Federal Courts Improvement Act Transmitted to Congress}, Third Branch, Dec. 1993, at 9.
\item[244] \textit{Improvement Act Hearing}, supra note 242, at 53.
\item[245] H.R. 4357, 103d Cong., 2d Sess. § 101 (1994); see \textit{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).
\end{footnotes}
only if all plaintiffs were citizens of the forum state.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{249}

Bar groups\textsuperscript{250} and members of the academy\textsuperscript{251} have argued equally strongly for retaining federal diversity jurisdiction.\textsuperscript{252} Their arguments are based on diversity jurisdiction's constitutional basis\textsuperscript{253} and the fact that our crowded state court systems are in no position to absorb these cases.\textsuperscript{254} The political

\textsuperscript{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].


\textsuperscript{248} Plaintiff Diversity Jurisdiction Hearing, supra note 246, at 8-27, 32-33.

\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{252} See, e.g., John P. Frank, Diversity Jurisdiction: Lets Keep It, 3 ADELPHIA L.J. 75 (1984).


\textsuperscript{254} See Wise, supra note 28, at 6.
prospect of Congress's placing an increased burden on crowded state court systems remains especially problematic. 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. The report projected that the dockets of many state trial and appellate courts will double by the end of this decade.

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. 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. 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."

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

257. On the criminal side of the state dockets, felony actions increased the most, up 66% since 1985, and domestic relations cases, taking up one-third of all state civil dockets, increased 43% during the same period of time. Id.
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 Commission and the Comprehensive Antiterrorism Act's special alien terrorist removal courts—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.

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. 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." He presented the obvious case against pulling these judges from work on their

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.
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." 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).


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

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. 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 arguments and self-imposed limitations on writing and publishing opinions.


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).


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." 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. 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.

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." These consequences, both obvious and subtle, deserve full exploration; a few


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-

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."²²³

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 judge²²⁴ or simply to assist²²⁵ in handling a heavy judicial workload, empowered to "discharge all the judicial duties of a District Judge therein."²²⁶ 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.²²⁷ 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.²²⁸

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.²²⁹ Obvi-

²²³. Senior Judges Help District Courts Keep Pace, supra note 279, at 1.
²²⁵. See Act of April 2, 1852, 10 Stat. 5 (1852).
²²⁶. Id.
²²⁸. FISH, supra note 287, at 28.
²²⁹. 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

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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, 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. The fierce competition for "top clerks" may be some indication of the degree to which judges abdicate decisional authority to these freshly minted JDs.

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 attorneys to evaluate or "screen" appeals (the very essence of the judicial decisional function) outside even the supervision of a judge, and the


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. 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. "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, 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.


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].


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, both criminal and civil. 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." 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. Legislation has been proposed that would broaden the statutory authority of magistrate-judges to include handling certain criminal trials without the consent of the criminal defendant. 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.

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

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).
303. See PROPOSED LONG RANGE PLAN, supra note 5, at 11.
304. See supra note 243 and accompanying text.
magistrate-judges are being regularly assigned responsibility for entire civil cases, just as if they were Article III judges. 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. 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. 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." Unfortunately, litigants who do not "opt-out" are denied the advantages that Judges Ware and Aguilar personally enjoy—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. 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. 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. 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.


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. 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." These magistrates also would conduct hearings and make recommendations for consideration by Article III appellate judges, as do trial magistrates for district court judges.

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. 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.


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, 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.” 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.” 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.

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. 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. Professor Meador prefaced this work by correctly

322. Id.
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. 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."

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. 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. Germany's unitary federalism, however, may be fairly described as "virtually another form of government" from the United States' federalism. The bulk (up to ninety-five percent) of German law is federal code-based, in the United States, federal courts from a comparative perspective.

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.
329. Id.
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).\textsuperscript{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.\textsuperscript{333} This specialization and efficiency have survived\textsuperscript{334} and, indeed, assisted the legally exacting reunification of East and West Germany.\textsuperscript{335} It remains to be seen, however, what impact the unification of Europe will have on the member states' national court systems.\textsuperscript{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.\textsuperscript{337} Germany's courts are divided into six specific, formal subject matter jurisdictions—constitutional, financial, social, ad-

\textsuperscript{332} See FORRESTER & ILGEN, supra note 328, at 10.


