STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

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JUNE 20, 22, 29, JULY 20, 21, 28, AND 29, 1977

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STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

MONDAY, JUNE 20, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2237, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, and Ertel.

Also present: Michael J. Remington, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

The Subcommittee on Courts, Civil Liberties, and the Administration of Justice is meeting this morning to commence oversight hearings on the state of the judiciary and access to justice.

I welcome this debate. For many years, one of the primary flaws in the discussion of problems affecting the judiciary is that the debate has been narrowly restricted to members of the legal profession, judges, and law professors. Few members of the public or their representatives have participated. Since the public (and especially those members of our society who are poor, underprivileged, uneducated, and generally unrepresented) are an important part of the constituency of the Federal courts, I applaud their growing participation in the debate on court reform and access to justice and am pleased to note the contributions of the two witnesses we will hear from today. First, Mr. Ralph Nader, who needs no further introduction, will testify; then, Mr. Thomas Ehrlich, former dean of Stanford Law School and present president of the Legal Services Corporation, will appear.

On Wednesday, June 22, Attorney General Griffin B. Bell will present his views and those of the administration. On June 29 the Honorable Robert A. Ainsworth, Jr., circuit judge, U.S. Court of Appeals for the Fifth Circuit, will testify for the Judicial Conference. He is chairman of the Committee on Court Administration of that body. Due to scheduling problems caused by the July 4 holiday and the congressional recess, the hearings will recommence during mid-July and continue until the end of the month. During those weeks, we will hear from such witnesses as Robert H. Bork, ex-Solicitor General of the United States; Judge Shirley Hufstedler and Ben Zelenko, Ameri-

can Bar Association; Chief Justice Robert Sheran, Minnesota Supreme Court; Prof. Burt Neuborne, American Civil Liberties Union; Prof. William Cunningham, Santa Clara Law School; Congressman Charles E. Wiggins; Prof. A. Leo Levin, newly designated Director of the Federal Judicial Center; Steven Steinglass, Legal Action of Wisconsin; and Dennis Sweeney, Baltimore Legal Aid.

I am pleased to note that the questions to be raised at these hearings have been on the minds of the highest ranking members of the three branches of government. Recently, the Attorney General, with the support of the White House, created a new office for the improvements in the administration of justice, which was given the mandate of formulating a plan of action for court reform and which has issued "A Program for improvements in the Administration of Justice." In numerous speeches and press releases spokesmen for the Department of Justice have presented their plans to the American people and Congress. The President himself has shown his interest in the courts and their role in American society. In a recent Executive message, he stated that he supported legislation which will give citizens broader standing to initiate suits against the Government; further, he added that he supported the effort to expand the opportunity for responsible class actions by citizens. If nothing else, these proposals have broadened the parameters of the debate. Today, the issues posed by court reform and access to justice have a growing, public constituency. Since our Nation is firmly committed to democratic principles of government, I welcome the elevation of this debate by the President to a public forum.

I am also pleased to note that, in response to my invitation to participate in this debate, the Chief Justice of the United States has agreed to write a letter to the subcommittee on the problems confronting the federal judicial system and the people who use or aspire to use that system. This is the first time that the Chief Justice has accepted such a proposition. I feel that his participation will partially fill the gap created by lack of communication that exists between the legislative and judicial branches. His input will certainly aid the subcommittee in diagnosing the ills of the Judiciary and in prescribing the cures.

Chief Justice Burger has long been an articulate voice in favor of court reform. In this regard, the Chief Justice resembles Chief Justice Taft who, as described by Felix Frankfurter and James Landis, "deemed it the prerogative and even the duty of his office to take the lead in promoting judicial reform and to wait neither upon legislative initiation in Congress nor upon professional opinion."

Thus, as spokesman for the needs of the courts the Chief Justice is not acting in an unfamiliar role. Indeed, because of his function as head of the Judicial Conference of the United States and also because of his longstanding interest in the role of courts in American society, his participation is desired. Therefore, I will insert the Chief Justice's letter into the record immediately after I complete my statement. In addition, during recent years the Chief Justice has made several significant speeches which relate to the role of the judiciary in our society. I therefore submit four of these speeches—the keynote address at the National Conference on the Causes of Popular Dissatisfaction with

the Administration of Justice, the 1977 Report to the American Bar Association, Remarks to the American Law Institute, and Remarks to the ABA Minor Disputes Resolution Conference—into the record [see appendix 1 at p. 272].

The legislative branch has also been active in considering problems facing the judiciary. The 92d Congress created the bipartisan Commission on Revision of the Federal Court Appellate System; that Commission conducted an extensive inquiry and issued its final report in 1975. During the instant hearings we will hear testimony from its Executive Director, A. Leo Levin, and one of its members, Charles E. Wiggins.

In 1968 Congress passed the Federal Magistrates Act creating a new class of Federal judicial officers to replace the preexisting system of masters and commissioners. Significantly, the act empowered magistrates to relieve district courts of some of their civil and criminal workload by providing that the majority of judges in each district may, by rule, assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States." In 1976, an amendment to the act clarified the duties of magistrates and granted them slightly more authority than they had previously. These additional duties relate to the hearing of motions in criminal and civil cases, including both preliminary procedural motions and certain dispositive motions. Also, in 1976 Congress amended the Three Judge Court Act, by eliminating the requirement that three judges sit on all cases in which individuals seek to enjoin the enforcement of State or Federal laws on the basis of unconstitutionality. This relieved an important causal factor of court congestion. Both of these 1976 amendments were processed through this subcommittee.

For Congress, issues affecting the courts are among the most difficult questions to confront and to resolve. The assumption that court reform is an easy task, permitting expedited treatment, is simply not accurate. I do understand the frustration involved when legislative movement in this area is slow. Nonetheless, I wish to state that legislative analysis of court reform issues is an arduous, time-consuming endeavor. This task is rendered more difficult by the fact that the judicial branch lags far behind the other branches of Government and private industry in anticipating and preparing for the future. Moreover, the judiciary lacks the facilities generally available to the exexcutive branch in pressing its position on the Congress. The lack of information from the judicial branch concerning its goals and priorities makes any exercise of our responsibility more difficult.

Before I commence these hearings, I would like to refer to the Constitution. In spite of the fact that article III, the judiciary article, vests the judicial power of the United States "in one Supreme Court" and in "inferior" lower Federal courts, the framers of the Constitution specifically authorized Congress to organize the Supreme Court, to establish the lower courts, and to distribute jurisdiction among them. It is article III that grants Congress, and this subcommittee, the significant mandate of overseeing the functioning of the Federal courts, one of the principal forums for the resolution of disputes in our society. This is an important obligation which we, as Members of Congress, take seriously. I also note that article I vests us with power to constitute tri-

bunals inferior to the Supreme Court. During these hearings we may well discuss the creation of specialized administrative courts.

The Founding Fathers, by granting independence to the courts and by giving judges tenure "during good beha vior," in article III, intentionally made it difficult to change the courts or to replace Federal judges. This is a double-edged sword. First, in the long-term, it prevents the executive and legislative branches from encroaching upon the power of the judiciary. Thus, it protects the independence of the judicial branch. Also, however, it makes it more difficult to legislatively aid the judiciary when its dockets become overloaded or its machinery needs change. In this context, distance from the political branches works to the judicial branch's detriment. In short, what is apparently a strength in the system is also the cause of the slowness of reform. The central role of the Federal courts created by Congress pursuant to article III of the Constitution is to protect the individual liberties, freedoms, and rights of every citizen of this country and to insure the avowed premise and existing structure of our democratic scheme of government. Because of its historical mandate, exceptional quality and independence of Federal judges, and the tools it has developed over the years, the Federal judiciary is peculiarly suited to satisfy these needs. The courts have been a guiding light for those groups of individuals—often the poor, oppressed, undereducated, and unrepresented—who have been ill-equipped to combat the resources of both the Government and powerful private parties.

Historically, our courts have served our society well. Today, however, it must be recognized that they labor under extreme pressure. Throughout the 20th century, and particularly since the end of World War II, the quantity of litigation filed in the Federal courts has increased dramatically. As stated in the recently issued "Report of the Department of Justice Committee on Revision of the Federal Judicial System":

> In the fifteen year period between 1960 and 1975 alone, the number of cases filed in the federal district courts has nearly doubled, the number taken to the federal courts of appeals has quadrupled, and the number filed in the Supreme Court has doubled. Much of this litigation is more complicated because of the rising complexity of federal regulation.

Since 1968, at last count, Congress has passed 47 statutes adding to the jurisdiction of the Federal courts. The fact that these statutory schemes were necessary to the functioning of our society was clearly scrutinized by the Congress; the effect of these statutes on the courts was not.

Another phenomenon, affecting the access question and perhaps having a more pernicious effect on both litigants and prospective litigants than the problems of court overload, has been spiraling legal costs. Generally speaking, access to justice means access to the courts with legal counsel. Thus, for a large segment of our society, unable to pay the costs of legal representation, there is limited access to justice.

In a similar vein, the economics of paying a lawyer often make it counterproductive to seek legal aid to resolve minor disputes. Simply stated, it is unrealistic financially to pay a lawyer more than the amount of monetary damages sought in a legal action. This does not mean that minor disputes should not receive the attention of the of-

ficial institutions of our society, including the courts. On the contrary, unresolved minor disputes often raise frustrations and tensions to a level that should not be tolerated. In the words of Chief Justice Burger:

> We do not need to call on psychiatrists or clinical psychologists to tell us that a sense of injustice rankles and festers in the human breast and the dollar value of the conflict is not always a measure of tension and irritation produced.

It is additionally clear that the resolution of a minor dispute is more important to a poor person than to a rich person. A mathematical exercise of the simplest sort inescapably leads to the conclusion that an individual who earns $5,000 a year has a greater stake in expeditiously and inexpensively resolving a $500 claim than the individual who earns $50,000. The tension and irritation produced among the poor because of our failure to provide judicial machinery and fair procedures to resolve their disputes is of great concern to me. I agree with the Chief Justice and others that we must take steps to create a fair system to resolve minor disputes in our society; I also agree with the Department of Justice's decision to create experimental neighborhood justice centers. Hopefully, we will discuss this question further during these hearings.

Finally, I would like to comment on the growing perception that several recent Supreme Court decisions have had the effect of closing the courthouse doors to many citizens because of the Federal courts' rising workload. Several dissenting opinions have directly addressed this question. In *Warth* v. *Seldin*, 422 U.S. 490, 519 (1975), Mr. Justice Douglas observed:

> The mounting caseloads of the Federal courts are well known. But cases such as this one reflect festering sores in our society . . . I would lower technical barriers and let courts serve that ancient need. They can in time be curbed by legislative or constitutional restraints if an emergency arises. We are today far from facing an emergency.

This thesis was recently seconded by Mr. Justice Brennan. In a Harvard Law Review article [for the entire article see app. 2 at p. 292], he criticized several recent Supreme Court decisions (see *Stone* v. *Powell*, 428 U.S. 465 (1976); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Hicks* v. *Miranda*, 422 U.S. 332 (1975); *Paul* v. *Davis*, 424 U.S. 693 (1976; *Rizzo* v. *Goode*, 423 U.S. 362 (1976)) by stating:

> . . . federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered. Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated and systematic violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism.

If this is so, in return for aiding the Federal courts and reducing congested dockets by passing the judgship bill and by legislating several of the proposals pending in this subcommittee, we will consider passing legislation to reopen threshold doors that the court has closed. Or, in the alternative, we ought to investigate the creation of other adequate forums—and I emphasize "adequate"—to resolve the disputes that have been taken from the jurisdiction of the Federal courts. Several of our witnesses will address themselves to these issues.

What to do to resolve the questions facing the Federal courts; what role those courts should play in our modern democratic society; what

the future holds in store for the judicial branch of Government and the people who that branch has served so well in the past; and what should be our priorities as legislators, are the primary questions confronting us during these hearings.

[The letter from the Chief Justice to Chairman Kastenmeier follows:]

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington, D.C., August 29, 1977.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives.

DEAR MR. CHAIRMAN: I very much appreciate the subcommittee's invitation to participate in its hearings on the State of the Judiciary and Access to Justice. I commend you and the members of your subcommittee for undertaking a wide-ranging review of the problems facing the federal judicial system, preliminary to developing a legislative agenda in furtherance of the ultimate goal, delivery of justice to all. Because I consider Congressional concern with the larger issues facing the courts a matter of highest importance, I am pleased to accept your invitation to express some thoughts, which I hope are relevant.

It may be well to begin by reaffirming familiar major premises. From the earliest days of the Republic, justice has been a preeminent concern of our people. The preamble to the Constitution gives priority to establishing justice, ahead of the blessings of liberty. The pledge of allegiance, too, links justice with liberty and serves to remind each succeeding generation that justice for all remains a national aspiration of the highest importance. These old familiar propositions need to be recalled on occasion. As is so often true, however, the reality has fallen short of the aspiration, and there has been widespread discussion of how we, as a nation, might best reduce if not eliminate the gap. Your hearings are providing a valuable focus for this commentary and criticism and an appropriate forum for constructive assessment of resultant proposals.

To an aggrieved litigant seeking redress, the formal right to file a complaint and to become a party to a lawsuit is an empty promise if we fail to provide the "wheels" to deliver justice. And we have failed in many areas. Even a fair award four or five years delayed is drained of much of its value. And when the ultimate recovery is largely consumed in the expense of litigation, the system must be adjudged to have failed. Unfortunately, such failures are not isolated instances, both in state and federal courts. Happily, the new National Center For State Courts has already done much to expand the capacity of state courts. With close to 175,000 new cases filed in federal district courts each year, the delivery of justice is seriously threatened by the crisis of volume.

Any number of specific legislative proposals have addressed themselves to the difficult task of improving the federal judicial system, of making it possible for the courts better to serve the "consumers" of the system, the litigants. The Judicial Conference of the United States regularly transmits to the Congress specific proposals for reform designed to promote improvement. Many are familiar to you and I shall not restate them all here. Let me mention only a few by way of example: the eight year delay to enlarge the number of judges; curtailing federal jurisdiction based on diversity of citizenship, to mitigate, if not eliminate, the adverse effects of what has by now become a legal anachronism; realignment of the circuits to provide for manageable administrative units on the appellate level. Steps now being considered which I advocated eight years ago are already obsolete, overtaken by events.

This hardly exhausts your legislative agenda. An increased role for the federal magistrates, and increased efficiency in the operation of the jury system are further exampels of specific proposals which will be commanding your attention in the months ahead. The Bill to confirm the local rules for six member juries deserves swift attention and passage.

Within the brief compass of this statement I cannot attempt to address in detail any of the specific issues raised by these proposals. Instead, I should prefer to focus, in keeping with the scope and purpose of your hearings, on one aspect of the overall problem which is of direct concern to the Congress and which has been of major concern to me as Chief Justice: the proper role and function of the federal judicial system.

By constitutional design, the federal courts are courts of special, limited jurisdiction. The judicial power of the United States was limited by the Founding Fathers and the federal courts may not exceed it. Of greater significance for our purposes, however, is the fact that it was left to the Congress to determine the scope and jurisdiction of the federal judicial system. The Constitution, created only a single judicial tribunal, "one Supreme Court", leaving it to the Congress to determine whether or not to create federal trial and intermediate appellate courts and to define their jurisdiction should they be established.

The Congress has, from the first, been sensitive to the fact that the definition of jurisdiction presents sensitive policy questions, often subtle and complex, which are significant in their ramifications. Thus, the Judiciary Act of 1789, which created the first federal trial courts, made no provision for federal question jurisdiction. The so-called federal specialities, patents, admiralty, bankruptcy, were made cognizable by federal trial courts, but in 1789 cases "arising under" federal statutes generally were left to be heard in the first instance by state courts. It took almost a century of history, a civil war and the challenges of Reconstruction to create a situation which led Congress to grant general federal question jurisdiction to the federal courts.

The Congress, both in expanding federal jurisdiction and in contracting it, has been sensitive to changed and changing circumstances and has attempted to reflect these in what may seem to some highly technical, dry-as-dust jurisdictional statutes.

I would not want to overstate the case but at times, in my view, the Congress—preoccupied with a mass of pressing concerns—has been slow to act, as I have suggested in the past with respect to diversity jurisdiction. But the basic point remains: both as regards original jurisdiction and appellate review, Congress has over the years seen fit to make major revisions as well as minor adjustments in response to changing circumstances.

This, of course, is as it should be. The allocation of responsibilities between state and federal courts cannot be made once and for all time; it must be reassessed from generation to generation, and reviewed in the light of basic principles which govern our federal system of government, all guided by the imperatives of fairness and speed.

These points were well made by my distinguished predecessor, Chief Justice Earl Warren, almost two decades ago when he called for reassessment of the allocation of jurisdiction between states and federal courts. In a 1959 address to the American Law Institute he said:

> "It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism."

To that end, he expressed the hope "that the American Law Institute would undertake a special study and publish a report defining, in the light of modern conditions, the appropriate bases for the jurisdiction of federal and state courts." That address led to a major study and, ultimately, the recommendation, among others, that diversity jurisdiction be sharply curtailed. As a matter of principle, there is no reason for federal jurisdiction where no federal question is at stake and when state courts are available to provide an adequate forum. Diversity cases, by and large, are the prime example of a continuing failure to adhere to that principle. The mythology that only federal courts can fairly administer justice lives on, but it is without basis in fact.

For the most part, public debate concerning the proper role of the federal courts has focused, not on contracting federal jurisdiction, but on expanding it. The temptation is strong to enlarge the role of the federal courts. In my eight year tenure, Congress has enacted not less than 47 statutes enlarging federal jurisdiction. They are viewed as major contributors to the well-being of our society. Commenting on the high esteem in which the federal courts are held, and the resultant efforts to enlarge their jurisdiction, a wise practitioner observed that the federal courts are the victims of their own success.[1]

The recurring, indeed the persistent demands to assign large numbers of new causes to the federal courts can be viewed as a high compliment, a recognition of the contributions of the federal judiciary to the welfare of the country. Certainly, the indispensable role of the federal judicial system in righting ancient

[1] Address, Honorable Simon Rifkind, Pound Conference, St. Paul, Minnesota, April 6, 1976.

wrongs to large segments of our population, in reapportionment and in human rights is almost universally conceded. But the need to rely on federal courts as primary sources of justice, like diversity jurisdiction, has passed.

We can rightfully take pride in past accomplishments and we should recognize that the federal courts will inevitably continue their important role in the development of the national law. The record of a 36% increase in productivity of federal judges since 1969 has no parallel in government. The evolution of constitutional law has not ceased, nor will it ever. A few examples will illustrate this point:

(*a*) The Supreme Court has in very recent years expanded the rights of illegitimate children, terming it illogical and unjust to visit on the infant the condemnation of society for the acts of the parents.

(*b*) The Court has expanded the rights of prisoners, requiring them to be treated as persons free from the whim or fancy of their jailers.

Examples can be multiplied.

We can take pride in our constitutional heritage which includes due process, equal protection and freedom of speech. But these are evolving concepts, and the federal courts have, and will continue to have, an important role to play in giving them content and reality in contemporary terms.

No one would have the federal judicial system do less. There are many, however, who would have the federal courts do more. The more impressive the roster of federal court achievements, the more understandable the desire of many to broaden the jurisdiction of the federal courts and to charge them with an ever-expanding role in realizing our national aspiration of justice for all, overlooking that historically the state courts are the primary and basic system of justice, having 5,000 to 6,000 general jurisdiction judges as against 397 authorized active federal district judgeships.

There are fundamental objections to this approach. It should be observed, preliminarily, that to charge the federal courts with added responsibility without providing additional judges to discharge these responsibilities can hardly be viewed as a reasonable course of action, when the federal courts are already inundated, with resultant delays in adjudication. To continue on the present course is unconscionable when viewed, not in the perspective of the judges, but of the litigants. In the brief span of five years, from 1971 to 1976, federal appellate filings increased 43.9% and district court filings, 25.7%, without the addition of a single judgeship. True, there has been a dramatic increase in judicial productivity as I noted earlier, but as a prestigious Commission created by the Congress has warned us, on the appellate level at least, it was "achieved, in the main, by fundamental changes in the process of adjudication: curtailment of oral argument, frequent elimination of the judges' conference from the decision-making process, and, in hundreds of cases, decision without any indication of the reasoning impelling the result." [2]

In no sense do I challenge either the ends sought to be achieved or any particular mechanism utilized in the effort. I would, however, underscore the warning which accompanied that Commission's findings: "there are limits to what should be expected of judicial productivity and increased efficiency," and in the view of many they have already been exceeded.

Within limits—and there should be limits—more federal judges and more federal courts is an appropriate response to an increased volume of litigation. Certainly, my view on the need for the immediate addition of federal judges is well known to Congress and, indeed, I am encouraged by the progress in this Congress of a Bill which will come close to increasing the size of the federal judiciary by almost 25%. To absorb such an increase in a period of 12 to 18 months, necessary though it be, presents enormous problems, for which we have been preparing for the past two years. The "housing" problem alone will be staggering. It is important, however, to stress the limits of expansion. Almost fifty years ago, Felix Frankfurter, then a professor at Harvard Law School, wrote that "A powerful judiciary implies a relatively small number of judges." He warned against unwise proliferation of cases cognizable in federal courts even as he warned against procedures and burdens which serve to deny to judges the time for that "spacious reflection so indispensable for wise judgment."

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[2] "Structure and Internal Procedures: Recommendations for Change" by Commission on Revision of the Federal Court Appellate System Washington, D.C., June 1975.

If we continually enlarge the federal judiciary, we inescapably impair the quality of this forum. The notion of an effective judiciary is predicated upon belief in the need to keep its size relatively small and to keep the level of its thesis:

> Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions.

Simon Rifkind, a former federal judge and now a distinguished practitioner, made the same point at the Pound Revisited Conference, only last year. He enumerated the qualities we seek in our judges, judges charged with deciding difficult issues of far-ranging significance, and added: "If the judicial office is to attract people possessed of the qualities I have enumerated, it must be endowed with considerable prestige. The greater the number, the less the prestige. The less the prestige, the less the public respect, an essential ingredient of a satisfactory judicial system."

As you know, the Judicial Conference of the United States, and any number of circuit conferences, have spoken out sharply and with virtual unanimity, against the proliferation of Article III judges by a change in status of our present bankruptcy referees—a totally unnecessary and unwarranted step which will cost many millions of dollars per year. Some have misunderstood the nature of the objections. In part, the Judicial Conference view lies in the concern expressed by Frankfurter and repeated by Rifkind. Adding hundreds of specialized Article III judges at one fell swoop, in addition to the normal growth necessitated by the increase in caseload, cannot fail but to have an adverse effect on the institution as a whole. This is the warning of the Judicial Conference; this is part of its concern. Moreover, such a drastic change in the fabric of the federal judiciary is hardly required by the advantages sought to be gained. But this involves a longer, more detailed discussion than is appropriate here.

Bankruptcy referees aside, unlimited expansion of the federal courts is not an acceptable solution. Neither assembly-line justice, nor a rapid expansion of the size of the federal judiciary beyond anything presently contemplated, with the concommitant dilution of prestige and, I fear, quality, can be the answer.

It is particularly noteworthy that we are not dealing with a controversy between state and federal courts. On the contrary, state courts today are seeking a broader role in assuring that every "citizen should have access" swiftly to a judicial system "for the resolution of unavoidable disputes" and for the protection of "constitutional rights". At its annual meeting earlier this summer, the Conference of Chief Justices affirmed that "state court systems are able and willing to provide needed relief to the federal court system" in a significant number of different areas. We must remember also that cases moved out of the 397 federal trial courts to the state courts will spread those cases over approximately 5,000–6,000 state trial judges—a small increase for each one.

It is appropriate for the Congress to be concerned with the adequacy of support for state judicial systems. Indeed, for some years now—at least six years—there has been substantial federal funding of efforts to solve particular state court problems. It would, however, be equally wrong to assume that delivery of justice is only possible in the federal forum, that access to justice must mean the right to litigate in a federal court. There is no surer way to denigrate and downgrade our state courts and to change the basic premises of our federalism. It would be rank folly to disparage the 5,600 or more state judges by continuing the trends of the past.

All of us should join in recognizing that there is a long and difficult road ahead before we can make the delivery of justice a reality for all of our citizens. We already have more judges and lawyers per 100,000 population than any country on earth and we will need to think hard about which disputes are best resolved in courts and which are better left to more informal, less time consuming and less expensive procedures. We will need to think hard about how the federal government can contribute to the well-being of the state judicial systems, recognizing the major contributions of such new and innovative institutions as the National Center for State Courts and the National College of the State Judiciary. We will need to nurture the research and development arm of the federal judiciary, the Federal Judicial Center, created by the Congress and so gener-

ously supported by it. We will need to be concerned with every means to maintain and indeed improve the quality, efficiency and effectiveness of the federal judicial system itself. The people of this country are nearing the end of patience.

These are goals on which we can readily agree. It is harder to agree on the means of achieving them. As I observed earlier, the opportunity to litigate is not in itself an assurance of effective justice. We must remain concerned that we do not bestow access to the federal courts so casually and unwisely that access to justice becomes illusory. Not less than 19 Acts of Congress already call for "expedited" handling of federal cases; when so many cases are "expedited," few cases are expected *in law*, and few can be expedited in fact.

In this connection there is a lesson to be learned from history, one which illustrates the need to deal in the realities as best we can perceive them. Prior to the enactment of the Judges' Bill in 1925, the Supreme Court fell so far behind in its docket that it was perhaps justly criticized for not properly fulfilling its assigned role. The Congress responded to Chief Justice Taft's call with by-now familiar 1925 legislation which relieved the Court of much of its mandatory jurisdiction. There were many who then protested that access to the Court was being denied to litigants. In a formal sense, the argument had superficial appeal, but access in theory which in fact impedes or precludes the delivery of justice makes no sense. Happily, the spurious opposition in 1924–25 did not prevail, and Congress wisely chose to accord the indisputable realities a higher priority than dubious theory. In the hindsight of more than a half century of experience there is universal acceptance of that choice as a wise one by the Congress.

I close as I began, with warm appreciation for the opportunity to join with you in your concern with the larger issues which must be faced in fashioning the future of the federal judicial system. Whatever differences there may be among men of good will regarding the means of assuring the reality of justice for all, I know we are united in our commitment to that end.

Cordially and respectfully,

WARREN E. BURGER.

Mr. KASTENMEIER. With this in mind, I open the testimony.

I am very please to greet as our leadoff witness, Mr. Ralph Nader, who has a very important statement for us.

Mr. Nader?

TESTIMONY OF RALPH NADER, ACCOMPANIED BY GIRARDEAU SPANN, ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. NADER. Thank you, Mr. Chairman.

With me is Gerry Spann, who is an attorney with the Public Citizen Litigation Group, who has worked on issues of access with some degree of concentration in recent years.

The opportunity to comment on the plight of citizens who seek access to the courts for protection of their Federal rights and for the opportunity to suggest legislative priorities to help remedy that plight is an opportunity that comes in a different context than a few years ago at the height of the civil rights concern.

It comes in a congressional context when members in some quarters are becoming increasingly antagonistic to judicial review of government activities.

I was surprised, for example, to hear from Congressman Tom Foley recently, who declared an astonishing antipathy to the expansion of judicial review and resort to the courts involving cases that come under administrative or regulatory action.

I don't know how one would characterize this new kind of ambience among people who certainly have had a liberal background. But, it is something which at first I shrugged off as simply a reaction against the complexities of our times. But, I think if you look at it in the

context of the Consumer Protection Agency legislation, you see that the legislation has provoked the disclosure of these feelings on the part of members whom one would not have expected these feelings to be breeding.

We could be going through a period of legal nostalgia, as if the old days were much simpler and, therefore, much better, even though they were devoid of much justice as well. I think we need to focus very clearly on the function of preventative litigation which many of these proposals, which I shall explore today, and which are before the committee, can be characterized by.

Preventative litigation is litigation that indicates to the Government or to other groups that are involved in these Government actions that the people who are most victimized now will have standing and will have access, and will have some legitimate remedy to secure justice in the courts.

Of course, for every case that is filed in that respect, there is a ray of deterrence that follows from it. That is the kind of preventative law that we need more of.

During the past few years the Supreme Court, led by Chief Justice Warren Burger, has systematically closed the doors of the Federal courts to citizens whose constitutional and statutory rights have been violated by government and private institutions. The Court has not only shown a remarkable indifference to the traditional role that the judiciary has played in safeguarding fundamental rights, but has ignored the will of Congress by handing down decisions that circumvent the purpose of legislation enacted to protect Federal rights.

I urge this committee to lead the Congress to swift enactment of remedial legislation that will both open the doors closed by individual Burger court decisions, and will send an unambiguous message to the Burger court stating that the elected branches of government do not approve of the Court's refusal to protect individual Federal rights.

I would like my complete testimony, Mr. Chairman, included in the record, and I will try to summarize the points in my oral testimony.

Mr. KASTENMEIER. Without objection, your written testimony will be received and made part of the record.

Mr. NADER. Thank you.

[The prepared statement of Mr. Ralph Nader follows:]

STATEMENT OF RALPH NADER

Mr. Chairman and distingished members of the subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, thank you for the opportunity to comment on the plight of citizens who seek access to the courts for protection of their federal rights, and for the opportunity to suggest legislative priorities to help remedy that plight. During the past few years, the Supreme Court, led by Chief Justice Warren Burger, has systematically closed the doors of the federal courts to citizens whose constitutional and statutory rights have been violated by government and private institutions. The Court has not only shown a remarkable indifference to the traditional role that the judiciary has played in safeguarding fundamental rights, but has ignored the will of Congress by handing down decisions that circumvent the purpose of legislation enacted to protect federal rights. I urge this Committee to lead the Congress to swift enactment of remedial legislation that will both open the doors closed by individual Burger Court decisions, and will send an unambiguous message to the Burger Court stating that the elected branches of government do not approve of the Court's refusal to protect individual federal rights.

While legal commentators and the press have disagreed with many Burger Court decisions on the merits, my criticism is of a much more fundamental nature. The real damage caused by the Burger majority has resulted from its procedural decisions denying many injured citizens access to the forum created to protect their rights. It is one thing to tell citizens their legal claims are without merit, but it is an entirely different matter to tell them that their claims will not even be heard. If a sheriff stood at the courthouse door and prevented citizens from entering to present their grievances, the public outcry would generate page one headlines all across the nation. The Burger Court's restrictive decisions are accomplishing the same thing by barring many citizens with meritorious claims from access to the federal courts.

To make matters worse, in issuing its restrictive decisions, the Court has misused the threshold doctrines of standing, ripeness, mootness, and abstention, straining them beyond recognition in order to accomplish its ideological purposes. Through arbitrary use of those doctrines, the Court has not only destroyed faith and confidence in the federal judiciary but has developed precedents that are thoroughly confusing to courts and litigants alike. The result is an enormous waste of judicial resources which now have to be expended on threshold issues rather than on the merits.

Many of the Court's restrictive decisions have been rendered in spite of contrary expressions of congressional intent. For example, less than two weeks ago, the Court held in *Illinois Brick Co.* v. *Illinois*, No. 76-404, 45 U.S.L.W. 4611 (June 9, 1977), that ultimate consumers who suffer injury in the form of higher prices as a result of illegal price fixing cannot sue under the antitrust laws to recover their damages. Only direct purchasers can sue, but they have no incentive to do so since they merely pass the overcharges along to the ultimate consumer. Aside from its senseless result, what makes the *Illinois Brick* case so distressing is its unjustifiable disregard of congressional intent. Less than a year ago, Congress enacted the Antitrust Improvements Act of 1976, Public Law No. 94-435, 90 Stat. 1383, expressly authorizing state attorneys general to represent their citizens in antitrust actions in a *parens patriae* capacity. The *Illinois Brick* case directly undercuts the policy and intent of that important legislation by denying a state the right to recover antitrust damages for overcharges that will now have to be borne by all of the citizens of the state.

What we are witnessing is the emergence of an anti-consumer Supreme Court majority that is not content to merely rule against plaintiffs asserting individual and consumer rights, but insists on keeping those plaintiffs out of court altogether. The Burger majority is doing its best to render the judicial branch of government a nullity as far as individual rights are concerned by refusing to hear the claims of those who have nowhere else to turn.

The Court's restrictive decisions have posed a challenge for this Committee and for the entire Congress. Comprehensive legislation is needed to provide the Burger Court with the congressional mandate that it repeatedly invites as it slams shut one courthouse door after another. Therefore, I ask the Committee and the Congress to turn its attention to remedial legislation in the five areas in which the Court has most effectively restricted citizen access to justice.

I. STANDING AND RELATED THRESHOLD DEFENSES

The Supreme Court's restrictive standing decisions provide the most graphic example of the Burger Court's campaign to deny access to needy litigants. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court showed an amazing lack of sensitivity to the plight of indigents unable to afford medical care, and turned a deaf ear on their pleas for relief. There, individuals who could not afford to pay the high cost of hospital care sued to set aside a regulation granting favorable tax treatment to hospitals that would not treat indigents free of charge. They argued that since such favorable tax treatment was reserved for charities, the challenged regulations were not authorized by law. Although those plaintiffs had an obvious stake in the enforcement of a law enacted to benefit them by providing a financial incentive for hospitals to treat them free of charge, the Supreme Court dismissed their case for lack of standing. That decision was a bitter pill for those plaintiffs to swallow. Although they had enough at stake to file a lawsuit and take it all the way to the Supreme Court, the Burger majority told them that their interest was not sufficient for standing because they did not meet the Court's ill-defined concept of injury. Decisions such as *Simon* hardly inspire confidence in the fairness of the judiciary.

Likewise, in *Warth* v. *Seldin*, 422 U.S. 490 (1975), minority plaintiffs who alleged that they were the victims of housing discrimination resulting from a restrictive zoning ordinance were denied standing to have their constitutional claims adjudicated. *United States* v. *Solomon*, 419 F. Supp. 358 (D. Mid. 1976), shows that the Supreme Court's restrictive approach to standing has filtered down to the lower courts. There the United States Attorney General was denied standing to assert the constitutional rights of institutionalized mental patients relating to the conditions of their institutionalization, despite the fact that those plaintiffs were not able to adequately assert their own rights. The Burger majority even denied standing to Gary Gilmore's mother, holding that she did not have a legally cognizable interest in insuring that her son was not executed by the State of Utah under a statute that four Justices found to pose serious constitutional problems, or to insure that any rights waived by her son were waived in a knowing and intelligent manner. When a Court hands down decision after decision denying standing to plaintiffs with important federal claims, something is dreadfully wrong.

The obvious harm caused by restrictive standing decisions is that plaintiffs with important legal claims are left without a forum in which to assert them. There are other dangers, however, that are less obvious but equally serious. As a result of restrictive standing decisions, some legal issues can never be tested because no plaintiff will ever have standing to present them to the courts. In *United States* v. *Richardson*, 418 U.S. 166 (1974), for example, a citizen challenged the secrecy of the CIA budget, alleging that the constitutional provision requiring a public accounting for government expenditures was violated by the secret budget. Mr. Richardson was denied standing even though the Court admitted that no other citizen would ever have standing. Thus, the secrecy of the CIA budget may well be unconstitutional, but the courts will allow the practice to continue solely because no plaintiff will ever have standing to challenge it.

Standing is often combined with other justiciability defenses to further preclude or delay a hearing on the merits of important constitutional issues. Just a few weeks ago in *Clark* v. *Valeo*, No. 76–1105, 45 U.S.L.W. 3785 (June 6, 1977), a case handled by attorneys for Public Citizen, the Supreme Court affirmed a D.C. Circuit opinion challenging the one-house veto provision of the Federal Election Campaign Act of 1976, Public Law 94–283, 90 Stat. 482. Ramsey Clark asserted standing as a political candidate whose actions were regulated by the Act and as a voter suing under the "any voter" standing provision of the Act. He asserted that the threat of a one-house veto undermined the effectiveness of the purportedly independent Federal Election Commission by causing the Commission to modify its regulations in order to prevent a veto. The D.C. Circuit held that plaintiff Clark's claim was not ripe in the absence of an actual veto, even though he claimed that the same political pressure which undermind the independence of the Commission also precluded the need to veto the Commission's regulations. In addition, the D.C. Circuit completely ignored that injury was asserted by the plaintiff in his capacity as a voter, a claim which he had explicit statutory standing to assert. The *Clark* case is troubling in three respects. First, the Court refused to preserve the independence of a Commission created to implement badly needed election reform. Second, the Court went out of its way to avoid a decision on the constitutionality of the one-house veto procedure, even though it is appearing with more and more frequency in congressional enactments despite its dubious constitutionality. Third, the Court flaunted congressional intent by disposing of the case on threshold, justiciability grounds despite Congress' explicit directive not to do so, and its express desire to obtain a prompt ruling on any constitutional questions raised by the Federal Election Campaign Act.

A third harm inflicted by restrictive decisions concerning standing and the other justiciability doctrines is the tremendous waste of resources resulting from the Court's strained application of those doctrines. This is amply illustrated by the recent case of *Kremens* v. *Bartley*, No. 75–1064, 45 U.S.L.W. 4451 (May 16, 1977), a case concerning the extent to which Due Process safeguards are available to children in Pennsylvania mental institutions. After the district court had certified the case as a class action and had issued an opinion on the merits stating which Due Process requirements had to be met, Pennsylvania passed a new statute prescribing the necessary safeguards for roughly 20% of the class members. On appeal the Supreme Court refused to consider the merits of the case as they applied to the remaining 80% of the class members, but rather held that the new statute made the whole action moot. The Court did this

despite the well established principle stated in *Sosna* v. *Iowa*, 419 U.S. 393 (1975) that once a class is certified, an action does not become moot simply because the claims of the name plaintiff are moot. Moreover, both parties argued that the case was not moot and urged the Court to rule on the legal question decided below. This decision meant that the case had to be remanded to the district court so that a new class with new name plaintiffs could be certified even though this had nothing whatsoever to do with the district court's constitutional decision. Such waste of judicial resources is wholly unwarranted.

Carolina Environmental Study Group v. *United States Nuclear Regulatory Commission*, 431 F. Supp. 203 (W.D.N.C. 1977), appeal pending in U.S. Sup. Ct., No. 77-375, provides another example of wasted judicial resources. That important case tested the constitutionality of the liability limitation in the Price-Anderson Act for nuclear power plant accidents. There, the district court had to conduct a four-day trial on the issues of standing and ripeness alone before it could even consider the merits of the constitutional question. Although the district court ultimately invalidated the liability limitation, the threshold issues of standing and ripeness almost certainly will have to be completely re-argued before the Supreme Court on appeal. Moreover, if the Court reverses on standing or ripeness grounds, the nation will be deprived of the answer to an important constitutional question concerning nuclear power. The resulting uncertainty will cause serious problems for both proponents and opponents of nuclear power, and for the Congress, as debate on the viability of nuclear power continues.

When the Supreme Court exploits a threshold issue by extending it to cases where its application is improper, everyone becomes confused, and time consuming hearings are required to implement the Supreme Court's decisions. In addition, lower courts must waste time trying to sort out inconsistent precedents, and litigants feel compelled to appeal every case thereby expending even more judicial resources. As Mr. Justice Brennan stated dissenting in the *Kremens* case:

"I do not express this objection to the Court's opinion due to a concern for craft alone. Jurisdictional and procedural matters regularly dealt with by the Court often involve complex and esoteric concepts. An opinion that is likely to lead to misapplication of these principles will cost litigants dearly and will needlessly consume the time of lower courts in attempting to decipher and construe our commands. Consequently, I have frequently voiced my concern that the recent Art. III jurisprudence of this Court in such areas as mootness and standing is creating an obstacle course of confusing standardless rule to be fathomed by courts and litigants, see *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 519–530 (1975) (Brennan, J., dissenting); *DeFunis* v. *Odegaard*, *supra*, at 348–350, without functionally aiding in the clear, adverse presentation of the constitutional questions presented. As written, today's opinion can only further stir up the jurisdictional stew and frustrate the efforts of litigants who legitimately seek access to the courts for guidance on the content of fundamental constitutional rights."

Moreover, because defendants know that they may prevail on a threshold issue even when they are totally wrong on the merits, there is a significant reduction in the deterrent value that judicial enforcement actions would otherwise have.

These cases indicate the urgent need for corrective standing legislation. H.R. 7053, which is currently pending before this Committee, and S. 1393, the Senate version of that bill, would legislatively reverse the *Solomon* case and authorize the Attorney General to assert the rights of institutionalized individuals. While these are desirable pieces of legislation, they are only a start. What is needed is comprehensive standing legislation setting out precise standards under which citizens are assured of access to the courts to protect their rights. By incorporating meaningful and easy to apply standards, such legislation would eliminate the needless drain on the federal judiciary caused by the Supreme Court's confusion of the law of standing. Remedial legislation should, of course, insure that every injured citizen can invoke his or her right to a federal forum, and that no federal claim is rendered unenforceable because no plaintiff has standing to assert it. Senator Kennedy and Senator Metzenbaum are currently working on remedial standing legislation of the type described herein, and I urge the Congress as a whole to make such legislation a high priority when considering court reform legislation.

II. PUBLIC PARTICIPATION

The second area in which remedial legislation is needed is the area of attorneys fees. Recovery of reasonable attorneys fees is necessary to insure public participation in government decisionmaking because without access to attorneys, citizens do not have meaningful access to courts or administrative agencies. In *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court held that the plaintiff, who won an important case benefitting the public at large, could not recover the attorneys fees expended in that litigation. The Court thus failed to extend the legal doctrine articulated in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), under which the costs of litigation that benefits a large class of people are to be spread among that class of people through an award of attorneys fees.

The 94th Congress responded to the *Alyeska* case by enacting the Civil Rights Attorney's Fees Award Act of 1976, Public Law 94–559, 90 Stat. 2641, providing for court-awarded attorney's fees in successful suits filed under statutes including 42 U.S.C. § 1983, but the Civil Rights Attorney's Fees Act solves only part of the problem. Legislation providing for similar awards of reasonable attorneys fees in other administrative actions affecting consumer and citizen interest is still necessary. Our government has established an elaborate array of administrative agencies regulating nearly every essential consumer service. However, the success of the administrative process depends upon the ability of each agency to adequately consider the full range of interests affected by agency actions. The industries regulated by the agencies have large economic interests in the outcome of agency proceedings. Consequently, they hire attorneys and experts necessary to insure that their positions are fully and vigorously presented to the decision-making bodies.

Consumers are in a more difficult position, however. A single consumer rarely has enough of a financial stake in the outcome of an agency proceeding to warrant the expenditures necessary to insure that consumer interests are adequately presented to the agencies. Consequently, financial constraints limit the access of consumers and citizens to the administrative process just as surely as restrictive standing decisions have limited their access to courts. As a result legislation is also needed to help finance consumer participation in the administrative process.

In this regard, the Public Participation bills, H.R. 3361, authored by Representative Koch and Representative Rodino, and sponsored by 90 other Representatives, and S. 270, sponsored by Senator Kennedy and Senator Mathias, are high priority pieces of legislation. These bills allow agencies, in their discretion, to award citizens reasonable costs of participation in agency proceedings in amounts that correspond to the degree of assistance that they provide the agency. Moreover, those bills allow citizens to recover their costs in judicial review proceedings if they substantially prevail.

H.R. 3361 and S. 270 are important bills that are necessary to compensate for the inherent financial inequality between consumers and industry. Representative Danielson's Subcommittee on Administrative Law and Governmental Relation has shown a commitment to this proposal by holding extensive hearings on H.R. 3361 early this spring. The leadership of Representative Koch and Representative Rodino in developing this crucial consumer legislation also deserves special recognition. We expect that H.R. 3361 will be given high priority by the Judiciary Committee since it is essential legislation if the administrative process is to have the benefit of views from all affected interests.

III. CLASS ACTIONS

Class actions are a third area in which legislation is needed to undo the damage done by the Burger Court. The class action device was developed as a way to conserve judicial resources while enabling individuals with monetary claims too small to warrant the filing of a lawsuit to be aggregated in one action where the financial stake was large enough to warrant maintenance of the action. Class actions enable individuals to receive compensation for just claims that they would otherwise have to abandon. They also deter violations of law by corporations. Without the possibility of class actions, corporations would have a virtual immunity from liability as long as they take care not to cheat any one individual out of too much money and do not engage in con-

duct that is so outrageous that it will result in a criminal prosecution. Without class actions, unethical corporations have an incentive to exact millions of dollars in unlawfully obtained profits from defenseless consumers. However, through a trio of troubling decisions, the Burger Court has rendered consumer class actions virtually nonexistent in federal courts.

In *Snyder* v. *Harris*, 394 U.S. 332 (1969), the Court held that class claims could not be aggregated in order to satisfy the $10,000 amount-in-controversy requirement for federal jurisdiction. This meant that, except in areas where there was no amount-in-controversy requirement, small claims—the precise claims for which class action evolved—could no longer sustain a class action. Four years later in *Zahn* v. *International Paper*, 414 U.S. 291 (1973), the Court further held that even if the name plaintiff in a class action satisfied the $10,000 jurisdictional amount, no other individual could be included in the class unless he too satisfied the jurisdictional amount. In so doing, the Supreme Court displayed its morbid sense of irony in a manner that has now become characteristic. As a result of the *Snyder* and *Zahn* decisions, it is precisely those individuals who most need class actions that cannot bring them. Plaintiffs whose claims are large enough to proceed without the benefit of class actions have no trouble meeting the Court's requirements, while individuals with small claims cannot make use of the class action device even though the device was invented to protect them. Congress has now eliminated the jurisdictional amount requirement in federal question suits against the federal government, but that does not make it any easier to maintain class actions against corporate defendants—the defendants against whom class actions are most needed.