\textsuperscript{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).


\textsuperscript{337} ERIKA S. FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 172 (1994).
ministrative, labor, and ordinary.\textsuperscript{338}

Constitutional jurisdiction is allocated to one supreme judicial institution, established solely for reviewing constitutional claims.\textsuperscript{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.\textsuperscript{340} The Federal Constitutional Court (\textit{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.\textsuperscript{341} Structurally, the high constitutional court sits in two "senates" or divisions, each composed of eight judges.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,"\textsuperscript{345} in other words, a violation of the Basic Law.\textsuperscript{346} The court presides over such fundamental cases involv-

\begin{itemize}
  \item \textsuperscript{338} PETER DE CRUZ, A MODERN APPROACH TO COMPARATIVE LAW 76-78 (1993).
  \item \textsuperscript{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).
  \item \textsuperscript{340} DE CRUZ, supra note 338, at 78; FAIRCHILD, supra note 337, at 171.
  \item \textsuperscript{341} See DE CRUZ, supra note 338, at 78 ("The Constitutional Court may declare any law or judgment null and void.").
  \item \textsuperscript{342} FORRESTER & ILGEN, supra note 328, at 14.
  \item \textsuperscript{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).
  \item \textsuperscript{344} FAIRCHILD, supra note 337, at 171.
  \item \textsuperscript{345} DE CRUZ, supra note 338, at 78.
  \item \textsuperscript{346} See Michael Singer, The Constitutional Court of the German Federal Repub-
\end{itemize}
ing public institutions. 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."

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. All five jurisdictions have trial and intermediate level courts in each of the eleven state political units (Lander or Land). Courts of last resort, or federal supreme courts, for each of the subject matter jurisdictions are dispersed in various cities throughout the nation.

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. The Financial Jurisdiction oversees tax conflicts between the government and its citizens. 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. The Social Jurisdiction, the newest of the specialized court divisions, handles cases involving health insurance, social security, unemployment compensation, and other social programs. The division consists of three levels. 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.

The Administrative Jurisdiction division courts address all public-law issues and government-individual disputes, other
than social and financial conflicts, that are regulatory in na-

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.
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. This level made nearly 6000 total dispositions in 1978.

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). Even before this division is addressed, however, the independent Constitutional Council (Conseil constitutionel), which has authority to preview the constitutionality of prospective legislation, deserves special note. As described by Professor René David, in addition to various other duties,

> [the 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.

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. The changing nature of this court has been of signifi-

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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.
388. Id. at 29-30 (footnote omitted).
389. Id. at 30. Notwithstanding the Council of State's exclusive jurisdiction, in Ju-
cant interest, 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."

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. 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. At the lowest level of this system are administrative trial courts (tribunaux administratifs), dispersed throughout the nation’s regions. In 1987, a level of appellate administrative courts (Cours Administratives d'Appel) was established to review decisions of the trial courts. These appellate courts review authority of laws issues (annulment jurisdiction), and exercise full authority (pleine juridiction) over cases in which individuals allege injury at the hands of a public servant.

At the apex of this administrative governmental division is the Council of State (Conseil d'Etat), 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).


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).


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

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. In 1958, General de Gaule undertook a general reform of the judicial/procedural system aimed at making the judicial system more efficient. 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) 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.

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. 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.
406. MARY A. GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 122-23 (2d ed. 1994).
407. DE CRUZ, supra note 338, at 66.
serious felonies.  

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

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). 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.

The second level of appellate review is conducted by the country's highest level court, the Supreme Court (Cour de cassation). In contrast with the cours d'appel, the Cour de cassation reviews cases only for legal error. 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. Maximum access to the Supreme Court is assured by generous staffing and

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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 (Assemblee pleniere), composed of representatives of all five divisions, to remand for a third (and final) time. Id. Recent reforms allow a Division, or the Assemblee pleniere 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).
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.
nal jury nullification.\textsuperscript{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.\textsuperscript{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.\textsuperscript{425} Any number of other national court systems, both civil- and common-law-based, could be cited as examples of successful subject matter specialization.\textsuperscript{426} In each comparative example, one would find that the specialization models correspond to the unique needs and particular

\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{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-

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.
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. 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. Debate would add a needed dimension to Ninth Circuit Chief Judge Clifford Wallace's proposal for a three-branch conference on the federal courts. 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. 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.

Even if our present federal judiciary were fully staffed and a


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


few additional judges were added in our most overcrowded jurisdic-
tions, our nation's judges still would fail in their good faith
ttempt to adjudicate the civil actions and criminal prosecutions
of a nation of over 250,000,000 people. The 104th Congress
should create a significant number of new trial and appellate
judgeships for our most overcrowded jurisdictions. After provid-
ing 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 jurisdic-
tions and thirteen appellate circuits 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 influ-
ence 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.

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

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 JUDI-

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.” Unfortunately, Judge Reinhardt’s simple call “that Congress double the size of the courts of appeals” appears to be a lone voice on the federal bench.

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. 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. 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.” 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).
that increasing the "number of federal judges... helps the docket [but] aggravates... the problem of image, prestige and (ultimately) quality."\textsuperscript{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 \textit{University of Chicago Law Review} article,\textsuperscript{462} Chief Judge Newman warned that increasing the size of the federal judiciary to keep pace with the increased federal caseload would lead to "appointments of inadequate distinction"\textsuperscript{453} and a federal judiciary "indistinguishable from the judiciary of most states."\textsuperscript{454} Chief Judge Newman repeated his concerns in a 1991 speech to the Connecticut Bar Association\textsuperscript{455} and expanded and clarified his position in both a 1993 article in \textit{Judicature}\textsuperscript{456} and a commentary in the \textit{New York Times}.\textsuperscript{457}

Written in response to this Author's article suggesting an increase in the size of the judiciary,\textsuperscript{458} Chief Judge Newman's \textit{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."\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item[G451] 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)).
\item[G453] Id. at 764.
\item[G454] Id. at 767.
\end{enumerate}
\end{footnotesize}
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
judges, and other ancillary personnel. 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”—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” and the pending legislative effort to grant magistrates carte blanche authority to conduct designated criminal trials without criminal defendants’ consent are only the most recent warnings of the development of a “shadow judiciary.”

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. 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. Indeed, it should not be an option at all.

As noted above, only Ninth Circuit Judge Stephen Reinhardt

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.
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.\textsuperscript{473} He deems the argument "that we must remain small so that the quality of judges will remain high" as "wholly meritless."\textsuperscript{474} In a recent speech describing a "major battle" that is underway "over the heart and soul of our federal judicial system,"\textsuperscript{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?\textsuperscript{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.\textsuperscript{477}

Judge Reinhardt describes those in the freeze movement as varied in philosophy, both liberal and conservative.\textsuperscript{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


\textsuperscript{474} Reinhardt, \textit{supra} note 442, at 52.

\textsuperscript{475} Reinhardt, \textit{supra} note 441, at 1.

\textsuperscript{476} Id.

\textsuperscript{477} Id. at 3.

\textsuperscript{478} Id.
greeted by an admiring populace.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{479} Id.
\textsuperscript{480} Id. at 4.
\textsuperscript{481} Id. at 1.
\textsuperscript{482} See BERMANT ET AL., supra note 315, at 15.
\textsuperscript{483} Id. at 14 (quoting REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Sept. 12, 1990, at 93).
\textsuperscript{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. At the same time, the Judicial Conference adopted a carefully controlled growth policy for the federal courts.

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. 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. 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.

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

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.
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).


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) study reported strong opposition to specialization of federal appellate review among federal judges. 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.

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." 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. According to the FJC's report on the survey:

Some 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.

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.


1. Lobbying Against Federal Crime Control

Citing allegiance to federalism constructs, judicial commentators have demanded for years that criminal prosecutions be left to the protected province of the states. 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 intercircuit conflicts in those areas of the law." Id. The Committee specifically disfavored a separate administrative law court, however. Id. at 72-73.
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."

True to form, federal judges have been among the strongest critics of Congress's latest effort to "federalize crime." For example, Seventh Circuit Judge William Bauer complained that Congress was "overburdening the judiciary" with the latest crime legislation. 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." 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." 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.... Continuation 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."

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

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).
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." 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.

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 value 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

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

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

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," during a Wake Forest University commencement address. Upon accepting an honorary doctor of laws degree, 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).