After the *Snyder* and *Zahn* decisions, class actions were as a practical matter limited to federal statutory cases such as antitrust actions and securities fraud actions where no jurisdictional amount was required. However, in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Supreme Court sounded the death knell for consumer class actions even in these limited areas. *Eisen* held that no class action could proceed without first giving notice of the action to each class member who could be identified. Mr. Eisen's claim was for $70 dollars so he was understandably reluctant to pay the $225,000 postage, printing, and other costs required to notify each of the 2,250,000 class members in his suit who could be readily identified. The *Eisen* decision has, therefore, erected virtually insurmountable barriers to the maintenance of consumer class actions seeking damages.

Remedial legislation is badly needed. If class actions are to serve any function at all, plaintiffs must be able to aggregate claims and must be allowed to maintain actions without first paying prohibitively high notice costs. The Federal Trade Commission Improvements Act, H.R. 3816 and S. 1288, would facilitate the maintenance of some class actions seeking damages for violation of FTC trade regulations and consent orders. This legislation would establish useful procedural mechanisms for the maintenance of class actions in certain limited areas. While The Federal Trade Commission Improvements Act is an excellent starting point, what consumers really need is comprehensive legislation authorizing class action to deter a wide range of corporate abuses. In developing such legislation, the *Class Action Reporter*, edited by Beverly C. Moore, which periodically discusses the complex issues raised by consumer class actions, should be invaluable. I urge the Committee to actively pursue legislation that will maximize the benefits that can be derived through class actions.

IV. ABSTENTION IN ACTIONS FILED UNDER 42 U.S.C. § 1983

A fourth area in which the Supreme Court's procedural decisions have been particularly deplorable is in the area of enforcement of individual constitutional rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. That law was enacted to provide plaintiffs with a readily available federal forum in which to present their claims that constitutional rights have been infringed by state officials acting under color of state law. As in the area of standing, however, the Supreme Court has systematically refused to adjudicate § 1983 claims through use of the technical doctrine of abstention. In the 1971 case of *Younger* v. *Harris*, 401 U.S. 37, the Supreme Court ruled that federal courts could not enjoin ongoing state criminal prosecutions but were required to abstain from deciding such cases. Since that time, in cases such as *Huffman* v. *Pursue Ltd.*, 420 U.S. 502 (1975), and *Trainor* v. *Hernandez*, No. 75-1407, 45 U.S.L.W. 4535

(May 31, 1977), the Court has extended the *Younger* decision to cases where the state action is civil as well as criminal. Moreover, in *Hicks* v. *Miranda*, 422 U.S. 332 (1975) and *Doran* v. *Salem Inn*, 422 U.S. 922 (1975), the Court held that abstention is required even when a federal court action is commenced before a state court action. Those cases create a wholly unjustifiable situation. Although, as the Court held in *Wooley* v. *Maynard*, No. 75–1453, 45 U.S.L.W. 4379, 4380 (April 20, 1977), it is beyond dispute that "*Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U.S.C. § 1983 for an alleged deprivation of federal rights," that guarantee has been rendered a hollow promise by recent decisions. Now, all that a state official has to do when charged with violation of constitutional rights in a § 1983 action is to commence a state court enforcement proceeding, and the federal court is immediately divested of jurisdiction.

A second way in which the Court has diluted the effectiveness of § 1983 is by declaring it unavailable in situations where it is most needed. In *Rizzo v. Goode*, 423 U.S. 362 (1976), for example, the Court dismissed for lack of a "case or controversy" a § 1983 action filed by minority plaintiffs against the mayor, city managing director, and chief of police of Philadelphia, seeking relief from what the trial court found to be a pattern of official harrassment directed at minority citizens including use of illegal force and other improper conduct. Moreover, in *Paul* v. *Davis*, 424 U.S. 693 (1976), a plaintiff wrongfully branded an "active shoplifter" in a flier circulated by the Nashville Police Department sued for relief in federal court for violation of his Fourteenth Amendment Due Process rights. The Supreme Court, however, held that § 1983 was unavailable for redress of an injury that merely injured an individual's reputation. If Due Process safeguards mean anything, however, they mean that the state cannot summarily brand an individual a criminal before any hearing.

H.R. 4514 and S. 35 are bills that address many of the abuses inflicted upon § 1983 by the Burger Court. They allow § 1983 actions to be commenced against municipalities that are responsible for prohibited actions rather than limiting actions, as the Supreme Court has, to suits against individual officials who do not have the ability to pay damages caused by their unlawful conduct. Those bills also ensure that § 1983 actions will remain available for redress of patterns of abuses such as those present in *Rizzo*, and Due Process violations such as those injuring the plaintiff's reputation in *Paul* v. *Davis*. The bills also limit *Younger* type abstention to state criminal actions filed before the commencement of a federal action so that citizens cannot be deprived of a federal forum for adjudication of their federal rights, and they prohibit abstention solely to clarify a question of state law since this type of abstention is needlessly time consuming and can result in unnecessary delay in the exercise of federal rights. The Supreme Court's inventiveness has made reform in the complex § 1983 area a difficult task. However, H.R. 4514 and S. 35 provide a good starting point and have the potential to restore much of the access to federal courts that has been cut-off by recent Supreme Court decisons.

V. IMPLIED CAUSES OF ACTION

The fifth way that the Supreme Court has restricted access to the courts is by sharply cutting back on the recognition of implied civil causes of action arising from the violation of criminal and administrative laws. The purpose of an implied cause of action is to allow those who may benefit from enforcement of criminal or administrative statutes to enforce those statutes through a civil suit. For example, if a common carrier overcharged a passenger in violation of a federal regulatory statute, an implied civil cause of action would allow the passenger to recover the overcharge, but if no cause of action were implied, the passenger would be left without a federal remedy and in many cases, with no remedy at all. Until recently the trend had been in the direction of expanded recognition of implied causes of action because they not only allow victims of unlawful conduct to sue for compensation, but they also increase law enforcement and deterrence. Despite these benefits, however, the Burger Court has gone out of its way to eliminate implied causes of action wherever possible.

The Court began to reverse the favorable trend in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), where passengers were not permitted to challenge a plan to discontinue certain railroad passenger services. The Court ruled that since the Attorney General and the

railroad employees' union had a statutory right to challenge the plan, implication of a civil cause of action for the passengers, who were most affected, would interfere with the statutory scheme. In *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 413 (1975), customers of a bankrupt securities broker were denied a civil cause of action to compel the Securities Investor Protection Corporation to take remedial action, even though that agency had been set up specifically to aid investors in such situations by way of funding and other means. Again the only offered rationale was the tenuous assertion that an implied cause of action would upset the federal regulatory scheme.

The most regressive of the Court's implied cause of action decisions, however, was *Cort* v. *Ash*, 422 U.S. 66 (1975). There the Court addressed the issue of whether shareholders had a cause of action to recover for the benefit of their corporation, illegal campaign contributions made by its officers in violation of the criminal provisions of 18 U.S.C. § 610. In this case, implication of a civil cause of action would not only have compensated the corporation for the unlawful acts of management, but would have significantly increased enforcement of campaign financing laws. There was no conflict with a federal enforcement scheme whatsoever, and there was no other policy reason for disallowing a private civil action. Nevertheless, consistent with its other decisions limiting access to justice, the Burger Court refused to allow the action to be maintained in federal court, again refusing to imply a cause of action.

In *Wolf* v. *TWA*, No. 76–966, (Mar. 7, 1977), the Supreme Court denied certiorari and thereby placed its stamp of approval on a Third Court decision denying airline passengers an implied cause of action under the Federal Aviation Act, 49 U.S.C. § 1373(b). The pertinent provision of that Act required airlines to provide the precise service set out in their tariffs. Although TWA's tariff provided for hotel accommodations as part of certain European tour packages, and although passengers were charged for those hotels, when passengers arrived in Europe they learned that their hotels were in distant cities and their reservations were subject to conditions that were impossible to comply with. For example, passengers landing in London were assigned to a hotel in Scotland, almost 350 miles away. Passengers landing in Athens were assigned to lodging in Kavalla, 480 miles away. Moreover, passengers had to check in by 6 p.m. on the first day in Europe, or lose their hotel accommodations for the entire tour. Despite these serious passenger abuses, no civil cause of action was allowed.

As these cases indicate, remedial legislation is needed in this area too. Such legislation should provide for expanded recognition of civil causes of action, a trend that was prevalent until the Burger Court began issuing its restrictive opinions. Congress should enact a statute declaring that whenever enforcement of a criminal or administrative law or regulation would benefit a citizen, that citizen has an implied civil cause of action, as well as standing to enforce that cause of action. This should be the case except in rare instances where implication of a private cause of action would seriously interfere with some superseding federal policy. Such legislation should be fairly easy to draft and should, therefore, be promptly enacted.

CONCLUSION

The Burger Court has been exceptionally successful in denying citizens access to the federal courts for the protection of federal rights. Moreover, it has pursued its political purposes in subtle ways by handing down technical, procedural decisions that have partially masked what the Court has been trying to do. Now, however, the Court has gone so far that its motives are being exposed by some members of the Court who find the Chief Justice's judicial abdication a new form of judicial aggression against crucial citizen rights. In a recent *Harvard Law Review* article, Mr. Justice Brennan has described the present situation in the following way:

"A series of decisions has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make. At the same time, the *Younger* doctrine has been extended to allow state officials to block federal court protection of constitutional rights simply by answering a plaintiff's federal complaint with a state indictment. And the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment.

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out even-handed justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence." [Brennan, W. J., Jr. "State Constitutions And The Protection of Individual Rights," 90 *Harv. L. Rev.* 489, 498 (Jan. 1977), footnotes omitted.]

In addition to the injustice of the Court's technical decisions, the manner in which they have been written has created a serious burden on the lower courts. Against this backdrop it is difficult to give much credence to the Chief Justice's claims that the federal courts are overworked. The first court reform measure that should be implemented by the Congress is statutory clarification of the justiciability standards that the Supreme Court has done so much to confuse. Such clarification will eliminate a substantial drain on federal judicial resources, freeing the lower courts to decide the merits of the cases presented to them. If caseloads are still too heavy, more judges should be appointed. Congress should also consider limiting non-essential areas of federal jurisdiction, such as diversity jurisdiction, by at least prohibiting suits filed in the plaintiff's home state. This proposal has already been supported by the American Law Institute. However, Congress should never be misled by the Chief Justice into thinking that federal rights or remedies must be curtailed in order to ease the burdens on the courts. The primary function of federal courts is the protection of federal rights and that function must always be preserved. The Chief Justice apparently believes that the people should adjust to the needs of the courts, but it is the courts that must adjust to the legitimate needs of the people. If the long-overdue quest for justice by the citizens of this country burdens the judiciary, the judiciary must expand its resources.

Finally, Congress should remember that the Burger Court has proven to be both clever and inventive in narrowing access to the courts. This means that as legislation is drafted to curb the many abuses of the Burger Court, care must be taken to close as many loopholes as possible. However, language being what it is, escape valves will likely remain, so it is essential that Congress elaborate on its legislation with comprehensive legislative history that will reduce any ambiguity which may be seized upon by the present Court majority to further its ideology of restricting access to justice. Thank you for the opportunity to testify about these issues which are among the most important structural reforms before Congress. It will take both stamina and conviction for the sponsors of remedial legislation to prevail over the opposition that these proposals will undoubtedly encounter in the Congress, but I urge each member of Congress to rise to the challenge presented by the Burger Court.

Mr. NADER. While legal commentators and the press have disagreed with many Burger court decisions on the merits, my criticism is of a more fundamental nature. The real damage caused by the Burger majority has resulted from its procedural decisions denying many injured citizens access to the forum created to protect their rights.

It is one thing to tell citizens their legal claims are without merit, but it is an entirely different matter to tell them that their claims will not even be heard. If a sheriff stood at the courthouse door and prevented citizens from entering to present their grievances, the public outcry would generate page 1 headlines all across the Nation.

The Burger court's restrictive decisions, on procedural grounds, are accomplishing the same thing by barring many citizens with meritorious claims from access to the Federal courts.

This is not a parallel with the criticism of the Warren court. The criticisms in my testimony are not criticisms so much of the merits

of the Burger Court's decisions, but criticisms of the way the Burger Court has told citizens around the country, "Thou shall not pass through these Federal courtroom doors"; that is, "Thou shall not even have an opportunity to present evidence and make the case."

To make matters worse, in issuing its restrictive decisions, the Court has misused the threshold doctrines of standing, ripeness, mootness and abstention, straining them beyond recognition in order to accomplish its ideological purposes.

Through arbitrary use of those doctrines, the Court has not only destroyed faith and confidence in the Federal judiciary, but has developed precedents that are thoroughly confusing to courts and litigants alike. The result is an enormous waste of judicial resources which now have to be expended on threshold issues rather than on the merits.

Many of the court's restrictive decisions have been rendered in spite of contrary expressions of congressional intent. For example, less than 2 weeks ago the court held in *Illinois Brick* v. *Illinois*, No. 76–404, 45 U.S.L.W. 4611 (June 9, 1977) that ultimate consumers who suffer injury in the form of higher prices as a result of illegal price fixing cannot sue under the antitrust laws to recover their damages. Only direct purchasers can sue, the Court says, but they have no incentive to do so since they merely pass the overcharges along to the ultimate consumer.

Aside from its senseless result, what makes the *Illinois Brick* case so distressing is its unjustifiable disregard of congressional intent. Less than a year ago, Congress enacted the Antitrust Improvements Act of 1976, Public Law No. 94–435, 90 Stat. 1383, one of the great monuments to Senator Phillip Hart's work in the Senate, expressly authorizing State attorneys general to represent their citizens in antitrust actions in a parens patriae capacity.

The *Illinois Brick* case directly undercuts the policy and intent of that important legislation by denying a State the right to recover antitrust damages for overcharges that will now be borne by all of the citizens of the State.

What we are witnessing is the emergence of an anticonsumer Supreme Court majority that is not content to merely rule against plaintiffs asserting individual and consumer rights, but insists on keeping those plaintiffs out of court altogether. The Burger majority is doing its best to render the judicial branch of Government a nullity as far as individual rights are concerned by refusing to hear the claims of those who have nowhere else to turn.

The Court's restrictive decisions have posed a challenge for this committee and for the entire Congress. Comprehensive legislation is needed to provide the Burger Court with the congressional mandate that it repeatedly invites as it slams shut one courthouse door after another.

Therefore, I ask the committee and the Congress to turn its attention to remedial legislation in the five areas in which the Court has most effectively restricted citizen access to justice.

I might add here that one of the things we have a right to be proud of in the common law in our country is how advanced we are compared to the common law of England and Australia and Canada.

The more you look at the Burger Court, the more it seems that these moves that the Court majority has been taking are designed to revert our state of the common law to many of the restrictive standards that now obtain in England and Canada.

The Supreme Court's restrictive standing decisions provide the most graphic example of the Burger court's campaign to deny access to needy citizens. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court showed an amazing lack of sensitivity to the plight of indigents unable to afford medical care, and turned a deaf ear on their pleas for relief.

There, individuals who could not afford to pay the high cost of hospital care sued to set aside a regulation granting favorable tax treatment to hospitals that would not treat indigents free of charge. They argued that since such favorable tax treatment was reserved for charities, the challenged regulations were not authorized by law.

Although those plaintiffs had an obvious stake in the enforcement of a law enacted to benefit them by providing a financial incentive for hospitals to treat them free of charge, the Supreme Court dismissed their case for lack of standing. That decision was a bitter pill for those plaintiffs to swallow.

Although they had enough at stake to file a lawsuit and take it all the way to the Supreme Court, the Burger majority told them that their interest was not sufficient for standing because they did not meet the Court's ill-defined concept of injury. Decisions such as *Simon* hardly inspire confidence in the fairness of the judiciary.

In *Warth* v. *Seldin*, the court held that minority plaintiffs who were the victims of housing discrimination did not have standing to test the constitutionality of the restrictive zoning ordinance causing that discrimination. In *United States* v. *Solomon*, the Federal District Court for the District of Maryland followed the Supreme Court's lead in this area by denying standing to the U.S. Attorney when he sought to protect the constitutional rights of institutionalized patients who could not assert those rights themselves.

The Burger majority even denied standing to Gary Gilmore's mother, holding that she did not have a legally cognizable interest in insuring that her son was not executed under a Utah statute that four Justices found to pose serious constitutional problems. The restrictive pattern of these cases is readily apparent.

The obvious harm caused by restrictive standing decisions is that plaintiffs with important legal claims are left without a forum in which to assert them. There are other dangers, however, that are less obvious but equally serious.

As a result of restrictive standing decisions, some legal issues can never be tested because no plaintiff will ever have standing to present them to the courts.

In *United States* v. *Richardson*, 418 U.S. 166 (1974), for example, a citizen challenged the secrecy of the CIA budget, alleging that the constitutional provision requiring a public accounting for Government expenditures was violated by the secret budget.

Mr. Richardson was denied standing even though the Court admitted that no other citizen would ever have standing. Thus, the secrecy of the CIA budget may well be unconstitutional, but the courts

will allow the practice to continue solely because no plaintiff will ever have standing to challenge it.

Standing is often combined with other justiciability defenses to further preclude or delay a hearing on the merits of important constitutional issues. Just a few weeks ago in *Clark* v. *Valeo*, No. 76–1105, 45 U.S.L.W. 3785 (June 6, 1977), a case handled by attorneys for Public Citizen, the Supreme Court affirmed a District of Columbia circuit opinion which refused to reach the merits as to a challenge to the one-house veto provision of the Federal Election Campaign Act of 1976, Public Law 94–283, 90 Stat. 482.

Ramsey Clark asserted standing as a political candidate whose actions were regulated by the act and as a voter suing under the "any voter" standing provision of the act. He asserted that the threat of a one-house veto undermined the effectiveness of the purportedly independent Federal Election Commission by causing the Commission to modify its regulations in order to prevent a veto.

The District of Columbia Circuit held that plaintiff Clark's claim was not ripe in the absence of an actual veto, even though he claimed that the same political pressure which undermined the independence of the Commission also precluded the need to veto the Commission's regulations. In addition, the District of Columbia Circuit completely ignored the injury asserted by the plaintiff in his capacity as a voter, a claim which he had explicit statutory standing to assert.

The *Clark* case is troubling in three respects. First, the Court refused to preserve the independence of a commission created to implement badly needed election reform. Second, the Court went out of its way to avoid a decision on the constitutionality of the one-house veto procedure, even though it is appearing with more and more frequency in congressional enactments despite its dubious constitutionality.

Perhaps your committee could study the one-house veto movement and issue a report. The one-house veto is already in many existing laws, and it is being proposed by some Members of the House, right across the board. It would be dismaying indeed to have so much legislation on the books without a very close look at the constitutionality of this procedure by the committee most appropriately structured to make this judgment.

Although the report would have no binding effect, it would certainly have considerable impact.

Third, the Court flaunted congressional intent by disposing of the case on threshold, justiciability grounds despite Congress' explicit directive not to do so, and its express desire to obtain a prompt ruling on any constitutional questions raised by the Federal Election Campaign Act.

Another harm inflicted by restrictive decisions concerning standing and other justiciability doctrines is the tremendous waste of resources resulting from the Court's strained application of those doctrines. In *Carolina Environmental Study Group* v. *the United States Nuclear Regulatory Commission*, 431 F. Supp. 203 (W.D.N.C. 1977), appeal pending in U.S. Sup. Ct., No. 77–375, a case again handled by public citizens attorneys, the constitutionality of the liability limitation in the Price Anderson Act for nuclear power plant accidents was challenged.

There, the district court had to conduct a 4-day trial on the issues of standing and ripeness alone before it could even consider the merits of the constitutional question. Although the district court ultimately invalidated the liability limitation, the threshold issues of standing and ripeness almost certainly will have to be completely reargued before the Supreme Court on appeal.

As Mr. Justice Brennan stated, dissenting in *Kremens* v. *Bartley* on May 16, 1977,

> I do not express this objection to the Court's opinion due to a concern for craft alone. Jurisdictional and procedural matters regularly dealt with by the Court often involve complex and esoteric concepts. An opinion that is likely to lead to misapplication of these principles will cost litigants dearly and will needlessly consume the time of lower courts in attempting to decipher and construe our commands. Consequently, I have frequently voiced my concern that the recent Art. III jurisprudence of this Court in such areas as mootness and standing is creating an obstacle course of confusing standardless rule to be fathomed by courts and litigants, see e.g., *Warth* v. *Seldin*, 422 U.S. 490, 519–530 (1975) Brennan, J., dissenting; *DeFunis* v. *Odegaard*, *supra*, at 348–350, without functionally aiding in the clear, adverse presentation of the constitutional questions presented. As written, today's opinion can only further stir up the jurisdictional stew and frustrate the efforts of litigants who legitimately seek access to the courts for guidance on the content of fundamental constitutional rights. These cases indicate the urgent need for corrective standing legislation, H.R. 7053, which is currently pending before this committee, and S. 1393, the Senate version of that bill, would legislatively reverse the *Solomon* case and authorize the Attorney General to assert the rights of institutional individuals.

While these are desirable pieces of legislation, they are only a start. What is needed is comprehensive standing legislation across the board setting out precise standards under which citizens are assured of access to the courts to protect their rights.

By incorporating meaningful and easy to apply standards, such legislation would eliminate the needless drain on the Federal judiciary caused by the Supreme Court's confusion of the law of standing. Remedial legislation should, of course, insure that every injured citizen can invoke his or her right to a Federal forum, and that no Federal claim is rendered unenforceable because no plaintiff has standing to assert it.

Senator Kennedy and Senator Metzenbaum are currently working on remedial standing legislation of the type described herein, and I urge the Congress as a whole to make such legislation a high priority when considering court reform legislation.

There is a lot af talk and deliberation, as you know, Mr. Chairman, in Congress on regulatory reform. There seems to be a cloak of understanding that part of the regulatory reform is to throw open the decisions of regulatory behavior to challenge on behalf of citizens all over the country.

You can see, for example, how often there would have been challenges to the Interstate Commerce Commission's restrictive rulemaking decisions if there had been broader access.

It is difficult for me to understand why so many Members of Congress, other than the obvious explanation of special interest pressure, don't realize that the way you reform Government is to open it up to citizen participation and rectification. The proposals before this committee are generic to that approach.

In addition to the standing restrictiveness of the court's decisions, we have the issues of public participation, where remedial legislation is needed.

The financing of public participation and attorneys fees legislation is especially important. Recovery of reasonable attorneys fees is necessary to insure public participation in government decisionmaking because without access to attorneys, citizens do not have meaningful access to courts or administrative agencies.

If there is an economic barrier of entry to the Government, there is a realistic barrier to the display of those rights. As the costs of entry increase, the fewer people in this country are able to afford to participate before the Federal Power Commission, or the Food and Drug Administration, or the Department of the Interior, or many other departments and agencies of Government.

The case of *Alyeska Pipeline Service Co.* v. *The Wilderness Society* is a 1975 case in which the Supreme Court held that the plaintiff, who won an important case benefitting the public at large, could not recover the attorney's fees expended in that litigation. I might note parenthetically that Aleyeska Pipeline can be renamed the Cost-Plus Co., in terms of its overruns. This provides a perfect illustration of what can happen when there is a lack of access to monitor such operations.

That case was won on the basis of an invocation of a Federal law of some decades standing, which should have been invoked by the U.S. Government officials in the first place, the private litigator had to do the job of the Government.

The 94th Congress responded to the *Alyeska* case by enacting the civil rights attorney's fee award of 1976 providing for court awarded attorney's fees to successful plaintiffs in some cases. But the Civil Rights Attorney's Fees Act, given its name, as well as its substance, solves only part of the problem.

Legislation providing for similar awards of reasonable attorney's fees in other administrative actions affecting consumer and citizen interest is still necesary. Our Government has established an elaborate array of administrative agencies regulating nearly every essential consumer service. However, the success of the administrative process depends upon the abiilty of each agency to adequately consider the full range of interests affected by agency actions.

The industries regulated by the agencies have large economic interests in the outcome of agency proceedings. Consequently, they hire attorneys and experts necessary to insure that their positions are fully and vigorously presented to the decisionmaking bodies.

Consumers are in a more difficult position, however. A single consumer rarely has enough of a financial stake in the outcome of an agency proceeding to warrant the expenditures necessary to insure that consumer interests are adequately presented to the agencies.

Consequently, financial constraints limit the access of consumers and citizens to the administrative process just as surely as restrictive

standing decisions have limited their access to courts. As a result, legislation is also needed to help finance consumer participation in the administrative process.

In this regard, the public participation bills, H.R. 3361, authored by Representative Koch and Representative Rodino, and sponsored by 90 other representatives, and S. 270, sponsored by Senator Kennedy and Senator Mathias, are high priority pieces of legislation.

These bills allow agencies, in their discretion, to award citizens reasonable costs of participation in agency proceedings in amounts that correspond to the degree of assistance that they provide the agency. Moreover, those bills allow citizens to recover their costs in judicial review proceedings if they substantially prevail.

H.R. 3361 and S. 270 are important bills that are necessary to compensate for the inherent financial inequality between consumers and the industry.

Mr. KASTENMEIER. May I just comment there. You are referring to H.R. 3361. You realize that that bill has been recommitted from the full committee back to the subcommittee. It failed before the House Judiciary Committee.

Mr. NADER. Yes, I remember that morning vividly.

Mr. KASTENMEIER. You didn't take note of it in your written statement at all. I was just wondering.

Mr. NADER. I hope it doesn't reflect the majority of the full committee present, however.

Class actions are a third area in which legislation is needed to undo the damage done by the Burger Court. The class action device was developed as a way to conserve judicial resources while enabling individuals with monetary claims too small to warrant the filing of a lawsuit to be aggregated in one action where the financial stake was large enough to warrant maintenance of the action.

Class actions enable individuals to receive compensation for just claims that they would otherwise have to abandon. They also deter violations of law by corporations. Without the possibility of class actions, corporations would have a virtual immunity from liability as long as they take care not to cheat any one individual out of too much money and not to engage in conduct that is so outrageous that it will result in a criminal prosecution.

Without class actions, unethical corporations would have an incentive to exact millions of dollars in unlawfully obtained profits from defenseless consumers. However, through a trio of troubling decisions, the Burger court has rendered consumer class actions virtually nonexistent in Federal courts.

The decisions in *Snyder* v. *Harris* and *Zahn* v. *International Paper*, eliminated class actions in most cases unless each plaintiff had at least a $10,000 claim. This undermines the whole purpose of class actions, which is to allow compensation for claims too small to warrant the filing of an individual lawsuit.

Moreover, in *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156 (1974) the Supreme Court sounded the death knell for virtually all remaining consumer class actions. Eisen held that no class action could proceed without first giving notice of the action to each class member that could be identified.

Mr. Eisen's claim was for $70 so he was understandably reluctant to pay the $225,000 postage, printing, and other costs required to notify each of the 2,250,000 class members in his suit who could be readily identified.

The need for remedial legislation in this area is obvious. If class actions are to serve any function at all, plaintiffs must be able to aggregate claims and must be allowed to maintain actions without first paying prohibitively high notice costs.

The Federal Trade Commission Improvements Act, H.R. 3816 and S. 1288, would facilitate the maintenance of some class actions seeking damages for violation of FTC trade regulations and consent orders. This legislation would establish useful procedural mechanisms for the maintenance of class actions in certain limited areas.

While the Federal Trade Commission Improvements Act is an excellent starting point, what consumers really need is comprehensive legislation authorizing class actions to deter a wide range of corporate abuses.

By the way, Mr. Chairman, this comprehensive class action reform was clearly prominent in 1968–69 in Congress. Many Members were talking about it. So, it is like a resurrection of something that has already been considered previously before the hand of the Nixon administration and the Burger Court came down on those aspirations.

In developing such class action legislation, the Class Action Reporter, edited by Beverly C. Moore, which periodically discusses the complex issues raised by consumer class actions, should be invaluable to the committee. I urge the committee to pursue legislation that will maximize the benefits derived through such class actions.

The fourth point deals with abstention in actions filed under 42 U.S.C. 1983. The Supreme Court's procedural decisions have been particularly deplorable in the area of enforcement of individual constitutional rights under the Civil Rights Act of 1871, 42 U.S.C. 1983. That law was enacted to provide plaintiffs with a readily available Federal forum in which to present their claims that constitutional rights have been infringed by State officials acting under color of State law.

As in the area of standing, however, the Supreme Court has systematically refused to adjudicate 1983 claims through use of the technical doctrine of abstention, under which the Federal courts defer to State courts rather than decide the cases presented to them.

In a series of cases concerning abstention discussed in section IV of my prepared testimony, the Supreme Court has enabled State officials to deprive citizens of their right to a Federal forum for protection of their constitutional rights. In most cases, State officials need only file a State action and the Federal courts are thereby deprived of jurisdiction.

H.R. 4514 and S. 35 are bills that address many of the abuses inflicted upon section 1983 by the Burger court. They allow section 1983 actions to be commenced against municipalities that are responsible for prohibited actions rather than limiting actions as the Supreme Court has done to suits against individual officials who do not have the ability to pay damages caused by their unlawful conduct.

The bills also prohibit abstention except where State criminal actions have been filed before the commencement of a Federal action so that citizens cannot be deprived of a Federal forum for adjudication of their Federal rights.

The bills also prohibit abstention solely to clarify a question of State law since this type of abstention is needlessly time consuming and can unnecessarily delay the exercise of Federal rights.

The Supreme Court's inventiveness has made reform in the complex 1983 area a difficult task. However, H.R. 4514 and S. 35 provide a good starting point and have the potential to restore much of the access to Federal courts that has been cut off by recent Supreme Court decisions.

The fifth way that the Supreme Court has restricted access to the courts is by sharply cutting back on the recognition of implied civil causes of action arising from the violation of criminal and administrative laws. The purpose of an implied cause of action is to allow those who may benefit from enforcement of criminal or administrative statutes to enforce those statutes through a civil suit.

For example, if a common carrier overcharges a passenger in violation of a Federal regulatory statute, an implied civil cause of action would allow the passenger to recover the overcharge, but if no cause of action were implied, the passenger would be left without Federal remedy and, in many cases, with no remedy at all.

Until recently the trend had been in the direction of expanded recognition of implied causes of action because they not only allow victims of unlawful conduct to sue for compensation, but they also increase law enforcement and deterrence.

Despite these benefits, however, the Burger court has gone out of its way to eliminate implied causes of action wherever possible.

The most regressive of the Court's implied caused of action decisions was *Cort* v. *Ash*, 422 U.S. 66 (1975). There the Court addressed the issue of whether shareholders had a cause of action to recover, for the benefit of their corporation, illegal campaing contributions made by its corporate officers in violation of the criminal provisions of 18 U.S.C. 610.

In this case, implication of a civil cause of action would not only have compensated the corporation for the unlawful acts of management, but would have significantly increased enforcement of campaign financing laws.

There was no conflict with a Federal enforcement scheme whatsoever, and there was no other policy reason for disallowing a private civil action. Nevertheless, consistent with its other decisions limiting access to justice, or blocking access to justice, the Burger court refused to allow the action to be maintained in Federal court, again refusing to imply a cause of action.

When you put all these cases together, Mr. Chairman, they amount to what we believe is a severe commentary on the Court's behavior in recent years. They are not, of course, as glamorous as a substantive case on the merits and, therefore, do not generate publicity, public commentary, and editorials.

Perhaps it is precisely because they are not glamorous and because they are less subject to public attention and public understanding due to their technical and esoteric nature that they are so insidious.

Remedial legislation is needed. Such legislation should provide for expanded recognition of civil causes of action, a trend that was prevalent until the Burger Court begin issuing its restrictive opinion.

Congress should enact a statute declaring that whenever enforcement of a criminal or administrative law or regulation would benefit a citizen, that citizen has an implied civil cause of action, as well as standing to enforce that cause of action.

This should be the case except in rare instances where implication of a private cause of action would seriously interfere with some superseding Federal policy. Such legislation should be fairly easy to draft and should, therefore, be promptly enacted.

Efforts should also be made at regulatory reform. The idea that regulatory agencies can possibly deal with the billions of injustices that operate out of our regulatory commissions and the companies that have such heavy sway over them is, I think, very unrealistic. Nonetheless, regulatory reform should be attempted not only to improve the agency's procedures and evidential processes, but to give people all over the country who are aggrieved rights and remedies for those grievances.

In conclusion, the Burger Court has been exceptionally successful in denying citizens access to the Federal courts for the protection of Federal rights. Moreover, it has pursued its political purposes in subtle ways by handing down technical, procedural decisions that have partially masked what the Court has been trying to do.

Against this backdrop, it is difficult to give much credence to the Chief Justice's repeated claims that the Federal courts are overworked. The first Court reform measure that should be implemented by the Congress is statutory clarification of the justiciability standards that the Supreme Court has done so much to confuse.

Such clarification will eliminate a substantial drain on Federal judicial resources, freeing the lower courts to decide the merits of the cases presented to them. If caseloads are still too heavy, more judges should be appointed.

Congress should also consider limiting nonessential areas of Federal jurisdiction, such as diversity jurisdiction, by at least prohibiting suits filed in the plaintiff's home State. This proposal has already been supported by the American Law Institute. However, Congress should never be misled by the Chief Justice into thinking that Federal rights or remedies must be curtailed in order to ease the burdens on the courts.

The primary function of Federal courts is the protection of Federal rights and that function must always be preserved. The Chief Justice apparently believes that the people should adjust to the needs of the courts, but it is the courts that must adjust to the legitimate needs of the people. If the long overdue quest for justice by the citizens of this country burdens the judiciary, the judiciary must expand its resources.

It is remarkable that in a society that is dedicated to endless growth of supply for automobiles, cosmetics, and turpentine, it suddenly become antigrowth when it comes to expanding the resources of our judicial branch, whose total budget for the Federal courts from the district court to the U.S. Supreme Court is roughly one-fifth of the cost of the Trident nuclear submarine. It runs $420 million a year. I

think that should be repeated again and again whenever Chief Justice Burger goes around the country bemoaning the overburdened condition of the Federal judiciary.

I think, as a matter of fact, that the Congress spends about one-fourth of the money it appropriates for our Federal court system promoting tobacco and cigarettes, including the sale of cigarettes overseas, as part of the food for peace program.

Against this kind of measure, one can have very little tolerance in terms of shortchanging our Federal judiciary's needs to meet the long overdue deployment of citizen's rights.

Finally, Congress should remember that the Burger Court has proven to be both clever and inventive in narrowing access to the courts. This means that as legislation is drafted to curb the many abuses of the Burger Court, care must be taken to close as many loopholes as possible.

However, language being what it is, escape valves will likely remain, so it is essential that Congress elaborate on its legislation with comprehensive legislative history that will reduce any ambiguity which may be seized upon by the present court majority to further its ideology of restricting access to justice.

Thank you for the opportunity to testify about these issues which are among the most important structural reforms before Congress. It will take both stamina and conviction for the sponsors of remedial legislation to prevail over the opposition that these proposals will undoubtedly encounter in the Congress.

I urge each member of this committee to rise to the both educational and advocacy challenge vis-a-vis their colleagues in the House and in the Senate that is presented by the decisions of the Burger court. It will take a great deal of education, persuasion, and advocacy to turn around Members of the House like Congressman Tom Foley if you are going to achieve a Democratic plus liberal Republican majority on behalf of these bills.

So, it is a time for secular proselytization for these kinds of reforms on a 1-on-1 basis throughout the corridors of the House of Representatives.

Thank you.

Mr. KASTENMEIER. Thank you very much, Mr. Nader, for that splendid statement. It was appropriate that these hearings be opened with a critical analysis such as you presented. I, for one, commend you for it.

In your opinion, why do you think that the Chief Justice or the majority of the Court have limited access to the Federal court system, or in some cases even to the Supreme Court? What is the purpose of it, if it really doesn't have that much to do with the result in each case and with the substance?

Mr. NADER. There are two layers of explanation, Mr. Chairman. One is that they have a very limited view of judicial resolution of society's disputes, and that they want more of the burden to be assumed by the legislature. But they have gone so far in some of their decisions, particularly with this *Illinois Brick* case, that perhaps a deeper rationale should be evoked, and that is that this is a Court whose majority is not one of people orientation. It is a classic example of how judges' ideol-

ogies and temperaments make law. This is a Court whose majority believes in preservation of the status quo and does not believe in reducing the economic barriers of entry to the judiciary and does not particularly relish having corporate power overturned in their chambers.

I would think that Mr. Nixon knew what he was doing when he was picking these gentlemen. He was picking them for their ideologies, and he was predictably right.

Of course, many Presidents do that on both liberal and conservative grounds, but this Court is quite different from the Warren Court. The Warren Court didn't avoid making decisions, and its decisions could be criticized on the merits, while this Court avoids making substantive decisions, but makes the decision nevertheless in favor of the status quo by erecting procedural barriers.

Mr. KASTENMEIER. I am sure that both the Chief Justice and—well, many, many others who will come before this committee and have used other forums in the past will say that the Court is overburdened in terms of work, referring to caseloads and the like. Indeed, I noted this morning that this copy of the Congressional Quarterly reports that since 1960 the district courts have had more than twice as many cases filed each year and more than twice as many pending. The court of appeals had 4,800 some-odd cases filed 15 years ago, and 18,400 filed this last year. Pending cases reflect that growth.

Now, leaving aside the question of whether we can create enough judgeships to handle this or not, there is a general complaint that one of the problems with the system is that it is severely congested with too many cases. Do you think that this is at least a major reason to justify anything the Court has done in terms of the points that you have made.

Mr. NADER. Congressman, I think former Justice Douglas' comment on the Supreme Court burden is relevant here. He was adamant in his position that the Court, as of 1975, was not overburdened. Chief Justice Burger thought it was. And in looking at the Federal judges around the country, I think one can say, show me an overburdened Federal judge and I will show you a whooping crane. That is how rare they are.

Look at their vacations. There are hard-working judges, to be sure. But I don't think that is generally an issue. Quite apart from whether we think judges are working hard or not, we have to ask ourselves, this is a big country, the gross national product is growing, the population is growing, and new rights are being funneled to the people across the board from Congress, why don't we have a commensurate index to expand the Federal judiciary like we have interms of other economic activities, especially when you consider the relatively trivial appropriation for that important branch of our Federal Government.

In short, I would ask Chief Justice Burger, if he were here, just what is his standard of measurement in terms of society's allocation of resources that leads him to the conclusion that the judiciary in this country at the Federal level is overburdened? Other than merely reiterating that statement as an article of faith to be intoned rather than a proposition to be examined, what is his standard of measurement? You know we look at the population; we see so many men and

women have to get to work every day, and therefore there needs to be so many cars or mass transits. What is the standard of measurement he is using?

Mr. KASTERMEIER. The fact is that the judicial system is a large one. It is not just what his own opinion is. It is, in part, a statistical problem that there is such controversy, and I am not sure that you agree that the Federal court system is congested?

Mr. NADER. In some areas of the country, it can be congested, as I say, by the massive litigation, like *A.T. & T.* or *IBM* cases, and, of course, the waiting time for cases is quite long, but my response to that is not to worry about curtailing rights or not expanding rights. My response is to say, are these rights legitimate? If they are, expand the judiciary or make it more efficient.

Mr. Spann has comments to make on how courts can be weighted down through interminable litigation and other issues.

Mr. SPANN. Mr. Chairman, one of the reasons it is difficult to take the Chief Justice's complaints seriously about the overworked nature of the Federal court is that the Supreme Court, itself, has done so much to generate what amounts to make work for the lower courts. For example, in the case of *Simon* v. *Eastern Kentucky Welfare Rights Organization*, one of the cases to which Mr. Nader alluded in his testimony, there was an endless amount of time virtually wasted on the issue of standing. That case was filed in July of 1971, and it was litigated until June 1976. The district court invalidated the challenged regulation on the merits. The court of appeals reversed, affirming the validity of the challenged regulation, and then it went to the Supreme Court where, after the benefit of two well-considered lower court opinions, the Supreme Court summarily reversed on the issue of standing, saying it didn't want to consider the merits because, for some reason these plaintiffs were not the proper plaintiffs. That was from 1971 to 1976. All of that litigation turned out to be worthless.

A similar case was *Warth* v. *Seldin*. That was litigated from January 1972 to June 1975, again on the issue of standing. And after the Supreme Court ruled that the plaintiffs in that case didn't have standing, another case pending in the same circuit, the case of *Evans* v. *Lynn*, had to be reconsidered by the second circuit, *en banc*, resulting in the ultimate denial of plaintiff's rights whose standing had initially been upheld. That process took 3½ years and involved 11 lower court judges. The 4-day trial in the district court case considering the constitutionality of the Price Anderson Act provides another example, 4 days spent just on the issues of standing and ripeness.

I litigate these issues. I used to spend a paragraph in a brief discussing what amounted to a minor issue, and now it has turned into a 4-day trial.

The other thing that is important to remember with respect to absolute caseloads is that despite the restrictive nature of the Court's decisions, the standards that it is using are by no means clear. What that means is that the same number of cases is still being filed. No one knows who is ultimately going to have standing and who is not. Consequently, all the cases are still filed and taken through the full level of appeals.

I personally believe that by simply providing clear standards that are easily applicable and that relate to what the real purpose of the lawsuit is, getting the merits decided, Congress can do a lot to eliminate the burdens on the Federal courts.

Mr. KASTENMEIER. One of the things we cannot do by simply adding judgeships is to relieve the burden on the Supreme Court of the United States. From a statistical viewpoint, the number of cases that the Court is required to handle has increased so greatly that some alternative will be sought to further limit access to the Supreme Court of the United States. I have no doubt that this will be one of the remedies which will be recommended for overload in the Supreme Court. There are others, of course.

The Commission on Revision of the Federal Court Appellate System, as you probably know, recommended the creation of a national court of appeals. What is your view about overload and possible congestion in the Supreme Court?

Mr. NADER. I think, Mr. Chairman, the Supreme Court is of mixed opinions on this. As I mentioned, both Justice Douglas and former Chief Justice Warren thought that proposal was unnecessary, and I must say I find their reasons quite persuasive. There may come a time when the Supreme Court really is burdened beyond the ability to improve its efficiencies and to do its work properly, but I don't think that has been the case up to now.

Mr. KASTENMEIER. In other words, you do not believe that they are overburdened.

Mr. NADER. As of now, yes.

Mr. KASTENMEIER. Although with regard to Justice Douglas, his own condition probably belies his own personal judgment on the matter. He may have fallen victim to overwork, himself.

Mr. NADER. He was very fast, that is true, in getting his work done.

Mr. KASTENMEIER. In terms of less formal litigation and the resolution of minor disputes in most States, the justice of the peace and some of the small courts have disappeared from the scene and the result is that many people perhaps have less practical access to dispute settling institutions. The Justice Department is presently considering the creation of neighborhood justice centers and the addition of them to the lower end of the scale to resolve small disputes and the like. What comments do you have on that?

Mr. SPANN. Mr. Chairman, we haven't studied many of the Justice Department's positions in detail, simply because we think it is premature at this time to get too enmeshed in the particulars of that legislation. The only point important to make is that those types of alternate forums may be useful in some limited circumstances, but it is important to keep Federal claims, especially Federal constitutional claims, in the Federal courts, the forum that was created to resolve those claims.

Mr. KASTENMEIER. We are not talking about constitutional problems here, but practical problems confronting the poor person or the person who doesn't want to get involved in extensive, sophisticated litigation. What about such a person? I am surprised you haven't given more thought to that.

Mr. SPANN. There may be some need for alternate forums. The problem is there tends to be overlapping between what appears to be limited rights and broader constitutional ones.

Mr. KASTENMEIER. One of the things that has been urged upon us is that we ought to create, similar to environmental impact statements, a provision for judicial impact statements by Congress. Every time we alter the law substantially with reference to litigation, criminal or civil, we ought to have a statement accompanying that to indicate what burden it might place upon the courts. Do you have any particular comments on that?

Mr. NADER. I think that is part of an overall procedure which Congress should follow in terms of developing an index for judicial branch expansion. That would be kind of one of the rivulets that would flow into the stream to determine the conditions of expanding the Federal judiciary appropriations, as well as, I might add, improving the efficiency of the existing Federal judiciary in handling its caseload.

Mr. KASTENMEIER. Thank you.

Incidentally, I think one of the causes for very substantial increased filings in the Federal system is probably the result of legislation over the past 10 or 15 years. Some of it, of course, came from concern for civil rights; some of it came from consumer and environmental interests, and from law firms and centers that have embraced those interests; part of it arose because of the Legal Services Corporation. The result has been to make access to justice somewhat easier, particularly for the poor in this country. I think that this is appreciated sometimes negatively. Even at this very time, we will have trouble extending the Legal Services Corporation just because there are many who feel we have over-done giving access to justice. They see an explosion of litigation in the country, and they fear or do not know at what point it may stop, or what it all means, and I know you made reference to one of our colleagues. I suspect that some of this is at the basis for the reservations expressed by some, and you wouldn't expect it.

Mr. NADER. My problem with that attitude, which I am sure you have confronted in your discussions with some of your colleagues, is that it is not paralleled with a concern about the explosion of injustice, the explosion of pollution, explosion of restrictiveness, explosion of price-fixing. I find a lack of symmetry between a concern about the explosion of litigation on behalf of victims, if indeed it can even be characterized that ambitiously, and the lack of parallel concern about the gross expansion of the many ways in our industrial society, and in our corporate society that people can be harmed, directly and indirectly. Unless you have that symmetry of concern, I don't think you can be charged with adequate sensitivity with the plight of the people here.

Mr. KASTENMEIER. Well, of course, I am in agreement with the fact that we need what we presently have and we must work to perfect our system, but I do perceive some difficulty with reference to persuading others that we need to make this effort.

I suspect, as regards many of the areas which are presently being litigated, that the root problems did not recently arise but that the problems went unheeded, unaided for many in our society until the last 15 or 20 years.

Mr. NADER. Exactly. I think there needs to be better statistics here, too, because a lot of times the so-called explosion of people oriented or initiated litigation against Government corporations is not an explosion at all.

You have heard, I am sure, of the so-called product liability crisis; I am sure you have. And up until 1 year ago I would hear these statements by insurance executives that there are a million product liability cases filed in court at a given time in the United States, and when I wrote to the insurance executives and asked them to substantiate it, they not only couldn't, but said they would drop using that estimate. And we don't really know exactly how many product liability cases are filed in the court, so there isn't enough thorough data-gathering process.

But we know enough about product liability to state unequivocally that there certainly is no more than 100,000 cases and maybe many less filed in the courts of our land. Yet, you see this is what feeds the exaggerated concern about expanding people's litigation.

We need, and I think the committee could make a major contribution to this, to try to set up a system of data-gathering that is long overdue. This shouldn't be anywhere near as difficult as some of the data that is gathered by the Bureau of Labor Statistics.

Mr. KASTENMEIER. Actually, I think our next witness will suggest we do such a study.

At this point, I would like to yield to my friend from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Nader, I commend you on the very fine presentation of five points. Let me start with the abstention decision in *Younger* v. *Harris* which was unanimous, 9 to 0 in 1971. Is it that decision that you oppose, or the extensions of that in subsequent years?

Mr. SPANN. Representative Drinan, we do not oppose the *Younger* decision. That seems to be compelled by a congressional enactment, the Anti-Injunction Act. What the problem is, is that it is now being extended into civil areas. Even though Younger is rooted in a concern that Federal courts should not interfere with ongoing State criminal prosecutions.

Mr. DRINAN. So the bill you refer to, H.R. 4514, which resides in Mr. Edwards' subcommittee, where I also serve, that does not overturn *Younger*?

Mr. SPANN. That is correct.

Mr. DRINAN. It overturns *Rizzo*.

Mr. SPANN. It does. *Rizzo* is a different type decision, but it does reverse that case.

Mr. DRINAN. Is H.R. 4514 satisfactory? Will that undo all of the adverse things you mentioned here?

Mr. SPANN. I am hesitant to say yes, not on a conceptual plane, but I think it needs to be redrafted for various technical reasons.

Mr. DRINAN. Thank you.

On another problem, Mr. Nader, I have a bill in, cosponsored by others, that would increase diversity, the sum involved from $10,000 to $25,000. Could that inadvertently harm the plaintiff that you mentioned on page 12, or should we also confer standing individually of the amount in controversy?

Mr. NADER. This is on page 12?

Mr. DRINAN. You noted that the Court has held a class claim cannot be aggregated. If we increase the amount to $25,000, will that inadvertently cause damage to the plaintiffs who will not have $25,000 and cannot aggregate it?

Mr. SPANN. Yes, the principle would operate the same way. But the $10,000 amount is such a bar that the——

Mr. DRINAN. We should simply try to confer jurisdiction without this?

Mr. NADER. Yes.

Mr. DRINAN. You mention the ALI has drafted one law, but has the ALI done model statutes on other points in this paper?

Mr. SPANN. That I don't know.

Mr. DRINAN. On another point, could the Congress retroactively give standing to the plaintiffs in the *Price Anderson* case? I am certain that the Supreme Court is going to decide no standing. Could we get a law through that would retroactively give them standing so that the Supreme Court then would have to go to the merits and validate or invalidate the liability limitation?

Mr. SPANN. I have never thought about that. My instincts tell me no. I think that the result would be accomplished just by enacting comprehensive standing legislation. That would send a message to the Supreme Court that in fact Congress wanted issues to be decided on the merits. I think it would have just as good an effect.

Mr. NADER. Even if it wasn't retroactive, Congressman, it would be very salutary, because another case could be brought with roughly the same facts.

Mr. DRINAN. That could be another 2 or 3 years. I wonder if you agree with the case on standing, *Schlesinger* v. *The Reservists Committee To Stop the War*. There the Court dismissed the complaint of a group of former members of the armed services who argued that 100 or more people in the Congress should not have dual membership as U.S. reservists and U.S. Members of Congress. The Court held these plaintiffs claimed no concrete injury and therefore they had no right to a declaratory judgment and a ruling on the merits. Would that also fall within your criticism on standing?

Mr. SPANN. Yes, it would. That is a uniquely bad case because the constitutional provision sought to be enforced in that case was one that basically was designed to prohibit conflicts of interest, and no one individual is ever going to have a claim to the unique kind of injury that the Supreme Court seems to have made a prerequisite to standing. That is an example of the case where no one will have standing unless Congress assigns standing to basically what is going to amount to a private attorney general.

Mr. DRINAN. Would you give me a case where the Court legitimately said this is not a case or controversy within the meaning of the Constitution?

Mr. SPANN. It is very difficult to find one. The Court has only said that once in the context of standing in the case *Simon* v. *Eastern Kentucky Welfare Rights*. The problem is that there are so many other cases that the Supreme Court has decided in recent years that have upheld standing where there has been only a very minimal amount of personal claim by the plaintiff that it suggests whatever the article III

minimum requirement is, it is low. In *Baker* v. *Carr*, the interest of a plaintiff in a fraction of a vote was sufficient to satisfy the jurisdictional requirement.

Mr. DRINAN. Mr. Nader suggests that section 1983 would justify redress for damage to one's reputation. Is that self-evident from reading the statute? "Every person who under any statute," and so on, "is subjected to a loss, deprivation of any rights, privilege on immunity by the Constitution. * * *" If a person has some damage done his or her reputation, would that bring it under 1983?

Mr. SPANN. *Paul* v. *Davis*, the case to which the two pieces of legislation relating to 1983 are directed, involved a very specific kind of damage. It was the damage that only the police department, an official body of the State, could inflict. They circulated flyers branding someone an active shoplifter, when that was not the case. I think that type of injury to reputation does amount to a deprivation of the constitutional right of due process.

Mr. DRINAN. In the case that you mentioned here, where the plaintiffs lacked standing to get back some of the unlawful contributions of corporations, I assume it will apply also to any action brought by plaintiffs to get back bribes given abroad. Some 300 or 400 corporations now have given overseas payments that are illegal. Is there a taxpayers' statute in existing law that could give standing to these shareholders? They don't sue as shareholders, but as taxpayers, they maintain that the IRS will be deprived of benefits because these corporations contributed illegally to campaigns or gave illegal contributions abroad.

Mr. SPANN. There is legislation being prepared that would accomplish that.

Mr. DRINAN. I would be very interested in having that.

Mr. NADER. It is doubtful whether a case like that could be sustained.

Mr. DRINAN. Would you recommend Federal taxpayers' standing?

Mr. NADER. Most definitely. We have an anomalous situation in the country where a pattern of Federal subsidies streams out under proper and improper conditions to corporate recipients, and the taxpayer has no standing to challenge the way these subsidies are parceled out, not just the congressional authority, but the way they are parceled out, like Penn Central, or agribusiness, and that means that nobody has standing.

The importance about these standing cases is when they shut one litigant out, they are shutting out the whole country.

Mr. DRINAN. I agree totally with you. At the same time, courts cannot just issue advisory opinions.

One last question, Mr. Nader: What is the trend nationwide in the 50 States? Does it go by partisanship, or does their ultimate ideology reflect itself in the decisions that they make with regard to standing and these other questions to which you ably addressed yourself?

Mr. NADER. I wish we had a survey, but we don't.

[Mr. Nader subsequently supplemented his statement with additional materials. See app. 3 at p. 301.]

Mr. DRINAN. I think that would be very important.

Mr. NADER. It would. The standing laws at the local State level of government have traditionally been ahead of the Federal Government.

But there is no survey State by State to try to answer the question that you ask.

Mr. DRINAN. I think it would be a very important one, because, as I see it, what the Burger court has done may be a reflection of and also a stimulus to the State courts to observe what the judges would call judicial restraints. In fairness to the Burger court, and more importantly to undestand the whole question, I would like to see any material that is around. I am certain that there have been observations on not merely the statutes that permit standing for taxpayers or other plaintiffs at the State level, but the way they are interpreted.

Mr. NADER. Let me make two points that might help. Most States do have taxpayer standing laws, and about a half dozen to perhaps 10 States have passed standing laws giving any citizen in the State the right to challenge an environmental abuse. Michigan led with that law, and that gives, for example, anybody in the State of Michigan the right to challenge a polluting process of any natural resource in Michigan, based on a trust theory. Basically, the people in the State are given a trust role to preserve the environment of the State. That, by the way, has not been enacted on a national level, the environmental standing suit.

Furthermore, there are some States that have far more advanced consumer class action rights, California, for example, Arizona, and there has been no parallel development at the Federal level in the consumer class action area. I suppose one can generalize, pending even further survey information, that the States have been ahead of the Federal Government before the Burger court, and now the Federal Government is falling even further behind the States because of the Burger court.

Mr. DRINAN. Thank you very much. It is an excellent statement. Thank you.

Mr. KASTENMEIER. The gentleman from Pennsylvania, Mr. Ertel.

Mr. ERTEL. Thank you, Mr. Kastenmeier.

I have appreciated some of the abuses you have addressed, but I wonder how we also limit where the courts are going to go, because I don't think there is always judicial remedy. You have explained where you want to expand, but do we just allow the courts to limit by themselves as they are doing now, or should we do that by statute, where they would go if we passed the statutes expanding the standing

Mr. NADER. Well, I think that raises two separate questions. The extent to which we want legislation to tamper with the common law—and I would be very opposed to that on most grounds; I think the common law, for example, of products liability, the common law in many areas, has been an extraordinary adaptable and flexible process and has really given the opportunity for a decentralized decisionmaking system, which are the courts, to flower.

You only have one Congress, but you have a lot of Federal district courts, and that is very important to have those decentralized points of access. In areas where the common law is considered inappropriate or has not developed, such as nuclear power, there needs to be clear statutory standards, and that is what has been lacking, and that is what the Supreme Court has been asking for in its quaint way in the *Alyeska* case and other cases.

They are saying that unless Congress explicitly instructs, we will not infer. So what the Court is doing is throwing down a strong gauntlet to the Congress, saying unlike prior Supreme Courts, they are not going to infer; they are going to require explicit instruction, and in the case of *Illinois Brick*, they told the Congress just what explicit instructions they require, extraordinarily explicit, if they could find a way around the recent Antitrust Improvement Act, which some of us thought was pretty explicit.

Mr. ERTEL. I guess, then, what you are saying to us is we just enacted legislation allowing the standing and the Court will limit that, based upon the national limits of judicial power as they see them at the present time?

Mr. NADER. Yes; they will then be thrown back on whatever interpretation they make of the Constitution. They won't be able to say Congress is the reason why we are not giving standing.

Mr. ERTEL. The second question is: How can we enact standing in relationship to the case in controversy? Can't they throw it out even though we enact a statute saying under the Constitution there is a case in controversy?

Mr. NADER. That is the residual parallel. Whether they go so far as to say no matter what you do, Congress, our interpretation of the Constitution is in the contrary direction, and then, of course, that will require a constitutional amendment.

Mr. ERTEL. Thank you.

Mr. KASTENMEIER. Thank you. On the last question, put another way than Mr. Ertel's question, do you see any practical limitation to access to the courts that even as a proponent of access to the courts you would impose? Do you see an outer limit at which point access becomes counterproductive in terms of society's——

Mr. NADER. Yes; I do. It obviously requires a case-by-case judgment on the facts, but one of the principles that would limit access legitimately is when you give the courts a job that they cannot do, when you give the courts a job, that recalls Roscoe Pound's important dicta that some things may be beyond the limits of effective legal action. And by the same token, some things may be beyond the effective limits of judicial action, and some would say certain foreign policy issues are beyond the limit of effective judicial action.

So there are cases obviously where the limits would have to be drawn. There is an important value, which, if it isn't taken to the extreme, the way the Burger court takes it, is to put the Congress or the State legislatures in a position of making a decision rather than avoiding. But especially in areas dealing with new technology, in areas dealing with parallels that aren't traditional tort parallels, and in cases involving drugs and radiation, these require a legislative involvement quite clearly.

I might add the *Reserve Mining* case is an example of that, where there is no ability for the State of Minnesota to prove some people are dying from the asbestos thrown into Lake Superior by the Reserve Mining Corp. at Silver Bay, Minn. The courts need, I think, statutory guidance on probability of harm as a basis for issuing injunctions rather than to have to prove existing harm. There is about a 30-year incubation period before asbestos exposure resolves itself into asbestosis or cancer.

Mr. KASTENMEIER. As a followup on that and the last question, I take it you wouldn't put in the same category as those matters outside the normal competence of the judiciary the series of cases that we are looking at in terms of civil rights of institutionalized persons. In several notable instances Federal judges have had to operate institutions on their own motions, so to speak, having found that those institutions violated the civil rights of those incarcerated therein. As a consequence, for example, Judge Johnson in Alabama, and others, have taken very great steps with respect to judicial review and have taken over actual operation of institutions. Doesn't this sort of test the limit of the judiciary in terms of its normal functions?

Mr. NADER. Yes, it does, and it raises a very interesting arena for judicial activism, that is, if the legislature has consistently performed such an irresponsible role, vis-a-vis these institutions, does a caretaker role appear for the judiciary to command, in effect, as a sort of judicial rebuke to the legislative process until the legislative process is provoked by that caretaker role into action, and that is a tough area; that is a real gray area, but it is bolstered on behalf of judicial activism on the following principle: that in our country the last resort of justice within the legal process is the court. The last resort. And if you are part of the branch of government where you are the last resort, beyond which may be death, destruction, or violence, whether by victimization, or by riot, one can envision that kind of caretaker role being legitimized as displayed by Judge Johnson.

Mr. KASTENMEIER. We appreciate your testimony. In fact, the committee is very indebted to you, Mr. Nader, and you, Mr. Spann, for your appearance this morning. You have enabled us to see some of the problems that confront us here, and as we proceed in the weeks and perhaps even months to come to fully explore the question of access to the Federal judicial system and the State judiciary, we will draw upon your testimony.

Mr. NADER. I might add, Congressman Kastenmeier, we have a few insertions to submit for the record.

Mr. KASTENMEIER. Without objection, those additions will be received and made a part of the record.

Mr. NADER. Thank you. I would like to make one more brief point on the importance of data collection. I am sure we have all heard in recent years the statement that is repeated again and again that only the rich and the poor in this country have access to the courts. It is the middle class that is denied. Well, I would not deny that the middle class is denied, but I would say the easy assumption that a mere 2,000 or 2,200 legal services attorneys being able to handle the legal problems of 40 or 50 million people is ascribing almost superhuman productivity to that group of lawyers, and that illustrates again how important it is to have data, because I am sure many votes in the House are based on that kind of easy slogan, particularly during the backlash against the legal services a few years ago that you fought so valiantly against. You see a kind of mood sweep across the House based on easy slogans like that, that should be encountered by some hard data.

Mr. KASTENMEIER. I agree, and I am sure our next witness is in agreement with that. Thank you.

Mr. DRINAN. Thank you very much, Mr. Nader.

Mr. KASTENMEIER. Next we would like to call the man who runs the Legal Services Corporation, Mr. Thomas Ehrlich, who together with Mrs. Alice Daniel, are most welcome. They have been before us many times.

The Chair is appreciative of their patience and regretful that we must take them from other duties, the Congress being a three-ring circus as far as preoccupations with appropriations, authorizations and the like. Nonetheless, your willingness to come this morning and to share with us your views on the state of the judiciary and access to justice is appreciated.

TESTIMONY OF THOMAS EHRLICH, PRESIDENT, LEGAL SERVICES CORPORATION, ACCOMPANIED BY ALICE DANIEL, GENERAL COUNSEL

Mr. EHRLICH. Mr. Chairman, members of the subcommittee, I am very pleased to be here on behalf of the Legal Services Corporation staff and to discuss with you problems of access and congestion in the Federal judicial system. We have a prepared written statement which we would like to submit for the record, together with two papers commissioned by the corporation's research institute on legal assistance concerning the subject of today's hearings. (For the latter papers, see Appendix 4.)

Mr. KASTENMEIER. Without objection, the statement and appendices will be received and made a part of the record.

[The prepared statement of Thomas Ehrlich follows:]

STATEMENT OF THOMAS EHRLICH, PRESIDENT, LEGAL SERVICES CORPORATION

Mr. Chairman and Members of the Subcommittee, I am pleased to accept your invitation to testify on behalf of the Legal Services Corporation staff regarding the problems of access and congestion in the federal judicial system. The ills of that system have a severe impact upon the ability of poor people to seek redress of their grievances.

Historically, federal courts have provided the most effective forum for the poor to enforce their federal constitutional and statutory rights. The federal courts have often been the last hope for vindication of the rights of the indigent. Denial of access to that system deprives the poor of justice; delay in obtaining relief and the inability of overloaded courts to give sufficient attention to cases important to the poor may result in equally serious deprivations. It is essential, therefore, to solve the current problems of access and congestion in the federal courts. My comments will seek to provide a framework for discussion of those problems and possible solutions.

I.

The Legal Services Corporation is a private, non-profit corporation created by Congress in 1974 to support legal assistance for those unable to afford an attorney. This program is essential, the Congress declared, "to provide access to the system of justice in our nation for individuals who seek redress of grievances . . ."

To carry out that mandate, the Corporation now makes grants to 315 independent legal services programs located in each of the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and the Trust Territory of the Pacific Islands (Micronesia). There remain, however, nearly 16 million poor people who are entirely without access to legal services when they face a legal problem—either because they live in areas where no legal services programs exist, or because the programs in their areas are so severely underfunded that their access

to those programs is only theoretical. For these persons, justice is beyond reach and the fundamental promises of equal access to the legal system and equal justice under law have not been kept.

To help correct that grim reality, the Corporation has established a minimum short-term goal of providing the equivalent of at least two lawyers for each 10,000 poor people nationwide by 1979. With adequate funding, we are confident we can reach that goal.

We are, moreover, taking steps to ensure that the legal services available to poor people are of the highest quality. The Corporation offers substantial training and technical support to each program that it funds, and we are undertaking a national recruiting effort to attract the most able lawyers to legal services work. We are also conducting a Congressionally-mandated study of legal services delivery that will enable us to provide service in the most economical and effective ways possible.

Providing a minimum level of high-quality legal assistance to those in our society least able to afford that assistance is the most pressing of the Corporation's priorities. This Subcommittee—and you particularly, Mr. Chairman—helped immensely in reaching that goal with strong support for our appropriation request and our authorization bill, H.R. 6666. Personally, and on behalf of all those in legal services, we are most appreciative.

II.

Achieving the Corporation's short-term goals will not, however, make equal justice a reality. Equal justice requires much more: Substantive laws that do not discriminate against the poor; even-handed administration by government officials and private individuals and entities; a system of dispute resolution that assures equality in presenting each side of a dispute; and a legal system that provides fair, speedy, and humane means of resolving disputes. My comments today focus particularly on the federal system of dispute resolution and the federal role in improving our system of justice.

Most of the legal problems encountered by poor persons do not lead to litigation in the federal courts. The cases brought by legal services lawyers in those courts, however, are of enormous importance, not only to the individuals involved but to the poor generally and to the public at large. A large share concerns the wide range of administrative benefits established under federal law. Scores of landmark cases in this and other areas have been brought throughout the federal judicial system by legal services lawyers.

Many of the problems that the poor face daily—such as denials of social security or black lung benefits—involve difficult and important issues of law and complex factual disputes. Judicial review of decisions by federal administrative agencies is important to the vindication of individual rights and to the supervision of the procedures and rules of the agencies themselves.

The opportunity to obtain judicial review of the administration of the social security system, for example, has been vital to the power. In recent years the Social Security Administration was affirmed in only half of all judicial actions to which it was a party. In 1975 the affirmance rate fell to a low of 47.2 percent. The remaining cases were either remanded or reversed. Of those remanded, approximately 70 percent were ultimately decided in favor of the claimant. These are cases that have been subject to four administrative levels of review prior to court action: initial determination, reconsideration (an informal administrative review), formal hearing before an administrative law judge, and review by an Appeals Council. By contrast, last year, the courts of appeals affirmed 78 percent of all civil cases appealed from federal district courts and 81 percent of all administrative cases.

Social security and black lung cases illustrate one reason why litigants seek a federal forum and why access to that forum is so important for the poor—the failings of administrative agencies. There is an equally important reason: Many state judicial systems are inadequate and antiquated. Discovery is extremely difficult in some. In others, class action relief is virtually impossible or is severely restricted. In many there are serious administrative inefficiencies. Delays and congestion often pose even greater problems within the state systems than in the federal courts. Moreover, many state court systems have not been adequately responsive to the rights and entitlements of the poor. They have not provided a forum for vindication of state created rights or federal statutory and constitutional rights.

We are seriously concerned that important rights of poor people are being jeopardized because of restrictions on access to federal courts. Those rights are also threatened because federal litigation is too costly and too slow. The effect on the poor of delay and high costs is devastating. If the poor must wait months—even years—to be heard at the trial level, they may be without the very means to exist: food, shelter, and clothing.

The problem is exacerbated by delays in the courts of appeals. In the Ninth Circuit, for example, the average time in 1974 from the filing of a notice of appeal to the decision of the court in cases resolved after oral argument or submission on briefs was 449 days; in cases decided by a signed opinion, rather than by a per curiam or memorandum order, the average time was 565 days.

In such circumstances, even a poor person who prevails may be denied justice.

III.

In our view, permanent solutions to the problems faced by the poor in seeking access to—and justice in—the federal courts will not be resolved by patchwork solutions designed without careful analysis and thorough examination. A comprehensive approach is needed. That approach should begin with a major study of the problems of access to the federal courts, the causes of congestion, the costs to the litigants, the effects on the entire judicial system of proposed changes, and the impact of those changes on the vital role of judicial review. We urge this Subcommittee to take the lead in commissioning that study. We will be pleased to help in any way we can.

As a first step, a detailed statistical analysis is needed of the various categories of cases in the federal courts and the actual judicial time and resources spent in each category and court throughout the federal system. It is not enough simply to consider the number of new filings. Only by a full-scale review can the real problems be isolated and a comprehensive approach developed. Currently, insofar as we are aware, no such analysis exists, and we hope the Subcommittee will sponsor it.

The comprehensive study we are suggesting should also examine the procedures of the administrative agencies that produce large numbers of cases for judicial review. It may well be possible to simplify those procedures and reduce litigation and yet be fair to those whom the agencies are designed to help. A number of legal services lawyers, for example, have told me that the complexity of the rules governing eligibility for social security benefits makes judicial review in a substantial number of cases virtually inevitable. There are fourteen volumes of the Social Security Claims Manual from which agency workers make decisions. These rules, as well as the agency's often complex procedures, require subtle and difficult judgments—such as whether the claimant can engage in substantial gainful work—that may sometimes be beyond the competence of either the administrative or judicial process. Simplification of rules and procedures, however, must not result in arbitrary exclusion of persons who are needy and who were intended to be assisted by the programs.

The study we suggest must look to future as well as past causes of the current crisis. New dispute settlement mechanisms are needed that assure wide access to justice for all citizens without restricting the rights of any group. Ombudsmen, arbitrators, mediators, and conciliators can all be effective means of dispute settlement in a range of cases—both complex and simple.

More can and should also be done with community courts and other institutions for the settlement of disputes that are not well-suited to judicial processes or in which formal procedures are unnecessary. A number of complex matters—anti-trust and securities cases are examples—may require technical expertise better provided by decision-makers who are not judges. The federal government should have an important role in this area—encouraging experimentation. The Neighborhood Justice Center project being undertaken by the Justice Department is one example. Others would involve creative methods of dealing with the so-called "large cases" that often consume the full time of a district judge for a period of months or years.

Problems exist with many of the non-judicial means of resolving disputes and we should not ignore them. Remedies may be limited and difficult to enforce. To be effective, these approaches must actually solve conflicts, not just ameliorate surface issues. Another concern is how to assure informed consent to alternative approaches and to avoid coercion. Of central importance is participation by laypersons in both planning and decision-making regarding the establishment of

these approaches. Finally, there is a danger that new forums will become institutionalized "screening mechanisms" for moving cases out of the court system instead of attempts to deliver justice with better results and greater access by the public.

The comprehensive study we propose should recognize the vital role that the federal courts play in vindicating the rights of all citizens and in assuring the rule of law in the operation of other branches of government. For the poor this role is essential; their lives are governed extensively by government agencies and their access to those making decisions is often limited.

Faced with so many burdens on our legal system the temptation of many is to favor disenfranchising from the legal system those without muscle to push—particularly the poor and minorities. That temptation must be resisted. Changes that single out one group or class for disparate treatment must be avoided, and reform must be applied equally to all classes of litigants and to all types of cases. The problems of the poor are as important and deserving of judicial attention as the problems of other groups.

IV.

Within this broad and comprehensive framework, we suggest some possible specific reforms that this Subcommittee might consider. In our view, the problems of restricted access and court congestion are directly linked and cannot be resolved separately. The solution to one problem must be analyzed in relation to the other.

First, we suggest that the Subcommittee explore means of handling legal problems through techniques of aggregation that avoid the need for individual handcrafting. Dependence on litigation to develop the law imposes heavy costs on the individuals involved, though the benefits of those suits are spread widely. As a result, the law in many areas does not develop at all in response to new problems and needs—few people can afford to sue. And the wealth of those who can afford litigation inevitably distorts the path of the law.

Aggregate handling generally means cheaper handling because of the economies of scale. But even more important than those benefits, aggregation is a way to bring the collective interests of society and the individual interests of disputants more into congruence. By spreading resources more equitably, it can lead to equality between adversaries not possible if one person acts alone.

Of immediate concern in this area are the restrictions on class actions imposed in recent years. It is often true that the only means for the poor to obtain judicial relief is through class actions. The inability to recover modest sums on the part of large numbers of poor people may well mean that they sink further into poverty. Many rights cannot be protected without classwide enforcement. We hope the Subcommittee will consider legislation to allow members of a class to aggregate their claims in order to reach the amount in controversy necessary for federal jurisdiction. We also urge examination of the current notice requirements and the development of practical notice procedures that do not impose inappropriate burdens upon the poor and others seeking to vindicate the rights of a class.

Second, we hope the Subcommittee will consider legislation to authorize the award of attorneys' fees in a number of situations in which that is not now possible. Substantial progress was made in passage of the Civil Rights Attorneys' Fees Awards Act of 1976, but that Act does not reach most cases brought on behalf of poor people against federal agencies, since they do not arise under one of the civil rights laws covered under the Act. Moreover, the Act does not appear to include the costs of proceedings before federal agencies.

Currently, 28 U.S.C. § 2412 bars awards of attorneys' fees against the United States. We suggest examination of legislation that would provide for an award of attorneys' fees against the United States when they would be available against a private party, and other litigation expenses, including expert fees. Such legislation could also grant express authority to all federal agencies to award attorneys' fees, expert's fees, and other costs of public participation in federal agency proceedings, including rulemaking, ratemaking, licensing, and adjudicatory proceedings.

Third, a number of procedural barriers have been erected to prevent federal courts from deciding the substantive merits of a case. Often these barriers—such as standing, abstention, exhaustion of administrative remedies, and comity

doctrines—have not prevented ultimate adjudication of the issues, but instead have created long delays before the substantive issues were resolved. In many instances, these doctrines have resulted in greater expenditure of judicial resources and time than is necessary to resolve the merits, thus further increasing the problems of congestion and delay. We urge the Subcommittee to consider legislation to remove many of these restrictions, to ensure standing for individuals who are aggrieved and have an actual controversy; and to prevent unnecessary referral to administrative agencies or state court systems.

Fourth, a careful examination of federal jurisdiction statutes is needed. This study should lead to elimination of cases that do not belong in federal courts. In my own view, diversity cases are in this category. The study should also provide a sound basis for removing artificial barriers to those seeking to vindicate federal statutory and constitutional claims. Cases challenging federal agency procedures and policies, for example, should be heard in federal courts without delay and in a manner that assures effective remedies.

Fifth, legislation should be considered, and funds made available through the Justice Department and other agencies to improve the administration of state court systems and make them more attractive for vindication of citizens' rights. Planning grants for efficient administration and for reform of procedures and rules are among the many possibilities.

Sixth, the selection process for appointments to the federal bench should assure that lawyers sympathetic and understanding to the poor are appointed. Increased numbers of women and minority judges are particularly needed.

Seventh, many proposals have already been made to reduce significantly the number of federal court cases. These include: granting jurisdiction to the Court of Claims over F.E.L.A. cases; removing admiralty cases on which there is concurrent state jurisdiction; restricting removal jurisdiction; and compulsory arbitration of cases involving predominantly factual disputes—such as land condemnation. We have not analyzed each of these suggestions. Indeed, the factual predicate for such anaylses is the careful review of the actual workings of the federal courts that we have urged—what kinds of cases cause the real bottlenecks. But we urge the Subcommittee to review these suggestions in that context.

Eighth, we hope the Subcommittee will consider broadening the scope of the federal in forma pauperis statutes to include all expenses of litigation, including both fees and costs due to officers of the court, and payment of costs to third parties or those that could be recovered as taxable costs. This would obviously require sufficient appropriations to pay for these expenses. General standards of indigency would also be needed, although flexibility and discretion could remain in the judicial officers hearing the issues.

Finally, consideration should be given to legislation limiting the states' immunity from payment of welfare and other administrative benefits that have been illegally withheld. The constitutional basis for such legislation is by no means free from doubt, but the issue is of vital importance to poor people whom those programs were intended to benefit. Careful consideration should be given, therefore, to ways of providing effective remedies for unlawful conduct by state officials.

V.

Responding to the problems of court congestion and restricted access offers an important opportunity to improve our system of justice. We can meet this challenge if we adopt a comprehensive approach and creative solutions. But there are dangers as well. In the cause of easing the congestion of the federal courts, we must not create the perception, let alone the reality, of second class treatment or cheap justice for the poor.

The poor have long sought effective access to the federal system of justice in general and to federal courts in particular. We must not relegate their cases and problems to institutions and tribunals that appear to be set up only for them and the other participants—the government, corporations, or others—avoid.

Finally, as we work toward solutions we must also make sure that we are not undermining the substantive rights of citizens or imposing procedures that are more repressive and less satisfying to some segments of our population. The protections of process are important. Recent expansion of the due process clause was not primarily a result of vested interests protecting their own; it was a

result of the poor seeking protection from arbitrary government and private action and an opportunity to be heard before their entitlements and property (no matter how small they may appear) were taken away. In our efforts to solve the problems we face, we should not undermine the protections fought for by those most in need of protection.

During the past weeks, the Corporation's Research Institute on Legal Assistance sponsored a seminar for a number of lawyers in legal services on various problems relating to access to the federal courts. The Institute also commissioned two papers by Michael Trister on these problems, which I will be pleased to submit for the record. These research efforts are vital and we expect them to continue. In view of the Subcommittee's interest in this area, we look forward to sharing our views with you again as they are developed, and hope that you will also solicit the views of legal services lawyers who are involved daily with many of the problems you are considering.

Mr. EHRLICH. Thank you, Mr. Chairman. Now, if I may, I want briefly to review some of our key concerns, and then my colleague, Alice Daniel, general counsel of the corporation, and I will be pleased to answer your questions. The Federal judicial system is in serious trouble. The impacts of its ills have a severe impact on the ability of poor people throughout the country to seek redress of their grievances. That is our clear conclusion. We look forward to working with you in seeking corrective measures.

As you well know, the Legal Services Corporation is charged by Congress with supporting legal assistance for those unable to afford an attorney. "The program is essential," the Congress declared, "to provide access to the system of justice in our Nation for individuals who seek redress of grievances. * * *" This subcommittee—particularly you, Mr. Chairman, and your colleague, Mr. Railsback—have helped immeasurably in the efforts of the Corporation to provide high quality legal assistance to those in our society least able to afford that assistance. You have provided strong support for our appropriations request and for our authorization bill, H.R. 6666. Personally, and on behalf of all those in legal services, we are most grateful.

The Corporation's short-term goal, as you know, is to provide minimum access to all poor people, and it is an essential goal. But achieving that goal will not make equal justice a reality. Equal justice means much more. It means substantive laws that do not discriminate against the poor. It means evenhanded administration by Government officials and private individuals and entities. It means a system of dispute resolution that assures equality in presenting each side of a dispute. It means a legal system that provides fair, speedy, humane, and compassionate means of resolving disputes. My comments today focus particularly on the Federal system of dispute resolution and the Federal role in improving our system of justice, though by that focus I don't mean to suggest that reform is unnecessary in other dimensions of the legal system.

Many of the problems that poor people face daily—such as denials of social security and black lung benefits—involve difficult and important issues of law and complex factual disputes. Judicial review of those matters is essential. In recent years, for example, the Social Security Administration was affirmed in only half of the cases to which it was a party. By contrast last year, the courts of appeals affirmed 78 percent of all civil cases appealed from Federal district courts and 81 percent of all administrative cases.

So the failings of administrative agencies, therefore, are one reason why access to the Federal courts is so important for the poor. There is an equally important reason: Many judicial systems on the State level are inadequate and antiquated.

We are seriously concerned that vital rights of poor people are being jeopardized because of restrictions on access to Federal courts. Those rights are also threatened because Federal litigation is too costly and too slow. The effect on the poor of delay and high costs is devastating. In our view, this is the core of the congestion problem. If the poor must wait months—even years—to be heard at the trial level, they may be without the very means to exist—food, shelter, and clothing. This is the perspective we hope the subcommittee will adopt. This is the perspective from which we speak.

In our view, the problems faced by the poor in seeking access to—and justice in—the Federal courts will not be resolved by patchwork solutions designed without careful analysis and thorough examination. The single key message we bring is that a comprehensive approach is needed. That approach should begin, we believe, with a major study of the problems of access to the Federal courts, the causes of congestion, the costs to the litigants, the effects on the entire judicial system of proposed changes, and the impact of those changes on the vital role of judicial review. We urge the subcommittee to take the lead in commissioning that study, and we will be pleased to help in it.

As a first step, a detailed statistical analysis is needed of the various categories of cases in the Federal courts and the actual judicial time and resources—not simply the number of cases—spent in each category in each court throughout the Federal system. Currently, as far as we have been able to find out, no such analysis exists, and we very much hope the subcommittee will sponsor it.

The kind of comprehensive study we are urging should also examine the procedures of the administrative agencies that produce many cases for judicial review. It is possible, we think, to simplify those procedures and reduce litigation and yet be fair to those whom the agencies are designed to help. Over and over again, I have heard during the past year from legal services lawyers that the complexity of rules governing eligibility for social security benefits, for example, makes judicial review in most cases simply inevitable. Simplification of rules and procedures is needed and is possible.

Simplification must not however, result in arbitrary exclusion of persons who are needy and are intended to be assisted by the programs. But to the extent that legal problems that lead to litigation can be prevented, we will be taking major steps toward easing court congestion. There are a good many areas, in our view, in which elements of potential legal controversies can be prevented. Preventative steps are much needed, and the rules and procedures of administrative agencies are a major area for that reform.

The study we suggest should look at future as well as past causes of the current crisis. New dispute settlement mechanisms are needed that assure wide access to justice for all citizens without restricting the rights of any group. Ombudspeople, arbitrators, mediators, and conciliators, all those and others can be effective means of dispute settlement in a range of cases—both complex and simple.

More can and should be done as well, we think, with community courts and other institutions for the settlement of disputes that are not well suited to judical processes or in which formal procedures are unnecessary. A number of complex matters—antitrust cases and security cases are examples—may require technical expertise better provided by decisionmakers who are not judges. The Federal Government should have an important role in this area, a role of encouraging experimentation. The Neighborhood Justice Center project being undertaken by the Justice Department is one example. Others involve creative methods of dealing with the so-called "large cases" that often consume the full time of a district court judge for a period of months or even years.

Problems do exist with many of the nonjudical means of resolving disputes, and we should face those and face them squarely. Remedies, for one thing, may be difficult to enforce in a limited scope. To be effective, these approaches must actually solve conflicts, not just ameliorate surface issues. Another concern is how to assure informed consent to alternative approaches to avoid coercion. Of central importance is participation by lay persons—not just lawyers, but lay persons—in both planning and decisionmaking regarding the establishment of these approaches. Finally, there is a danger, which we have seen, that the new forums will become institutionalized "screening mechanisms" for moving cases out of the court system instead of attempts to deliver justice with better results and greater access by the public.

So the comprehensive approach we propose should recognize the vital role that Federal courts now play in vindicating the rights of all citizens and in assuring the rule of law in the operations of all branches of Government. For poor people, this role in the Federal courts is essential—their lives are governed extensively by Government agencies, and their access to those who make decisions is often limited.

Faced with so many burdens on our legal system in general, and our courts in particular, the temptation of many, as we have seen, is to favor disenfranchising from the legal system those without muscle to push, particularly the poor and minority groups. That temptation must be resisted. Changes that single out one group or class for disparate treatment must be avoided, and reform must be applied equally to all classes of litigants and to all types of cases. The problems of the poor are as important and deserving of judical attention as the problems of any other group.

Within a broad and comprehensive approach such as we are suggesting, our prepared statement suggests a number of possible specific reforms that we hope this subcommittee will consider. In our view, the problems of restricted access to the courts and court congestion are directly linked. The two should not be dealt with separately, but must be resolved together. The solution to one problem must be analyzed in relation to the other. Let me summarize briefly those possible specific reforms that we do hope the subcommittee will consider.

First, we suggest exploration of means of handling legal problems through techniques of aggregation that avoid the need for individual handcrafting in particular cases. Of immediate concern in this area, of course, are the restrictions on class actions imposed in recent years. It

is often true that the only means for the poor to obtain judicial relief is through class actions. We hope the subcommittee will consider legislation to allow members of a class to aggregate their claims in order to reach the amount in controversy necessary for Federal jurisdiction. We also urge examination of the current notice requirements in the development of practical notice procedures that do not impose heavy burdens on the poor and others seeking to vindicate their rights as a class.

Second, we hope the subcommittee will consider legislation to authorize the award of attorneys' fees in a number of situations in which that is not now possible. As this subcommittee is well aware, the resources available to provide legal assistance to those unable to pay for it are far too limited. Fundamental rights may be sacrificed unless there are additional sources of support.

Third, there are a number of procedural barriers that have been erected to prevent Federal courts from deciding the substantive merits of a case. Often these barriers—such as standing, abstention, exhaustion of administrative remedies, and comity doctrines—have not prevented ultimate adjudication of the issues, but instead have created long delays before the substantive issues are resolved. We urge the subcommittee to consider legislation to remove many of these restrictions.

Fourth, we believe that a careful examination of Federal jurisdiction statutes is needed. That study should lead to elimination of cases that do not belong in Federal courts—particularly, in my own personal view, diversity cases. It should also provide a sound basis for removing artificial barriers to those seeking to vindicate Federal statutory and constitutional claims.

Fifth, we suggest that legislation be considered and funds made available, through the Department of Justice and other agencies, to improve the administration of State court systems and make them more accessible and open for vindication of citizens' rights. Planning grants for more efficient administration and for reform of procedures and rules are among the many possibilities.

Sixth, the selection process for appointments to the Federal bench should insure that lawyers sympathetic and understanding to the poor and the problems of the poor are appointed. Increased numbers of women and minority judges are particularly needed. Commissions such as those established to select courts of appeals judges—if properly representative of all segments of society—may be one method of accomplishing that goal.

Seventh, many proposals have already been made to reduce significantly the number of Federal court cases. We have not analyzed each of these suggestions, but we hope that they will be given careful consideration. They include granting jurisdiction to the Court of Claims over FELA cases, removing admiralty cases in which there is concurrent State court jurisdiction, restricting removal jurisdiction, and compulsory arbitration of cases involving predominantly factual disputes such as land condemnation. Indeed, the factual predicate for such analyses is the careful review of the actual workings of the Federal courts that we have urged—what kinds of cases in which particular courts cause the real bottlenecks. We hope the subcommittee will pursue that vigorously.

Eighth, we urge the subcommittee to consider broadening the scope of the Federal in forma pauperis statutes to include expenses of litigation. This would obviously require sufficient appropriations to pay for those expenses, and general standards of indigency, although flexibility and discretion could remain in judicial officers hearing the issues.

Ninth, and finally, we believe that consideration ought to be given to legislation that limits the States' immunity from payment of welfare and other administrative benefits that have been illegally withheld. That issue, in the eyes of the legal services lawyers we have talked to, is their single most vital concern in terms of the role of the Federal courts for people—people for whom these welfare and other administrative benefits programs were intended to serve, but are not because of the illegal actions of States.

There are constitutional questions about any proposed legislation to correct the matter, and careful consideration is needed of ways to provide effective remedies for unlawful conduct by State officials in this area.

These and other proposals offer an important opportunity to improve our system of justice, an opportunity that we hope the subcommittee will pursue. They must be part of that comprehensive approach. They must avoid the dangers that I have indicated.

In the cause of easing the congestion in the Federal courts, we must not allow the perception, let alone the reality, of second-class or cheap justice for the poor. The poor have long sought effective access to the federal system of justice in general, and to the Federal courts in particular. We must not relegate their cases and their problems to institutions and tribunals that appear to be set up only for them and that other participants, the wealthy and the Government, are able to avoid.

Finally, as we work toward these solutions we must also make sure we are not undermining the substantive rights of citizens or proposing procedures that are more repressive and less satisfying to some segments of the population. The protections of processes are extremely important.

The recent expansion of the due process clause was not primarily a result of vested interests protecting their own. It was a result of the poor seeking protection from arbitrary government and from private actions, and an opportunity to be heard before their entitlements or their property, no matter how small they appear to some, were taken away.

In our efforts to solve the problems we face, we shouldn't undermine the protections fought for so hard and so long by those most in need of protection.

Over the past weeks, Mr. Chairman, the corporation's research institute on legal assistance has sponsored a seminar for a number of lawyers in legal services on various of the problems this subcommittee is considering concerning access to the Federal courts. It also commissioned the two papers that I have submitted for the record.

Those research efforts are vital, and we expect them to continue. In view of your own and the subcommittee's interest in this area, we look

forward to sharing our views with you again as they are developed, and we hope you will also solicit the views of legal services lawyers more generally—lawyers who are involved on a daily basis with so many of the problems you are considering.

Now, Mr. Chairman, Alice Daniel and I will be pleased to answer your questions.

Mr. KASTENMEIER. Thank you very much, Mr. Ehrlich, for a very comprehensive and helpful statement. I have a series of questions, but I am going to yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. President, I commend you upon this fine paper.

Would you have any comments as to why the rate of reversal of social security claims is so astonishingly high?

Mr. EHRLICH. There are some 14 volumes of rules and regulations in the Social Security system that each administrator must try to wind her or his way through before reaching a judgment. I think it is not completely surprising on that ground alone that the administrators have a hard time with these cases.

But, there is a more serious concern that we have. Even apart from the need for simplification—and the reality that without simplification the reversal rate will be very high—the Federal courts have traditionally been very understanding and sympathetic to the goals that Congress sought to establish in the social security process and the needs of the poor, more than the administrators who apply the rules. That is another reason why I think so often there have been reversals.

Mr. DRINAN. As you know, the VA is not even reviewable in the courts. Do you think that the courts would reach the same results, if we authorized them to review such cases?

Mr. EHRLICH. I wouldn't want to suggest——

Mr. DRINAN. I just keep wondering what can the Congress do to alter a situation like that, which is so distressing. In any event, on another topic, on page 8, you speak favorably of the Neighborhood Justice Center. I don't know what that is. The Attorney General is going to testify here Wednesday. He may mention that. What are they talking about?

Mr. EHRLICH. As we understand the proposal, it is, on a pilot basis, to establish three projects—one I believe in Kansas City, one in Los Angeles, and one in Atlanta—that will provide an opportunity for all citizens to come in and seek to resolve specific grievances in defined areas before an arbitrator or a mediator, as opposed to being forced solely to use the court system.

In our own view, if it is open to all citizens, if it does in particular seek to prevent problems as opposed solely to resolving them once they have arisen, if it does in the areas of family law, consumer law, and housing law, and also provides a chance for people to work through grievances once they do arise, then this could be an important step on a neighborhood basis toward providing better access to justice than is now available.

We certainly have not seen the details of the proposals either, but at least as I understand it, that is the concept.

Mr. DRINAN. I don't know who is advising them or where this idea came from. It seems strange that the law enforcement department of the Government is doing this. But, we will wait and see.