525. U.S. CONST. art. I, § 8, cl. 3.


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. Lopez533 in April 1995, nullifying the Gun-Free School Zones Act.534

The Lopez majority opinion first discussed what Chief Justice Rehnquist termed "first principles"—the limited powers of national government and federalism535 and the history of the Court's Commerce Clause interpretation.536 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.537 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."538 The majority then

532. Id. at 1005.
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.\(^5\)\(^4\)\(^8\) 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."\(^5\)\(^4\)\(^9\)

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.\(^5\)\(^5\)\(^0\) 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.\(^5\)\(^5\)\(^1\)

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

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alternative arguments in addition to the Commerce Clause argument. 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," and containing, in Article IV, Section 4, a specific guarantee that the national government will protect the states from "domestic Violence." 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.1 laws: And to such other questions as may involve the Nat.1 peace and harmony."

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

553. U.S. CONST. pmbl.
554. Id. art. IV, § 4.
555. 2 RECORDS, supra note 65, at 46 (Madison).
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. The Center for Disease Control reports that the youth homicide rate nearly doubled between 1984 and 1991 due to firearm deaths, and the National Education Association estimates that 100,000 students bring guns to school each day across America.

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. 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. As Chief Justice Rehnquist might state:


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).


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.\textsuperscript{563}

Of course, the distinction between local and national concern may depend on one’s security perspective. In addition to preparing to announce the \textit{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. \textsuperscript{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.\textsuperscript{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.\textsuperscript{566}


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.”\textsuperscript{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

\textsuperscript{565} \textit{Id.}
\textsuperscript{566} \textit{See James Podgers, Rethinking the Commerce Clause: Arson Rulings Illustrate Lower Court Quandary over Congressional Power}, \textit{A.B.A. J.}, Dec. 1995, at 44.
\textsuperscript{567} \textit{FEDERAL COURTS STUDY COMMITTEE, supra} note 316, at 147.
more distant horizons. 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. 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. Additionally, written comments were solicited. The Proposed Long Range Plan for the Federal Courts (Proposed Plan or Plan) was submitted to the Judicial Conference on March 15, 1995. 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.

Although comprehensive in detailing present case overload
and predicting future judicial gridlock\(^{575}\) (including the consequences of appointment delays\(^{576}\)), 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 crime\(^{579}\) 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).


\(^{579}\) PROPOSED LONG RANGE PLAN, supra note 5, at 23-27 (Recommendations 2-5).
range of civil litigants.\textsuperscript{580} Further, the Plan promotes the formal institutionalization of various judicial shortcuts that threaten both judicial independence and excellence.\textsuperscript{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."\textsuperscript{582} The Proposed Plan declares that federal court criminal jurisdiction should be limited to five specific offense types or categories,\textsuperscript{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.\textsuperscript{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

\textsuperscript{580} Id. at 27-36 (Recommendations 6-12).

\textsuperscript{581} Id. at 32-33 (Recommendations 9-10).

\textsuperscript{582} Id. at 23 (Recommendation 2).

\textsuperscript{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.

\textsuperscript{584} Id. at 25 (Recommendation 3).
systems, 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. 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.

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.” The Proposed Plan then lists six appropriate subjects for federal civil jurisdiction.

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 (high-
er) amount in controversy requirement that does not include a
punitive damages assessment.\textsuperscript{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 inju-
ries."\textsuperscript{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.\textsuperscript{593} Additionally, the Proposed Plan would bar from federal
courts routine claims for benefits brought pursuant to the Em-
ployee Retirement Income Security Act of 1974.\textsuperscript{594} The Pro-
osed Plan also recommends that any future national benefits
programs (such as a national health insurance plan) should
designate a state court forum for review.\textsuperscript{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.\textsuperscript{596} The Proposed Plan encourages longer and
more intense service from senior judges ("as much as possi-
ble")\textsuperscript{597} and favors using additional permanent clerks to screen
certain pro se claims.\textsuperscript{598} The Plan also advocates either replac-
ing 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.\textsuperscript{599}

\textsuperscript{591} Id. at 29-32.
\textsuperscript{592} Id. at 34-35 (Recommendation 12).
\textsuperscript{593} Id. at 35.
\textsuperscript{594} Id. at 35-36.
\textsuperscript{595} Id. at 35.
\textsuperscript{596} See supra notes 574-76 and accompanying text.
\textsuperscript{597} PROPOSED LONG RANGE PLAN, supra note 5, at 91-92 (Recommenda-
tions 65-66); see id. at 77 (Recommendation 52b (1-4)) (explaining four ways in
which senior judges can increase their involvement in governance).
\textsuperscript{598} Id. at 61 (Recommendation 35d).
\textsuperscript{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."\textsuperscript{606}