Now, could you spell out your own personal philosophy, or could you give us some specifics? On page 13 you say that this study should be to eliminate cases that do not belong in Federal court. Shouldn't we think alternatively, that maybe there are classes of cases which do belong in Federal courts which are not entitled now to go there?

Mr. EHRLICH. There certainly are.

Mr. DRINAN. Could you name one or more that you feel should be eliminated from the Federal courts?

Mr. EHRLICH. Other than the broad class of diversity cases, I also suggested that there are a number of possibilities in the category of the very large case, the antitrust case that takes months, often years, and takes a Federal district court judge wholly outside the system, except for that one case, for that entire period.

It does seem to us that there well may be ways to deal with those problems other than in the Federal courts. The current approach precludes all other litigants from using that court for that period. I don't want to say I know specifically which category of cases at this point, because again the predicate, the essential predicate, is a real analysis of where the bottlenecks are, where the problems are, and that just hasn't been done.

Mr. DRINAN. No, but you are assuming that the Federal judges have these cases all the time. We have too many different types of cases. Maybe we would say that the IBM antitrust case would be out. Will they be saying if we concede that, that the desegregation cases should be out? That Judge Garrity in Boston should not have spent months and months exclusively on this case?

Why don't we just turn the question around and say cases have a right to be there unless it is clearly contrary to public policy? Why do we start with the assumption that there are too many cases there? That is what you are suggesting that this study should do. I am suggesting we turn the coin over and look at it the other way.

Mr. EHRLICH. A fair point. Certainly our concern is not overburdening judges. Our concern is poor people who are denied access to the system and a chance to use the system, a chance to have equal justice.

I agree completely. Along the way we are suggesting that, for example, in admiralty cases in which there is concurrent State jurisdiction, there well may be areas in which particular pockets of problems can be better dealt with outside the Federal court system, while still preserving the essential rights and entitlements to which our citizens need access to the courts.

Mr. DRINAN. Would you have any comments on specific points that Mr. Nader made? Would you disagree with any of his recommendations?

Mr. EHRLICH. I certainly agree with the major concerns that he expressed. I cannot say I have had any chance to read his prepared statement or to go through any of the specific proposals. But the basic message—that we must not close down the Federal courts particularly to poor peoples' problems, but rather must open them up,

and provide the resources necessary for the judicial resolution of problems—is a theme I agree with completely.

Mr. DRINAN. He didn't seem to suggest that we need a study. He had five areas, and legislation has been introduced in most of them. I am not opposed to further study. But, why are all these statistics from the Judicial Conference not sufficient? What really will the projected study find out that we don't know now?

Mr. EHRLICH. All the materials we have seen from the Judicial Conference, and from other analyses, with a few empirical exceptions, goes to the numbers of filings and the length of time from filing to resolution. They do not tell in what courts and in what categories of cases there are problems, if there are any.

Now, you may be suggesting that, with some exceptions a better allocation of judicial time, energy, and effort could deal much more quickly with many cases. We do know the problems in terms of the delays. In the ninth circuit, for example, as we cited in our statement, the length of time it takes for the court to resolve a case, from the time it is filed to the time it is settled, was 449 days, and in cases decided by a signed opinion, the average time was 565 days, close to 2 years. That is the problem for poor people.

Mr. DRINAN. All right. But isn't the ultimate question one not really of facts, or empirical data, but a policy question? You say on page 13 that you urge the subcommittee to consider legislation to remove many of these impediments to insure standing for individuals who are aggrieved, and have an actual controversy.

Isn't the essential question that we have to decide really in the Congress what is an actual controversy, and what is the role of the Federal courts?

Mr. EHRLICH. Absolutely right. But we have heard over and over again that there is a problem of overburdened courts, and isolated facts or statistics are cited as examples of that problem. There has been up to now, and still is I frankly think, no means to deal with those charges, except by showing in fact what is going on in the Federal courts.

We do not say wait until a comprehensive analysis is done before you move ahead with some of these reforms. We do say reform is needed on a comprehensive basis, and if you do the kind of a study we are talking about, there will be the basic factual predicate for all the reforms we think that are needed as opposed to a series of relatively less satisfactory patchwork proposals.

Mr. DRINAN. One last question. Do you have any reflections on the point I raised with Mr. Nader? Is there a trend now over the past 5 or 10 years in State courts toward judicial restraint? Do they feel that people are using the courts too much, and should become political activists and go after the legislature or the administrative agency? Are there other areas where public policy should be made?

A lot of judges I know at the State level and a lot of literature says that the courts have almost abused their function, and they should exercise more judicial restraint.

Mr. EHRLICH. What we have seen is not a drawback in the terms you are suggesting, but rather quite often very serious problems of delay and congestion in the State courts, and inadequate procedures

and resources. As serious as the problems in the Federal courts are, they are often even more significant in the State courts.

But, I haven't seen the kind of drawback from judicial involvement on the State level that you are suggesting on a national basis. Of course, there are a number of specific examples in specific States.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. Mr. Ehrlich, I appreciate your being here. Of course, while we are considering the authorization bill for the corporation, it becomes increasingly evident to us on the committee that you and your colleagues in the corporation are held in very high regard.

We appreciate the work you have done in establishing public confidence in your corporation and its mission, even though residual opposition remains as is the nature of the beast.

To follow up on some of the things discussed, the Department of Justice Committee on Revision of the Federal Judicial System recommended that nonarticle III tribunals be created, and that several categories of cases—Social Security Act, Federal Employees Liability Act, Truth Lending—be assigned to these tribunals.

I take it from what you have said that you might not care for that sort of resolution; on page 15 you state, "We must not relegate their cases or problems to institutions and tribunals that appear to be set up only for them or their participants."

Is that a correct reading of your statement? Do you resist the creation of a specialized court?

Mr. EHRLICH. We do very much. If they are special courts to deal with poor people's problems, they create at least the impression—and even worse, the reality—of second-class justice, of cheap justice for poor people.

Taking categories of problems that are primarily poor people's problems, such as black lung cases or social security cases, or some of the other ones that you suggest, and saying we are going to have special tribunals for those because the Federal courts are too important to deal with these issues, which in the eyes of some are trivial, to us would be a serious mistake.

They are not trivial to the women and men whose lives depend on those benefits. They are the most important kinds of issues they can possibly face.

Mr. KASTENMEIER. But even if justice were done, and even if the individuals involved had their cases handled expeditiously, wouldn't that offset the classification of the court as either an administrative tribune or as an article I or III Federal Court?

Mr. EHRLICH. I don't think it would. That is a big "even if," and one of the problems, of course, is finding first-class nonjudges to deal with those problems, and so forth. But even if one does surmount that hurdle, as you are suggesting, it is not the egos involved that makes me urge that people problems, as I call them, ought to be the center stage in the resolution by Federal courts of cases and controversies. They are the problems that affect people most of the time.

Mr. KASTENMEIER. But is that consistent with your sort of general cursory approval of neighborhood justice centers, where obviously conflict resolution takes place is a less formalized manner?

Mr. EHRLICH. There is a two-step process: First, by preventing problems from arising through education of citizens in their basic legal rights before they get into a problem; and second by simplification and uniformity, so that concerns in the areas of warranty, for example, or probate, for the middle class, and some other areas, too, can be avoided.

To the extent this can be done, it is a great step forward. That is why I hope the neighborhod justice centers will be actively involved in preventative as well as remedial efforts. But, when a problem does arise that cannot be resolved through other means, then it does seem to me appropriate to try mediation or conciliation or arbitration—as long as it is done on a noncoercive basis.

As long as the Federal courts are still open, this will be an additional alternative, open to all, not just poor people.

Mr. KASTENMEIER. Two other quick questions. In terms of the analysis that you recommend, do we have the time for it; that is to say, can we wait before we perfect or attempt to perfect a system for such an analysis to be put together for us, or alternatively, how long do you think such an analysis ought to take?

Mr. EHRLICH. In our view, a major analysis of the facts as I have described them could take place in a 2- to 3-month period over the summer and early fall. It could be done by the time Congress starts again in the fall. In the interim, I do think work can and ought to go forward in terms of studying and drafting in the areas we suggest, and in those that others have suggested, too. We do not say hold up those efforts.

I suspect, knowing the general pace of the legislative calendar, that it will be next fall before the kind of comprehensive efforts that you have talked about in your opening statement and elsewhere will actually move through the Congress.

At that time. I think those efforts would be much benefitted by the kind of analysis we have suggested.

Mr. KASTENMEIER. I have one further question. You indicate support for the abolition of diversity jurisdiction, or, in any event, its curtailment. At the same time, or elsewhere, you also state that the level of State court justice must be upgraded. What would be the effect of abolishing diversity jurisdiction on the State courts? What I am saying is we are literally, by doing the first, imposing greater burdens on the second, which you express sympathy for in terms of solving its problems.

Mr. EHRLICH. It is a fair point. I do not pretend to have talked to all, or even a representative group of State trial and appellate court judges. The majority of the ones I have talked to, though, have said that they think State courts could handle these cases. A good many have suggested, in fact, that those courts would benefit by being able to deal with the range of issues that are involved in diversity cases, and that this would not put a significant burden on the State court system which, of course, is a much, much larger system, though often antiquated, and often in need of substantial reform, as you have suggested.

Mr. KASTENMEIER. Thank you, Mr. Ehrlich. I am sorry we didn't have some specific questions for you, Ms. Daniel, this morning, but

undoubtedly we will before this study is completed, and after the authorization and appropriation bills are signed into law, we undoubtedly will have a need to again resort to you and your expertise as to the general subject of access to justice and court reform.

We appreciate your work. Thank you for coming this morning.

Mr. EHRLICH. We look forward to that happy day as well, Mr. Chairman. We will be delighted to work with you and your staff toward our the common goal. Thank you very much.

Mr. KASTENMEIER. The committee would like to announce that our next hearing on this subject will be held at 9:30 Wednesday morning in room 2142, at which time we will hear from the Attorney General, the Honorable Griffin Bell.

Until that time, the committee stands adjourned.

[Whereupon, at 12:25 p.m., the committee adjourned, to reconvene at 9:30 a.m., Wednesday, June 22, 1977.]

STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

WEDNESDAY, JUNE 22, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Santini, Ertel, Railsback, and Butler.

Also present: Michael J. Remington, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning we are continuing hearings started this week on the state of the judiciary and access to justice in this country.

We are most privileged to have as our witness today, and it is a privilege for me to personally greet, the Attorney General of the United States, Griffin B. Bell.

Mr. Attorney General, you may proceed as you wish.

TESTIMONY OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY PAUL NEJELSKI, DEPUTY ASSISTANT ATTORNEY GENERAL

Mr. BELL. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Incidentally, we are mindful of the time constraints that you have, and the committee will make every effort to accommodate you.

Mr. BELL. If we finish it would be fine. I would like to go to Justice Clark's commemoration service if I can. He was an old friend, but I understand it takes 25 or 30 minutes to get there, so we may not be finished. If we are not, don't worry about it. I am sure if Justice Clark were living he would prefer I be here rather than at the service, because it has to do with the administration of justice, as you know, which was one of his main interests in life.

Mr. Chairman and members of the committee, it is a pleasure to appear before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice on the general issues of the state of the judiciary and access to justice. I have submitted a statement which I assume will be made a part of the record.

[The statement of Attorney General Griffin B. Bell follows:]

STATEMENT ON THE STATE OF THE JUDICIARY AND ACCESS TO JUSTICE BY GRIFFIN B. BELL, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

It is a pleasure to appear before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice on the general issues of the State of the Judiciary and Access to Justice.

As requested, I would like to speak on these issues from the vantage point of my past experience as a judge on the Fifth Circuit Court of Appeals, as a practicing attorney, and, currently, as the Attorney General of the United States. As you may know, the issues which are the subject of these hearings have concerned me for a number of years before I became Attorney General. While a judge I was involved closely with the Federal Judicial Center, serving as Chairman of the Committee on Innovation and Development from 1968-1970; and then as a member of the Board of Directors of the Center from 1973–1976. Also, I have been privileged to serve on a number of American Bar Association groups concerned with judicial administration; in 1976 I was Chairman of the ABA Division of Judicial Administration.

A little over a year ago, the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. I was pleased to participate in that meeting, and then to chair the Pound Conference Follow-up Task Force established by the American Bar Association.

This Task Force reported to the Board of Governors of the ABA in August, 1976. [Copy of the report to be submitted for the record. See app. 334.] As you will see from reviewing the report of the Task Force, the subjects discussed at the Conference and the recommendations which resulted are many and varied.

In one of my first actions as Attorney General I created the Office for Improvements in the Administration of Justice, with responsibility for looking into the kinds of issues, problems, and proposals discussed by the participants in the Pound Conference and by other commentators on the administration of justice. Eight weeks ago, the head of the new Office, Assistant Attorney General Daniel J. Meador, appeared before this Subcommittee to discuss some of our initial thinking as to the functions and jurisdiction of our new Office for Improvements in the Administration of Justice. Since that time, after close and frequent consultation with me, Professor Meador has developed a two-year program for improvements in the administration of justice. [See app. 56 at p. 389.]

In a very real sense, the recommendations arising from the Pound Conference and the agenda that I have had prepared for the Department of Justice address the same issues of assuring access to effective justice for all citizens and improving the operations of our judicial system. Many of the steps to be taken to address these issues are the same; but in several areas the Department of Justice, under my direction, is pursuing alternatives to the Pound Task Force recommendations, as well as addressing totally new issues. I believe that you will see, however, that the work of the Pound Conference and the agenda for the Department of Justice share the common aim of developing and implementing a national policy for the delivery of justice.

An important part of our program is an attempt to provide the proper forum for deciding disputes. The first goal on the Department's agenda is "to assure access to effective justice for all citizens."

In the federal system, not all disputes require an Article III judge, and we are seeking to give appropriate cases to magistrates.

Not all disputes require a federal forum, and we are seeking to return at least some diversity cases to state courts.

And not all disputes may require a court for their resolution. Some may be too big, and some may be too small.

In the area of matters that fall under State and local jurisdiction, we are seeking to provide national leadership where the same problems repeat themselves throughout the country.

All of these are items on an action agenda. I would like to discuss briefly some of the specific steps which I find particularly important to judicial system change and improvement, noting as I go the recommendations of the Pound Conference Task Force.

The Proposed Magistrate Act of 1977 is now before the House and the Senate. We hope to work with you on this bill in the Fall. In our estimation it is a good bill, providing flexible relief for court congestion caused by the kinds of cases which do not require district court attention.

As you will see from the Department's agenda, our Magistrates proposal is one of the steps toward assuring access to effective justice for all citizens through more effective courts. Another area under examination would be to help witnesses by providing a new schedule of fees along with increased transportation and subsistence allowances. These are the sorts of changes that will improve citizen participation in the courts.

One of the efforts already underway to make the courts more effective is the President's program of panel selection of judges for the Circuit Courts of Appeals. The Circuit Judge Nominating Commission, established by President Carter in February, is composed of 13 nominating panels; nine panels already have been announced.

Also in the area of seeking to make the courts more effective, we should examine some mechanism, short of impeachment, which would permit the removal of Federal judges who have become physically or mentally disabled or whose conduct on the bench does not comport with the Constitutional requirement of good behavior. We are living in a time when our public institutions are under examination and the courts should not be exempt. At the State level, judicial tenure and removal commissions, started in California in 1960, have been adopted in 44 States, the District of Columbia and Puerto Rico. These commissions are operating successfully. I know full well the importance to our society of an independent judiciary, but I believe legislation which would create an avenue for citizen complaints involving Federal judges and provide for investigation and action on those complaints is necessary and timely.

In the same area of assuring access to effective justice for all citizens, we have a number of projects under study to which I have assigned a high priority. First, we are developing a number of programs of nonjudicial settlement procedures. Within the next few months we hope to have in operation three Neighborhood Justice Centers financed with federal funds. The Centers would be alternatives to the courts for settling a wide range of disputes by using such techniques as mediation, conciliation, and fact-finding. I would like to submit for the record a recent article in the Washington Post on this program. [Washington Post, June 13, 1977, page A5]

As you will note, the Neighborhood Justice Center program is one of the major recommendations of the Pound Conference Follow-Up Task Force. Another one of the Pound Conference recommendations for new mechanisms for the delivery of justice is increased use of arbitration. We have been studying the experience of four States, California, New York, Ohio, and Pennsylvania, with compulsory and nonbinding arbitration, in order to identify criteria by which to select Federal cases which might aptly be referred to arbitration. Some of the criteria under consideration are the following: (1) cases seeking monetary damages, not injunctive relief; (2) cases in which a dispute-resolving rather than a law-declaring function predominates; (3) cases which tend to use expensive court resources without any proportional benefit either to the litigants or to society; (4) cases in which a rapid decision is desirable to the parties but not generally available in district court; (5) cases in which the litigants have an alternative state forum available if they are dissatisfied with the procedures afforded to them in Federal court. We are now in the process of selecting specific categories of cases appropriate for referral to arbitration under these criteria. I hope that our proposals in this area will help both to provide cheaper and swifter justice for the litigants and to relieve our Federal courts of some of the burden of their civil caseload that can be dealt with appropriately by this alternative method of dispute resolution.

We are also looking at means of providing more effective procedures in civil litigation. A priority project in this area, which is addressed in the Pound Conference report as well, is the improvement of class action procedures. We are now in the process of a comprehensive review of this matter which will include broad consultation with a variety of persons and groups who are concerned with class action suits. We expect to be able to recommend some improved procedures which will facilitate the handling of class action cases by the courts and afford broader access for citizens to seek redress through the class action device. We are also exploring the possibility of certain types of alternative and innovative ways of handling some of these suits more effectively.

In the same area of procedural reform we are beginning studies of pretrial procedures, especially discovery, with the goal, as stated in the agenda, of reducing expense and delay and to increase fairness in the use of these procedures. I should add that correcting abuses in the use of discovery is one of the major recommendations contained in the Pound Conference report.

Another proposal in the area of procedure is a bill which would repeal all statutory provisions that accord priority calendar status to civil cases before a Federal district court or court of appeals other than habeas corpus matters. Instead of the current list of more than 30 civil statutes which provide priority calendar status to cases brought under them, under our proposal each court would establish its calendar priorities under the supervision of the Judicial Council of the circuit.

I have directed Professor Meador's Office, along with the Office of Legislative Affairs, to develop an administrative proposal for judicial impact statements. This would be a means of predicting litigation impact on the judicial system of various types of proposed legislation in order to improve judicial planning and resource allocation. The Chief Justice has expressed his interest in this area, and I look forward to progress on these impact statements.

The second major goal of the Department's agenda is to reduce the impact of crime on citizens and the courts. While most of our current efforts in this area are characterized as substantive reforms in Federal law, I would like to note that the revised Federal Criminal Code recently has been introduced. I believe that this bill is an example of the type of substantive law reform that will improve the effectiveness of criminal proceedings by simplifying and centralizing the Federal criminal law which today is found in the 50 titles of the United States Code and thousands of judicial interpretations.

The third goal on the agenda of the Department is to reduce impediments to justice unnecessarily resulting from separation of powers and federalism. In the area of reallocation of Federal and State authority, a bill developed by the Department would limit diversity jurisdiction by precluding a plaintiff from invoking diversity jurisdiction in any district in a state of which he is a citizen. The Pound Conference report contains a general recommendation for the reduction or elimination of diversity jurisdiction. As noted in the report:

"The high quality of justice dispensed in State courts makes resort to removal to the Federal courts unnecessary; moreover, today parochialism is hardly the problem it once was, if it can be said to be a problem at all. The change would have little impact on the total volume of litigation in state systems, but would provide significant relief to the Federal courts." [1]

Another project under the third goal which is now being considered would be the convening of a Federal Justice Council. The Council would have members from the executive, judicial and legislative branches. It would provide a forum for discussion of court-related problems, and it would be the catalyst for improving the courts and their related functions. Similar proposals have been made before by Chief Justice Burger, the Hruska Commission on Revision of the Federal Court Appellate System, and a Departmental committee which was chaired by former Solicitor General Robert Bork. I expect to receive a more complete paper on this idea within the next few days, and I will be glad to keep you informed of further developments on it. I believe that the idea behind the creation of the proposed Council reflects much of the force behind the Pound Conference itself: that there should be full communication and discussion between the three branches on all aspects of judicial system functioning.

Finally, I would like to mention some of the efforts now underway to increase and improve research in the administration of justice, the fourth goal on the Department's agenda. We are looking forward to passage of the fiscal year 1978 appropriations bill for the Department of Justice which will provide for the first time research funds to be used for studies of many of the issues contained in the agenda that I have discussed today.

In another area, the Pound Conference Follow-Up Task Force recommended the creation of "A Federal office for the collection of data relevant to judicial administration and to dispute resolution generally." [2] The Department of Justice now spends approximately $40 million annually on statistics about crime and

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[1] American Bar Association, Report of the Pound Conference Follow-Up Task Force, 37–38 (August 1976).

[2] Id. 7–8, 44–45.

justice. I am examining our activities in this area with the goal of making changes which would fulfill many of the functions recommended by the Pound Task Force. I would hope that the Department would be able to move soon on this important matter and I am giving decisions in that area a high priority.

In closing, I would like to return to the central theme which has guided both the Pound Conference Follow-Up Task Force and the development and implementation of our program for improvements in the administration of justice. As stated in the Pound report:

"It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all." [3]

These are imposing words, but in fashioning a national policy for the delivery of justice, I believe firmly that "justice for all" must be our guiding principle.

[From the Washington Post, June 13, 1977]

U.S. To Fund Neighborhood Justice Center Tests in 3 Cities

(By John M. Goshko)

The Justice Department is launching an experimental program to give the public a speedy and inexpensive way to resolve minor disputes through neighborhood justice centers that would serve as alternatives to the courts.

The centers would attempt, through mediation, to settle the sort of conflicts—domestic spats, claims by customers against merchants, arguments between landlords and tenants—that clog the dockets of the lower courts in American cities.

The centers and their services would be available to anyone willing to submit a dispute to mediation. But Justice Department officials believe they will be especially helpful to poor people who are denied access to justice because of the lack of money, education and time.

"We're trying to devise new means to alleviate the difficulty of many Americans in finding answers to small grieviences," explains Deputy Assistant Attorney General Paul Nejelski. "For many, litigation in the courts just isn't a practical answer. It's too costly and too time-consuming for the man of limited means who feels he's paid $25 for a pair of boots that aren't any good.

"At the same time," Nejelski adds, "many of the traditional institutions that used to provide a framework for settling such disputes, such as the family and church, are losing their efficacy. Others like the justice of the peace, the policeman on the beat and the precinct captain are fading from the American scene."

As part of its search for substitutes, the Justice Department hopes to have three neighborhood centers, funded with federal money but under local control, in operation by the fall.

Although the plans are still tentative, department officials say it seems fairly certain that one will be in Los Angeles and one in Atlanta. The third is expected to be in the Midwest.

The experimental centers will be evaluated closely over a 15 to 18-month period, and department officials are hopeful that the experiment will spur cities all over the country to set up their own neighborhood centers.

To assist such efforts, the department has plans for a "national resources center" that would serve as a clearinghouse for information and technical assistance for local governments wanting to try the idea.

The impetus for this program comes from Attorney General Griffin B. Bell, who has established as one of his main priorities a drive to provide better access to justice without putting an unbearable strain on the resources of the federal, state and local courts.

To direct this campaign, Bell has set up an Office for Improvements in the Administration of Justice under Assistant Attorney General Daniel J. Meador, a former law professor at the University of Virginia. Meador's office already is involved in several initiatives to speed the process of justice, including plans for arbitration of certain cases in the federal courts, and recently introduced legislation to broaden the jurisdiction of federal magistrates.

Of all the plans, though, Bell is known to regard the neighborhood justice centers as potentially the most important. He has said that he wants the pro-

[3] Id. xi.

gram to demonstrate how the federal government can play "a leadership role" in assisting the states and cities to improve the quality of justice.

To this end, he directed that the experiment be financed by federal funds through the Law Enforcement Assistance Administration. Department officials estimate the costs at $150,000 each for the three prototype centers and an additional $300,000 to $350,000 for evaluation of their operations.

The planning has been done primarily by Nejelski, one of Meador's deputies, and by John Beal, a department attorney. Both say that a great deal of trial and error will be necessary to learn how the centers can operate most efficiently.

Each center will have an administrator, who may or may not be a lawyer, some paralegal assistants and a cadre of mediators, recruited, if possible, from the neighborhood served by the center and given special training.

"We hope to recruit from retired persons, housewives and others who know the people of the neighborhood and their problems," Nejelski says. "If, for example, you have a dispute involving a family who are Black Muslims, it would be important to have a mediator who is also a Muslim or at least familiar with their traditions and sensibilities."

Establishment and control over the centers will be accomplished in a variety of ways. In Los Angeles, the department is working through the local bar association, while the projected Atlanta center probably will be tied to the local courts. Each center also will have a citizens' advisory board representing the ethnic, economic and social composition of its neighborhood.

They will be geared to handle cases referred by public and private agencies and what Nejelski calls "walk-ins from the street." A primary task of each administrator, he adds, will be to ensure that the people of the neighborhood are aware of the center's services and be encouraged to put their trust in it.

Nejelski notes that the centers are certain to encounter some cases that they cannot handle, either because one of the disputants will not agree to mediation or because they involve issues that require the intervention of a lawyer. In such instances, he says, the centers will assist the parties to a dispute in going to court or seeking some other legal remedy.

Both Nejelski and Beal point out that these general guidelines still leave a lot of unanswered questions. They range from whether chain stores and municipal agencies, which might be parties to a dispute, will cooperate in submitting to mediation to the type and premises and working hours that would be most appropriate for the centers.

"That might sound trivial," Nejelski says, "but there are real problems in whether people might find a storefront location less intimidating than a public building. If you schedule mediation sessions at night when people aren't tied up at work, will they be afraid to come because of a high crime incidence in the streets?

"These are all things where we're still groping for answers, and that's why we're starting in a small way with only three centers. We hope their experience will tell us what's good and what's bad and which way we should go in the future."

Mr. BELL. As requested, I would like to speak on these issues from the vantage point of my past experience as a judge on the Fifth Circuit Court of Appeals, as a practicing attorney, and, currently, as the Attorney General of the United States.

As you may know, the issues which are the subject of these hearings have concerned me for a number of years before I became Attorney General. While I was a judge I was involved closely with the Federal Judicial Center, serving as Chairman of the Committee on Innovation and Development from 1968–70, under Chief Justice Earl Warren. Then, I served as a member of the Board of Directors of the Center from 1973–76, during the tenure of Chief Justice Burger.

Also, I have been privileged to serve on a number of American Bar Association groups concerned with judicial administration; in 1976 I was Chairman of the ABA Division of Judicial Administration.

A little over a year ago the Judicial Conference of the United States, the Conference of State Chief Justices, and the American Bar

Association sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. I was pleased to participate in that meeting and then to chair the Pound Conference followup task force established by the American Bar Association.

This task force reported to the board of governors of the ABA in August, 1976. I hold in may hand a copy of the report of the task force followup. I am sure the committee has a copy, but I will leave this copy of the report [see app. 5a at p. 334].

As you will see from reviewing the report of the task force, the subjects discussed at the conference and the recommendations which resulted are many and varied. Prof. Leo Levin from the University of Pennsylvania Law School, who was our reporter for this task force, in July will become the Director of the Federal Judicial Center, so he will be here in Washington where we can work closely together.

In one of my first actions as Attorney General I created the Office for Improvements in the Administration of Justice, with responsiblity for looking into the kinds of issues, problems, and proposals discussed by the participants in the Pound Conference and by other commentators on the administration of justice.

Eight weeks ago, the head of the new Office, Assistant Attorney General Daniel J. Meador, appeared before this subcommittee to discuss some of our initial thinking as to the functions and jurisdiction of our new Office for Improvements in the Administration of Justice. Since that time, after close and frequent consultation with me, Professor Meador has developed a 2-year program for improvements in the administration of justice [see app. 5b at p. 389].

In a very real sense, the recommendations arising from the Pound Conference and the agenda that I have had prepared for the Department of Justice address the same issues of assuring access to effective justice for all citizens and improving the operations of our judicial system. Many of the steps to be taken to address these issues are the same; but in several areas the Department of Justice, under my direction, is pursuing alternatives to the Pound task force recommendations, as well as addressing totally new issues.

I believe that you will see, however, that the work of the Pound Conference and the agenda for the Department of Justice share the common aim of developing and implementing a national policy for the delivery of justice.

An important part of our program is an attempt to provide the proper forum for deciding disputes. The first goal on the Department's agenda is to assure access to effective justice for all citizens.

In the federal system, not all disputes require an article III judge, and we are seeking to give appropriate cases to magistrates.

Not all disputes require a Federal forum, and we are seeking to return at least some diversity cases to State courts.

Not all disputes may require a court for their resolution. Some may be too big, and some may be too small.

In the area of matters that fall under State and local jurisdiction, we are seeking to provide national leadership where the same problems repeat themselves throughout the country.

All of these are items on an action agenda. I would like to discuss briefly some of the specific steps wihch I find particularly important to judicial system change and improvement, noting as I go the recommendations of the Pound Conference task force.

The proposed Magistrate Act of 1977 is now before the House and Senate. We hope to work with you on this bill in the fall. In our estimation it is a good bill, providing flexible relief for court congestion caused by the kinds of cases which do not require district court attention.

As you will see from the Department's agenda, our magistrates proposal is one of the steps toward assuring access to effective justice for all citizens through more effective courts. Another area under examination would be to help witnesses by providing a new schedule of fees along with increased transportation and subsistence allowances. These are the sorts of changes that will improve citizen participation in the courts.

One of the efforts already underway to make the courts more effective is the President's program of panel selection of judges for the Circuit Courts of Appeals. The Circuit Judge Nominating Commission, established by President Carter in February, is composed of 13 nominating panels; nine panels already have been announced.

I might say we are in the process now of beginning to appoint the other four; and in those panels which have already been assigned the task of filling vacancies, we are beginning now to get reports in from them. So, this is very much in process.

Also in the area of seeking to make the courts more effective, we should examine some mechanism, short of impeachment, which would permit the removal of Federal judges who have become physically or mentally disabled or whose conduct on the bench does not comport with the constitutional requirement of good behavior.

We are living in a time when our public institutions are under examination and the courts should not be exempt. At the State level, judicial tenure and removal commissions, started in California in 1960, have been adopted in 44 States, the District of Columbia, and Puerto Rico.

These commissions are operating successfully. I know full well the importance to our society of an independent judiciary, but I believe legislation which would create an avenue for citizen complaints involving Federal judges and provide for investigation and action on those complaints is necessary and timely.

I was on the American Bar Commission on Standards of Judicial Administration for 5 years, and this is one of the things we went into in some depth. We interviewed people who had been on the State commissions, so I am fairly familiar with how they operate and the way they safeguard the due process rights of the judges too. They work very well indeed.

In the same area of assuring access to effective justice for all citizens, we have a number of projects under study to which I have assigned a high priority. First, we are developing a number of programs of nonjudicial settlement procedures. Within the next few months we hope to have in operation three neighborhood justice centers financed with Federal funds. The centers would be alternatives to the courts for settling a wide range of disputes by using such techniques as

mediation, conciliation, and fact-finding. I would like to submit for the record a recent article in the Washington Post on this program, Washington Post, June 13, 1977, page A5.

Mr. KASTENMEIER. Without objection, the committee will be happy to receive that article and make it a part of the record [see app. 5c at p. 392].

Mr. BELL. As you will note, the neighborhood justice center program is one of the major recommendations of the Pound conference follow-up task force. Another one of the Pound conference recommendations for new mechanisms for the delivery of justice is increased use of arbitration. We have been studying the experience of four States, California, New York, Ohio, and Pennsylvania, with compulsory and nonbinding arbitration, in order to identify criteria by which to select Federal cases which might aptly be referred to arbitration.

Some of the criteria under consideration are the following: (1) Cases seeking monetary damages, not injunctive relief: (2) cases in which a dispute-resolving rather than a law-declaring function predominates; (3) cases which tend to use expensive court resources without any proportional benefit either to the litigants or to society; (4) cases in which a rapid decision is desirable to the parties but not generally available in district court; and (5) cases in which the litigants have an alternative State forum available if they are dissatisfied with the procedures afforded to them in Federal court.

We are now in the process of selecting specific categories of cases appropriate for referral to arbitration under these criteria. I hope that our proposals in this area will help both to provide cheaper and swifter justice for the litigants and to relieve our Federal courts of some of the burden of their civil caseload that can be dealt with appropriately by this alternative method of dispute resolution.

We are also looking at means of providing more effective procedures in civil litigation. A priority project in this area, which is addressed in the Pound Conference report as well, is the improvement of class action procedures.

We are now in the process of a comprehensive review of this matter which will include broad consultation with a variety of persons and groups who are concerned with class action suits. We expect to be able to recommend some improved procedures which will facilitate the handling of class action cases by the courts and afford broader access for citizens to seek redress through the class action device. We are also exploring the possibility of certain types of alternative and innovative ways of handling some of these suits more effectively.

In the same area of procedural reform we are beginning studies of pretrial procedures, especially discovery, with the goal, as stated in the agenda, of reducing expense and delay and increasing fairness in the use of these procedures. I should add that correcting abuses in the use of discovery is one of the major recommendations contained in the Pound Conference report.

Another proposal in the area of procedure is a bill which would repeal all statutory provisions that accord priority calendar status to civil cases before a Federal district court or court of appeals other than habeas corpus matters. This proposal applies to civil cases and habeas is a civil case. Instead of the current list of more than 30 civil

statutes which provide priority calendar status to cases brought under them, under our proposal each court would establish its calendar priorities under the supervision of the Judicial Council of the circuit.

I have directed Professor Meador's Office, along with the Office of Legislative Affairs, to develop an administrative proposal for judicial impact statements. This would be a means of predicting litigation impact on the judicial system of various types of proposed legislation in order to improve judicial planning and resource allocation. The Chief Justice has expressed his interest in this area, and I look forward to progress on these impact statements.

The second major goal of the Department's agenda is to reduce the impact of crime on citizens and the courts. While most of our current efforts in this area are characterized as substantive reforms in Federal law, I would like to note that the revised Federal Criminal Code recently has been introduced.

I believe that this bill is an example of the type of substantive law reform that will improve the effectiveness of criminal proceedings by simplifying and centralizing the Federal criminal law which today is found in the 50 titles of the United States Code and thousands of judicial interpretations.

The third goal on the agenda of the Department is to reduce impediments to justice unnecessarily resulting from separation of powers and federalism. In the area of reallocation of Federal and State authority, a bill developed by the Department would limit diversity jurisdiction by precluding a plaintiff from invoking diversity jurisdiction in any district in a State of which he or she is a citizen.

The Pound Conference report contains a general recommendation for the reduction or elimination of diversity jurisdiction. As noted in the report:

> The high quality of justice dispensed in State courts makes resort to removal of the Federal courts unnecessary; moreover, today parochialism is hardly the problem it once was, if it can be said to be a problem at all. The change would have little impact on the total volume of litigation in State systems, but would provide significant relief to the Federal courts.

Another project under the third goal which is now being considered would be the convening of a Federal Justice Council. The Council would have members from the executive, judicial, and legislative branches. It would provide a forum for discussion of court-related problems, and it would be the catalyst for improving the courts and their related functions.

Similar proposals have been made before by Chief Justice Burger, the Hruska Commission on Revision of the Federal Court Appellate System, and a departmental committee which was chaired by former Solicitor General Robert Bork.

I expect to receive a more complete paper on this idea within the next few days, and I will be glad to keep you informed of further developments on it. I believe that the idea behind the creation of the proposed Council reflects much of the force behind the Pound Conference itself: that there should be full communication and discussion between the three branches on all aspects of judicial system functioning.

Finally, I would like to mention some of the efforts now underway to increase and improve research in the administration of justice, the

fourth goal on the Department's agenda. We are looking forward to passage of the fiscal year 1978 appropriations bill for the Department of Justice which will provide for the first time research funds to be used for studies of many of the issues contained in the agenda that I have discussed today.

I would like to stop at this point to say I am sure the public does not understand that we have much research money in the LEAA, but we cannot use any of it for Federal justice, and we cannot use any of it for State or Federal civil justice. It is restricted completely to State criminal law.

In another area, the Pound Conference followup task force recommended the creation of a Federal office for the collection of data relevant to judicial administration and to dispute resolution generally. The Department of Justice now spends approximately $40 million annually on statistics about crime and justice. I am examining our activities in this area with the goal of making changes which would fulfill many of the functions recommended by the Pound task force. I would hope that the Department would be able to move soon on this important matter and I am giving decisions in that area a high priority.

I must add here that the National Center for State Courts is very much interested in this same project, and they want to run it for all of the State court systems, and we should try to get some uniformity between their reporting of data and what we report. It makes it very difficult to plan when we don't have uniform statistics. I don't really care who keeps it as long as we get a uniform system. They built a new center now at Williamsburg, and after all, they would be representing 50 court systems, while we just have one. So we can work that out.

In closing, I would like to return to the central theme which has guided both the Pound Conference followup task force and the development and implementation of our program for improvements in the administration of justice. As stated in the Pound report:

> It is important to keep firmly in mind that neither efficiency for the sake of efficiency nor speed of adjudication for its own sake are the end which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all.

These are imposing words, but in fashioning a national policy for the delivery of justice, I believe firmly that "justice for all" must be our guiding principle.

Mr. Chairman, thank you very much. I will be glad to answer such questions as I may have the answers to.

Mr. KASTENMEIER. Thank you, Mr. Attorney General.

I commend you on your statement.

It is truly a restatement of the concerns and the goals that this subcommittee has in mind.

The concluding part of your statement suggests that the State court justice system is of serious concern to people, and you mentioned the limitations of LEAA in that connection, and I am wondering whether you favor the creation of a National Institute of Justice or a similar revenue sharing program which would aid State courts.

Mr. BELL. You probably have seen the paper several times. I am having a study make of the LEAA, and I don't know for sure what

the study is going to recommend, but I am fairly certain that they are going to recommend the conversion of the several institutes now in the LEAA into one institute which we could call the National Institute for Justice. If they recommend that, I am going to recommend to the Congress that we expand that institute to include civil justice and Federal and State justice.

We now have institutes on corrections, juvenile justice, and criminal justice. If we could draw all of those together and use the same funding we already have, we could think about the total justice system, as we ought to know by now we can't run just criminal courts.

When I came to Washington I perceived the need for some national policy on the delivery of criminal justice, when I started out on that task it took me a very short time only to realize that we had to be concerned with a national system for the delivery of justice, because the same courts are handling criminal and civil cases. So I think we could very well do what you have suggested, Mr. Chairman, and that is go into some kind of national institute. It wouldn't cost the taxpayers anything extra.

Mr. KASTENMEIER. In another area in which you, as head of the Department of Justice, have shown very great leadership in is your support for H.R. 2439, which would assist in providing access to justice for institutionalized persons.

I wanted to certainly compliment you on the Department's firm stand on that. We just concluded hearings and we are interested in moving ahead in that area.

Nonetheless, as relates to other areas, I would like to ask you if you plan to support or advocate legislation which would improve access to justice for citizens by revising class action, habeas corpus, or standing procedures.

Mr. BELL. We are studying all of those things and I can say generally, yes, we do. We are very much interested in class actions, which are widely misunderstood. People think the class action, as it is now constituted, provides a great deal of access, when the opposite is true. Most of the time the class action is not certified because of manageability problems. So, all of those things need to be studied. Standing needs to be studied. That is a very serious question, particularly since the Supreme Court decision within recent weeks in the *Illinois Brick* case for example.

Mr. KASTENMEIER. The major thrust of the testimony of Mr. Nader Monday was that the Supreme Court, through its pattern of recent decisions, has been systematically denying access to the courts through various means. Not necessarily conscientiously, but that has been the effect, somewhat subtle, and sometimes not so subtle.

Mr. BELL. I might say there I think we are suffering from a lot of things that really stem from the fact that the courts are behind on the cases. The courts' cases that are almost unmanageable because they are so big, and I think a lot of these things all are coming from that one problem. If we can improve the structure of the courts. I think we won't have so many restrictive decisions on standing.

Mr. KASTENMEIER. In connection with class actions, the Deputy Attorney General, Mr. Flaherty, recently gave a speech in which he stated that the Department was working on alternatives to the class action.

Do you know what alternatives the Deputy Attorney General had in mind? Wouldn't merely liberalizing class action procedures actually reduce the numbers of cases?

Mr. BELL. I have no idea what he had in mind. Mr. Nejelski may know.

Mr. KASTENMEIER. Mr. Nejelski?

Mr. NEJELSKI. We are working now in a study group in our office on class actions, and we hope to have a background paper available in a matter of weeks on that.

I think some of the alternatives may be either in court or out of court in using the relator action, using Government intervention to assist. I think there are a broad range of alternatives from private through public that we are considering, and would like to develop.

Mr. KASTENMEIER. As you develop the alternatives, we would be very interested in learning about them.

At this time, in view of the time constraints we are working under, I am going to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

Mr. Attorney General, we are delighted to have you, and I can't help but think that the kind of new focus that you are putting on providing judicial access is long overdue, and much needed.

Is it your belief that rather than having any kind of an omnibus bill to deal with many of these things that you mentioned, that it would be better to take them up 1 by 1 or piecemeal, or what is your feeling about that?

For instance, eliminating diversity or a partial elimination of diversity?

Mr. BELL. My feeling is we ought to go 1 by 1.

I am most anxious to get something done, and I don't want to get into something so large that it's going to fall of its own weight. Some of these things are more controversial than others.

Mr. RAILSBACK. That is right.

Mr. BELL. Diversity is one. I have been dealing with this all over the country for several years, and I have a feel for it. We will have a blood letting if we try to do away with all diversity. Lawyers would be rising up and contacting you, and yet there is really not any need for diversity jurisdiction any longer, so we have a position where we just want to do away with diversity jurisdiction for the residents of a State.

After all, the Founding Fathers in the first Congress never had in mind protecting the local citizen; they were trying to protect the stranger. So I think if our proposal for reducing diversity jurisdiction is adopted, we might make progress.

I believe we will do better if we have separate bills on these matters, but, of course, we have to depend on the Judiciary Committees in the House and Senate to move all of these bills, and you are doing it.

Mr. RAILSBACK. What is your feeling about a national court of appeals?

Mr. BELL. I have testified on that before the Senate, and I will say the same thing here. I was originally against the national court of appeals, and then when I testified before the Hruska Commission I said

that for referral jurisdiction, that is cases referred by the Supreme Court to that body, I would abide by whatever the Supreme Court said about it.

If they felt the need for it, then I would say we needed it.

Later on Justices Powell, White, and Stewart, I believe, wrote a letter to that Commission saying they would like to have reference jurisdiction. Since then the American Bar has come out for reference jurisdiction.

I still oppose transfer jurisdiction. I was a court of appeals judge and I have known many times when I would like to transfer a hard case somewhere else. I think it would be an abomination if you put in the law a way where judges could just simply transfer hard cases up to another level. I don't think you should be able to do that, and I think the Nation has gone all of these years without any such thing. Even though the court of appeals can certify questions to the Supreme Court, you can look through all of the law books and find very few cases where that has been done.

Reference jurisdiction I will go along with, but not transfer jurisdiction.

Mr. RAILSBACK. May I just share with you a concern that I have, as somebody that has been interested in LEAA and had something to do with its formation and also the formation of the juvenile institute, that one of the major purposes of LEAA was not simply to provide funds on kind of a Federal revenue-sharing basis to local law enforcement for purposes of helping them meet some of their problems.

The original thrust was to encourage, particularly the Federal Government and State and local governments to provide imaginative, innovative, new law enforcement programs.

I am the first to admit that it has not always worked that way. In some cases it has.

The other thing in respect to having a juvenile institute, for instance, or institute of juvenile justice was to recognize that we had tremendously high rates of recidivism, particularly among youthful offenders. It was meant to put a focus on the problems of juvenile delinquency.

I just want to express to you if we have a major overhaul of LEAA or if we combine the juvenile institute with the institute of criminal justice or whatever, what I am worried about is you are simply going to get back into the position of doling out funds to State and local governments that are not going to be imaginative, that are not going to be innovative, but rather are going to be to meet some of the hardware needs or the traditional needs that they have had, which are very important as well. I generally favor revenue sharing, but that is the concern I have, and I wanted to express it to you.

Mr. BELL. When I get this report in and have a chance to study it, I thought I would advise this committee and the Senate Judiciary Committee as to our views. The block grant part of it, which is 85 percent of the money, is where we have gone wrong. I have just proven that, I think, by having a study made of one State to see how many employees they had there being paid by LEAA, and in this one State I found 1,042 people being paid by LEAA. They have more people in the

one State being paid by LEAA than we have in LEAA itself. So that is a good example of what has gone wrong.

Mr. RAILSBACK. I am not saying I think the original purpose or intent has really always been effectively carried out, and there may be a great deal of waste. But my feeling is there is great merit in recognizing that we do have to come up with innovative, imaginative new programs. In my opinion, in this country we have—and I am sure you agree—we have tremendously serious problems with crime and particularly with the high rates of recidivism.

Mr. BELL. I am in full agreement with that.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman and thank you, Attorney General Bell.

I want to state that I agree with my friend from Illinois, Mr. Railsback, on the funding of different matters through LEAA, and if that is the route we have to follow, I certainly hope we can tighten it up a little bit. I don't think the dollars are effectively spent.

I am much interested in your suggestions, and I thank you for them, of some way we can try to make justice available to everybody. I know this isn't going to be usually a Federal jurisdictional question; it's normally a State question, but I am thinking of the tens of thousands of disputes involving dollar values of less than $1,000. Under today's prices there just simply isn't a lawyer around who can afford to practice law handling that type of dispute. Yet they are of tremendous importance, major importance to many of our citizens, and the courts, through no intentional fault of their own, simply aren't able to provide a means of settling these disputes.

I don't really know where we can go here, but I invite and encourage you to provide us with all of the help you can. All we can give is leadership, but I am gravely concerned with the fact that probably the majority of Americans, with a majority of their disputes, have no where to go to get them effectively resolved. When you are talking about $500, $700, or under $1,000, the courts just simply aren't the remedy anymore.

You talk about neighborhood centers, this might be very good, and I sure hope you will give us all of the leadership you can, because I think that the average American looks at the courts, as he must through his own eyes, and when his dispute involves a few hundred dollars and he has no way of remedying it, he figures the courts don't serve their function. I think he is probably right, and I think if you took a vote, most people would say that today.

I know this won't work in the United States, and I hope it never will, but I had the unique experience of visiting the People's Republic of China a few weeks ago. They don't even have lawyers, except for those dealing with foreign trade.

Mr. BELL. I certainly hope we don't get to that point.

Mr. DANIELSON. I emphasize let's not get to that point, but you know their disputes are handled real quickly. The governing board of the community or factory community simply calls the people in and sits them down and it is resolved in about 10 minutes, and that is all there is to it.

Of course there is no appeal or anything like that, and there being no property there are no judgments awarded, and I don't want to go that far.

Here is the thing that bothers me in the neighborhood center. You have to have a coercive power of a sort. You must be able to compel the attendance of the defendant, the person against whom the claim is being made. The person seeking relief, yes, he will be glad to come into the neighborhood center. But how about the person from whom the relief is sought, the merchant who sold shoddy merchandise, or the person who otherwise took advantage?

I don't know how you are going to coerce them unless you have something like a court. You have to coerce, if need be, the attendance of the witnesses. You have to have a coercive power to collect a judgment.

I believe and hope that someone with your vast experience and with that tremendous staff of good lawyers you have down there can think up a way that we can solve some of those problems, because I really believe that it's the neighborhood center, the counterpart of the old justice of the peace, who probably can do more toward making people again feel satisfied with their courts than anyone else. If you have any ideas there I would like to hear them, especially as relates to the coercive element which seems to be necessary in dispute solving.

Mr. BELL. The concept of the neighborhood justice center is not to have to use coercion. If you had to have the coercive power of the court, people would be sent to the courthouse. The ideal way would be to run these neighborhood offices as branches of the court clerk's office, and all of these things would be done by persuasion.

Now, once you pass persuasion, you would just have to give it the regular handling at the courthouse, but many of these things we believe can be resolved by commonsense and persuasion. It wouldn't take the place of the courthouse. Professor Sanders, who spoke at the Pound Conference in St. Paul, has called this a courthouse of many doors. He was going to have all of these things in the courthouse. I thought of the idea later on at the Task Force that we ought to get something out in the neighborhood and in urban areas. It's difficult to get to the courthouse.

Mr. DANIELSON. Right.

Mr. BELL. We need something like the justice of the peace again, except it's too late in our history to go back to the justice of the peace. Today we can have neighborhood justice centers, but if you need the forces of the law, then you go on to the courthouse.

Mr. DANIELSON. I agree with you. We can't send people to the courthouse, that is one of the burdens today, they can't get to the courthouse. When they do get there they have to stand in this line and they lose 1 or 2 days wages just getting heard on usually a $200 or $300 claim. It just isn't worth it.

Mr. BELL. They can't afford to go to the courthouse, and even if you have a substantial lawsuit, with modern discovery procedures, one is hard put to pay the lawyers. So the middle class is being priced out of the market too.

Mr. DANIELSON. You are not only hard put to pay the lawyer, but the lawyer in turn can't afford to handle the case unless he can get his fee.

Thank you. I won't burden you on this.

Mr. BELL. We have a problem. The question is the solution.

Mr. DANIELSON. You are pointing in the right direction, and I encourage you and hope you will do whatever you can.

Mr. BELL. Thank you.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I appreciate very much, Mr. Bell, you joining us today. My principal function up to now has been to act as an interpreter for all of the fine people you have brought here to the Department of Justice. You mentioned on page 3 of your testimony, that in the Federal system, not all disputes require an article III judge, and we are seeking to give appropriate cases to magistrates.

I am trying to decipher exactly what you envision the proper function of a magistrate is.

The Bork report refers to the cases that should be transferred to new tribunals, which I assume were the magistrates, those cases which involve repetitious disputes, and rarely give rise to important legal questions.

Do you share that view, that that is basically what we are striving for?

Mr. BELL. Exactly. I think the Bork report was speaking in terms of maybe some court outside of the district court like an administrative tribunal, and the difference is that we want to use a magistrate because they are right there in the courthouse already.

Mr. BUTLER. I just wanted to be sure how high their status would be in your judgment.

One other area of relief that you do not mention, which we have used in State courts, is what we call a commissioner in chancellory, and from time to time in the Federal court special masters for extensive involvement in complex litigation. I notice in our district court our judges have been tied up for the last 3 weeks in a patent case.

Is there any plan to encourage the use of special masters or things of that nature as a form of relief or is any consideration being given to that?

Mr. BELL. That is being done now.

Mr. BUTLER. You think it's being done?

Mr. BELL. Yes. All of the district judges today are using magistrates as masters, they are using even bankruptcy judges as masters in some types of cases.

I believe last year the Congress passed the Magistrates Act to allow wider use of magistrates as masters.

Mr. BUTLER. My question is not directed so much to magistrates as to masters generally, which are outside of the existing judicial system.

Mr. BELL. There is more use of masters today than there ever has been before.

Mr. BUTLER. I am encouraged by that.

One other area which you went into, on page 5, we should examine some mechanism, short of impeachment, which would permit the removal of the Federal judges whose conduct does not comport with the constitutional requirement of good behavior. Is it your feeling

that we could adopt statutory standards of good behavior which would automatically result in the termination, or do you think we still have to go through an impeachment?

For example, suppose we said a judge who murders his wife no longer is meeting our requirements of good behavior. If that event occurs, then his appointment expires. Can we do that, or must we still impeach?

Mr. BELL. To remove altogether, you would have to impeach. The Nunn bill, which is pending in the Senate, goes short of removal, by providing for suspension. The judge would be suspended, but he or she would not be removed. If you had an egregious case, you would still want to use the impeachment process. But there has to be something short of impeachment, because Congress does not have the time to handle all of these cases, and there may be more and more as we increase the number of judges.

We are about to increase the number of judges from 500 to about 625 in this Congress, so there should be a suspension system.

Mr. BUTLER. That is the extent you think we can go constitutionally with regard to that?

Mr. BELL. That is my judgment.

Mr. BUTLER. A suspension, of course, under your view, the Constitution would require we continue compensation during that period, so all we are doing is getting them out of the adjudication of cases, but we are still stuck with all of the burdens that the system requires.

Mr. BELL. That is why I say if it were egregious enough, you would want to go ahead with impeachment, and that would relieve the taxpayers of any obligation, if it was a successful impeachment.

Mr. BUTLER. As you well know, that is not the favorite recreation of the Congress at the moment.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. I thank the gentleman from Virginia.

With the indulgence of the Attorney General, we will recess for 5 minutes.

I am still mindful of time constraints.

Mr. BELL. I would rather finish here, so I will not go to the service.

Mr. KASTENMEIER. We appreciate that. In fact, several members have already gone ahead so as to return in the next several minutes, so as to commence their part of the questioning. But for the rest of us who must go and vote, we will recess for about 5 minutes, and one of the other members upon returning will reconvene.

[A short recess was taken.]

Mr. SANTINI. Mr. Attorney General, in deference to your time constraints we will reconvene the presentation of testimony and the questions and answers that were instituted by the chairman and as soon as he returns from this vote he will divest me of my short-lived chairmanship.

I would first of all like to express my commendation to you for the forthright challenge that you have assumed here in addressing the specifics contained in your statement and the awesome problem of our administration of justice system in this country. I was particularly pleased to hear your reference to JP's, because as a former JP and State trial judge I felt JP's were the bulwark of the judicial

systems at one time. I am particularly pleased with your stress and emphasis on judicial reform and the need for improved administration of justice because that is the hallwark of an institution in my State, the National College of State Judiciary, with which you may be familiar.

Mr. BELL. I am indeed familiar with the National College of the State Judiciary, Reno, Nev., one of the great things that Justice Tom Clark has done for our Nation. Almost every State trial judge in Georgia has attended that school, and I would have to say that the great impetus for court reform in your State, and we have had a lot of court reform, came from the attendance by these trial judges in Reno, so I expect that college has done more to improve administration of justice throughout the Nation than any single thing. So I commend Nevada and the people who made it possible to have that college there, one being the Fleischmann Foundation, I believe.

Mr. SANTINI. That is correct, the Fleischmann Foundation had a hand in creating the college.

Father Drinan, have you had an opportunity to share your questions with the witness at this point?

Mr. DRINAN. No; if I may. I don't want to keep the Attorney General as he is going to the funeral of a dear friend of all of ours, Mr. Justice Tom Clark. Mr. Attorney General, I commend you on your zeal for reforming or modernizing the Federal courts.

I have some specifics. A lot of us have been in this for a long time like yourself and I would like to know when the Justice Department will respond to a bill that I filed, H.R. 5576. This subcommittee asked on April 22 for the views of the Justice Department. This bill would change the existing situation by requiring merit selection of U.S. attorneys. The Attorney General himself would appoint them. In the document that came to us from the Department of Justice or the Attorney General's Office the modernization of the Office of the U.S. attorney was strongly recommended. Would you give us your views on that bill?

Mr. BELL. I spoke at the American Law Institute on that and said that the decision had been made to leave the U.S. attorney selection in the patronage system, but I thought we would have to come to the day soon when we would change that because——

Mr. DRINAN. When is soon, sir?

Mr. BELL. I don't know that we can support your bill right now.

Mr. DRINAN. What bill would you support?

Mr. BELL. I wouldn't support any bill right now, but we have an agreement with the Senate if they take the court of appeals judges out of the patronage system we would go along on the other, so I am working my way very carefully on some other merit positions.

Mr. DRINAN. That is disappointing in that your recommendation really means nothing in the document you gave to us.

On another point, in the reformation of the EEOC and similar agencies for the enforcement of civil rights, Congressman Don Edwards and I have a bill, H.R. 3504, which somehow got to OMB and Mr. Lance is refusing to take a position on it. This would do precisely the things that you are recommending. It would expand the authority of HUD and EEOC to resolve discrimination complaints

administratively. It would seek to cut down on the number of jury trials. Could you indicate anything as to why Mr. Lance has jurisdiction and why the administration is holding up any action on H.R. 3504?

Mr. BELL. We have to send all administration bills through the OMB. I cannot give you the jurisdictional basis, and I cannot tell you why it is being held up, if it is being held up. Did you say it is EEOC and HUD?

Mr. DRINAN. Yes. This seeks to unscramble EEOC. It seeks to carry out what the Civil Rights Commission last week said has to be carried out, namely, get some overall direction to the civil rights enforcement efforts of the administration.

The blistering 201 page report by the Commission said there was a total lack of coordination and direction in the civil rights area. This bill seeks to rectify part of that. May I ask you to speak to Mr. Lance and try to somehow at least have the administration go on record? If the answer is "no" as on the U.S. attorney's bill, all right; I just want to know.

Mr. BELL. We are not in a position to take immediate positions on all matters. We are having a study made of the entire civil rights posture of the Government. There are a lot of other people in civil rights besides those two agencies. There are 1,300 civil rights agents at HEW, for example, far more than we have at the Justice Department, but we are making a study.

Mr. DRINAN. On the third point, has the administration any position on the bilingual courts legislation which is pending before another subcommittee of the Judiciary Committee. The Justice Department opposed the bill last year. Will the Department be in favor of it this year?

Mr. BELL. I couldn't tell you. I have not studied it. I will be glad to do so and advise you in writing.

[The information referred to follows:]

[The Attorney General subsequently notified the subcommittee that the Department of Justice would take a position on bilingual court legislation "in the near future".]

Mr. DRINAN. I thank you again. I don't want to hold you from Justice Clark's funeral. I have several other specific questions. I welcome the general statement that you made, but I am waiting, as I have been for some years—although I know now it is different, that there is going to be a new day at the Justice Department. But I just want specific recommendations on pending legislation in all of these areas; for example, on the FOIA and Privacy Act.

One last question, if I may, Mr. Chairman. Mr. Richardson some 3 or 4 years ago, told the litigation divisions of the Justice Department not to defend any FOIA suit if the agency in question had not first cleared the refusal to disclose the information to the Justice Department. Mr. Levi countermanded that policy, I wonder, Mr. Bell, if you have a policy now? Do you allow the Justice Department to spend a vast amount of resources defending what may be an unjustifiable withholding of information by several agencies?

Mr. BELL. I don't think we do. We don't intend to, and we put out an instruction to all agencies giving the basis on which we would defend the suits. Our policy has been widely publicized.

Mr. DRINAN. I know that. It doesn't get to the precise point that I mentioned. Do you say to the agencies we will not defend you unless you first clear your denial of information with the Justice Department?

Mr. BELL. No; we have not said that.

Mr. KASTENMEIER. The gentleman from Nevada, Mr. Santini.

Mr. SANTINI. Thank you, Mr. Chairman.

General Bell, first of all, I would like to examine the issue of diversity as you have discussed on page 10 in your statement, and the conclusion contained therein by the Pound Conference that there would be little impact in the event of a shift in diversity requisites on the State courts. I am wondering what is the basis for that conclusion, sir?

Mr. BELL. I thought somebody might ask that question here. It seems to be a contradiction in terms. What it intends to reflect is the fact that with the vast volume of cases in State courts, the volume is so great that there would be little impact from transferring a few additional cases to the State courts, but in the Federal courts where the cases are few the percentage of transfers would be very high. This is simply because there are many more cases in the State courts than there are in the Federal, and I have heard State judges say, well, we could take your diversity cases without hardly knowing we had those extra cases. I think that generally would be true. I don't know about in a State as small as Nevada, but certainly in these large States they wouldn't know they have these extra cases.

Mr. SANTINI. It would seem advisable, sir, in whatever direction we pursue in our efforts to eliminate the inequities created by the diversity constraint that we do enlist the aid and assistance of State judicial organizations because I otherwise apprehend that you could be undermined constantly with the general aversion that we cannot assume any more work at the State level. Don't let them shift that burden over on us. Keep it the way it is.

Mr. BELL. We can give you the exact number of cases, for example, that would be shifted in Nevada if you would like to have that.

Mr. SANTINI. I would appreciate that information.

[The information referred to follows:]

By using a projection from data supplied by the Administrative Office of U.S. Courts, 154 diversity cases were filed in federal district court in Nevada in 1976. Of these cases, a projected total of 55 cases were brought by a resident of Nevada; these 55 cases would be the maximum number of cases barred by the Administration's proposal.

Mr. SANTINI. On an issue that was not touched upon in your statement but I know as a matter of preliminary concern to you, bankruptcy judges in their expanded jurisdiction, has the Attorney General's Office taken any position with regard to the desirability or feasibility of expanding the jurisdictional requisites of the bankruptcy judges?

Mr. BELL. We have not. The only position I have taken is I told the Office of Legislative Affairs that we do not want to run the clerk's office for the bankruptcy courts. The Federal courts were all at one time managed by the Justice Department. I think this is a very bad thing because we are the chief litigant in the Federal courts, and I don't think the public can understand why we ought to be the clerk for

the Federal courts and the litigants. So I think if you are going to do whatever it is the House is planning to do with the bankruptcy judges, one thing is the management ought to be with the court administrative office. The court administrative office does a good job, I know from experience. They manage the bankruptcy courts now, so why move the management? Certainly you ought not move it to us where we are litigating in those courts. The public might think that we had an advantage.

Mr. SANTINI. If that administrative concern were eliminated could you be supportive of an expanded independence and expanded jurisdiction and responsibilities for bankruptcy judges in this country?

Mr. BELL. I think I could support some of the things that the House has in mind. I wouldn't go so far as to make the bankruptcy judges article III judges, for example. In fact, I haven't talked to my bankruptcy judges, but I have trouble understanding why they would want to be article III judges. They might all lose out. If they are article III judges how are they going to be appointed? The same way as all judges I guess. Is that to start over? I haven't talked to any of them. I know a lot of bankruptcy judges, and I thought pretty soon I would maybe get briefed on just what it is they want and what the complaints are about the present system. As you know, they do important work, particularly in the recent years when we had an economic recession. They have had some of the major matters in the country to handle. I have a high regard for them, but I am not really ready to commit on that until I can study it more.

Mr. SANTINI. I just was interested in your remark contained in your statement in reference to class actions that alternatives to class actions were being studied. It has been touched upon. I wonder if you could advise the committee on what some of the alternatives to class actions might be?

Mr. BELL. We are going to furnish the committee with a list of those alternatives.

Mr. SANTINI. I would appreciate that.

I want to in conclusion emphasize my enthusiastic support for your efforts in trying to reform, shape, and examine our administration of the justice system in this country. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Pennsylvania, Mr. Ertel.

Mr. ERTEL. Thank you, Mr. Chairman.

Nice to meet you, Mr. Attorney General. I have just a very few questions and a very specific one which I addressed to you previously, but as I have witnessed the federal system over the years it appears to be coming more and more a rich system of justice, a justice system which is only for the rich and powerful, because it becomes so very expensive to litigate in the Federal courts. I think you alluded to that in some degree in your statement, that in fact you are trying to set up a system where there would be the ability of the average citizen or even less than the average citizen financially to get into it. I just wonder if there is not a way, if we can, instead of continuing the restricting of the jurisdiction of the Federal courts, get the courts more open and try and cut down on the expense for people going through the Federal court system. It has become almost prohibitive for anyone to get in who is not a wealthy individual.

Do you have any ideas or thoughts on that other than this Neighborhood Center, which really is only a mediation service?

Mr. BELL. The Neighborhood Justice Center really is designed for the State courts. One of the three model projects that we have designed is to be run by the State courts, one by a city, and one by a bar association.

I want to disagree with you to some extent. The Federal courts are courts for the poor and the rich only. They are not courts for the middle class because the middle class has to pay, and they cannot afford what it costs to be in the Federal court. We expanded in forma pauperis proceedings. We give every criminal defendant a lawyer for trial and appeal. We give even some assistance to lawyers, so they can afford to be in the Federal court. We should do that, as the Constitution requires it.

Mr. ERTEL. If I may, the poor do get representation in criminal cases because of the Criminal Justice Act, but how about the civil litigants?

Mr. BELL. They can proceed in forma pauperis.

Mr. ERTEL. But then they usually wind up in a system which is so complex they cannot understand it.

Mr. BELL. Not only that; it is a burden on the lawyers actually. The lawyer ends up having to finance the case until the case is finished. It is not a very good system. What we need to do is address the basic problem, which is that the rules need changing. We have abuses in discovery, for example, and it is too expensive and the procedures are too complicated, and therefore it takes too long to try a case.

You know the joke about a lawyer who says: "Don't make everything into a Federal case." Apparently at one time Federal cases were big cases, but not any more. A lot of them are small cases, but we treat them all the same. That is one thing I would like to see us think about.

Mr. ERTEL. I wonder if you have any specific suggestions as to how to do that? Would it be having the Federal judge involved more in the discovery process to eliminate some of the abuses in the discovery process?

Mr. BELL. That is one way of doing it. That is one thing I advocate. We have to get the judges in position where they can take charge of a case, if they will, at the beginning and define the issues. One of the first steps ought to be define the issues, restrict discovery to those issues. I don't mean to say there aren't some judges who won't do that now. Some will. But some won't. Then we should look at the magistrate's idea and at arbitration. Once we come to an arbitration bill you will see that will take care of a lot of these small cases. When I say "small cases," I mean in money. My idea of arbitration is that almost any case involving money could be arbitrated, but you have to be very careful not to treat people differently. We have to set up a system where every case of the same type gets the same treatment. We have to be careful not to violate the equal protection clause. That is one reason we have been slow about reporting an arbitration bill. We are careful about that, and in the magistrate's bill, because that is double consensual jurisdiction. The judge has to refer it and the parties have to consent.

Mr. ERTEL. I come from one of those States that has an arbitration system, Pennsylvania. We also have a very extensive JP system, and we found or at least my observation was when we consolidate the JP system from a widespread system of many JP's to a more tight and lesser JP system, I think we denied a lot of people justice because again we upgraded; we caused people to go more into those courts.

Mr. BELL. That is what we have done all over the country. We have become very efficient.

Mr. ERTEL. We have become efficient at the sake of justice in some respects.

Mr. BELL. Yes; and we have gone overboard to the point where the efficiency is about to destroy us. We need to think more in terms of access than efficiency.

Mr. ERTEL. There is one question I wanted to ask you in reference to the same problem. I have heard complaints about cases, and I wonder if the Justice Department is thinking along this line, taken under advisement by a judge, both in the federal system and in the State system, and that case remains under advisement for 16 to 18 months before a decision is rendered, which in effect many times denies justice in that case because by the time the judgment comes down conditions have changed; circumstances have changed. Is there any way that the Justice Department is moving to try to encourage or suggest to judges to speed up their decisionmaking process from the time of hearing?

Mr. BELL. No, sir. You see, we are a litigant and we suffer that fate oftentimes.

Mr. ERTEL. I understand, and so does everybody else. It is very difficult to get a handle on a judge who refuses to make a decision.

Mr. BELL. That is something that really addresses itself to Federal management in the court system. In the Fifth Circuit in which I served, we had a rule that if a judge had not written an opinion in a year it went back to the calendar automatically. That is too long. Lay people would think that is too long, but we did have that rule. In some State systems you have to have an opinion out within a certain number of days or it is automatically affirmed.

Mr. ERTEL. That is right. Pennsylvania has such a rule.

Mr. KASTENMEIER. Has the gentleman concluded?

Mr. ERTEL. I have one other question, if I might.

Mr. Attorney General, I addressed a letter to you about 1½ to 2 weeks ago concerning a Federal district judge in the Eastern District of Pennsylvania, a judge by the name of Fogel, whom I do not know, only press reports on and some information I have gotten that in fact in the past administration the Assistant Attorney General recommended he be impeached, and there was another Deputy Attorney General—I don't know your hierarchy, but somebody above him suggested he resign. There was a grand jury investigation involving that judge where he took the fifth amendment, it is my understanding from reports. I ask you as to what in fact the Justice Department is doing at this time?

Informally, not through your Department but some other way, I found out that there are reports and there have been recommendations in the Justice Department for 6 months concerning this particular

incident, and I get reports from people in that area that they are leery about appearing before the judge because there is a terrific cloud over his head. They don't know whether they are getting justice or not, and don't know whether the allegations are true or not since this has been going on.

The grand jury, as I recall, returned a nolle pros or no bill about September of last year, almost 9 to 10 months ago. What, if anything, is the Justice Department doing, and what can we expect to hear? I think it is of utmost concern to the people who are practicing in that court, and to the people who are litigants before that court.

Mr. BELL. I know the matter you have in mind, and I can report to you that I met this week with Mr. Benjamin Civiletti, the head of the Criminal Division, about that particular case, and we will be responding to your letter at an early date. We are getting ready to make a move in the case. That is all I would like to say about it now, but we will respond to your letter.

Mr. ERTEL. I appreciate that.

Mr. KASTENMEIER. I am going to have to terminate the gentleman's questioning. In behalf of the committee I express our very deep gratitude to you, Mr. Attorney General, for coming this morning and I am sorry we detained you so late. We appreciate your testimony. It is vital to this committee, and we undoubtedly will want to continue the dialog with you and the Department of Justice.

In the meantime we will accept whatever appendices you have with your statement for the record. I don't see among the papers presented Mr. Rowan's newspaper article about you which appeared in the newspaper this weekend.

Mr. BELL. That is about the finest thing that has happened to me lately.

Mr. KASTENMEIER. I think his view is shared by many.

Thank you, Mr. Attorney General.

This concludes the meeting this morning.

Mr. BELL. Thank you.

[Whereupon, at 10:55 a.m., the subcommittee adjourned.]

STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

WEDNESDAY, JUNE 29, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:10 a.m., in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Railsback, and Butler.

Also present: Michael J. Remington, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning the subcommitee convenes a third day of oversight hearings on the State of the Judiciary and Access to Justice. On June 20 the subcommittee heard from Ralph Nader and Thomas Ehrlich; on June 22 it heard from Attorney General Griffin B. Bell.

Our only witness this morning, and we are very pleased, indeed, to have him here, is the Honorable Robert A. Ainsworth, Jr. Judge Ainsworth is presently a Circuit Judge on the Court of Appeals for the Fifth Circuit.

He is testifying today in his capacity as Chairman of the important Committee on Court Administration of the Judicial Conference of the United States. He has held that position since 1971 and has been a member of the committee since 1969.

Judge Ainsworth is broadly experienced in both the legislative and judicial processes. Between 1950 and 1961 he served in the Louisiana State Senate; in 1952 he founded the Louisiana Legislative Council, between 1952 and 1956 and later in 1960 he was president pro tem of the State senate where he served until 1961 when he was named as a district judge by President Kennedy. In 1966 he was elevated to the Fifth Circuit Court of Appeals by President Johnson.

We are honored to have Judge Ainsworth with us today.

Judge Ainsworth, you may proceed as you wish, sir.

TESTIMONY OF HON. ROBERT A. AINSWORTH, JR., CIRCUIT JUDGE ON THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Judge AINSWORTH. Thank you very much, Mr. Chairman, and thank you for the very kind and generous introduction.

I thought, in the interest of saving time, that I might just broadly sketch the first six pages of my statement, with reference to the Judicial Conference of the United States and its various committees.

Mr. KASTENMEIER. In that connection, we will then receive your written statement with its appendixes for the record.

[The prepared statement of Judge Ainsworth follows:]

STATEMENT OF HON. ROBERT A. AINSWORTH, JR., UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MR. CHAIRMAN: My name is Robert A. Ainsworth, Jr. I am a judge of the United States Court of Appeals for the Fifth Circuit. I am appearing before your subcommittee primarily in my capacity as Chairman of the Committee on Court Administration of the Judicial Conference of the United States to discuss with you the work of the Conference particularly in its relationship to the Congress and to legislation. It will be helpful to a better understanding of our work if I set forth in some detail the manner in which the Judicial Conference and its committees are set up.

The Judicial Conference of the United States has operated in its present form for nearly 20 years although it is an outgrowth of the Conference of Senior Judges, as the chief judges of the circuits were then called, which was summoned to meet for the first time by Chief Justice Taft in December 1922. The Conference now meets twice a year, usually in March and September, here in Washington in the Supreme Court Building, and by statute is subject to call into special session by the Chief Justice. From time to time, such special sessions have been held, as for example, in January 1965 when the Conference met to discuss and plan for the responsibilities of the federal courts under the newly enacted Criminal Justice Act.

The Judicial Conference of the United States is the policy-making body of the federal judiciary. The statutory enactments relating to the Conference, its composition and duties, are set forth in section 331 of title 28, United States Code. At the present time, it is composed of the Chief Justice of the United States as Chairman, the chief judges of the eleven circuit courts of appeals, eleven district judges elected for three-year terms by their colleagues, the Chief Judge of the Court of Claims and the Chief Judge of the Court of Customs and Patent Appeals, a total of 25 judges. The primary duties of the Judicial Conference, as set forth in the statute, are to make a "comprehensive survey of the condition of business in the courts of the United States and prepare plans" for the intercircuit assignment of judges; also to "submit suggestions to the courts in the interest of uniformity and expedition of business." The Conference is charged with carrying on a continuous study of the operation and effect of the general rules of practice and procedure and to make recommendations from time to time to the Supreme Court in regard to these rules. Lastly, the Conference is charged with making recommendations to the Congress for legislation, and the Chief Justice is required to report to the Congress on the proceedings of the Conference.

Since the Conference normally meets twice a year, most of the matters which come before the Conference are considered first by one of the committees of the Conference which in turn makes its findings and recommendations to the full session of the Conference. There are three general committees of the Conference, which have representatives from each of the eleven circuits. These are the Committee on Court Administration, the Committee on the Operation of the Jury System and the Committee on the Administration of the Criminal Law. The Committee on Court Administration is presently composed of fifteen members, at least one from each judicial circuit in the United States; seven are circuit judges and eight are district judges. The Court Administration Committee operates with four important subcommittees charged with matters relating to federal jurisdiction, judicial statistics (including needs of additional judgeships), also to supporting personnel and to judicial improvements. The Conference also has several general committees composed of from five to seven or more members which oversee the activities of the bankruptcy system, the federal magistrates system, the probation system and the administration of the Criminal Justice Act and the federal defender system. Additionally, the Conference has a committee which advises the Chief Justice on intercircuit assignments, a review committee

which examines the reports of extrajudicial income filed semi-annually by judges, magistrates and referees in bankruptcy, and an advisory committee on judicial activities which renders opinions to judges, magistrates and referees on matters pertaining to interpretation of the Code of Judicial Conduct. Most importantly the Conference has a committee on the budget which presents to the September session of the Judicial Conference each year its recommendations for the budgetary submission required to be made each October to the Office of Management and Budget. The Chairman of the Budget Committee also presents the requests for appropriations for the federal judiciary to the appropriations committees of the House of Representatives and the Senate.

In addition to the foregoing, the Conference has a Committee on the Rules of Practice and Procedure which is charged with formulating and presenting to the Conference for ultimate submission to the Supreme Court and the Congress, proposals for changes and modification of rules of practice and procedure. To assist it in its operations this standing committee has had from time to time six advisory committees, three of which are currently functioning, namely, the Advisory Committee on Criminal Rules, the Advisory Committee on Civil Rules, and the Advisory Committee on Appellate Rules. In the past there have also been advisory committees concerned with admiralty rules, bankruptcy rules and rules of evidence.

At the present time the Conference also has five ad hoc committees created for specific purposes; one to consider standards for admission to practice in the federal courts, one to advise the Conference on proposals for the court structure in the Pacific Territories, one relating to current proposals to change the bankruptcy system, one concerned with habeas corpus matters, and one created for the purpose of appropriate commemoration of the Nation's bicentennial.

Except for the committees relating to the Rules of Practice and Procedure and the Committee to Consider Standards for Admission to Practice in the Federal Courts, the membership of the several committees of the Judicial Conference is composed almost entirely of federal judges. In appointing members of these committees of the Conference, every Chief Justice has made an effort to select judges from both the circuit and district courts and to provide for geographical representation from the several sections of the country on these committees. The ad hoc and the rules committees are also composed of members of the practicing bar and legal scholars. Both the ad hoc committee on standards for admission to practice and the advisory committees on rules of practice and procedure also have reporters who are reimbursed when actually employed and who prepare the agendas for the committee meetings and serve as secretaries and research scholars to the committees. In addition, the rules committees now invite to their meetings staff of the appropriate committees of the Congress, a step which we feel has contributed to a mutual understanding of the operations and views of the rules committees and the committees of the Congress.

As you know, Mr. Chairman, the Judicial Conference, during each session of the Congress, receives from the Judiciary Committees of the House of Representatives and the Senate, requests for comment on pending legislative matters. In addition the Conference, through studies by its own committees, brings its suggestions for new legislation to the Congress. I believe it can be safely said that the Judiciary Committees of both houses of Congress have on almost all occasions sought the views of the Judicial Conference on any matters affecting the Judicial Branch. The Office of Management and Budget likewise sends to the Judicial Conference for comment several legislative proposals emanating from the Executive Branch which have an impact on the judicial process. The Chief Justice has, from time to time, urged upon the Congress the importance of providing impact statements on important legislation in order that the Congress may fully understand what the passage of such legislative proposals will mean to the workload of the federal courts. It has been our experience that those proposals of the Congress which have not been referred to the Judicial Conference normally emanate from committees other than the judiciary committees, and accordingly they are less familiar with the practice which the judiciary committees follow in referring to the Judicial Conference legislative proposals which will have an effect on the federal court system. I refer, for example, to such matters of important national policy which are not primarily concerned with the judiciary but which could have substantial impact on the work of the federal courts such as legislation affecting consumer matters, energy, banking or the flow of commerce.

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In discussing with you the relationship between the courts and the Congress, I speak to you with some knowledge of the viewpoint of the legislators, having been a member of the Senate of my own State of Louisiana for eleven years, as the Chairman so kindly pointed out and at one point Chairman of the Senate Judiciary Committee. From the point of view of the judges, I can tell you that the Conference has welcomed the opportunity which the judiciary committees have afforded it to submit views on proposed legislation which in one way or another will affect the federal courts. I believe, too, that the Administrative Office of the United States Courts, which furnishes staff support to the Conference and its committees and which is the conduit for inquiries and comments between the Judicial Conference and the Congress, has taken a forward step in the last few months leading to a better understanding of our mutual problems through the establishment of a Legislative Liaison Office. That is the Office we have just been talking about. In the short time in which this office has been in existence I think it has already demonstrated a capacity for engendering a greater understanding as well as for expediting an exchange of viewpoints.

It is not my purpose today to discuss the specifics of any legislative proposals but rather to bring to your attention some of the major areas where, from the standpoint of the Judicial Conference of the United States, legislative proposals merit attention. I think there can be no doubt that the most important of these areas to the federal courts is legislation establishing additional circuit and district judgeships. Your Committee and the Congress are aware of the tremendous explosion in litigation which has occurred in the past fifteen years. New filings in the circuit courts of appeals in this period have increased by 303 percent and civil and criminal filings in the district courts by 91 percent. Speaking only from the standpoint of the Court of Appeals of the Fifth Circuit, when I was named to the Court of Appeals eleven years ago, following five years on the district court, the Fifth Circuit had just finished a year in which there had been 1,093 appeals filed. For the year ending June 30, 1977, there have been 3,240 appeals filed through the end of May.

The recommendations for new judgeships transmitted to the Congress by the Judicial Conference earlier this year were the product of examination and deliberations over a long period of time by the Subcommittee on Judicial Statistics of the Committee on Court Administration. Working in close collaboration with the experts in this field in the Administrative Office and using the analyses and recommendations of the circuit and district courts, the subcommittee has on a quadrennial basis produced detailed surveys of the judgeship needs of the federal courts. These reports are not submitted to the Congress until they have come under the scrutiny and approval of the Court Administration Committee and the Judicial Conference.

Many of the criticisms leveled at the courts of appeals today are directed to some of the devices which we have had to develop in order to bring to conclusion as many cases as we have been able to in these past few years. I refer, for example, to the screening procedures which we have set up, to the elimination of oral argument in a number of cases, and to the practice in some circuits of rendering decisions from the bench without written opinions. These are obviously expedients and they are not steps which we would necessarily want to take; we frankly had no alternative.

I think most of us would agree that simply adding judges to our already overburdened courts is not a panacea. We all recognize, for example, that an appellate court cannot function if it is too large. Most of my brethren in my own court have agreed that with fifteen judges currently on our court we have suffered a loss in efficiency simply through the necessity of keeping abreast of what each of the other panels in the same court is doing.

The Judicial Conference has recommended to the Congress other areas of exploration aimed at meeting the problem of the explosion of litigation in the federal courts. At its session last September, for example, the Conference reaffirmed its support of legislation pending in the 94th Congress which would prohibit a plaintiff from filing a diversity case in the state of his residence and legislation which would increase the jurisdictional amount in diversity cases to $25.000. At its March session this year the Conference went further and approved legislation pending in the current Congress which would abolish diversity of citizenship as a basis of jurisdiction in the United States courts in the fifty states. It is interesting to note that the Department of Justice report on the federal courts, issued in January of this year, also recommends the abolition of diversity jurisdiction.

The Administrative Office, at the direction of the Judicial Conference, has already submitted thirteen legislative proposals to the 95th Congress, as reflected in the attachment to this statement. Three of these relate to the jury system and would, among other things, make uniform throughout all federal districts the provision for juries of six persons in civil cases and would also provide for a more realistic payment of fees to jurors in the light of the current economy. It is probably through service on a jury that most of our citizens obtain a close view of the work of our federal courts. The Judicial Conference, by sponsoring panels and seminars throughout the country, has brought about a better understanding on the part of our courts of the operation of the jury system with a view to minimizing the delays which have often caused our jurors to become discouraged and disgruntled with the jury system. Proper remuneration of the expenses incurred in serving on federal juries will go a long way, I believe, toward reducing further the reluctance of many of our citizens to perform jury service.

Also before the Congress are a series of bills sponsored both by the Executive Branch and by the Judicial Conference, which, although varying in some details, would allow the federal district court judges to make a greater use of United States magistrates. Our magistrates have served well in most areas, not as a separate tier of judges but as valuable adjuncts to the United States district judges in the discharge of their responsibilities. In the reporting year just ending, for example, United States magistrates will have handled some 266,000 matters, ranging from the issuance of process to the trial of minor offenses and the pretrial of many civil actions.

We hear a great deal said as to the need for court reform and for greater access to the judicial process and to the prompt determination of cases. Yet we must not lose sight of the fact that the Congress, the federal judiciary and the legal fraternity, as well as the scholars of the nation, have been directing much attention in the very recent past and at present to these problems. I cite, for example, the work of the Commission on Revision of the Federal Court Appellate System. Likewise, last year there was a profound examination of the problems facing the judiciary today and in the years ahead at meetings in St. Paul, Minnesota, which have come to be known as "Pound Revisited." The Judicial Conference was a co-sponsor of these meetings. Also, early in this present year there was a valuable study issued by the Department of Justice Committee on the Revision of the Federal Judicial System. The Judicial Conference, and specifically the Committee on Court Administration, has before it at present for study and an expression of views many of the recommendations and findings of these groups.

Some of the legislation which I have mentioned is of comparatively recent origin, as for example, the establishment of the federal magistrates system and the revision of the jury system through the enactment of the Jury Selection and Service Act of 1968. I think we all recognize that the Congress has indeed been active in responding to the needs of the federal judiciary.

We must, however, look not only to today but to the immediate and the long-range future of our judicial system. There are a number of important factors which may well have a profound influence on the federal judiciary in the years ahead. There will undoubtedly be wide-spread use of computers and other information processing and retrieval technologies; there will be more sophisticated means for the prediction and control of human behavior; there will be striking demographic changes in our population; there will be widespread reliance on less formal administration rather than strictly legal processes for dispute resolution; there will undoubtedly be widely expanded access to legal services and there will be government provision for an increasing array of services and widely expanded governmental regulation of the economy, particularly on scarce natural resources. These are but a few of the factors which must concern us on the bench and in the Congress when we look toward the future.

Before concluding I would point out to the Committee the great strides which have been made in one branch of the judiciary in planning for the future and in taking into account the various factors which will undoubtedly have a significant impact on the course of the future of the federal judiciary. I am referring, of course, to the work being done by the Federal Judicial Center. The Center was created nearly ten years ago by the Congress to serve as the training arm and the research and development arm of the federal judiciary. Under three distinguished directors the Center has proceeded not only with vast training programs for all areas of the federal judiciary but also in the area of research and

development. I am sure the Center will, if it has not aready done so, report fully to your Committee on its achievements. I would like to mention only one area which is now coming into fruition to demonstrate that the Center has indeed been abreast of the developments of technology in behalf of the judiciary. The research and pilot programs in the area of computer-assisted legal research have now reached the point where the Administrative Office can, and is, in the process of providing equipment for this purpose for many of the metropolitan district courts and for the courts of appeals. Over the long run this will undoubtedy prove to be a significant advancement.

Since the beginning of this year the Attorney General has created a special division, headed by an Assistant Attorney General, the primary function of which is to work in the area of judicial improvements. The American Bar Association has likewise created a special committee for this purpose. With their cooperation and the assistance which I am confident we can look forward to from our universities and private foundations, I am sure that the Congress, with the continued assistance of the Judicial Conference of the United States and the judiciary as a whole, will go forward to meet the challenges and problems ahead.

95TH CONGRESS—JUDICIAL CONFERENCE LEGISLATION

1. To provide for the appointment of additional judges for the United States district courts and courts of appeals, and for other purposes. (Submitted February 9, 1977.)

Introduced as: S. 11 on January 10, 1977; H.R. 3685 on February 17, 1977; H.R. 3714 on February 21, 1977; H.R. 4482 on March 3, 1977; and H.R. 4822/3/4 on March 10, 1977.

2. To amend the Federal Rules of Criminal Procedure to provide for appellate review of sentences. (Submitted March 29, 1977.)

Introduced as H.R. 7245 on May 7, 1977.

3. To amend the Jury Selection and Service Act of 1968, as amended by revising the section on fees of jurors and by providing for a civil penalty and injunctive relief in the event of a discharge or threatened discharge of an employee by reason of such employee's federal jury service. (Submitted March 31, 1977.)

Introduced as H.R. 7810 on June 15, 1977.

4. To amend the Jury Selection and Service Act of 1968, as amended, to make the excuse of prospective jurors from federal jury service on the grounds of distance from the place of holding court contingent upon a showing of hardship on an individual basis. (Submitted March 31, 1977.)

Introduced as H.R. 7814 on June 15, 1977.

Introduced as H.R. 7809 on June 15, 1977.

5. To provide for the defense of judges and judicial officers sued in their official capacities. (Submitted March 31, 1977.)

Introduced as H.R. 7241 on May 17, 1977.

6. To amend title 28, United States Code, to provide in civil cases for juries of six persons, to amend the Jury Selection and Service Act of 1968, as amended, with respect to the selection and qualification of jurors, and to extend the coverage of the Federal Employees Compensation Act to all jurors in United States district courts. (Submitted March 31, 1977.)

Introduced as H.R. 7813 on June 15, 1977.

7. To amend section 1332(a)(1) of title 28, United States Code, relating to the jurisdiction of the United States district courts in suits between citizens of different states. (Submitted March 31, 1977.)

Introduced as H.R. 7243 on May 17, 1977.

8. To amend the Bail Reform Act. (Submitted April 18, 1977.)

Introduced as H.R. 7242 on May 17, 1977.

9. To amend section 1963 of title 28, United States Code, to provide for the registration of criminal judgments of fine or penalty. (Submitted April 18, 1977.)

Introduced as H.R. 7240 on May 17, 1977.

10. To amend the Canal Zone Code with respect to the appointment and service of probation officers and for other purposes. (Submitted April 15, 1977.)

Introduced as H.R. 7244 on May 17, 1977.

11. To amend chapter 313 of title 18 of the United States Code. (Submitted April 19, 1977.)

Introduced as H.R. 7239 on May 17, 1977.

12. To enlarge and amend the trial jurisdiction of United States magistrates in misdemeanor cases. (Submitted May 26, 1977.)
Introduced as: S. 1612 on May 26, 1977; and H.R. 7812 on June 15, 1977.
13. To improve the administration of the Federal Magistrates System, and for other purposes. (Submitted May 26, 1977.)
Introduced as H.R. 7811 on June 15, 1977.

Judge AINSWORTH. Fine. I have made an editing change on one page with reference to judicial impact which I have noted with the reporter, so she has the editing change in the prepared statement.

The Judicial Conference of the United States activity is not as well known perhaps as we who participate in its activities sometimes think it is. It meets twice a year here in Washington at the Supreme Court, usually in March and September. Special sessions may be held from time to time, they are not too frequent, when some special subject of emergency consideration has to be taken up.

It is a 25-judge body composed of the Chief Justice as the Chairman, and the chief judges of the 11 circuit courts of appeals together with 11 district judges who are elected by the judges of their circuit for 3-year terms. In addition, the chief judge of the Court of Claims and chief judge of the Court of Customs and Patent Appeals are present, so you have a total of 25 judges.

Its duties are specified in section 331 of title 28 of the United States Code, and I will not repeat them here.

When the Conference meets here in Washington, it meets to receive the reports of various committees of the Conference, which from time to time make recommendations to the Congress. These recommendations are made by the chairmen of the respective committees, so I, as the chairman of the Committee on Court Administration personally make my report in writing and orally to the conference.

The Committee on Court Administration, of which I am chairman, is composed of 15 judges, at least 1 from every circuit in the United States. It operates with four important subcommittees, Federal Jurisdiction, Judicial Statistics, Supporting Personnel and Judicial Improvements. Judicial Statistics has to do with the need of creating additional Federal judgeships, so that is a very important subcommittee.

There are numbers of other general committees of the conference which I won't name at this time, and those having to do with revision of rules of practices and procedure for submission to the Supreme Court in due course, also special ad hoc committees which have to do with standards for admission to practice in the Federal courts, and those relating to changes in the bankruptcy system, habeas corpus, and so forth.

To get down to the specifics of the operations of the committee, on page 6 I cite the following:

> As you know, Mr. Chairman, the Judicial Conference, during each session of the Congress, receives from the Judiciary Committees of the House of Representatives and the Senate, requests for comment on pending legislative matters. In addition the Conference, through studies by its own committees, brings its suggestions for new legislation to the Congress. I believe it can be safely said that the Judiciary Committees of both Houses of Congress have on almost all occasions sought the views of the Judicial Conference on any matters affecting the judicial branch.

The Office of Management and Budget likewise sends to the Judicial Conference for comment several legislative proposals emanating from the executive branch which have an impact on the judicial process.