Similarly, reaffirming judicial leaders' desire to keep their numbers few, the Proposed Plan warns generally that "federal law would be babel"\textsuperscript{607} with a large judiciary and details specifically the harm that would be incurred by growth at the trial and appellate levels.\textsuperscript{608} The Plan, however, cautiously avoids discussing the controversial and more blatant "fixed numerical limits"\textsuperscript{610} idea for the judiciary's future size.\textsuperscript{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";\textsuperscript{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

\textsuperscript{606} \textit{Id.} at 47 (Recommendation 25) (excepting contexts such as bankruptcy proceedings, international trade matters, and claims against the federal government).
\textsuperscript{607} \textit{Id.} at 19.
\textsuperscript{608} \textit{Id.} at 18.
\textsuperscript{609} \textit{Id.} at 41-42 (Recommendation 18).
\textsuperscript{610} \textit{Id.} at 42.
\textsuperscript{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.

\textit{Id.} at 42.

\textsuperscript{612} See supra note 605 and accompanying text.
courts will need substantially more judges as we enter the next century. The appeal for more judges operating in a contemporary, specialized judicial structure must be made directly to Congress, the branch of the government that is constitutionally charged to "from time to time ordain and establish" 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. 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. 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. 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

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.
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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).

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. 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.” This underutilized appointment authority holds promise for an end to the confirmation mess 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. Obviously, such a proposal’s worth is found in its shock value: it would be an error to amend the Constitution in this manner.

The constitutional system for exclusive executive choice in appointments, combined with the recess appointment authority, remains a perfectly good constitutional system. 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

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 Mordecia Rosenfeld, Reproducing Federal Judges, N.Y. L.J., July 6, 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 2,955 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 in 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.


\(^{630}\) 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. The annual appellate caseload will rise to approximately 325,100 from the present level of 50,224. 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.” 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.”

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,” 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

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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.
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.\footnote{637}

Past specialization success has been achieved by the United States Court of Custom,\footnote{638} the United States Tax Court,\footnote{639} the Court of International Trade,\footnote{640} the Emergency Court of Appeals,\footnote{641} the Temporary Court of Emergency Appeals,\footnote{642} and the Court of Appeals for the Federal Circuit.\footnote{643} As discussed above, a strong per se prejudice, especially among federal judges, continues to exist against further Article III specialization;\footnote{644} however, there have been and remain proponents for a move away from generalized federal court jurisdiction.\footnote{645}

\begin{itemize}
\item 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).
\item 639. See Harold Dubroff, The United States Tax Court: An Historical Analysis (1979).
\item 641. See Nathaniel L. Nathanson, The Emergency Court of Appeals, in Office of Price Administration, Problems in Price Control: Legal Phases (1947).
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.\(^4\) Specific arguments against specialization, such as loss of the supposed benefits of general jurisdiction "percolation" of issues,\(^7\) and fear of "capture" of subject matter litigation by one side,\(^6\) 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."\(^8\)

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."\(^9\)

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.\(^6\) 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.

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\(^4\) WILLIAM AND MARY LAW REVIEW [Vol. 37:535

\(^6\) See BAKER, supra note 29, at 262.

\(^7\) Id.


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, 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. 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. The Act required court reports to be submitted to the Administrative Office by early 1994.

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." 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.

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653. Id. §§ 472, 478.
654. Id. § 472.
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; 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. In the last four decades, the average rate of per capita violent crime has quadrupled in the United States.

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. 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, and crime so frightens our nation's elderly and disabled that many have become prisoners in their own homes.

659. Walinsky, supra note 658, at 39, 44.
660. Id.
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.\textsuperscript{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.\textsuperscript{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 1994\textsuperscript{666} 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

\textsuperscript{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.