The Chief Justice has, from time to time, urged upon the Congress the importance of providing impact statements on important legislation in order that the Congress may fully understand what the passage of such legislative proposals will mean to the workload of the Federal courts.

It has been our experience that those proposals of the Congress which have not been referred to the Judicial Conference normally emanate from committees other than the judiciary committees, and accordingly they are less familiar with the practice which the judiciary committees follow in referring to the Judicial Conference legislative proposals which will have an effect on the Federal court system.

I refer, for example, to such matters of important national policy which are not primarily concerned with the judiciary but which could have substantial impact on the work of the Federal courts such as legislation affecting consumer matters, energy, banking, or the flow of commerce.

Mr. BUTLER. Mr. Chairman, could we interrupt or would you like to complete his statement?

Mr. KASTENMEIER. I yield to the gentleman for the purpose of asking questions. To the extent possible, we would like to let him finish.

Mr. BUTLER. I think you have touched on a point that greatly concerns me in that legislation is constantly developing in all areas—particularly with reference to commerce—that doesn't come out of the Judiciary Committee.

For example, there is a Federal Trade Commission Improvements Act floating around here that is going to greatly expand, before it gets through, the jurisdiction of the Federal courts. I am interested in knowing at what point the Judicial Conference becomes aware of these things. I thought that you didn't have the same liaison you have with the Judiciary Committee. I guess what I am really asking is, what are you doing to improve that or do you think the initiative should come from us?

Judge AINSWORTH. I think it should go both ways. I think the present system is probably inadequate, and with the Judiciary Committees, we have no problem, because you recognize right away there is something affecting the judiciary, and you ask our comment on it. Someone who is interested in the Federal Trade Commission may not be thinking about the impact on the Federal courts at the time.

The meeting we are having here today is part of the process, of getting better acquainted with each other as to how we are proceeding. That is why I described in such detail how the Conference works.

I don't know what the best mechanism is. We don't have a staff to oversee all of the bills that are introduced in Congress and that are proceeding in Congress. That would be too vast a job for us to undertake.

I don't know how you pass the word to the entire Congress concerning the situations we have that the Judicial Conference is interested in knowing what the impact is going to be on the courts.

We are open to suggestions, and we greatly are desirous of cooperating with you to find a way.

Mr. KASTENMEIER. If I may, following up on the question asked by the gentleman from Virginia, you have just set up legislative liaison office. It's a new instrumentality within the Judicial Conference, and I guess the question is really, To what extent is that office going to be competent or able to monitor legislation passing through

the Conference and entering the Judiciary Committee or any other committee in Congress? Will the new liaison office be able to assess the impact and desirability of legislation as far as the Judicial Conference is concerned?

Judge AINSWORTH. I don't think we are going to know yet, because this activity has just started. We have one man, Mr. Weller, doing this. He is so busy now just with his activities, his checking for us now on things, whether he can do more or whether we are going to have to expand his setup, I don't know, but it strikes me that it is a good beginning—the legislative office is a good beginning.

Whether or not that office could monitor the entire Congress, I don't know. It certainly is a starting point, and a good one.

Mr. KASTENMEIER. We also, of course, have a Federal Judicial Center. Its work is not primarily legislative, but it does have a research and development arm which presumably could be expanded.

Judge AINSWORTH. I think it would be better to stay in the Administrative Office. The Judicial Center's activities are more of a study group, putting on seminars of various kinds. We are not saying they are not equipped to do it; they can. But I think we would have closer touch with it through the Administrative Office, through someone like the one we have in the legislative liaison, Mr. Weller, so that we might have to expand that office.

Mr. KASTENMEIER. I suspect you will. I think the Congress would resist assuming a positive burden of conforming; that is to say, I think the initiative for measuring the impact of legislation really must come from the Judicial Conference itself, we should not oblige Congress to let you know whenever we think something might affect you.

Judge AINSWORTH. We can't hold you accountable in every instance, obviously, but it seems to me it's a mutual thing; we both have to be alerted to what is going on.

Mr. BUTLER. The mechanical problem, if you will excuse me, of scanning all legislation, of course, is overwhelming. But will your liaison office have access to the same computer services that our offices do? By pressing the right button you can pretty much find out what is floating around here concerning the courts. So that is something I hope you will consider in any event.

Judge AINSWORTH. I don't know if we have access. I was just turning to Mr. Foley to see if he knew, but he doesn't know either.

Mr. BUTLER. I make that suggestion.

Judge AINSWORTH. If we can, I think that would be very desirable but I don't think we ought to have the burden all by ourselves. That is why you will note the editing change I put in my statement. I am trying to put the burden back on the Congress to an extent.

Mr. BUTLER. That was a subtlety that didn't escape us.

Judge AINSWORTH. I noted it didn't.

Mr. KASTENMEIER. What you have in your statement is that the Chief Justice has from time to time urged upon the Congress the importance of requesting impact statements from the Judiciary, et cetera. How did you change that, sir?

Judge AINSWORTH. I thought it had some vagueness. I want to be sure that as to the judicial impact statement I urge upon the Congress the importance of providing it for us.

Mr. BUTLER. He struck the word "requesting" and put the word "providing" in.

Judge AINSWORTH. Yes; and I struck "from the Judiciary" also, you notice.

Mr. BUTLER. Yes.

Judge AINSWORTH. So I was trying to put it in the language I understand the Chief Justice feels about it. I did not have it accurate before.

May I proceed, or do you have further questions?

Mr. KASTENMEIER. Please proceed, sir.

Judge AINSWORTH. In discussing with you the relationship between the courts and the Congress, I speak to you with some knowledge of the viewpoint of the legislators, having been a member of the Senate of my own State of Louisiana for 11 years, as the chairman so kindly pointed out, and at one time chairman of the Senate Judiciary Committee.

From the point of view of the judges, I can tell you that the Conference has welcomed the opportunity which the judiciary committees have afforded it to submit views on proposal legislation which in one way or another will affect the Federal courts. I believe, too, that the Administrative Office of the U.S. Courts, which furnishes staff support to the Conference and its committees and which is the conduit for inquiries and comments between the Judicial Conference and the Congress, has taken a forward step in the past few months leading to a better understanding of our mutual problems through the establishment of a Legislative Liasion Office. That is the office we have just been talking about.

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It is not my purpose today to discuss the specifics of any legislative proposals but rather to bring to your attention some of the major areas where, from the standpoint of the Judicial Conference of the United States, legislative proposals merit attention. I think there can be no doubt that the most important of these areas to the Federal courts is legislation establishing additional circuit and district judgeships.

As I already indicated, that came within the purview of the committee of which I am chairman.

Your committee and the Congress are aware of the tremendous explosion in litigation which has occurred in the past 15 years. New filings in the circuit courts of appeals in this period have increased by 303 percent and civil and criminal filings in the district courts by 91 percent. Speaking only from the standpoint of the Court of Appeals of the Fifth Circuit, when I was named to the Court of Appeals of the Fifth Circuit, 11 years ago, following 5 years on the district court, the Fifth Circuit had just finished 1 year in which there had been 1,093 appeals filed. For the year ending June 30, 1977, there have been 3,240 appeals filed through the end of May.

That is three times as much business as when I first went to the court, and we have added only two judgeships during that period of time. We have 15 judgeships now, but we have vacancies from time to time through retirement, illness and so forth.

The recommendations for new judgeships transmitted to the Congress by the Judicial Conference earlier this year were the product of examination and deliberations over a long period of time by the Subcommittee on Judicial Statistics of the Committee on Court Administration. Working in close collaboration with the experts in this field in the Administrative Office and using the analyses and recommendations of the circuit and district courts the subcommittee has on a quadrennial basis produced detailed surveys of the judgeship needs of the Federal courts. These reports are not submitted to the Congress until they have come under the scrutiny and approval of the Court Administration Committee and the Judicial Conference.

Mr. KASTENMEIER. On that point, the Judiciary Committee is about ready as a full committee to process that particular legislative request. This action is somewhat belated, but nonetheless we are in the process of doing it now.

Insofar as the future, it's likely that that particular matter will be placed in this subcommittee rather than the present subcommittee; from a quadrennial viewpoint I am interested in knowing when we can expect the next analysis and request of the Court Administration Committee.

Judge AINSWORTH. It's a very good question.

Mr. KASTENMEIER. This present one, is it the fall of 1975, updated somewhat?

Judge AINSWORTH. It's updated currently, as of the first of January of this year, it's dated up to then, but we have been doing it every 4 years. As you know, we haven't had a district judgeship created in 8 years, appellate judgeship in 9 years, and this is when this great explosion has occurred in new case filings.

I thought and recommended to my committee and the recommendation was adopted, and I recommended to the Judiciary Conference that we now make the survey every 2 years, biennially, and the conference has adopted that as a policy. So we are not going to wait for 4 years next time. We are going to wait 2 years and come back again and say these are the needs.

We have been most scrupulous in analyzing the figures and in recommending these judgeships. We have not recommended every judgeship that has been requested. We have been sensitive to our responsibility in this regard. We have had the benefit of the best analysis the Administrative Office can give us. In our view, every judgeship requested in that bill ought to be given us, if we are to do the work. Now this is a subject of dispute, and you can take individual courts and individual district perhaps and quarrel about them; but we have been over it, carefully. As you note, since this is updated to January 1, it has been a matter of continous study for the last 8 years.

So these are not figures pulled out of the air. These are sensible figures based upon caseloads, based upon projections, and we sincerely hope that the committee will give us the manpower that we need. That is one of the reasons that this is put in the statement.

Mr. KASTENMEIER. I think the 2-year proposal is a good suggestion. For example, even the western district of Wisconsin barely missed a judgeship whenever the last judgeships were created, in 1969 or thereabouts, and all of these years a single judge has had an extraordinary burden in the district.

Judge AINSWORTH. Judge Doyle.

Mr. KASTENMEIER. Judge Doyle, and we have not been able to help because the matter was a prisoner of the total package, so to speak, which had been delayed and delayed, and delayed.

Judge AINSWORTH. There is some question about Federal judges being overworked and overburdened, and I note some preceding witnesses have questioned that. They really don't know what they are talking about. The judges in general are overburdened. I can speak for myself. I left the State senate and law practice to go into the worst Federal district court in the United States in filings per judgeship. It was No. 1 in the Nation. I didn't know that, or I probably would not have taken the appointment if I had known it, and I spent 5 years just working all of the time. We had a vacation of 1 month. That saved our sanity, I suppose. Then I was appointed to the Fifth Circuit Court of Appeals that had the biggest caseload per judge in the United States of any court of appeals, and it has continued to increase.

I am not trying to get your sympathy, but I haven't taken a vacation in the last 5 years. I could have, perhaps, but there was work to do. So I just stayed around the office and did the work.

Others have taken some time off. I took none off.

I know Judge Doyle, and I know how he feels. We are 500 Federal judges in the country, but we have communications, seminars, meetings, conferences and we get to know each other. There is a universal cry: "How can we keep up with the explosion in our docket, in the cases we have?" We can't do it. I sat in Houston week before last for a week of court, and one of the Federal district judges came in to say hello, and he slumped down in the chair and I said, "You look pretty tired," and he said, "I stay here every night until 7 o'clock, and I come in all day Saturday and sometimes on Sunday," and I said, "Well, that is beyond the call of duty. I don't think you ought to do that." But I was taking briefs home and reading them all day Saturday myself.

So we are a dedicated group, I can say this without trying to be immodest about it, hard working, and very much overburdened. There isn't any question about it. Any fair person who will examine our dockets and what we do can prove it to his own satisfaction.

Mr. KASTENMEIER. There is no doubt about that, sir. I think it is a fair statement, and I think it's well you make it for the record.

I have just one last question in terms of a new request coming every 2 years: When could this request be made, 2 years from the date of actual statutory approval of the preceding requests?

Judge AINSWORTH. I am not sure, but I will have to talk to Judge Butzner who is chairman of the subcommittee and I would guess it would be 2 years from January 1 of this year, because we have had some requests since the bill has been filed in Congress, since we filed our report, from people who have shown additional statistics.

We are trying to update as far as we can without coming to you and saying add one more judgeship, to so and so. But I would think that the cutoff point ought to be January 1 of this year, and 2 years hence we will have a report go to the Judicial Conference and then in turn come to you, which would be 2 years from now.

Should I proceed, sir?

Mr. KASTENMEIER. Yes; proceed, sir.

Judge AINSWORTH. Many of the criticisms leveled at the courts of appeals today are directed to some of the devices which we have had to develop in order to bring to conclusion as many cases as we have been able to in these past few years. I refer, for example, to the screening procedures which we have set up, to the elimination of oral argument in a number of cases, and to the practice in some circuits of rendering decisions from the bench without written opinions. These are obviously expedients and they are not steps which we would necessarily want to take; we frankly had no alternative.

I think most of us would agree that simply adding judges to our already overburdened courts is not a panacea. We all recognize, for example, that an appellate court cannot function if it is too large. Most of my brethren in my own court have agreed that with 15 judges currently on our court we have suffered a loss in efficiency simply through the necessity of keeping abreast of what each of the other panels in the same court is doing, and a court of 26 judges for the fifth circuit, if I may add my interpolation, would be sheer madness. It just could not work, in my judgment, and a majority of the members of my court share that view.

But 26 is the number we need for the 6 States of the fifth circuit, Texas to Florida.

The Judicial Conference has recommended to the Congress other areas of exploration aimed at meeting the problem of the explosion of litigation in the Federal courts. At its session last September, for example, the Conference reaffirmed its support of legislation pending in the 94th Congress which would prohibit a plaintiff from filing a diversity case in the State of his residence and legislation which would increase the jurisdictional amount in diversity cases to $25,000.

At its March session this year the Conference went further and approved legislation pending in the current Congress which would abolish diversity of citizenship as a basis of jurisdiction in the U.S. courts in the 50 States. It is interesting to note that the Department of Justice report on the Federal courts, issued in January of this year, also recommends the abolition of diversity jurisdiction.

I note the witnesses who came here before recommended the abolition of diversity jurisdiction, but I also remember that Senator Burdick said he would introduce such a bill in the Senate, and for 8 or 9 years it never got out of committee. So what would this mean? In our court it would mean a reduction of 12 to 15 percent of the caseload, which might take care of the gain of 12 to 15 percent a year in total filings. This is a tricky thing, but I don't see how anyone could complain about a bill which would prohibit a plaintiff from filing a diversity case in a State of his residence.

Sixty percent of the cases filed in diversity are this type of case, the plaintiff residing in the same State. So, 60 percent of 12 to 15 percent might mean 10-percent reduction in our docket right off, just with that one bill, but we are striving for anything we can do to save ourselves from this terrible caseload which we have, terrible in the sense of numbers, not otherwise. The cases are very interesting.

The Administrative Office, at the direction of the Judicial Conference, has already submitted 13 legislative proposals to the 95th Congress, as reflected in the attachment to this statement. Three of these

relate to the jury system and would, among other things, make uniform throughout all Federal districts the provision for juries of six persons in civil cases and would also provide for a more realistic payment of fees to jurors in the light of the current economy.

It is probably through service on a jury that most of our citizens obtain a close view of the work of our Federal courts. The Judicial Conference, by sponsoring panels and seminars throughout the country, has brought about a better understanding on the part of our courts of the operation of the jury system with a view to minimizing the delays which have often caused our jurors to become discouraged and disgruntled with the jury system. Proper remuneration for the expenses incurred in serving on Federal juries will go a long way, we believe, toward reducing further the reluctance of many of our citizens to accept jury service.

Also before the Congress are a series of bills sponsored both by the executive branch and by the Judicial Conference, which, although varying in some details, would allow the Federal district court judges to make greater use of U.S. magistrates. Our magistrates have served well in most areas, not as a separate tier of judges but as valuable adjuncts to the U.S. district judges in the discharge of their responsibilities. In the reporting year just ending for example, U.S. magistrates will have handled some 266,000 matters, ranging from the issuance of process to the trial of minor offenses and the pretrial of many civil actions.

We hear a great deal said as to the need for court reform and for greater access to the judicial process and to the prompt determination of cases. Yet we must not lose sight of the fact that the Congress, the Federal judiciary and the legal fraternity, as well as the scholars of the Nation, have been directing much attention in the very recent past and at present to these problems.

I cite, for example, the work of the Commission on Revision of the Federal Court Appellate System. Likewise, last year there was a profound examination of the problems facing the judiciary today and in the years ahead at meetings in St. Paul, Minn., which have come to be known as Pound Revisited. The Judicial Conference was a cosponsor of these meetings. Also, early in this present year there was a valuable study issued by the Department of Justice Committee on the Revision of the Federal Judicial System, and that was alluded to by Judge Bell when he was here before you recently, my former colleague on the fifth circuit, the Attorney General.

The Judicial Conference, and specifically the Committee on Court Administration, has before it at present for study and an expression of view many of the recommendations and findings of these groups.

Some of the legislation which I have mentioned is of comparatively recent origin, as for example, the establishment of the Federal magistrates system and the revision of the jury system through the enactment of the Jury Selection and Service Act of 1968. I think we all recognize that the Congress has indeed been active in responding to the needs of the Federal judiciary, and I say that from some experience in this committee. We have had fine cooperation from the Congress, but I think sessions such as we are having today can improve it. We can do better. We would like to feel we are here to cooperate in every way you would like for us to, and we know you would do the same.

We must, however, look not only to today but to the immediate and the long-range future of our judicial system. There are a number of important factors which may well have a profound influence on the Federal judiciary in the years ahead. There will undoubtedly be widespread use of computers and other information processing and retrieval technologies; there will be more sophisticated means for the prediction and control of human behavior; there will be striking demographic changes in our population; there will be widespread reliance on less formal administration rather than strictly legal processes for dispute resolution; there will undoubtedly be widely expanded access to legal services and there will be Government provision for an increasing array of services and widey expanded governmental regulation of the economy, particularly on scarce natural resources. These are but a few of the factors which must concern us on the bench and in the Congress when we look toward the future.

Before concluding I would like to point out to the committee the great strides which have been made in one branch of the judiciary in planning for the future and in taking into account the various factors which will undoubtedly have a significant impact on the course of the future of the Federal judiciary.

I am referring, of course, to the work being done by the Federal Judicial Center. The Center was created nearly 10 years ago by the Congress to serve as the training arm and the research and development arm of the Federal judiciary. Under three distinguished directors the Center has proceeded not only with vast training programs for all areas of the Federal judiciary but also in the area of research and development.

I am sure the Center will, if it has not already done so, report fully to your committee on its achievements. I would like to mention only one area which is now coming into fruition to demonstrate that the Center has indeed been abreast of the developments of technology in behalf of the judiciary. The research and pilot programs in the area of computer-assisted legal research have now reached the point where the Administrative Office can and is, in the process of providing equipment for this purpose for many of the metropolitan district courts and for the courts of appeals. Over the long run this will undoubtedly prove to be a significant advancement.

Since the beginning of this year the Attorney General has created a special division, headed by an Assistant Attorney General, the primary function of which is to work in the area of judicial improvements. The American Bar Association has likewise created a special committee for this purpose. With their cooperation and the assistance which I am confident we can look forward to from our universities and private foundations, I am sure that the Congress, with the continued assistance of the Judicial Conference of the United States and the judiciary as a whole, will go forward to meet the challenges and problems ahead.

Mr. Chairman and members of the committee, I will be glad to answer any questions I am able to in connection with the statement which I just made.

Mr. KASTENMEIER. Thank you, Judge Ainsworth. The committee is indebted to you for your presentation and your appearance this morn-

ing. It has been very helpful. Indeed, I think about the only thing further we could have hoped for was perhaps that you might have conveyed the statement from the Chief Justice himself, but, of course, this forum is always open to him, and at some later time perhaps he might care to submit a statement (see p. 6, *infra*).

Judge AINSWORTH. He is working on the statement. I saw him yesterday, and he told me to say to you that he regrets he didn't have it ready for today, but the Court is winding up its term this week and handing down its last decision today, in fact, and he has been working 15 and 16 hours a day, according to his staff. They told me this yesterday, and he just hasn't had a chance to complete it, but he will in a matter of days, I am confident.

Mr. KASTENMEIER. We will look forward then to receiving his statement in the future.

This forum is, of course, always open to him. Indeed, on the question of access to justice, I suppose if a critic of the courts were here, he could ask whether the courts of appeals and the Supreme Court ought to be somehow accountable for decisions which have the effect of narrowing access to justice, in the same manner as those who advise the imposition of judicial impact statements on Congress.

Judge AINSWORTH. Could I comment on that, Mr. Kastenmeier?

The Supreme Court doesn't need me as an advocate to defend its decisions, and I won't undertake the task beyond saying I think perhaps this is overblown about denial of access to the courts. We don't find it where I sit. I am in a very key position to observe appeals from six of the Deep South States. I haven't seen a denial of access to the courts.

Now, I note comment being made about the decision which held that the Court would not examine the policy of the CIA as to its secret budget. Now, I assume, without having read that decision thoroughly, that if the CIA's budget is secret, that was ordained by Congress.

Then we have the proposition of whether Members of Congress can belong to the reserves of the military, which is a decision which was criticized by someone. But these look to me most intimately as matters for Congress. Congress could, if it wished, say that its Members cannot belong to the military reserve. Congress, if it wished, could say the CIA budget shall no longer be secret. So, what shall the Federal courts say to the legislative body of the Nation? No, you can't do that, we are sitting in judgment on you, who are the elected Representatives of the people. How would you have felt about a decision that had gone the other way?

I have read ever since I became a Federal judge of criticism that Federal judges are usurping the power that belongs to the legislative branch, and even to the executive branch.

My own feeling is we must steer a moderate course, and it is a course that I steer, and I don't see that decisions of the Supreme Court in that respect are closing the door to access, because the case filings belie that. We are having more litigation and more cases filed every single year in the Federal judiciary.

I will not even undertake to say what Congress should do in respect to acts which would affect the jurisdiction of the Federal courts and so forth. That is a matter peculiarly that belongs to you; that is a

matter of legislative policy. We as judges shouldn't tell you what to do in that regard. You tell us you want to expand our jurisdiction, whatever it may be, in environmental cases, or consumer cases or whatever they may be, and we do it. All we say is provide us with the tools.

Mr. KASTENMEIER. There are, of course, a number of cases cited to us which relate to class actions, attorney fees, habeas corpus, standing, and other areas, for which the general charge has been made that the total effect of those cases in the last several years has been to narrow access. This is something we have only begun to explore as to its merits.

Judge AINSWORTH. You might want to get some scholars here who have the time, who are Supreme Court watchers, if you will, and let them come and give their views about it. We are Supreme Court watchers on the court of appeals because what they do directly affects what we do, but we are engaged in the day by day processing of litigation and sometimes don't have the opportunity to give all of the thought that the academic community might give to it.

I just don't believe that the proposition that the courts have denied access to the poor and to the minorities will stand up. I just don't think it's a fact. It's certainly not a fact where I sit.

Mr. KASTENMEIER. Speaking for myself, I think my own view would be consonant with that of the Attorney General. We would seek to do both; that is to the extent possible to provide access to justice and to every extent possible to relieve the burden of the courts and the congestion; both of these are our responsibilities.

I yield to the gentleman from Illinois.

Mr. RAILSBACK. Mr. Chairman, could I just make a comment and suggest that I think there is a difference in talking about access to courts and access to justice. I think we ought to make that distinction, because I don't think it's so much a question of the courts, at least in any way purposefully or maliciously denying access to the regular judicial process. But I think there is a feeling that perhaps, in fact, there are too many disputes that are being resolved by courts. There are many legal scholars, including judges, that I think would share that view.

Judge AINSWORTH. Yes; you make a good point, Congressman, an excellent point, and I noted in one of the statements, I hope I am not interrupting your question, but I noted in the statement of the President of the Legal Services Corp., page 4. "Most of the legal problems encountered by poor persons do not lead to litigation in the Federal courts." The very point that Mr. Railsback just made.

I haven't seen the doors closed. I don't believe it's a fact. I sit on EEOC cases that affect poor people, and their rights in matters of discrimination constantly, and matters of collective bargaining in NLRB appeals and in matters involving school desegregation, and matters involving teachers who have been discharged for one reason or another, some allege through racial discrimination. Our court is just as active in that regard as it has ever been, and we are very proud of our reputation in the field of civil rights and maintaining the rights of the poor, of minorities, and those pertaining to racial and sex discrimination.

Mr. KASTENMEIER. I have no doubt that much of what the Congress has done has resulted, among other things, in an explosion of litigation

in the courts. That certainly applies to the Legal Services Corporation, which is merely one of a number of legislative initiatives that have produced additional litigation. Indeed, I don't argue with the gentleman from Illinois. The larger question of access to justice, in my view, includes a smaller question of access to the courts. Access to justice is a broader, more comprehensive issue, and I was addressing myself to certain critics who say that access to the courts is part of the larger question, and has been increasingly restricted. This is something I think a dialogue in the months to come can perhaps clarify for us.

I have a number of other questions, but I want to yield to my two colleagues so they have an opportunity to finish their questions. I yield back to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I want to thank my chairman, and also thank our witness for his statement.

I frankly can understand why you put so much emphasis on the need for more judges, in the light of what apparently another subcommittee of the House Judiciary Committee has done.

I might just say in that connection that it would seem to me that it would be well advised if the Judiciary Conference had an opportunity to maybe at least address itself to the recommendations by that particular subcommittee, which I understand cut approximately 20 judges from those recommended by the Judicial Conference.

I also have a number of questions that I am not going to be able to put to you, but I do have just a few I would like to have you address.

I take it that you would personally favor abolishing the statutory priorities that now relate to jurisdiction.

Judge AINSWORTH. Yes, by all means. The Congress has given us so many priorities that now those cases that remain just can't be reached. Would you be surprised to know that one category of cases that does not have priority is civil rights?

Mr. RAILSBACK. I attended an ABA conference down in Bermuda, and it dealt with some of these problems, and I look at three pages of statutory priorities, in other words, that were given some kind of priority status, and has the Judicial Conference addressed that formally. I don't think you have included it in your list, and if not, I think you probably should.

Judge AINSWORTH. I don't think we have, but the Attorney General had his office communicate with me about this as to whether or not I didn't think it would be advisable to eliminate these priorities, and let the judicial council of each circuit establish priorities for the circuit, subject to approval of the Judicial Conference. I think this is Professor Meador's suggestion to the Attorney General, and I enthusiastically support it.

Mr. RAILSBACK. I am kind of fascinated by the idea that has been propounded by the Attorney General, I believe, relating to neighborhood justice centers. I have also talked to the Chief Justice with my chairman, Mr. Kastenmeier.

I am fascinated by it, and I am not sure it is going to work, and I think it's very important the way we structure it. For instance, I know in England that they have people that handle disputes in neighborhoods, but they are, as I understand it, on a voluntary basis rather than any kind of a paid basis. I guess the specter that I see that really

bothers me about this so-called neighborhood justice center is getting back to the days of the so-called justices of the peace that we had in Illinois, which were really, in my opinion, an abomination. What is your feeling, and has the Judicial Conference taken any position on the so-called neighborhood justice center?

How do you think it should be structured?

Judge AINSWORTH. No, we have not. It's a new concept in the sense it has been suggested by the Attorney General. I frankly don't know how I would structure it. I share your feelings about the justices of the peace. Most of them are not lawyers, and real justice is not administered in many instances. We are familiar with it in the fifth circuit.

I just cannot aswer that. It would take more study.

Mr. RAILSBACK. May I just suggest this to you? I would think that this concept which is going to begin on kind of an experimental/demonstration basis, could be extraordinarily important for the future of justice and access to justice in this country in resolving primarily so-called neighborhood disputes. I would think the Judicial Conference would want to get very involved in this.

Judge AINSWORTH. I think so.

Mr. RAILSBACK. And give us the benefit of their thinking.

Judge AINSWORTH. I think so, and I appreciate your suggestion. I think it is highly desirable from the viewpoint of keeping it out of the courts. It would tend to reduce the caseload, but it would have to work, and I suppose you have to experiment with it first. I would say we will undertake to study it.

Mr. RAILSBACK. I do favor doing it on an experimental and very limited basis. I find it interesting that apparently in England they have tried it and it has been very successful. I understand the allegation has been made that 70 percent of their disputes are handled by these so-called neighborhood justice tribunals or whatever they are called.

Judge AINSWORTH. Many of these problems wind up in State courts or what we call city courts, municipal courts, involving matters of neighborhood fights, children fighting with each other and the parents becoming involved, matters of seizure of furniture and property, nonpayment of installments.

Mr. RAILSBACK. I would think things like trespass, some marital problems.

Judge AINSWORTH. Some neighbors object to the kids knocking the ball over the fence in their yard and tramping on the flowers. Of course that doesn't wind up in the Federal court, but dispute resolution methods of that kind seem desirable to me too.

Mr. RAILSBACK. I think, Mr. Chairman, I will yield back my time.

Mr. KASTENMEIER. I thank my colleague.

Before I yield to the gentleman from Virginia, I would like to ask one question because I don't know what interruptions we may have. I do want my two colleagues here when I ask you the question. It relates to several statutory proposals, and indeed if Mr. Foley has any comments I would invite them because my purpose in asking the questions now is possibly to avoid separate hearings on these subjects. The concern to statutory proposals relating to the furnishing of accommodations to judges of the courts of appeal.

We have a bill by our colleague from Texas, Mr. Brooks, I think relating to a judge in Texas. I wonder, Judge Ainsworth, if you are familiar with this class of proposals and if you would comment?

Judge AINSWORTH. Yes, I am, and we have a memorandum which is prepared on this subject which we would like to submit for the record if we may.

Mr. KASTENMEIER. We would be pleased to receive that. (See appendix 6a.)

Judge AINSWORTH. It is right here. I will put it out on the table. We had this problem with Judge Coleman in our court who lives in Ackerman, Miss., just a small dot on the map, 1,500 population, and he had no chambers. He had to rent his own chambers for a number of years, and he is a constituent of Senator Eastland. He had to have a bill passed fixing Ackerman, Miss. as a place for holding court in for the Fifth Circuit. They don't even have a courthouse there. That was done in order that the Federal Government could provide facilities.

We have a judge living in the Sixth Circuit involving a similar situation, and Judge Skelton, now moving back to Texas, who is on the U.S. Court of Claims here. These bills that are proposed would not cost the Federal Government any additional money. It woul be using facilities, Federal buildings, that are situated where the judge lives. These are highly desirable pieces of legislation in my view.

Mr. KASTENMEIER. I am hopeful that the subcommittee can consider these statutory proposals in July and move them forward if we don't find any difficulties. I take it when we say there is no cost, it is on a space available basis.

Judge AINSWORTH. Yes; that is the way I understand it.

Mr. KASTENMEIER. I shouldn't see any particular difficulty, but if my colleagues have any comment they may make such. I understand Judge Meskill also is interested in this.

Judge AINSWORTH. In Connecticut?

Mr. KASTENMEIER. Yes.

Thank you for your comments. If there is no further discussion on that question, namely, providing facilities for courts of appeals' judges under special circumstances, I would like to yield to our colleague from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I have only one area that I would like to explore with you in the brief time we have. What has the Judicial Conference done with reference to the question of tenure of judges in terms of what we may do to replace judges who are not measuring up to the qualifications and yet somewhere short of requiring impeachment.

Judge AINSWORTH. Pursuant to the recommendation of the committee of which I am chairman the Conference adopted in principle the Nunn bill, Senator Nunn's bill, on judicial tenure, with certain exceptions. The most notable, as I recall right now, is that a judge could not be removed except by impeachment but he could be suspended from his activities as a judge without there being any question of constitutionality involved. So we have gone on record as supporting the concept of the tenure bill.

If you would like me, Mr. Butler, I could supplement the record with the exceptions that we noted.

Mr. BUTLER. Yes; I think I would like to have the record supplemented with that. I would also like to have for my own use access to the material that your researchers produced during the course of that.

Judge AINSWORTH. I don't know that we have any research beyond that. We did examine the terms of the bill and approved it in concept with the exceptions I have noted. We don't have any material other than that I can supply to you, but I could give you what we decided.

Mr. BUTLER. Yes.

Mr. Chairman, don't you think we ought to have that in the record, the benefit of the resolution which I assume you can supply.

Judge AINSWORTH. Yes, sir; we will be glad to submit it.

Mr. KASTENMEIER. Would the gentleman from Virginia restate his request?

Mr. BUTLER. The witness has stated that the Judicial Conference has taken a formal view of the Nunn proposal in the Senate and has offered to supply us with its resolution on that area. I would like it filed in the record when it arrives.

Mr. KASTENMEIER. Without objection, that will be done and it is a worthy recommendation. [See app. 6b, p. 398.]

Mr. BUTLER. I have no further questions, Mr. Chairman. I appreciate the help of the witness.

Mr. KASTENMEIER. May I follow up on what the gentleman has said. I am not familiar with the Nunn proposal. Is the proposal that a circuit judicial council be allowed to censure or——

Judge AINSWORTH. No; this would set up a national commission itself to receive complaints and it sets up quasi-courts within the judiciary of judges to hear these complaints and if somebody is not performing his duties through intemperance of some kind, or illness, or senility, whatever it may be, we can remove him from his duties, though not from his office, because we feel that the House of Representatives by impeachment alone may do this. That is arguable about the constitutionality, but we didn't want to get into an area that we thought was fraught with constitutional questions because suspension would accomplish the same result.

Mr. KASTENMEIER. In other words, you feel the limit of a legislative proposal or other plan would be the removal from duties?

Judge AINSWORTH. Yes. I am not using the right term. I forgot whether it is suspension from duties or what it may be, but Mr. Nunn's bill is very lengthy. It is right down to intimate detail.

Mr. BUTLER. Mr. Chairman, if I may add to that point, were there within your group, and without identifying them, people who argued that we could establish statutory standards of good behavior, the transgression of which could result in removal from office and without impeachment?

Judge AINSWORTH. I didn't hear any myself. I could not universally say that no one among Federal judges believes that, but I think it is the prevailing view that you can only remove a Federal judge by impeachment.

Mr. BUTLER. Being a member of the fraternity that would surprise me a little bit.

Judge AINSWORTH. I would be surprised to know of any to the contrary. I have seen law review articles on both sides of this question.

But our feeling was why subject it from the very beginning to an attack on constitutionality when you could accomplish the same result. Of course the gentleman would continue to receive his pay under this suspension, but that's all. He wouldn't perform any functions as judge.

Mr. BUTLER. That isn't such a bad deal.

Mr. RAILSBACK. You might want to submit to that jurisdiction.

Judge AINSWORTH. It usually happens when one gets old and possibly senile.

Mr. KASTENMEIER. Does the Judicial Conference have a point of view with respect to potentially providing for the censure of judges?

Judge AINSWORTH. Well, this is one of the things that could be done, as I recall from the Nunn bill. I am not entirely sure of that, but I think it could, something less than suspension. I am not 100-percent sure, but it seems to me it is.

Mr. RAILSBACK. Mr. Chairman, may I ask a question?

Mr. KASTENMEIER. Yes; the gentleman from Illinois.

Mr. RAILSBACK. Has the Judicial Conference taken any position on the national court of appeals?

Judge AINSWORTH. No; it has not. In fact it is being studied by the committee of which I am chairman, and I think it is going to be studied quite a while. I personally have some reservations about it.

Mr. KASTENMEIER. What reservations do you personally have about it?

Judge AINSWORTH. I am just not sure it is going to accomplish the desired result, but I haven't studied it that carefully because it has been sent to me and I have in turn sent it to a subcommittee of the committee, and I have read the comments of Supreme Court Justices, some who favor it, some who don't. I read former Chief Justice Warren's criticism of it in the American Bar Journal. I don't know exactly what the position of the present Chief Justice is. He will have to speak for himself in that regard. I am not sure he has unequivocally endorsed it. Whether we have all of the conflicts that need resolution in the circuits again is questionable.

Judge Bell when he was one of my colleagues used to talk about this subject with me a great deal, and I think perhaps he has now gone along, and supports the concepts. I am not ready to embrace it, but I am really openminded on it.

When I say I have reservations, I want it to be shown to me that it will achieve what the sponsors say it will. I know the Commission on Revision, my recollection, headed by Prof. Leo Levin, did recommend such action.

Mr. KASTENMEIER. In terms of whether we are talking about creation of a national court of appeals which might take certain categories of cases and not others; whether we create in the future differential specialties for the dispensing of justice in the Federal system; whether we staff the adjudicating body with Article III judges as is being suggested for bankruptcy, or whether these are magistrates whose responsibilities are different, whose jurisdiction or authority is different from a district judge; or whether we tend to develop by other means specialized courts for social security cases or other matters are the general questions we face today. How do you react to the possibility

of a restructuring of the Federal court system that would result in a tendency towards specialization rather than broad powers presently and historically exercised by district judges.

Judge AINSWORTH. Mr. Kastenmeier, I would have to see what the proposal is to judge. I don't think that we necessarily must maintain the status quo. I think we must look for other ways, and when I was a legislator I tried to reform things. I tried to change them. I tried to see things function better than they were. It is just a concept I had as a legislator. I retain that feeling here. So I would have to see the proposal to be able to be more specific in my response.

Mr. KASTENMEIER. I appreciate that reply. There are a number of proposals that touch on this in one way or another, and I am sorry Mr. Butler has been forced to leave because he is a member of another subcommittee, as indeed Mr. Drinan is, which would elevate bankruptcy referees, judges, to Article III status, and of course I understand the Conference is opposed to that and I don't know that there is any necessity to restate its position unless you care to amplify on it.

Judge AINSWORTH. No; beyond saying that we have taken a strong view that it should not occur, and I find no dissenting voices in that respect in the Judicial Conference.

Mr. KASTENMEIER. I would like to discuss with you then for a moment your personal observations on the Department of Justice's proposal to enlarge both the civil and criminal jurisdiction of magistrates.

Judge AINSWORTH. I think it is desirable. I think it is a good idea.

Mr. KASTENMEIER. Under the Department's proposal, magistrates would not have staff, would not publish opinions, and of course would not be granted Article III status. How then should the quality, consistency, and fairness of their decisions be insured?

Judge AINSWORTH. In most instances what they do is subject to review by their district judge although the district court in New Orleans where I live has been able to get stipulations from counsel that the decision of the magistrate—sometimes magistrates sit with the jury there—that whatever comes out there will be the judgment of the court and go on to the court of appeals if it is appealed. My feeling is that there is sufficient supervision by the district court to make it work. There is a very close working liaison between the magistrates and the district judges and I from my own observation looking at it just in the district court in my home city would say it is working very well. The district judges are enthusiastic about it.

When I was a district judge we didn't have that support. We had to do it all. For example, I almost used to dread the fall of the year because Louisiana is a duck hunting State and we had all these duck hunters who would come before me for violation of the migratory bird treaties, and I used to have to sit until 5, 6, or 7 o'clock sometimes just to hear people who shot one duck too many or something like that. I felt my talents should be addressed to better things than that. Now the magistrates handle all of these things.

Mr. KASTENMEIER. Under the Department of Justice's proposal, there would technically have to be an appeal from a magistrate's decision.

Judge AINSWORTH. To the district judge. Well, there is no problem there. You have that with the bankruptcy court now at all times. It is a very simple matter to do that. What the judges are trying to get are stipulations from parties who are anxious to get their cases tried. The docket is congested and they see an opportunity to get the case tried even before a jury with a magistrate presiding, with the understanding that that will be the judgment of the court.

Judge Bell is not too enthusiastic about that. I don't want to put words in his mouth, but I have talked to him about it and he is inclined to believe we ought to have this next step, this appeal to the district court. Now, when you have a jury verdict you have a problem there because if substantial evidence supports a jury verdict that ought to be the end of the proposition without the district judge reviewing the facts; and perhaps he won't do any more than review to see if there was substantial evidence in the same respect the court of appeals reviews a jury verdict.

Mr. KASTENMEIER. There has been some apprehension, I suppose particularly in the client community, that this might tend to result in specialization and to downgrade certain classes of cases which district judges would not presumably take. These cases would go to magistrates, and the implication is that these causes of action would assume a diminished status.

Judge AINSWORTH. I don't see that in the district court I am speaking of, that I used to be a member of, but it may occur somewhere else. A case that is being referred to the magistrates in this district court covers the broad spectrum of all of the cases. They are not just particular types of cases. Of course, in the criminal-case area these minor criminal offenses such as migratory bird violations do go to them. They get them all, and in that respect they are specialists in that particular phase of the criminal law, but otherwise I haven't detected that they are being given cases in particular categories. They are given any type of case that may be on the docket.

Mr. KASTENMEIER. How would the judgment be made as to whether any type of case be given a district judge or a magistrate and how would the person filing that case distinguish whether it would be handled either by a magistrate or by a judge?

Judge AINSWORTH. That is a matter as I understand it, and I am not sure just exactly what the procedure is, but I think it is a matter that the district judge would refer to the magistrate. Until it is referred to him the magistrate cannot claim anything from the docket. It is directly referred to him and wouldn't be referred to him in some instances without the consent of the parties, not in all instances, but in most instances.

Mr. KASTENMEIER. What criteria would the judge employ as a matter of practice? There must be some criteria as far as what cases are referred and what cases are not?

Judge AINSWORTH. I really cannot answer that. I think it is just an ad hoc situation case by case.

Mr. KASTENMEIER. A different question, Judge Ainsworth. The Administrative Office, at the direction of the Judicial Conference, has submitted 13 legislative proposals to Congress; 8 of the 13 have come to

this subcommittee. Among others, they relate to the Jury Selection and Service Act, as to jury fees and also 6-person juries, and as to diversity cases.

Judge AINSWORTH. That is the list attached to my statement, isn't it?

Mr. KASTENMEIER. Yes; of those 13, I think 8 of them are in this subcommittee. I am wondering whether you could give us any offhand or official reply as to priorities that ought to be assigned to these bills?

Judge AINSWORTH. You will note, Mr. Chairman, the first one mentions the one for the appointment of additional judges.

Mr. KASTENMEIER. Yes. Would that have the highest priority?

Judge AINSWORTH. That is it. The others are important, but we will take that for all of the others put together. That isn't minimizing the importance of the others. That is the only one I would care to give priority to among this list here.

Mr. KASTENMEIER. Thank you.

One of the bills provides for the defense of judges and judicial officers sued in their judicial capactities. Could you explain the problem involved here?

Judge AINSWORTH. Well, you would be surprised perhaps to know that we get sued all the time by people, and when we get sued it is not for $10,000. It is $10 million, $200 million, or some way out type of thing. Such a suit is frivolous because nobody has that much money to respond in judgment to start with.

We had a suit filed several years ago in which they sued every Federal judge in the United States. They just took the directory and in some way they missed a judge. I think it was Judge Garza, a district judge in Texas, so the Chief Justice named him to hear the case. He was the only one who wasn't sued perhaps in the whole country.

This gets to be a real problem. Who is going to defend the judge. He doesn't have any resources to pay counsel. Somebody has to undertake the responsibility.

Mr. KASTENMEIER. Under this proposal who would defend the judges and judicial officers?

Judge AINSWORTH. The Department of Justice. Now and then they undertake to do this anyhow. The U.S. attorney would do this. I am trying to think of a case. We had a district judge sued in New Orleans by some of those involved in the killing of the California judge in open court in which Angela Davis was later tried as a coconspirator and was acquitted. The U.S. attorney undertook this defense at the request of the judge, but he just did it. We want to put it on a more formal plane than that.

Mr. KASTENMEIER. Are these suits all frivolous, or are some of them serious?

Judge AINSWORTH. Well, they border on being frivolous. There is no merit to them. I haven't seen one of any merit. When I was a district judge I had the misfortune that I had the clerk of the court talk me into appointing counsel one day for a lady. I appointed the president of the bar association. He represented her as best he could. She had been proceeding pro se. They lost the case. The Supreme Court denied certiorari. She then sued him for $2 million for ineffective assistance in a civil action.

He called me up. He said, "Thank you very much. I hope you don't appoint me any more times."

He had no outside resources he could command to furnish counsel. He had to get his own lawyer. The suit was immediately dismissed.

But when a judge gets sued he is powerless. He cannot go in and file his own pleadings and appear in court. It just wouldn't be the proper thing to do. So I think most of these cases border on being frivolous. I haven't seen one with any merit whatever.

Mr. KASTENMEIER. Not only insofar as it affects that particular area, but this subcommittee is being urged to consider various bills. We have already considered certain bills, and in fact passed one last year which relates to attorneys' fees and costs, changing or modifying the American system or giving statutory direction to the courts' discretion in the area.

From your own experience, outside of perhaps the parameters of your own committee's work in the Judicial Conference, do you have any feeling that there are changes necessary as concerns award of attorney fees?

Judge AINSWORTH. I would prefer to respond as we do in numerous inquiries that come from the Judiciary Committee; we have a Subcommittee on Federal Jurisdiction headed by Judge Gignoux, district judge in Portland, Maine, and when we get in an area of this kind we say we will not express a view. This is a matter of legislative policy and we prefer not to give a view.

You ask me personally what I think about it. I think it is a subject well worth considering. I can recall I practiced law for nearly 30 years and I have had many clients ask me, "If I win the case do I get the attorney's fee back."

I said, "No, you don't."

"Well, that doesn't seem fair if I win. With your charges, I am losing that much even in winning the case." And I never could convince anyone that that was fair who asked me, but nevertheless it was a rule of law. Attorneys' fees were only available if they were statutorily provided.

Congress has already taken some steps to change the *Alyeska* rule, especially in civil rights cases.

Mr. KASTENMEIER. We did that last year for civil rights and certain IRS cases.

Judge AINSWORTH. Whether you should expand that, I really hesitate to answer, but I don't have any objection one way or the other.

Mr. KASTENMEIER. Thank you.

One last question: 28 U.S.C. section 331 provides that the Judicial Conference shall continuously study the operation of the Federal courts and shall propose changes to the general rules of practice and procedure so as to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." Keeping this express statutory mandate in mind, it is my impression that there are very few statutory proposals from the Conference which relate to access to justice issues such as class actions, habeas corpus or standing.

Would you care to respond to this impression?

Judge AINSWORTH. The Civil Rules Committee of the Conference presently has a study on class actions, Rule 23. As I recall, it is headed

by Judge Tuttle, who is a senior judge in our circuit and is former chief judge of our circuit. So the matter is receiving active attention. It is a very thorny problem and I don't know how soon that committee will report but it has had it under consideration for a number of months and so it is receiving active study.

Mr. KASTENMEIER. We will look forward to whatever recommendations they make in that regard. I regret that not more of my colleagues are here this morning, but in conclusion I want to express my personal thanks to you, Judge Ainsworth, for your able and thorough representation of the Judicial Conference this morning and for your testimony on the large number of bills which interest this subcommittee.

Perhaps I should say for the record that questions directed to judicial accommodations for appellate judges would amend 28 U.S.C. section 142, and are contained in Senate bill S. 653, H.R. 2677, H.R. 2770, and H.R. 3727.

In conclusion, again, sir, we thank you for your help.

Judge AINSWORTH. Thank you very much, Mr. Chairman.

You have been most courteous to me in the presentation. We hope you will avail yourself if you desire our views from time to time. The Administrative Office stands ready to supply you with any information we have on particular legislation and we view with much pleasure the fact that you have asked us to come today because it may be the beginning of something even better for both sides in this matter.

Thank you.

Mr. KASTENMEIER. Let's hope so.

Accordingly, the committee is adjourned.

[Whereupon, at 12:30 p.m., the subcommittee adjourned.]

STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

WEDNESDAY, JULY 20, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 1:30 p.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, and Railsback.

Also present: Michael J. Remington, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

Today we continue our general oversight hearings on the state of the judiciary and access to justice.

We have scheduled one witness today; he is Prof. Burt Neuborne of the New York University Law School. Professor Neuborne is testifying on behalf of the American Civil Liberties Union.

I observe that he is well qualified to testify for that important organization. In 1967–72 he served as staff counsel to the New York Civil Liberties Union, and from 1972 to 1974 was assistant legal director of the ACLU, and is currently a member of the board of directors of the New York Civil Liberties Union, and voluntary litigator for the ACLU.

We are very pleased to have Professor Neuborne with us today.

I would like to yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much, Mr. Chairman.

I just want to say I, too, welcome Professor Neuborne. It brings back nostalgia since I was in legal education for a dozen years. I look back with regret and ask: Why did I leave the best of all possible worlds?

I commend you for the immense amount of work you have done for the ACLU. One of the many things that I have learned already from reading your paper is the fact that I missed your law review article in the Harvard Law Review, and in my previous incarnation I never would have done that. But we are going to get hold of it.

I am pleased also you have information here about the necessity of additional Federal judges, and we shall use that to very, very good purposes.

I thank you very much.

Mr. NEUBORNE. Thank you, Father Drinan.

Mr. KASTENMEIER. Before calling on Professor Neuborne I should indicate that a second witness we had originally scheduled today,

Mr. Bernard Veney, who has appeared before this committee in a different capacity, will not be able to be with us as a witness.

However, the subcommittee will be pleased to accept his statement for the record on this subject.

At this point I would like to call on you, Professor Neuborne, and you might wish to commence by identifying your colleague. You may then proceed from your statement or as you wish.

TESTIMONY OF BURT NEUBORNE, PROFESSOR OF LAW, NEW YORK UNIVERSITY, AMERICAN CIVIL LIBERTIES UNION; ACCOMPANIED BY PAM HOROWITZ, COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. NEUBORNE. Thank you, Mr. Chairman.

Seated with me at the witness table is Ms. Pam Horowitz, who is an attorney with the ACLU's Washington office, and who is working closely with me in attempting to present information to the Congress on the problems of access to justice and our concerns with the appropriate allocation of what has increasingly come to be perceived as a scarce natural resource—the attention time of article III judges.

With the committee's permission I would like to enter my written statement in the record and summarize it by discussing with you some of the alternative solutions that have been put forward for dealing with the access problem in the courts today.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be accepted and made a part of the record, and you may proceed.

[The statement of Prof. Neuborne follows:]

STATEMENT OF BURT NEUBORNE, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and members of the subcommittee: I am pleased to accept your invitation on behalf of the American Civil Liberties Union to discuss the increasing difficulty faced by Americans seeking access to justice in our society. Although we pride ourselves that we live under a government of law, not men or women, we know that the best of laws remain remote abstractions in the absence of sensitive officials charged with the duty to administer and enforce them.

To many Americans, the majestic promises of the Constitution and laws remain just that—majestic promises. During the past 30 years, however, an extraordinary corps of officials—the Federal judiciary—has done much to transform the promise of law into practical reality. Favored with a proud tradition, staffed with persons of substantial ability and insulated against local majoritarian pressures, the Federal judiciary has done more than any other institution in our society to transform the vision of law from that of defender of privilege to engine of social reform.

Given the achievements of the Federal judiciary, we are prone to forget that it consists of a robed bureaucracy of fewer than 500 persons. The critical issue which confronts this Subcommittee is how best to allocate the finite resources of that bureaucracy, which has played so central a role in the evolution of our modern conception of law.

Concern with the proper allocation of scarce natural resources is, of course, not a new issue for this Congress. However, in approaching the problem of access to the Federal courts, this Congress is rationing, not physical goods, but justice itself; for, to the powerless in our society, the Federal courts—and only the Federal courts—are institutionally capable of withstanding the pressures which always accompany decisions favoring minorities at the expense of majorities and the weak at the expense of the strong. The Founding Fathers understood that all decisions, even in a democracy, may not be left to majoritarian

control. They recognized that tyranny by a majority is scarcely less tolerable than tyranny by a few. In order to provide a counter-majoritarian check, they established a written Constitution and an independent Federal judiciary to enforce it. Virtually every decision by a judge on constitutional grounds overturns a decision of a popularly responsible official. Thus, constitutional decisions inevitably involve the judiciary in counter-majoritarian positions. Moreover, in recent years, Congress has enacted statutes designed to enforce constitutional guarantees. In construing and implementing such statutes, courts are often called upon to render decisions which disfavor the majority in order to redress discrimination aimed at minorities. Finally, Congress has enacted legislation designed to curb abuses by powerful economic and social forces which, while non-majoritarian, are sufficiently powerful to exert pressure on the forums called upon to administer and implement the statutes. It is a lesson of our history that the only institution capable of enunciating and implementing counter-majoritarian norms in a sustained manner are the Federal courts. To the extent, therefore, that litigation involving powerless plaintiffs (such as constitutional litigation, social security cases of consumer litigation) is shunted to non-Article III forums, the capacity of our society to enunciate and implement results which, although just, are distasteful to local majorities or power groups will have been seriously diminished.

At the present time, a rough laissez-faire form of allocation is taking place. As in any situation involving a scarce resource, in the absence of a structured allocation, market mechanisms operate to effect an allocation based on wealth. Aided and abetted by a Supreme Court which appears increasingly insensitive to the problems of the poor, such a market allocation is currently underway, with access to Federal court tending more and more to be dependent on the wealth and status of the litigants rather than the importance of the issue or the needs of the parties for the unique services of an Article III forum.

Again, as in any situation involving the allocation of a scarce resource, four types of responses have been suggested:

(*a*) Expansion of the scarce resource by creating additional Article III judges;

(*b*) Substitution for the scarce resource by diverting litigation to alternative dispute resolution systems, such as state courts, magistrates or community justice schemes;

(*c*) Conservation of the scarce resource by eliminating inefficient use of it, by simplfying procedures and eliminating certain cumbersome duties; and

(*d*) Rationing of the scarce resources by limiting access to those litigants demonstrating a need for the unique institutional services available in an Article III forum.

With the Subcommittee's permission, I propose to explore, first, why access to a Federal court is a unique resource and, having identified the unique aspects of Article III adjudication, comment on the suggested approaches to allocating access to Article III courts.

In a recent article, "The Myth of Parity," 90 Harv. L. Rev. 1105 (1977), I have attempted to summarize the institutional factors which render the Federal courts uniquely competent to enunciate and implement potentially unpopular constitutional or statutory norms. (A copy of "The Myth of Parity" is annexed to my testimony) see [Appendix 7a]. Briefly summarized, three factors appear to coalesce to provide Article III courts with unique advantages for the resolution of disputes involving powerless persons and controversial issues:

(*a*) First, the level of technical competence in the Federal trial courts is far higher than the levels of technical competence prevailing in state court systems or alternative dispute-resolution forums. Put bluntly, Federal judges, because of the prestige and compensation involved, tend to reflect a level of technical competence which substantially exceeds the competence of state trial courts. Since fewer than 500 Federal judgeships need be filled, the number of qualified aspirants always far exceeds the number of vacancies, providing an appointee pool of relative excellence. Moreover, when the support facilities available to Federal judges and the selection processes involved are added to the ability factor, the competence gap between an Article III forum and alternative methods for resolving disputes becomes marked.

(*b*) Second, Federal judges, in part because of their tradition, in part because of their bureaucratic relationship with the Supreme Court, and, in part, because of their social structure, appear more receptive to the commands of the Federal Constitution. While state judges recognize a duty not to violate the Constitution, Federal judges have demonstrated a commitment to enforce it. In the subtle difference between those two visions of judicial responsibility lies the answer to many doubtful cases.

(*c*) Third, and perhaps most important, the Federal judiciary, with life tenure, is the only dispute resolution mechanism designed to withstand constant political and social pressure to resolve disputes in favor of powerful or popular litigants.

The coalescence of a competence gap, a psychological set and insulation from local pressures explains the fact that for almost two hundred years, lawyers seeking to enforce constitutional norms have systematically turned to Federal courts. Thus, whether the plaintiff was a slave owner seeking enforcement of the Fugitive Slave Clause; a freedman seeking enforcement of the Fifteenth Amendment; a corporation seeking to enforce substantive due process or a modern plaintiff seeking to enforce the First Amendment; each has sought access to a Federal court in the altogether correct belief that Federal courts would provide the most effective forum in which to enforce constitutional rights.

Several different responses have been suggested to deal with the fact that demand for Article III adjudication threatens to exceed the supply which 500 judges can produce.

I. EXPANSION

Given the importance of Article III adjudication, it is often argued that the supply of the scarce resource should be expanded by appointing more Article III judges. Obviously, if it were possible to solve the oil crisis by discovering more oil, that would be the most preferable alternative. However, unlike oil, the unique attributes of Article III adjudication might be diluted by an uncontrolled expansion of the size of the Federal judiciary. The level of competence would be threatened, to say nothing of the intangible psychological qualities which are a significant aspect of the current Federal bench. While uncontrolled expansion is, thus, undesirable, a substantial increase in the Federal bench seems warranted. Certainly, in a country with a population of almost 200 million, it is not too much to suggest that a controlled expansion over time to one thousand Article III judges would neither dilute the quality nor the prestige of the Federal bench. Were such a controlled expansion undertaken, the pressures on access to the Federal courts would be substantially lessened.

II. SUBSTITUTION

The primary response of the Burger Court and the Department of Justice to the access problem has been to shunt cases which plaintiffs seek to bring in Federal court to substitute (less effective) dispute resolution forums.

(*a*) *The Burger court and the closing of the Federal courts*

In a recent article, "The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection," 5 Hofstra L. Rev. 545 (1977), I have described in detail the decisions of the Burger Court creating procedural obstacles to access to Federal court. [See Appendix 7b.] Taken together, the Burger-Rehnquist procedural decisions effect a dramatic shift in constitutional adjudication from Federal to State court. In large part, the Burger Court has defended this shift on two grounds: First, that the shift is necessary to ward off excessive cases which are swamping the Federal judiciary and second, that state courts are equally capable of enforcing constitutional rights.

As I have attempted to demonstrate in Appendix A, the notion that parity exists between state and Federal courts as constitutional enforcement forums is a dangerous myth which masks the reality that by shifting constitutional cases into state courts, the capacity for enunciating counter-majoritarian doctrine has been lessened. Thus, shunting cases into state courts does not solve the access problem; it constitutes a form of rationing in which the scarce resource is replaced with an altogether inappropriate alternative. In addition, the assertion by the Burger Court that cases raising constitutional issues are "swamping" the Federal courts is simply untrue. While civil rights and habeas corpus filings have risen dramatically in the past decade, they constitute a

small percentage (under 10 per cent) of the business of the Federal courts. Moreover, most civil rights cases raise issues of law rather than issues of fact. The vast bulk of civil rights cases are disposed of by motion—either preliminary injunctions, motions to dismiss or summary judgment. Unlike other bases of Federal jurisdiction, civil rights cases do not consume "bench time," since they rarely involve complex factual issues. Moreover, they rarely require the empanelling of a jury.

The Burger Court is correct, of course, in suggesting that civil rights cases prove vexing and difficult to the Federal judiciary—precisely because the issues they pose *are* vexing and difficult. It is a strange mode of allocation which shunts difficult and vexing cases posing issues calculated to raise public passions out of an Article III forum tailor-made to decide them and into state forums demonstrably less competent to decide them. Such an irrational allocation is, however, the heart of the Burger Court's "solution" to the access problem. Thus, if this Subcommittee does nothing else, it should recommend legislation designed to undo the shift from Federal to state courts which has been created by the procedural decisions of the Burger Court described in Appendix B.

(b) The Department of Justice and the creation of substitute forums: Increasing the jurisdiction of Federal magistrates

One suggestion to the access problem has been the creation of a tier of Article I "para-judges", the Federal Magistrates, who would be expected to relieve the pressures on Article III judges. To the extent that the cases diverted to the Article I magistrates do not require the unique presence of an Article III judge, no objection, in principle, exists to utilize magistrates as a device to alleviate overcrowded dockets. However, as might be expected, the suggested use of Article I magistrates involves cases which cry out for the attention of an Article III official. Whenever a case involves a powerless litigant posing issues which are likely to bring countervailing pressures into play, the unique institutional capacity of an Article III judge is critical to systematic resolution in a just manner. Shunting such cases to magistrates, who will possess neither the capacity, psychology nor independence of Article III judges, would be a tragic mistake. Yet, suggestions abound to remit primary responsibility for habeas corpus, prison suits, "petty" offenses (involving up to six months imprisonment), Social Security challenges and a host of other cases involving powerless plaintiffs and highly charged issues, to magistrates, with limited appellate review. Since an Article I para-judge is simply no substitute for a real Article III judge, magistrates are not the answer. Of course, it would be possible to upgrade the salary and tenure of a magistrate to approximate that of an Article III judge. However, if substantial sums are to be expended on building an Article I facsimile of an Article III judge, I find it difficult to understand why we should not spend the money to create additional Article III judges. If, however, the Article I magistrates are not conceived as the equivalent of Article III judges, it is a sham to divert cases to them—especially cases which require the ability and independence of an Article III judge. I am submitting for the record a copy of the ACLU's testimony before the Senate Judiciary Committee on S. 1613, the Administration's magistrates bill.

III. CONSERVATION

Scarce judicial energy may be conserved in a number of ways. Ironically, reform of the Burger Court's procedural tangle, described by Justice Stevens as "Daedelian," would conserve an enormous amount of judicial energy which is currently expended to no discernible social purpose in determining whether cases are properly in Federal court. Well over half the current energy of Federal judges deciding constitutional cases is devoted to deciding whether to decide them. If judicial resources are scarce, such an allocation of energy is not rational.

In addition, judicial resources could be utilized more efficiently if the artificial barriers to class actions imposed by the Supreme Court were removed. Class actions provide the potential for permitting a fixed quantity of judges to serve vastly more individuals. If efficiency is generally the aim of the Burger Court and the current Department of Justice, reform of the class action area is long overdue.

Finally, substantial judicial energy could probably be conserved by reforming discovery practice (both civil and criminal).

It is, however, somewhat premature to suggest final conservation approaches since, despite the collection of raw data by the Federal Judicial Center, we have very little data on the amount of time consumed by Federal judges in performing their functions. We suggest that prior to any final resolution of these critical issues, a survey of the Federal judiciary be undertaken pursuant to which accurate estimates of the allocation of time in the Federal courts would be secured. Once such information is available, Congress would be in a position to make fine judgments on whether the social benefits of Article III adjudication of given issues justify the expenditure of judicial time necessary to resolve them. In the absence of such data, consideration of access to the Federal courts risks degenerating into a raw struggle between powerful litigants anxious to retain the benefits of the superior technical abiilty available in Federal court and powerless litigants whose status and claims are uniquely appropriate for Article III resolution. In such a struggle, the powerless are not favored to prevail.

VI. RATIONING

If the access problem cannot be solved by expansion, substitution or conservation, resort to rationing becomes necessary. Under a rationing analysis, prospective litigants in Federal court are screened to determine whether their status or the nature of their claims creates a special need for Article III adjudication. Three obvious candidates for screening are diversity jurisdiction, minor criminal jurisdiction and Jones Act-FECA cases.

Whatever historical basis for diversity jurisdiction may once have existed, there seems little modern justification for its continuation. Retention of diversity jurisdiction is even less justifiable when it results in the shunting of constitutional cases (which require Article III consideration) to state courts. Accordingly, we urge the Subcommittee to consider the complete abolition of diversity jurisdiction. The primary beneficiaries of modern diversity jurisdiction are powerful commercial and tort litigants who utilize diversity to gain access to a forum of excellence. While one can hardly blame litigants for opting for a superior forum, such a luxury can no longer be afforded. The abolition of diversity would, moveover, create a strong pressure to upgrade state courts, since powerful interests would be required to litigate substantial claims in state court, instead of currently using diversity jurisdiction to funnel them into Federal court. Finally, abolishing diversity jurisdiction would effect a disproportionate saving in scarce judicial time for two reasons. First, most diversity cases involve substantial factual issues requiring extensive trial time—often involving a jury. Second, the very complexity of diversity jurisdiction consumes substantial quantities of judicial time merely to decide whether jurisdiction exists at all.

Since no current justification for diversity exists and since abolition would go far toward solving our current access problems, further inroads into access for constitutional plaintiffs cannot be justified.

In addition to diversity, Federal judges unnecessarily expend substantial time disposing of minor criminal offenses such as interstate auto theft; thefts of postal money orders and disorderly conduct in National Parks. While serious Federal offenses must, of course, receive the attention of Federal officials, substantial doubt exists whether petty crimes, which are identical to state crimes, but which are in Federal court because of geographical accident, should consume the time of the Federal courts. Instead, we suggest that the United States Attorneys be encouraged to "waive" such criminal business to the appropriate state forum for more efficient disposition. We estimate that a serious paring of Federal criminal jurisdiction would substantially alleviate the current pressures on the Federal judiciary. This "waiver" approach is preferable—from both a practical and a constitutional standpoint—to forcing "petty offenders" into a parajudicial Federal magistrates forum, as the Administration's magistrates bill does.

Finally, Federal courts continue to hear tort cases under the guise of the Jones Act or the FELA. Serious doubt exists whether continuation of such time-consuming heads of jurisdiction are warranted in the absence of a showing of a special need for Article III attention.

CONCLUSION

A serious danger exists that forces hostile to the vigorous enforcement of individual rights will seek to use the current caseload problem of the Federal courts as a pretext for stripping Federal courts of the primary responsibility for enforcing constitutional rights against state and local encroachment. Many of

us fear that the Burger Court decisions analyzed in Appendix B have done precisely that by shunting many constitutional cases into state court. The ACLU suggests the following concrete responses to the caseload problem which will serve as forums in which the powerless may continue to seek "equal justice under law":

I. Expand the Federal judiciary, over time, to 1,000 sitting judges.

II. Abolish diversity jurisdiction and consider the abolition of minor criminal jurisdiction, Jones Act and FELA jurisdiction.

III. Commission a study of the allocation of time by Federal judges to determine whether conservation methods are possible.

IV. Reform the procedural decisions of the Burger Court to eliminate unnecessary expenditure of time on esoteric procedural technicalities.

V. Reform class action procedure to enable it to play a significant role in increasing judicial productivity.

VI. Reject attempts to substitute state courts and Article I magistrates for Article III judges in those cases involving litigants and issues calling for Article III adjudication. Specifically, enact legislation reversing the attempts by the Burger Court to shift constitutional adjudication from Federal to state courts and reject attempts to shift cases involving impoverished litigants to Federal magistrates.

We believe that a modest expansion of the Federal judiciary, coupled with a modest pruning of unnecessary bases of Federal jurisdiction is a complete answer to current concerns over Federal caseload. Any attempt to impose more Draconian solutions is motivated, not by a desire to assist the Federal courts, but by a desire to emasculate them.

Thank you for this opportunity to present the views of the American Civil Liberties Union before this Subcommittee.

Mr. NEUBORNE. Thank you, sir.

We are prone to forget, I think, given the enormous achievements of the Federal judiciary in the past generation, that it is a relatively small bureaucracy which at its most numerous, without health problems and without leaves or vacations, consists of only 500 robed bureaucrats: 500 judges sworn to uphold the Constitution and to implement the laws of the United States.

We are becoming increasingly aware that there is a saturation point to the attention span and capacity for work which 500 bureaucrats can bring to bear on the enormous problems that the Federal Judiciary is asked to deal with on a daily basis.

I propose to discuss with you this afternoon, if I may, first, what is the unique product of the Federal judiciary? What do they do which is so special and different which differentiates the adjudication process in an Article III court from the similar adjudication processes which go on in State courts (and which would go on, I take it, in alternative dispute resolution forums which have been suggested as a means of remedying the overburdened Federal judiciary). Once I have attempted to identify what I consider to be the unique characteristics of an Article III adjudication, I propose to discuss the various methods that have been suggested to deal with overcrowding in the Federal courts and to analyze those alternatives with regard to the special functions and the special purposes which Article III adjudication provides.

First, I should state that there is a historical lesson that all of us should be aware of. For the past 200 years, really from the very beginning of the Federal judiciary, plaintiffs or persons seeking to enforce constitutional rights have traditionally turned to the Federal courts as the optimum forum for enforcement of those rights.

The enforcement of constitutional rights in the U.S. courts can roughly be broken down into four eras.

The first era is an era we don't like to think about very much, but it nevertheless is a valid historical period for study, and that is the period from about 1795 to the Civil War, when the Federal courts were given the responsibility, a dubious responsibility as we look at it today, of enforcing the fugitive slave clause of the Constitution which guaranteed to a slaveowner the right to recapture his slave if the slave ran away.

Often the slaves would run away to the North in an attempt to find freedom, and it was the obligation of the Federal judge, having taken his oath, to enforce the Constitution of the United States, and to enforce the fugitive slave laws to return those slaves to their southern owners.

Obviously the enforcement of the fugitive slave clause raises very, very difficult issues of when morality should override an obligation to enforce the law, but putting aside those extremely difficult philosophical questions, it is clear, as a historical fact, that the pre-Civil War litigators, the slaveowners who were attempting to enforce their constitutional rights in this period, realized the forum that was not likely to enforce them in a vigorous way were the State courts. So the first litigants who attempted to get into Federal court were the slaveowners attempting to recover their slaves.

The pattern that was set in this pre-Civil War period has replayed itself three more times in our history. Three other types of litigation settings have arisen in which access to a Federal court has become a paramount end of a particular litigating group. Shortly after the Civil War and emancipation, the Negro slaves who had been freed, sought to use the Federal courts to enforce the guarantees of the 13th, 14th, and 15th Amendments.

They attempted to, in effect, replicate the process which the slave owners had used before the Civil War. This time the newly freed slaves attempted to use the Federal courts to enforce rights vigorously on their own behalf.

The history of the failure of that effort is one of the sadder chapters in American jurisprudence, but for our purposes, I think it's enough to recognize that an attempt was made over a 25-year period to gain access to the Federal courts, but that attempt ultimately floundered on a series of procedural technicalities.

The freed slaves were forced to go into Southern State courts and the record of the State courts, which failed to enforce their constitutional rights, is one of the most shameful eras in American legal history.

The third attempt at using the Federal courts involved corporations. Shortly after the Civil War corporations were deemed to be persons within the meaning of the 14th Amendment, and within a very short time the corporate bar attempted to gain access to the Federal courts, to enforce their 14th Amendment rights under the Constitution.

They were a great deal more successful than the newly freed slaves, and were able to construct a jurisdictional theory, a theory, by the way, which is the identical theory which civil rights lawyers use today to get into court. There is an intellectual linkage between the current civil rights bar and the theories used by the corporate lawyers at the beginning of the 20th Century.

The corporate bar was able to use the Federal courts to enforce substantive due process all the way up to the New Deal.

The fourth wave of constitutional litigants that have attempted to use the Federal courts are the current wave of civil rights litigants represented by the generally pro bono civil rights bar, which has attempted to use the Federal courts to enforce the expanded vision of constitutional rights which has come down to us from the Warren court.

Now, the lesson of these four historical eras where you had litigants of widely differing social status, widely differing rights, and widely differing political complexions, the lesson that comes down to us from the interplay of those four historical eras is there is something special about a Federal court when it comes to enforcing constitutional rights. When the enforcement of a constitutional right is likely to trigger hostility from local majorities or local powerful forces, which although they may not be majoritarian are nevertheless able to influence decisionmaking in a local forum, access to a Federal court becomes critical.

The special role of the Federal courts over the years has been to provide an insulated forum of excellence where claims which touch majoritarian or powerful interests in a way that would cause those powerful interests to recoil and fight back may be resolved on their merits. Only Federal courts have provided an institutional forum capable of enunciating counter majoritarian doctrine over a sustained period of time.

No other institution in American life has proved itself capable of standing up to outraged majorities or standing up to outraged special interests in the way a Federal court has. I think that three indicia, three elements of the Federal court system, stand out to explain why they have built this admirable history of constitutional enforcement.

First, there is the fact of sheer technical competence; in part because the Federal judiciary is so small. Because we are only talking about staffing 500 judgeships at any one time, the appointee pool is really remarkably high in excellence.

There are, for example, and I am not sure this statistic is anything more than a dramatic example, but there are more judges, more trial judges in southern California than there are in the entire Federal judiciary, and you gentlemen, I am sure, are aware that when one has to staff a bureaucracy, if one has to staff a very large bureaucracy, the average level of competence in that bureaucracy is going to be, by and large, lower than if one is called upon to staff a very small bureaucracy, and can pick and choose in terms of who you appoint.

The prestige factor involved in the Federal judiciary, as well as the compensation level of the Federal judiciary, has tended over the years to attract an extremely high level of technical competence in the judiciary.

Finally, the method of appointment: The method of appointing a Federal judge is far from perfect, but especially when one is dealing with trial judges, it is calculated to attain excellence in the final product to a much higher degree than the election processes or politically motivated appointment processes; which tend to dominate the selection process for judges in most of our States.

There is a competence gap, and I think we have to recognize it, between the State and Federal judiciaries, especially at the trial level when you compare Federal trial judges and State trial judges.

There is a undeniable competence gap which is painful to discuss. Certainly the Federal courts cannot say it, because to say it is to cast doubt or to appear to be casting some aspersions on a fellow judge, but there is a competence gap, and those of us who practice routinely in the two court systems around the country, especially in civil rights cases, see that gap and are motivated by it in selecting forums.

Second, there are psychological differences between judges, and that I think stems in part from their role in the governmental hierarchy. Federal judges have as a primary duty the obligation to enforce the Constitution of the United States. They are in a direct bureaucratic line with the Supreme Court. They feel an affinity and a responsibility to it, not only to enforce the decisions of the Supreme Court, but to anticipate what the Supreme Court would want them to do in a particular case.

I don't suggest all, but many State judges appear to treat the Constitution and the decisions of the Supreme Court in certain areas as things which they grudgingly recognize that they may not violate.

They certainly recognize that the supremacy clause requires them to follow clearly enunicated Federal law. On the other hand, they do not attempt to anticipate the rulings of the Supreme Court, and they seem to feel less of an obligation to affirmatively reach out and enforce the Constitution. The difference between affirmatively enforcing and not violating may sound like a semantic difference, but in a doubtful case it may be the difference on which way the judge will go, and after all, constitutional litigation is mostly about doubtful cases.

If it is a clear case, it doesn't get to court, but where you have people on both sides presenting powerful legal and moral claims, the psychological seat of the judge can be critical in the final disposition of the case.

Finally, and I think most importantly, Federal judges are insulated. They are appointed for life. They have tenure. The Constitution is designed to provide them with maximum insulation from political pressures, and they have operated over the years in a way which I think would bear out the wisdom of the Founding Fathers choice to make them an insulated judicial forum.

There are only four States that give their trial judges anything like the type of independence that a Federal trial judge has. The vast bulk of the trial judges sitting in State courts in the United States are democratically chosen. There are many arguments in favor of the democratic choice of judges. But one thing you must recognize, if you ask a judge to decide a constitutional case and he decides that a particular act of Government is unconstitutional, is that that judge is setting himself or herself against the popular will.

He is saying I know the majority or the elected representatives of the majority want this particular thing, but they cannot have it. That will inevitably set a judge on a collision course with majoritarian sentiment in the community, and the passions can become quite inflamed. When the judge who is asked to make a counter-majoritarian decision is himself responsible to that same majority in order to be

reelected (or feels himself a representative in some way of the same majority that he is asked to rule against), you have serious tension.

I don't suggest that State judges always tailor their decisionmaking process to tack with the wind of majoritarian sentiment. I do suggest though that where the issues are close and where there are fair arguments to be made on both sides, a judge with a majoritarian consistency will be more likely to embrace the majoritarian side of an issue than the nonmajoritarian side of the issue, and that explains the difference in the two court systems over a 200-year period in the enforcement of constitutional rights.

All of that is preamble, and as my students would no doubt say, a boring preamble, to the current problem. If you have 500 Federal judges, and if, as I think it is accurate to say, they are screaming for help because they say they are overburdened, how does one respond to that situation?

I think one responds first by recognizing that Federal judges are dispensing a unique product. That unique product is Article III adjudication; adjudication by an insulated official of excellence. Therefore, we must deal with this issue as we would deal with any conservation problem, any problem in the scarcity of natural resources.

We can, first, attempt to expand the natural resource. We can, second, attempt to substitute for the natural resource; we can, third, attempt conservation measures; and failing those three steps, we can finally ration access to the natural resource.

With the subcommittee's permission, I would like to go through each of those possible alternatives and comment on some of the proposals which are before the Congress at this time to deal with the issue of court congestion and suggest where they fall in that analysis.

First, the expansion analysis: Using the analogy to oil, if it were possible for us to discover more oil today, to simply wave a wand and discover lots more oil, I guess all of us would say that is the best way to deal with oil scarcity, and therefore, the presumption arises that if we have a scarcity of article III judges, why not simply deal with that by expanding the universe of article III judges.

I think one answer is that there is something lost by an uncontrolled expansion of the Federal judiciary. To the extent the Federal judiciary becomes too large, you lose the exclusivity, you lose the ability to maintain excellence in the appointment process, you lose many of the intangible factors that make it so effective.

The American Civil Liberties Union does not urge the Congress to engage in an uncontrolled expansion of Federal judicial appointments.

We do, however, suggest that a modest expansion is certainly within both the realm of possibility and the realm of practicability.

In a country of 200 million people, it is not too much to ask that there be 1,000 Federal officials capable of dispensing article III adjudication for the resolution of disputes.

We now have a judiciary of about 500, perhaps a little larger. It seems to me that, over time, in a controlled expansion there is no principled reason why the judiciary could not grow substantially in size. The growth of the article III judiciary would, of course, go a long way toward alleviating the pressures, the docket pressures, which Federal judges are currently called upon to deal with. Thus, we endorse and we are pleased to see there was a modest growth in the

Federal judiciary very recently, and we hope the Congress will consider a controlled growth situation, ultimately rising to as many as 1,000 article III judges.

The second obvious response to a scarcity problem is substitution. That is the response which the Burger court has urged upon us. It is also the response that the Department of Justice has urged upon us. Their response is, to the extent that the Federal courts are overburdened, simply substitute other forums for them. The other forums can either be State courts, magistrates, or community disputes resolution systems; but substitution, they argue, is an alternative to scarcity.

Now, the only problem with that is that it overlooks the fact that the article III judge, when he or she performs an article III function, is performing a unique function, and that function cannot be substituted by creating or shunting cases to alternative bureaucracies. If you send a constitutional case to a State court, sure, it's there, it is going to be dealt with, but it's not going to be dealt with by an article III judge; and if there is something unique in the way the article III system operates in constitutional cases, you lose that when you send a case to a nonarticle III forum.

The case that I have discussed in the Hofstra article you have before you as an appendix to my testimony, I think nothing is to be gained really by rehashing those cases in detail. The sum and substance of the Burger court decisions over the last several years, and I think this is not a controversial statement at all, it is something we all would agree with, has been to shift constitutional decisionmaking in large categories of cases from article III courts to State courts. They have reacted to the congestion problem in the Federal courts by simply taking classes of constitutional cases and shoving them into the State courts instead.

The net result is a substitution effect. You have a forum, but it's a State forum and not a Federal forum, and I suggest that given the lessons of history and given the fact that the article II courts dispense a unique brand of adjudication, that is not an acceptable way to deal with scarcity.

You don't substitute water for gasoline, and I don't think you substitute nonarticle III adjudication for article III adjudication in cases in which the nature of the issue or the nature of the litigants calls out for an insulated forum.

We don't object in principle to the notion of substitution. To the extent that the case doesn't require that special kind of article III attention, sure, it's a perfectly good idea to find a substitute forum to take it. But constitutional cases, cases involving consumer issues, social security issues, they seem to be paradigm cases where you have precisely the types of litigants or issues which have cried out for Federal adjudication in the past, and which continue to require Federal adjudication in the future.

I should say a word about the Justice Department recommendation that we use magistrates as a substitute forum, as a kind of alternative forum to dispose of certain cases. Again, there is nothing wrong in principle with using magistrates as para-judges. There is nothing wrong with harnessing that energy to attempt to help a judge carry out the judge's article III functions.

The problem is what types of cases are you going to route to a magistrate, because a magistrate is going to be an article III substitute, without the prestige, without the insulation, and without the tenure of an article III judge. Simply sitting magistrates down in a Federal courthouse does not make them article III judges. The attribute of an article III judge is that insulation combined with the excellence, which is what really makes the article III judge a special figure in American life.

To the extent that the Justice Department's magistrate bill hope to create a corps of magistrates that approaches the level of excellence of article III judges, it is going to have to spend so much money both for the salaries of the magistrates and to provide them with some sort of insulated tenure, that you really are building a facsimile of an article III judge. If we are going to build facsimiles of article III judges, why don't we just go ahead and appoint more article III judges; why have a tier of article I judges who have the same attributes as an article III judge, but who are nevertheless not given the title of an article III judge?

On the other hand, if we are not going to spend enough money on the magistrates to have them approach article III judges in excellence, prestige, and tenure, then it's a shame to send cases to them, because they are not going to dispense justice of the same quality as the article III judge would have dispensed. Thus, to the extent that cases are to be sent to magistrates, if they are cases that do not require the special expertise, the special ability of an article III judge to dispense justice, fine.

I urge the committee, however, before taking any action on any magistrates bill, to scrutinize carefully the categories of cases magistrates are going to be asked to handle. The suggestions abound for sending magistrates habeas corpus cases or sending magistrates social security or discovery in constitutional cases, for giving magistrates factfinding power in constitutional cases. Those are precisely the functions over time that have been the province of an article III judiciary. That is why the article III judiciary has performed as brilliantly as it has. To take those areas away from the article III judiciary and give it to an article I official is to change the nature of the decision process, and inevitably it will change the nature of what comes out of that decision process—to the country's detriment.

Third, there is conservation. We have talked about expanding the judiciary and we have talked about substituting for the judiciary. Finally, the third obvious response is conserving the judiciary. I don't think we are really ready to talk in a serious way about conservation yet, because we have not yet done a time study on what Federal judges use their time for.

There are the raw statistics of the National Center that tell us how many filings we have had last year, what kinds of cases are coming in, but those are very, very raw figures. They are gross figures in that they do not attempt to determine, for example, whether a particular type of jurisdiction takes up a lot of bench time or whether that jurisdiction only takes clerk time, or whether a particular type of jurisdiction requires the impaneling of a high proportion of juries for disposition or whether another type of jurisdiction is often disposed of on summary judgment by preliminary injunctions, so the amount

of judge time that various types of cases take have really not been analyzed in any kind of meaningful way.

I suggest, as a precondition to going forward with any kind of a serious reevaluation of our Federal jurisdictional structure, that there be a searching inquiry into the time allocation which Federal judges are forced to undertake to dispose of certain functions.

For example, I suspect that if one were to send a questionnaire to the Federal judges, you would find them engaged in a disproportionately high number of minor, petty criminal cases; that much of this elegant bureaucracy, is spent disposing of postal money order thefts or interstate auto thefts, or disorderly conduct in a national park, which are issues which could easily be disposed of by the State courts. Area survey of the varieties of ways the judges spend their time would begin to pinpoint this.

I suspect that judges spend an enormous amount of time dealing with discovery and with the complexities of the Federal discovery laws. Were that to be determined in some sort of survey, you would then have an area to target onto, for a finely tuned reform of the system, instead of a blunderbuss approach which really might not get to the heart of the matter.

A third example. It's quite clear, I think, that civil rights filings have increased dramatically since 1961, primarily because prior to 1961 you couldn't have any civil rights filings at all, so sure, there has been a tremendous increase in the last 15 years in the ability to file civil rights cases in the Federal court.

The raw civil rights data doesn't tell the whole story. Civil rights cases, in my experience—and I think this is an accurate description—are often disposed of on the pleadings. They are often disposed of on a motion for failure to state a claim upon which relief can be granted; they are often disposed of on summary judgment, and they are often disposed of on motions for preliminary injunction. They rarely go through to full-scale trial. They almost never require the impaneling of a jury. They do not take up, in comparison to other types of jurisdiction, anything like the amount of benchtime, judgetime, that other types of jurisdiction require to be disposed of.

Until we have studies of that, until we can really make fine judgments on what types of jurisdiction, what types of tasks are taking how much time, it seems a little premature to talk about a serious conservation approach. But I think that is a first step, and it is a first step which I urge on the committee.

Finally, there is the fourth and most drastic approach to a scarcity problem, and that is rationing. Rationing, it sounds funny to talk about rationing access to the Federal courts, but that is really what we would be doing. We would be saying there are certain types of cases which have a special need to be in the Federal courts and certain types of cases which don't necessarily require the expertise or the special attributes of an article III judge, and we would allocate the attention of the article III judge based upon those types of concerns, and that is really a form of rationing.

We have suggested three candidates, to the extent the committee thinks it's necessary to ration access to the Federal court, we suggest three obvious candidates for an initial screening.

First, the whole area of diversity jurisdiction. Diversity jurisdiction, as I am sure you are all more than aware, was initially created to deal with the problems of bias that might infect a State court when it deals with an out-of-State litigant.

It is now almost universally accepted that the original need for diversity jurisdiction, guaranteeing a neutral forum, has long since lapsed in this country. State courts have not been epidemically unfair to out-of-State litigants and are not likely to become epidemically unfair. If, in fact, a threat of bias can be shown, there could be remedial action taken on an ad hoc basis. But there appears to be no need any more for a diversity jurisdiction that simply guarantees access to a Federal forum for two commercial litigants who happen to be from different States; who are litigating a purely State cause of action, and have purely State concerns, and who do not exhibit either the status, powerless status, or type of political issues which have been traditionally thought to be the special province of the Federal courts.

Consequently, we suggest that diversity jurisdiction be abolished.

The suggestion has been made to this committee that it be cut back. On diversity, we go beyond this. We see no real need for a broad-based diversity jurisdiction today, especially if the result of keeping diversity jurisdiction is to push other cases which need article III attention out of the Federal courts and into some substitute forums. Therefore, if some rationing is going to be necessary, let it start with those diversity cases which do not require the attention of an article III judge.

We suggest by abolishing diversity we would gain two very substantial additional savings. First of all, diversity almost always deals with fact questions. Diversity cases, I suspect, are among the single largest civil generator of jury trials in our Federal court system. Thus, to the extent that they tend to raise issues of fact which are disposed of by juries, and to the extent that civil juries are a burden on the current Federal system, by abolishing diversity we would have an even greater savings of time than would appear from the raw filings that would be disposed of.

Second, diversity itself is a very complicated issue requiring a great deal of litigation, simply to decide whether there is jurisdiction at all. By abolishing this terribly complex jurisdictional issue, you would save judges a disproportionately large amount of time.

The other two candidates for screening would be the petty criminal jurisdiction of Federal courts which I mentioned a moment ago, where the existence of a Federal or State forum to try a criminal case depends upon the accident of geography. The fact that you commit a crime on Jones Beach, which is now a national park, as opposed to committing it on the sidewalks of New York, ought not to determine whether you are tried in a Federal court or tried in a State court. It ought to be determined by the importance of the crime and the need for special attributes of an article III judge.

So we suggest that there be discretionary power given to U.S. attorneys to wave criminal jurisdiction over certain offenses which now must be tried in a Federal court, but which could just as easily and probably more efficiently be disposed of in a State court system which

is geared to the disposition of that type of claim. We suspect that jurisdiction over those claims could be waived with, I think, a substantial savings in judicial time.

Mr. KASTENMEIER. If I may interrupt, I think earlier you suggested that the quality of the trial itself might be different.

Mr. NEUBORNE. Yes; I think that may be so. I think one would have to say, that is why I talk about this in the rationing sense, I think we lose something and I think we would lose something if we sent it from a Federal to a State trial court, but I think if something has to give, it seems to us that would be a candidate for going. Were I defense counsel for someone charged with one of those petty offenses I would be loath to be moved out of what is the optimum forum for disposition, but looking at it from above, in a structural way, that type of claim would seem to lose less by being moved into a State court.

Finally, the Jones Act and FELA claims, which are really specialized tort jurisdiction given to the Federal courts for maritime torts and for certain types of torts involving railroad accidents, are precisely the same type of subject matter which are disposed of in a relatively efficient way by the State courts now. There is some question whether if, again, somebody has to be thrown out of the lifeboat, it ought not to be those litigants who have special need for the Federal courts, but litigants raising claims which are currently disposed of in a relatively efficient way by the State courts.

With those three as candidates for initial screening, we think a modest pruning of the Federal jurisdiction would go a long way toward dealing with the access problem.

In summary, we think a modest expansion of the Federal judiciary, coupled with a modest pruning of some of its jurisdictional bases which have outgrown the historical justification for their existence, would completely solve the access problem.

We reject the notion, and we hope the Congress will reject the notion, that the access problem can be dealt with by substituting inferior forums for resolution of these claims which have historically been the grist for the article III mill, and which continue to cry out for the type of adjudication which only an article III judge can provide.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thanks you, Professor Neuborne, for an unusually informative and useful discussion of this subject.

I only apologize for the fact that more of my colleagues are not here, and I hope they will take your statement and read it.

Your analysis is very lucid. It does raise a number of questions we have to grapple with. While this subcommittee is concerned with the status of the judiciary and access to justice, nonetheless, it is presently true that some of our companion subcommittees have responsibility for the creation of Federal judgeships and for certain other aspects of judicial reform. This subcommittee should at least be aware of developments in those other subcommittees.

In discussing the present Supreme Court you indicate one of the recommendations for reform is substitution. It may also be true, may it not, that these reformers may be interested in rationing as well? The Chief Justice, for example, in setting forth the possibility of

an inferior Supreme Court is thinking of rationing access on a certain limited basis.

Mr. NEUBORNE. I think that is precisely right, sir, and I think you have put your finger on the danger in the Burger Court approach. The Burger Court is trying to sell us something called substitution. They say that what they are selling us is an alternative product that will do the job just as well. What you have said, and I think quite accurately, is what they are suggesting is rationing, because they are not giving us an alternative product that will do the job as well; they are giving us an inferior substitute that may not be able to do the job at all, leaving people with insufficient access to an article III court, and placing us precisely in a rationing system.

If someone were to suggest that the appropriate way of dealing with our access problem in the Federal courts was to abolish their responsibility for dealing with constitutional cases, it wouldn't get 10 feet. Everybody would jump up and say that is ridiculous. That is what they are there for; that is their major function.

The Burger court has found a better way. Instead of telling us that they are going to abolish the Federal courts' constitutional jurisdiction, they have phrased their opinions cutting back on that jurisdiction in terms of substituting the State courts for the Federal courts, assuring us we are going to have a forum, but neglecting to tell us it is an inferior forum; a forum historically that has not been able to do the job. I, for one, am not able to accept the assertion by Justice Powell in *Stone* v. *Powell* that times have changed and we should trust the State courts—which for 200 years have not done the job—because there has been some magic change, and they will do the job now.

I think it's up to the Court, the Supreme Court, to tell us what has changed, and make us forget 200 years of history in this country.