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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. The new legislation also confronts violence against women by creating a federal crime for interstate stalking and spousal abuse. It also provides a new civil remedy for gender-based crimes of violence. 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. The recent antiterrorism legislation, developed as a result of the Oklahoma City bombing, 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. 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.... [T]he would be ludicrous to premise a reform plan upon the naive belief that Congress is going to heed calls to reduce


669. Id. § 40221.

670. Id. § 40302.


673. S. 735; H.R. 1710.

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 \textit{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 Uprisings\(^678\) and the Shays Rebellion,\(^679\) was a cen-

\(^{675}\) Reinhardt, \textit{supra} note 274, at 1515.
\(^{677}\) See \textit{supra} part VI.C.2.
\(^{679}\) See \textit{DAVID P. SZATMARY, SHAY'S REBELLION} (1980); see also \textit{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. 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.” 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,” 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. In the same section that authorizes Congress to “constitute Tribunals inferior to the supreme Court,” the Constitution explicitly grants Congress the power to raise revenue for the specific purpose of providing “for the common Defence” of the states. The Constitution also bestows upon Congress the authority to “call forth the Militia to execute the Laws of the Union and to supress Insurrections,” in addition to the power to protect against foreign invasions. 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.”

Another explicit textual dedication of this national constitutional responsibility, which this Author recently labeled the

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680. See supra notes 678-79 and accompanying text.
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"\textsuperscript{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."\textsuperscript{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.\textsuperscript{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. 1. to secure Republican Government. 2. to suppress domestic commotions."\textsuperscript{691} Randolph "urged the necessity of both these provisions."\textsuperscript{692}

James Madison, in \textit{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."\textsuperscript{693} Surely, James Madison would have seen the present level of violent


\textsuperscript{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.


\textsuperscript{691} 2 RECORDS, supra note 65, at 47.

\textsuperscript{692} Id.

\textsuperscript{693} \textit{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." 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."

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."

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.1 laws: And to such other questions as may involve the Nat.1 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 Tran-
quility," 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).
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.\textsuperscript{708} Half of the amendments that were ratified and became the heart of the Bill of Rights addressed the rights of criminal defendants.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


the entire federal criminal justice process encourages, entices, cajoles, and even demands criminal defendants to plead guilty. 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 total—a voluntary guilty plea automatically voids a defendant's important and legitimate Fourth, Fifth, and Sixth Amendment claims. The most egregious constitutional violations are automatically "cured," swept under the criminal justice rug.

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. 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. For example, a substantial number of federal trial court jurisdictions relegate their § 2254 (state habeas) cases to a separate docketing status; 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.


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. Legal observers have made good faith arguments in support of the need for reform of prisoner cases flooding the federal courts. 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." 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," which produced fewer than ninety published opinions during the Court's 1993 and 1994 Terms, will increasingly diminish such uniformity.

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).
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. 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."

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. 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, effectively argued that the bill was a classic example of contemporary national legislation. Congress often has passed national civil rights legislation when the states have refused to take responsibility.

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

725. Deibel, supra note 549, at A9 (quoting Kennedy, J.).
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. . . . It's not radical. It's not unprecedented." Id.
The judiciary's Administrative Office later threatened that the Act would result in a fifty percent increase in civil rights actions. 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"), 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." As discussed above, the Constitution grants both explicit and inherent authority to the political and judicial branches to maintain domestic tranquility. Additionally, the Constitution's "Protection Against Violence Clause" 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
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. 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. 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.

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 (.0.002) of the entire federal budget, 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.\footnote{Reinhardt, \textit{supra} note 441, at 7.}

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.

\textbf{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. \textit{Id.}\footnote{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, \textit{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.

ready pool of potential Article III appointees.\textsuperscript{743}

The creation of the U.S. National Court of Criminal Appeals, as the first of several such subject-matter-specialized junior supreme courts,\textsuperscript{744} would provide uniformity of national law in all areas of criminal procedure, a uniformity that is long overdue.\textsuperscript{746} The problem of national law inconsistency and the cost of national law conflicts in all subject matter areas have been recognized for years.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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.

\textsuperscript{744} For a parallel discussion and design of a National Court of Commercial Appeals, see Williams, \textit{supra} note 637.


the National Court of Criminal Appeals would be composed of seven permanent judges, separately appointed to the court. 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 intercircuit panels and third-tier intermediate court models.

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

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.”\footnote{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.\footnote{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-

\footnote{752. U.S. Const. art. III, § 1.}
\footnote{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.
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

758. See supra note 681 and accompanying text.