Mr. KASTENMEIER. In terms of what we might do about the State courts, you suggest, and others as well, that the quality of State courts should be upgraded. The ABA and the Chief Justice both have recommended creation of a National Institute of Justice, which essentially would be a grant organization or a specialized extension of the concept of revenue sharing for these purposes. Do you support such a proposition?

Mr. NEUBORNE. I don't oppose it. There is nothing wrong with something to attempt to upgrade the State courts, but I think we should not be misled by the assertion that simply by creating bureaucracy to serve the courts, to give them a little more information and make them a little more efficient, that we are going to fundamentally change their ability to deal with constitutional cases.

The only thing that will change the ability of State courts to deal with constitutional cases would be the creation of a group of officials on the State level comparable in expertise, stature, and tenure to the article III judges. There is nothing inherent about a Federal judge that makes a Federal judge a better person to litigate a constitutional case before. If you had an article III judge, or the equivalent of an article III judge on a State level, then institutionally there is no reason why that person shouldn't operate just as well as a Federal judge, and so I would hope that the suggestions for improving the State judiciary

don't degenerate into simply paper shuffling suggestions, but really talk about attacking the institutional problems which make the State judiciaries incapable of effectively and in a sustained way enforcing laws that are counter majoritarian.

Mr. KASTENMEIER. In turning to the function of the article III judge in the future, even though you have expressed quite coherently your own views, don't you really foresee a very difficult and extended debate, not necessarily as to diversity, but as to what elements of criminal jurisdiction or whether the Jones Act, social security cases, or habeas corpus cases should be given low priorities or should receive the attention of some other arbiter than an article III judge.

Mr. NEUBORNE. I think that is right. I think trying to choose between those types of cases is an extraordinarily difficult decision to make. I would hope that one could avoid having to make that decision by abolishing diversity, because once diversity is abolished you will have released such an extraordinary amount of judge time to deal with those other cases that I think that the overload problem would be solved. If diversity were abolished and people continued to say to you that there is an overload problem in the Federal courts that requires more rationing, they are not talking about trying to save the Federal courts, they are talking about trying to emasculate them. What they really could be doing is attempting to assault the existence of a counter majoritarian institution like the Federal courts and to take them out of the business of making decisions in controversial areas, because if diversity is abolished, there is no principled reason why the Federal courts can't deal with their current caseload in an efficient way.

Mr. KASTENMEIER. It is probably the consensus of this committee that in looking at the two questions, that is access to justice and the state of the judiciary, the latter being seen as a problem of the judiciary, court congestion and so forth, that we should attempt to try to resolve both. To the extent possible, we should make access to justice more readily available and at the same time through various means we should reduce court congestion and promote the efficiency of the judicial system.

I take it you feel that this is theoretically possible; you have presented a scheme for doing that?

Mr. NEUBORNE. I think so, sir. I see no inevitable conflict between efficiency and justice. It is one of the happy situations where we can have both, and I think we should have both.

Mr. KASTENMEIER. Do you foresee in the years to come the creation of more specialized courts in the Federal system, quite apart from what we are able to achieve through disposing of diversity and the like, or would you prefer to see the article III judge as we presently and historically have had in our judicial system.

I am asking this in part because the full committee also is dealing with bankruptcy referees, judges or whatever, and the question of their article III status is before us. There are implications here, precedents that concern me. It is not that I think they shouldn't be article III judges, but if, in fact, they are, then in 5 or 10 years we may have other types of judges who desire similar stature. They may be specialists, as indeed bankruptcy individuals are; and we may also have

the question of if, in fact, they become true article III judges that historically have only handled special types of cases, may they not also handle other matters such as criminal cases.

I feel perhaps my friend from Massachusetts can aid me, for he serves on the subcommittee that reported that bill, and supports, I think, the notion. Nonetheless, some of these implications concern me in terms of looking into the future and the nature of judges that we may be either creating or expecting. Do you have any comment?

Mr. NEUBORNE. I think there were two points that should be made in that area. To the extent that any specialized court has before it or is likely to have before it either litigants or issues of the type who have traditionally looked at the article III judge as a protection against powerful majorities or interests—for example, social security cases where you are likely to have poverty litigants almost all of the time before the court; to the extent you are likely to have powerless litigants, powerless plaintiffs or issues of substantial passions, it would seem to be folly to take those types of cases and move them out of an article III forum and into a less insulated, less prestigious, less technically competent forum. So that the current suggestions for the creation of article I courts, for example, along specialized lines for certain types of cases, seem to me not to ask the real question. The real question is what kind of a case is it, what type of people are we likely to have in there, and how likely is it we are going to need the special attributes of an article III judge?

I don't see any inherent problem with specialized courts, if they are going to be dealing with certain issues. For example, the tax courts as specialized courts have tended over the years to deal with the type of litigants and the type of issue which doesn't need the special attention of an article III judge, and they work pretty well, and so it's hard to answer the question in the abstract without knowing what kind of jurisdiction is being suggested to use the specialized court for.

I think merely waving a wand over a specialized judge and making him an article III judge doesn't solve the problem either. It helps to give them some form of insulation, but unless they have that special selection process and special prestige and special regard in the community that comes from serving as a generalized article III judge, the bureaucracy that results wouldn't be the same type of bureaucracy, and really, when we shake down all of the structural material, we are left with the question:

What type of person is likely to be sitting there as the dispute resolver, because although, as I suggested in my testimony, we are fond of saying we have a government of laws, not men or women, but I think we all know that the nature of the individual who implements the law or who enforces it and who finds it is critical to the ultimate disposition of these cases. Therefore, we should be engaged in a process of attempting to construct some structure which leaves us with people of the same degree of talent, degree of independence, and degree of excellence as we have managed almost to blunder into in creating an article III judiciary.

We have been remarkably fortunate in blundering into this excellent group of bureaucrats, and it doesn't denigrate them to call them bureaucrats. They have performed remarkably well, and any other

dispute resolver that we attempt to create we should be concerned to see to it that we come out with the same type of product that we have managed to create with the article III judge.

Mr. KASTENMEIER. I know that some circuit appellate judges are concerned about size of the circuits. They are concerned because of certain procedures they followed in the past—procedures designed to maintain a parity or common understanding of the law of the circuit—will allegedly be defeated by the mammoth growth of such circuits. Have you given this any thought?

Mr. NEUBORNE. Yes, sir. One of the reasons why we do not suggest an absolutely uncontrolled expansion in the judiciary is this valid concern of many appellate judges. I am not sure which circuits you are referring to. I would assume that the ninth and the fifth are the two circuits that are experiencing this in the greatest degree. That is so; there is a serious problem in the appellate processes in both circuits.

One possibility, of course, which I am sure has been pressed upon the committee, is to break the ninth and fifth circuits into smaller circuits. There is nothing holy about the fact we have 10 circuits. There could be smaller geographic units, and that would alleviate the problem.

Mr. KASTENMEIER. It is a common statement that procedural rights are precluded from being raised. Is it your view that the Burger Court has circumscribed substantive rights by creating procedural obstacles?

Mr. NEUBORNE. Yes, sir, I feel very strongly on that. The Hofstra statement appended to my testimony (see Appendix 76) is an attempt to argue the proposition at some length that the decisions of the Burger court render it procedurally more difficult to raise certain types of substantive claims and have the effect of transferring those from Federal to State courts and have, in effect, changed the nature of the substantive claims themselves. It is something of a sham to say there is a substantive right, but there is no place for you to raise it effectively, yet in many situations we are left with that type of proposition.

Mr. KASTENMEIER. One last question. This is probably in the nature of an unavoidable contest that will always exist between the legislative and the judicial branches. Understandably, the judiciary is interested in something akin to a judicial impact statement. I would have to be the first to agree that what the Congress has done, I think in good cause, has had a tremendous impact on the workload of the Federal courts. For example, civil rights legislation, the creation of the Legal Service Corporation, although necessary, have resulted in increased case filings in the Federal courts as well as the States.

One of the subcommittees of the Judiciary Committee was successful in having enacted the Speedy Trial Act, which the Chief Justice condemns. We are considering, and I think most people feel we very greatly need, a revised Federal criminal code; yet the reaction of our highest judicial officers is that this will create chaos for them and that it will take years to be able to cope with the impact of such a legislative monster, notwithstanding the public social needs and equities it would bring about.

Of course, it works the other way, too. When the court passes on social questions such as abortion and school desegregation, the legislative impact is enormous. I do not think anything further needs to be said in support of this proposition.

I am interested in whether you think the judiciary has made a case for requiring the legislative branch to file judicial impact statements.

Mr. NEUBORNE. I think it appropriate in the input that goes into the legislative process to assure yourselves when you enact a bill that there will be adequate implementation of the rights created by the bill. The existence of sufficient judges to carry out the commands of the legislature seems to be an appropriate thing for the legislature and the judiciary to be concerned about.

I do suggest it is a little premature. One of the things I suggested to you in my testimony was the need for a really close survey or a time study of the decision processes that are going on in the Federal courts. It may well be we are not talking about judicial impact; we are talking about simple inefficiency. I do not mean that in a pejorative sense; I mean the use of time on a subject that could be better used for something else. We may be talking about unnecessary expenditure of time on certain types of functions that could be performed better by someone else.

Once that was done and you really had a good picture of what the time allocations of a Federal judge were, I think it appropriate that there be some concern that additional legislation be accompanied with at least recognition of the responsibility of the judiciary for implementing what the Congress is passing.

I do not know whether anybody has suggested this, but might it not be part of some of the legislative process itself that a given bill, if it was determined to create a substantial number of additional cases, might carry with it a small increase in the judiciary itself to compensate for the increased workload of the judiciary?

I should say I do not think judges are immune from this. I guess we are all prone to complain we have too much work. I know when my dean asks me to take another hour of classes I have 36 reasons why it cannot be done, and then I somehow survive. I think judges are the same way. They are prone to cry wolf a little too often.

I think with the abolition of diversity there is just no reason for the Federal courts to claim chaos. They will be as well suited as any judicial bureaucracy in history to deal with the issues before them.

Mr. KASTENMEIER. I suspect in any event communication between the judiciary and Congress can be improved on that score so no one need be surprised by the effect of that decision.

Mr. NEUBORNE. If I may interject, part of the problem of the Federal courts is self-created. Justice Stevens dissented in one of the procedural decisions, calling those decisions Daedalian, referring to Daedalus, the legendary craftsman capable of creating complex structures that no human could possibly reproduce. Justice Stevens was saying that it is so complex, so difficult to follow, that it generates enormous amounts of litigation. I venture to say if this survey were taken, you would find that over half of the judge's time sitting on a constitutional case is spent in deciding whether to decide it. He does not have enough time left over to decide the merits. That is why they feel pressed. If those procedural things could be simplified, you would save time.

Mr. KASTENMEIER. Assuming not only the desirability but the commitment to go ahead with such a study, you would not have us defer other questions?

Mr. NEUBORNE. I think diversity could be abolished tomorrow without any of us losing sleep, but I think the study would be very helpful.

Mr. KASTENMEIER. Thank you.

The gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman, and thank you, Professor Neuborne.

As to magistrates I have basic questions whether we should expand their jurisdiction at all. They used to be the U.S. commissioners, as you know. They are appointed by the judges and it is unlikely a judge is going to reverse the decision of a person he or she appointed. Would you have any thoughts that we should simply take a firm line in Congress and say magistrates should not be expanded? They are, after all, becoming the servants or "slaves," if you will, of the Federal judges.

Mr. NEUBORNE. I am very suspicious of the expansion of jurisdiction of the magistrates. I think our experience with the commissioners was not a happy one. The commissioners did not deal well with the issues posed before them. I know there are those who say the caliber of person who has been selected as magistrate is quite high and we can trust substantial——

Mr. DRINAN. I am not certain of that. I think the system is fundamentally wrong. The judges appoint them and obviously they are beholden. In Massachusetts recently a U.S. magistrate was accused of some improper things and he was just fired by the judges.

Mr. NEUBORNE. I think that is absolutely right. If you are willing to build a reasonable facsimile of an article III judge, I do not see why you do not go ahead and create another article III judge.

Mr. DRINAN. I agree with you on diversity. Way back in 1964 I wrote a law review article saying diversity has to go or be modified. I have a bill before this subcommittee on that subject. I do not know why people do not move on it. The bill would modify the amount required—so it will be $25,000. Mr. Railsback and Mr. Wiggins are cosponsors. I think it may cut down diversity cases by 25 percent.

This subcommittee may eventually have the power or the question of the need for appointing further Federal judges. Is there any literature that has grown up on a formula by which the Federal judiciary could grow?

In Florida, for example, the number of judges grows almost automatically with a population of a particular county. Have you seen any literature trying to devise a rational formula?

Mr. NEUBORNE. No, sir, I have not. It is a fascinating concept, but I think that is something that some thought should be given to.

Mr. DRINAN. Several counties and States do this simply to remove judicial selection from politics, and population is the formula in Florida. In some places they are toying with the number of cases filed along with the time that is taken for the average or median number of cases.

I think that is the way we have to go; otherwise you wait for Republicans and Democrats. If the number of judges just edged up according to the needs, if a statistical norm could be developed, the selection of judges would be an easier question. As the chairman indicated, I am on another subcommittee and we cleared yesterday, through the

House Judiciary Committee, a bill to make all bankruptcy judges article III judges as of 1983. The concept emerged in that other subcommittee. I think the arguments in favor of article III judges are quite powerful. However, important people, like the Chief Justice, think bankruptcy referees—he still calls them that—have worked out quite well. I frankly see the magistrate emerging as a second class of judicial officer, just as the bankruptcy judges did.

In 1898, the Federal judges had the Congress authorize bankruptcy referees, and the Federal judges gave them the whole area of bankruptcy. Now the number of litigants in the bankruptcy courts is twice or thrice the number in the Federal courts, and 9 million creditors are involved. In a certain sense the bankruptcy court is much more important than the whole Federal system, except those people are poor and in trouble, and the Federal judges have nothing to do with them. We should realize that they are just as entitled to tenured judges as others.

On three-judge Federal courts, this subcommittee did write the legislation that eventually abolished them. We sought to have the ACLU testify and they did not answer. Do you have any reflections now that that great American institution has gone into the sunset?

Mr. NEUBORNE. I will testify for myself, if you do not mind. I think it is well behind us. I think that the three-judge court was not performing a constructive role at the time it was abolished. I applaud the subcommittee for getting rid of it.

Mr. DRINAN. Mr. Chairman, ex post facto, we have the ACLU on record. If anything develops, we will cite you as speaking infallibly on its behalf.

What are the four States you mentioned that have the Federal system?

Mr. NEUBORNE. They are listed in that Harvard article. It is Massachusetts, New Jersey, Rhode Island, and one other New England State.

Mr. DRINAN. We in Massachusetts have preserved a pure Federal system. I was wondering if Massachusetts fell out of grace because the people passed a referendum that forces judges to retire at 70?

Mr. NEUBORNE. No, sir.

Mr. DRINAN. We are still in the state of grace?

Mr. NEUBORNE. At least until December.

Mr. DRINAN. On the petty Federal crimes, what is the formula to get rid of them? If it is a Federal crime, I suppose we could remit that to the States?

Mr. NEUBORNE. Yes.

Mr. DRINAN. Is there any other way by which we could limit the jurisdiction?

Mr. NEUBORNE. You could say there is no reason to treat disorderly conduct in a national park any differently than on a street or interstate auto theft, which occur in substantial numbers, or postal money order theft.

Mr. DRINAN. We have thought of all those things. It is hard to remit them to the States because they are clearly Federal matters. Now magistrates might be able to fact-find in those cases, if there are any facts to find.

Mr. NEUBORNE. It is possible.

Mr. DRINAN. All of those things I do not think amount to 4 or 5 percent of judicial business in the Federal courts.

Mr. NEUBORNE. In terms of filing, but in terms of the actual time on the bench, especially with the Speedy Trial Act, to the extent that criminal jurisdiction is given to a Federal judge, it requires substantial discovery time, benchtime, impaneling of the jury, and expenditure of energy on the part of the Federal judiciary.

Mr. DRINAN. Can you name the formula?

Mr. NEUBORNE. I have not really thought about the constitutionality of this, but it seems to me the formula need not necessarily be a fixed one, but it could give power to a local U.S. attorney in certain types of cases to waive prosecution to the State courts and to simply decline to take up the time of the Federal courts.

Mr. DRINAN. I doubt if he would do it, because the State people would apply pressure because they have enough fish to fry.

Mr. NEUBORNE. Obviously it would have to be coupled with some sweetener to the States to have them take these things, a formula that would reimburse the State for the expenditure of energy in the prosecution of these cases. I think U.S. attorneys would be delighted to get rid of this.

Mr. DRINAN. They cannot get rid of them unless they know they are going to be tried. I do not think that would work. I just do not. We thought of that some years ago and no one thought it a good idea. The U.S. attorneys and their opposite numbers at the State level said forget it. You have to change the jurisdiction somehow. I have been thinking in terms of numbers: no postal offense under $500 or $1,000.However, it is a Federal crime.

Mr. NEUBORNE. You have to be sure the State power would make it a crime at all before you would create a flaw in the Federal jurisdiction. Frankly, I have not thought about it enough to venture an opinion.

To the extent the States would have power to prosecute those crimes, that is a possibility, although I would hope it could be done in a more cooperative way. I question whether or not it would not be possible to have a waiver situation where the U.S. attorney and his counterpart in the State hierarchy might not make some sort of deal and take these categories, especially if it was in the financial interest of the State to do so.

Mr. DRINAN. You mention the roughly 500 judges. It is always astonishing to me that the number grows so slowly. I would think the number of Federal judges would have doubled in a generation or more.

Mr. NEUBORNE. It is remarkable that we have so few, and it is remarkable what they have done. There was a study done in 1961 by Professor Patterson of the sitting Federal district judges in the South, called "Fifty-Eight Lonely Men." Those 58 lonely men were called upon by this country to implement the desegregation decrees of the Supreme Court, and they did so in one of the more remarkable annals of jurisprudence; they sat there and took the political heat. All of them did not respond with the same level of excellence, but by and large, those 58 men wrought a juridical miracle over a period of 15 or 20 years. We do not have an institution in American life other

than the Federal district judge that could have done that. That is one of the things I hope this committee keeps in mind. This is a unique institution we are dealing with.

Mr. DRINAN. I agree totally. I have seen judges in Massachusetts who were fearless judges simply because they have life tenure. But when you say to expand this to a thousand sitting judges, is that a ballpark figure?

Mr. NEUBORNE. I chose it because it doubled the current judiciary and I felt it would deal with the current problems.

Mr. DRINAN. If we can put through the Senate bill rather than a bill devised by a subcommittee of this committee, we will have, I think, 113 more Federal district judges and roughly 25 court of appeals judges.

I thank you for your very intriguing paper. I hope that you and your colleagues will begin work on a formula so that by some mechanical, rational method the number of Federal judges can expand or contract. Then the Congress would not have to be involved in this every 4 or 8 years.

Mr. NEUBORNE. I think it is a terrific idea and it is something to which we will give attention.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. Before I yield to the gentleman from Illinois I would like to say one of the proposals before us is that we have a judgeship bill every 2 years, rather than every 4 years, so that any recommendation would be more current and less far-reaching as to numbers. That might be a step forward.

Mr. NEUBORNE. Yes, sir.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. I want to, No. 1, thank you for your statement. I find myself agreeing with much of what is in it. Maybe I want to take issue a little with that part of your statement which deals with your concerns about increasing the jurisdiction of Federal magistrates. I would like to explain why I take issue with that.

Mr. NEUBORNE. Yes, sir.

Mr. RAILSBACK. It is because, to take one part of your statement, you are saying that there is a need for rationing and there is a need to do something else with, say, petty offenses or petty crimes. I think your suggestion is maybe they ought to go to the State courts. My feeling is, for some of the reasons given by Bob Drinan, maybe the magistrates will serve a useful purpose in that kind of case.

I want to say also it is my understanding in expanding civil jurisdiction of magistrates it is meant to be expanded in cases where the litigants agree to that forum, and that seems all right by me. My feeling is maybe we ought to be concerned about continuing to upgrade administrative law judges, and there has been some upgrading. In other words, now, as I understand it—I had lunch with one of them yesterday—they are required to go through a kind of testing procedure, and I think there are now about a thousand administrative law judges. I think his feeling is they are trying to upgrade their status and also the prerequisites that may be necessary before they can become an administrative law judge.

Then in respect to social security cases, I had the experience of representing a couple of social security disability claimants, and I agree

with the thrust of your remarks that it does not seem to me we have a very good system right now for representing those people that may not have any means at all and really may be suffering from a crippling disability, which, for one reason or another, a former hearing examiner, now an administrative law judge, will actually rule on the objections, rule on the admissibility of evidence, present the Government's case, in effect. I think something has to be done about that.

I had the experience of taking that on an appeal to the Federal district court where I got the distinct feeling that the district court judge could have cared less that I was representing this woman who happened to suffer from emphysema, I was taking up his valuable time.

That leads me to just pose this question. I am wondering perhaps if at least a magistrate who would serve as, say, the Federal appeals officer initially, would not give you a better hearing than a Federal district judge who thinks it is beneath his dignity to be hearing a social security appeals case. What do you think of that?

Mr. NEUBORNE. I think a Federal judge who thinks it is beneath his dignity to hear the case of a social security recipient betrays his trust very substantially. I am sorry that you had an experience like that with a Federal district judge. It is dreadful to the extent that it happened.

Mr. RAILSBACK. I am afraid that with all of the demands and all the statutory priorities we have now imposed upon the Federal judiciary, which you know about and are going to try to knock out—there are three pages of statutory priorities that we have imposed on a Federal district judge. Do you agree we must do something about that?

Mr. NEUBORNE. Yes. I have no quarrel with rationalizing the way Federal judges expend their time. That is within the area of the conservation study. I think it is terribly important to eliminate inefficiencies in the way the Federal judge dispenses his attention. There is a limited quantity and it is something we have to deal with. By and large, however, I think that you will find Federal judges do not react the way that judge did. The sheer statistics are that last year 54 percent of the social security determinations were reversed by the Federal courts. Somebody is listening.

Mr. RAILSBACK. I did not know that. That is indeed encouraging.

Mr. NEUBORNE. Somebody is listening to those claims because they are reversing them wholesale.

Mr. RAILSBACK. My feeling was that in the old days lawyers for one reason or another did not want to handle any social security disability cases, the people did not know really what they were entitled to as far as representation. I just thought it was a very serious problem. I did have an unpleasant experience.

Let me move on very quickly to something else that you do not deal with in your statement to any great degree. The administration and the Attorney General apparently are very interested, in fact when one of them appeared before us, the new assistant attorney general in charge of judicial improvements, he talked about neighborhood justice centers. I have asked other witnesses who have appeared before us about this. I am fascinated by the concept of neighborhood justice centers and have learned that in England apparently they are employed extensively and have really resolved a great percentage of the disputes.

Mr. NEUBORNE. I think when brought to bear on a certain type of dispute they are enormously constructive.

Mr. RAILSBACK. Where the parties would agree to go before that tribunal.

The reason I bring it up, you express concern about the difference in levels of expertise in the Federal article III judges and magistrates and administrative law judges and State court judges. Here we are having neighbors sitting, really, resolving disputes. I am just wondering if you have any ideas about how that should be structured.

Mr. NEUBORNE. I think the key, sir, is the nature of the dispute that you will let them resolve or that you will require people to exhaust that type of situation. It seems to me a commercial dispute, for example, between a shopkeeper and an individual over whether the rug was torn at the time the rug was bought is a possibility for community resolution if the parties think it would be constructive. I would not want to see consumer cases routed or shunted off into these types of forums without any possibility for getting a more vigorous and more prestigious and expert forum to deal with it.

Initially for certain types of cases that are to be resolved on facts, a fact-finding determination without law expertise, I do not see why they could not be quite constructive. After all, we tried with the small claims courts in the country to do something about that. The small claims courts in this country have failed, not because there is anything wrong with them, but because we have never staffed them adequately and committed the resources to these little people's courts in order to make them work.

In New York you cannot enforce a judgment in a small claims court. You get this judgment but you might as well paper your wall with it because it costs too much to get the sheriff to enforce it. Over half of the judgments of the small claims courts in the city of New York are not enforced. Those are problems that we are going to have to deal with in the community resolution situations as well. It is all well to set up a forum, but if you do not think about how you are going to enforce the decisions of a forum and the nature of the claims to be brought before the forum, I am afraid we are going to replicate the sad experience of the small claims courts.

I suggest this for the committee's consideration. It might be very interesting to make a study of why the small claims courts have failed before we go ahead and invest a substantial amount of resources in these community resolution centers. I suspect there is going to be a fairly substantial overlap in factors to make them succeed.

Mr. RAILSBACK. I think that is a good suggestion. I think I have taken up enough time. I certainly wholeheartedly agree with your suggestion to abolish diversity as one of the pieces of jurisdiction in the Federal district court. Again I want to thank you for what has been very valuable testimony.

Mr. NEUBORNE. Thank you, sir.

Mr. KASTENMEIER. We thank you for your testimony here today. This particular enterprise will be ongoing in one way or another for some time. I hope we will have an opportunity to call upon you again. In fact, we might like to ask you a bit further about the nature of the study you suggest for efficiency, as well as other questions. I want to thank you. The committee is privileged to have heard your testimony.

This concludes today's hearing. We will be meeting here tomorrow morning at 10 o'clock for continuation of the hearings.

The committee stands adjourned.

[Whereupon, at 4:55 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, July 21, 1977.]

STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

THURSDAY, JULY 21, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Ertel, and Railsback.

Also present: Michael J. Remington, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

The subcommittee is meeting today on the very important public question of the state of the judiciary and access to justice.

We are pleased to welcome several illustrious witnesses.

First of all we have, representing the American Bar Association panel, the Honorable Shirley Hufstedler. She has been a circut judge in the Ninth Circuit Court of Appeals since 1969 and before that she was both a county and an appellate judge in the California State court system.

She is a member of the ABA Committee on Coordination of Judicial Improvements and on the Judicial Conference's Advisory Committee on Civil Rights. She has long been interested in the area of court reform and access to justice, and we are extremely pleased with her presence today.

I realize that Judge Hufstedler has a time problem and I hope we can accommodate her in that connection.

Also with us is a really old friend, Ben Zelenko, he having served about 11 years as general counsel of the House Judiciary Committee, and is dearly known to us all. He is a practicing lawyer here in Washington and shortly, we are informed, will be the new chairman of the ABA Committee on Coordination of Judicial Improvements; we certainly look forward to working with him.

We do expect other members shortly. I wondered whether it might be appropriate at this point to ask Mr. Zelenko to present the statement of Mr. Stanley; you may do so in its entirety or if you prefer to summarize the statement you can also do so.

By then we should shortly, I think, have other members present.

94-738—78——10

TESTIMONY OF BENJAMIN L. ZELENKO, CHAIRMAN, AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON COORDINATION OF FEDERAL JUDICIAL IMPROVEMENTS, ON BEHALF OF JUSTIN A. STANLEY, PRESIDENT OF THE AMERICAN BAR ASSOCIATION; AND HON. SHIRLEY M. HUFSTEDLER, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Mr. ZELENKO. Thank you, Mr. Chairman.

It is a great privilege for me personally to be before the subcommittee this morning.

Justin Stanley, president of the association, could not be with you this morning. He planned to, and for personal reasons could not come this morning. I have been asked to present his testimony to the subcommittee on judicial reform and access to justice.

With your permission, Mr. Chairman, I would like to highlight some portions of that testimony because I think it does cover a good deal of the agenda before the subcommittee.

However, I will not read Mr. Stanley's statement in its entirety; I will try to pick those portions which I think would need emphasis this morning.

Mr. KASTENMEIER. Accordingly, without objection, his statement in its entirety will be received for the record, and your own summary of it will also be heard.

[The statement of Justin A. Stanley follows:]

STATEMENT OF JUSTIN A. STANLEY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the subcommittee: I am Justin A. Stanley, an attorney from Chicago, Illinois, and the President of the American Bar Association. I appear before you today to share with you our Association's interests and concerns about the subject of these hearings—access to justice—and am accompanied by Judge Shirley Hufstedler and Mr. Benjamin Zelenko, who are members of our Special Committee on Coodination of Federal Judicial Improvements.

By way of preface, I would like to compliment this subcommittee for the leadership role it has taken in this important area, not only by holding these hearings but by developing significant pieces of legislation aimed at improving access. Representatives of our Association have testified earlier this year before this subcommittee on two occasions: first, in support of the Legal Services Corporation Amendments Act of 1977; and second, in support of legislation to improve the representation of persons confined in institutions. Both are significant steps forward in increasing access to those who have previously lacked it. We are pleased that H.R. 6666, the Legal Services bill, has now passed the House, and we hope that H.R. 2439 or similar legislation will move forward as well.

For our own part, the problems of access to justice are of deep and long-felt concern. The improvement of the administration of justice has been a preeminent objective of the Association throughout its 99-year history. We have, for example, developed over a period of years a multi-volumed set of Standards for the Administration of Criminal Justice and are currently developing a similar set of Standards of Judicial Administration. One of the most recent manifestations of our concerns is the so-called "Pound Revisited" Conference which we, together with the Judicial Conference of the United States and the Conference of Chief Justices, held in St. Paul last year. This National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held in commemoration of Dean Pound's classic address on this subject, developed a number of suggestions for improving access, some of which I will refer to below. And this past week here in Washington, our Consortium on Legal Services held two days of open meetings on how to help the average citizen obtain satisfactory legal assistance.

Our concerns in this access field are not, of course, manifested only in the development of standards and the holding of occasional conferences and meetings. A number of our sections and committees are addressing themselves to specific problems and issues. I would like to summarize for you the wide range of "access" issues with which the Association is concerned.

First, in the area of court congestion, we have actively supported legislation to increase the number of federal judgeships at both the District and Circuit Court levels. I testified earlier this year before Chairman Rodino's subcommittee on this subject and hope the full committee will move swiftly to meet this growing need.

Our association has had a great interest in developing new dispute-resolution mechanisms which would be more accessible to the average citizen. Our Special Committee on the Resolution of Minor Disputes has been actively involved in this area, seeking to foster alternative methods of resolving common problems which are too small in terms of dollars or national impact to justify their being handled in the traditional court processes. The Special Committee has, for example, worked closely with the Department of Justice in developing a new concept of "neighborhood justice centers"—a mechanism which was one of the key recommendations to come out of the "Pound Revisited" Conference I referred to above. Such centers, which will no doubt take a variety of forms, will make available different means of processing disputes, including arbitration, mediation, and referral to small claims courts. The association last month recorded its support for H.R. 2482, the Consumer Controversies Resolution Act, which would provide funding to the States to experiment with this sort of innovative mechanism for resolving disputes.

We have also supported legislation to create a National Court of Appeals with reference, but not transfer, jurisdiction. We believe the primary purpose of this new court should be to meet the needs of the general public and litigants in the Federal courts for greater stability and predictability of national law. The Supreme Court can give plenary consideration to only about 150 cases per year. Hundreds of other cases pending in the Courts of Appeals present serious questions of national law which are unsettled within and between circuits. Such a court could both settle such questions and, as an important byproduct, provide relief to all of the beleaguered courts in the Federal system.

Another proposed means of resolving court congestion is expansion of the jurisdiction of Federal magistrates. I understand that there has been concern in some quarters that citizens will receive "second-rate justice" from magistrates. I think adequate assurances of quality can be provided in the expansion legislation which will allay these fears. Our policymaking body, the House of Delegates, will be considering a resolution next month to endorse the administration's bill, H.R. 7493, and I am sure the quality issue will be fully considered.

The House of Delegates will also be considering two other recommendations relating to court congestion: one, to endorse legislation to eliminate statutory priority calendaring of cases; and, the other, to endorse the elimination of diversity jurisdiction for resident plaintiffs and to increase the jurisdictional amount in such cases to $25,000. Judge Hufstedler and Mr. Zelenko will be able to discuss these court congestion issues in greater detail.

Another concern of ours is the establishment of a mechanism for review, research and experimentation with respect to the justice system. The association believes that the courts, and the many other components of the justice system, cannot be properly reformed and improved until a great deal more information is obtained about how the justice system operates. Too often we have had to deal with problems of the justice system on a piecemeal basis as a crisis has emerged in a particular area. It is our view that the Federal, State, and local governments would profit greatly from the establishment of a comprehensive justice research and experimentation center, established as an independent agency of the Federal Government. We have drafted legislation to establish such a National Institute of Justice and firmly believe that such an agency would return benefits to our justice system far exceeding the agency's relatively nominal cost. Indeed, in terms of access to justice, our draft bill states that the Institute should "give particular attention to the impact of justice and the administration of law on the individual citizen and his opportunity to secure prompt and effective recognition of his legal rights, privileges and obligations, and to securing to him equal legal protection and access to legal redress without regard to income status, race, sex, age, religion or national origin."

Increasing the availability of legal services as a means of access is a high priority of the association as well. I have previously mentioned legislative proposals of this subcommittee designed to provide legal services for disadvantaged persons—the Legal Services Corporation Amendments Act and the bill relating to the rights of confined persons. I would also stress the great needs in the area of legal services for criminal defendants, particularly at the State level. Five years ago, the Supreme Court in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), ruled that no person may be imprisoned for any offense unless he is represented by counsel at his trial. Yet excessive caseloads and inadequate salaries for public defenders, and low pay rates for assigned counsel, have resulted in many parts of the country in little more than pro forma representation. The primary needs in this area are for increased money and training: and the Federal Government, we believe, should move into this area in a large-scale fashion to ensure that rights guaranteed by the Sixth Amendment will become a reality.

Citizen access to the services of attorneys may be broadened in a number of other ways. We have strongly supported prepaid legal services as a means of making legal help available to middle-income citizens, and we were active in efforts last year to amend the Tax Code to provide more favorable tax treatment for participants in such plans. I note that the United Auto Workers and Chrysler have just reached agreement on such a plan which will ultimately cover 150,000 workers.

We have also reported legislation such as H.R. 3661 which would provide for the payment of attorneys' fees and other expenses in administrative proceedings and in the judicial review of such proceedings where the availability of such fees and expenses is necessary to assure the presentation of positions which deserve full and fair consideration in the public interest and would otherwise not be presented. We also favor removal of all arbitrary or unreasonable statutory limitations on attorneys' fees paid by clients in proceedings before administrative agencies and in judicial review thereof. While certain limitations were imposed some years ago with the apparent intention of protecting clients from excessive fees, the fees are now in many cases so low that attorneys cannot afford to handle certain cases, and the restrictions thereby operate to deny legal assistance to persons appearing before these agencies.

For example, an attorney appearing on behalf of a claimant for benefits from the Veterans' Administration is limited to a total fee of $10. As you may know, the Senate Committee on Veterans' Affairs is currently considering legislation. S. 364, which would remove this limitation.

Lawyer advertising has, of course, been suggested as a means of increasing citizen access to legal services, and the discussion of this issue has been greatly heightened by the Supreme Court's recent decision in the *Bates* case. I have appointed a task force of Association members to address this issue in light of that decision, and they intend to develop recommendations for consideration by our House of Delegates next month.

We have also made efforts to improve the quality of legal services, both by programs of continuing legal education for our members and by establishing a Center for Professional Discipline to assist the states in meeting their responsibilities to protect the public from lawyers who are deficient in representing their clients. We are now beginning to undertake another comprehensive review of our entire Code of Professional Responsibility, to make sure it meets current needs and obligations.

We also favor several measures to improve the quality of justice rendered by the courts. I have previously mentioned our development of Standards of Judicial Administration. In addition we have supported merit selection of judges for a number of years and are pleased that the President and various Senators have been implementing such a system. A recommendation for expansion of this system to cover all federal judges will be considered by our House of Delegates next month. We also favor legislation such as H.R. 1850, the Judicial Tenure Act, which would provide for the creation of a judicial tenure commission to review complaints against sitting judges and which would have the power, if needed, to remove unfit judges. Finally, we have fought long and hard for increases in the compensation paid to federal judges and other top government officials. It is unreasonable to continue to expect persons of the highest calibre to accept positions in government unless adequate compensation is provided.

The above discussion has illuminated, I hope, the Association's broad concerns with problems of access to the justice system and has indicated those

legislative matters to which we give high priority. I would now like to make a few general comments regarding principles which one might follow in choosing remedial proposals for the federal court system.

First, change ought not be embraced for the sake of change alone. A judicial system acquires strength and acceptance by its stability. Legislative revisions in procedure and structure should occur in response to documented need and then serve a sizeable sector of the population. Second, justice is denied when it is delayed. Therefore, any remedial proposals should be fashioned bearing in mind that expeditious resolution of disputes is a primary goal. Third, characterizing judicial opinions on access to the courts as pro-business or anti-consumer or pro-prisoner or anti-prisoner shows little understanding of the issues. Similarly, I venture to say that simply because a revision will lead to litigation is not sufficient reason to oppose it, any more than curtailing litigation is alone sufficient reason to endorse a change. Fourth, and finally, legislative revision of federal court jurisdiction and operations should consider the roles of the state court systems and the extent to which these systems can relieve the federal courts of backlog and burdens.

In conclusion, the ABA pledges its wholehearted assistance to this subcommittee in its task. The federal justice system must remain preeminent in the vindication of constitutional rights, and its components must be so equipped and empowered that they can respond effectively and swiftly to the changing needs of our society. We applaud your efforts in this regard and stand ready to work with you.

Mr. ZELENKO. Thank you, Mr. Chairman.

The association would like to compliment this subcommittee for the leadership role it has taken in this important area, not only by holding these hearings but by developing significant pieces of legislation aimed at improving access.

Representatives of our association have testified earlier this year before this subcommittee on two occasions: First, in support of the Legal Services Corporation Amendments Act of 1977; and second, in support of legislation to improve the representation of persons confined in institutions.

Both are significant steps forward in increasing access to those who have previously lacked it. We are pleased that H.R. 6666, the legal services bill, has now passed the House, and we hope that H.R. 2439, or similar legislation will move forward as well.

For our part, the problems of access to justice are of deep and long-felt concern. The improvement of the administration of justice has been a preeminent objective of the association throughout its 99-year history. We have, for example, developed over a period of years a multivolumed set of Standards for the Administration of Criminal Justice and are currently developing a similar set of Standards of Judicial Administration.

One of the most recent manifestations of our concerns is the so-called Pound Revisited Conference which we, together with the Judicial Conference of the United States and the Conference of Chief Justices, held in St. Paul last year. This National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held in commemoration of Dean Pound's classic address on this subject, developed a number of suggestions for improving access, some of which I will refer to below.

This past week here in Washington, our consortium on legal services held 2 days of open meetings on how to help the average citizen obtain satisfactory legal assistance.

Our concerns in this access field are not, of course, manifested only in the development of standards and the holding of occasional con-

ferences and meetings. A number of our sections and committees are addressing themselves to specific problems and issues. I would like to summarize for you the wide range of access issues with which the association is concerned.

First, in the area of court congestion, we have actively supported legislation to increase the number of Federal judgeships at both the district and circuit court levels. Mr. Stanley testified this year before Chairman Rodino's subcommittee on this subject and we hope the full committee will move swiftly to meet this growing need.

Our association has had a great interest in developing new dispute-resolution mechanisms which would be more accessible to the average citizen.

Our special committee on the resolution of minor disputes has been actively involved in this area, seeking to foster alternative methods of resolving common problems which are too small in terms of dollars or national impact to justify their being handled in the traditional court processes.

The special committee has, for example, worked closely with the Department of Justice in developing a new concept of neighborhood justice centers, a mechanism which was one of the key recommendations to come out of the Pound Revisited Conference I referred to above. Such centers, which will no doubt take a variety of forms, will make available different means of processing disputes, including arbitration, mediation, and referral to small claims courts.

The association last month recorded its support for H.R. 2482, the Consumer Controversies Resolution Act now before a subcommittee of the Interstate and Foreign Commerce Committee, which would provide funding to the States to experiment with this sort of innovative mechanism for resolving disputes.

We have also supported legislation to create a national court of appeals with reference but not transfer jurisdiction. We believe the primary purpose of this new court should be to meet the needs of the general public and litigants in the Federal courts for greater stability and predictability of national law.

The Supreme Court can give plenary consideration to only about 150 cases per year. Hundreds of other cases pending in the courts of appeals present serious questions of national law which are unsettled within and between circuits. Such a court could both settle such questions and, as an important byproduct, provide relief to all of the beleaguered courts in the Federal system.

Another proposed means of resolving court congestion is expansion of the jurisdiction of Federal magistrates. I think adequate assurances of quality can be provided in the expansion legislation which will allay these fears. Our policymaking body, the house of delegates, will be considering a resolution next month to endorse the administration's bill, H.R. 7493, and I am sure the quality issue will be fully considered.

Mr. Chairman, the following item in Mr. Stanley's prepared statement I think needs to be corrected. The house of delegates has already approved legislation to eliminate statutory priority calendaring of cases.

Another proposal it will consider next month is a proposal to eliminate or curtail diversity jurisdiction for resident plaintiffs, and to increase the jurisdictional amount in such cases to $25,000.

Mr. DRINAN. If I could ask a question at this point, I know Mr. Zelenko can't speak for his principal, but he sluffed over the whole question of tenured article III judges. I am quite apprehensive about extending the jurisdiction of the magistrates. Would you have any thoughts on that?

I am very apprehensive of what the ABA might do next year on judicial personnel. It may just slide over the tough question of tenure of judges. I just don't see where magistrates can substitute for the full-time, tenured judge.

Mr. ZELENKO. I will be happy to respond.

The only question there was that the magistrates bill proposes to expand the petty offense jurisdiction of magistrates, as I understand it, and to allow parties in misdemeanor cases to consent to trial before magistrates. Those issues, as I understand it, were examined in Senate hearings and no significant constitutional objection has been raised.

The Senate Committee report I read reviews those issues.

Mr. DRINAN. They blew it, you know. There is a constitutional objection. Why should the poor who are engaged in the petty offenses be subjected to a magistrate and not a tenured judge? The magistrate is appointed by the judge, and it is very unlikely that the judge will ever reverse his own magistrate.

Mr. ZELENKO. I think the issue you raised also has to be discussed in terms of the article III proposals in the bankruptcy field, and I know Judge Hudstedler is prepared to address that issue. Could we come back to that, Mr. Drinan, after we finish the statement?

Mr. KASTENMEIER. Yes. I would hope we could raise that question in both contexts, and as I understand your position on behalf of the ABA and Mr. Stanley, it only refers to the magistrates bill itself and the limitations within that bill.

Mr. ZELENKO. With respect to the magistrates bill, yes, sir.

Another concern of ours is the establishment of a mechanism for review, research, and experimentation with respect to the justice system. The association believes that the courts and the other components of the justice system cannot be properly reformed and improved until a great deal more information is obtained about how the justice system operates. Too often we have had to deal with problems of the justice system on a piecemeal basis as a crisis has emerged in a particular area.

It is our view that the Federal, State, and local governments would profit greatly from the establishment of a comprehensive justice research and experimentation center, established as an independent agency of the Federal Government, such as the National Institute of Justice.

Indeed, in terms of access to justice, our draft bill states that the Institute should—

> give particular attention to the impact of justice and the administration of law on the individual citizen and his opportunity to secure prompt and effective recognition of his legal rights, privileges and obligations, and to securing to him equal legal protection and access to legal redress without regard to income status, race, sex, age, religion, or national origin.

Increasing the availability of legal services as a means of access is a high priority of the association as well. I have previously men-

tioned legislative proposals of this subcommittee designed to provide legal services for disadvantaged persons, the Legal Services Corporation Amendments Act and the bill relating to the rights of confined persons.

I would also stress the great needs in the area of legal services for criminal defendants, particularly at the State level. Five years ago, the Supreme Court in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), ruled that no person may be imprisoned for any offense unless he is represented by counsel at his trial. Yet excessive caseloads and inadequate salaries for public defenders, and low-pay rates for assigned counsel, have resulted in many parts of the country in little more than pro forma representation. The primary needs in this area are for increased money and training, and the Federal Government, we believe, should move into this area in a large-scale fashion.

Citizen access to the services of attorneys may be broadened in a number of other ways. We have strongly supported prepaid legal services as a means of making legal help available to middle-income citizens, and we were active in efforts last year to amend the tax code to provide more favorable tax treatment for participants in such plans. I note that the United Auto Workers and Chrysler have just reached agreement on such a plan which will ultimately cover 150,000 workers.

We have also supported legislation such as H.R. 3661 which would provide for the payment of attorneys' fees and other expenses in administrative proceedings and in the judicial review of such proceedings where the availability of such fees and expenses is necessary to assure the presentation of positions which deserve full and fair consideration in the public interest and would otherwise not be presented.

We also favor removal of all arbitrary or unreasonable statutory limitations on attorneys' fees paid by clients in proceedings before administrative agencies and in judicial review thereof. While certain limitations were imposed some years ago with the apparent intention of protecting clients from excessive fees, the fees are now in many cases so low that attorneys cannot afford to handle certain cases, and the restrictions thereby operate to deny legal assistance to persons appearing before these agencies.

For example, an attorney appearing on behalf of a claimant for benefits from the Veterans' Administration is limited to a total fee of $10. As you may know, the Senate Committee on Veterans' Affairs is currently considering legislation, S. 364, which would remove this limitation.

Lawyer advertising has, of course, been suggested as a means of increasing citizen access to legal services, and the discussion of this issue has been greatly heightened by the Supreme Court's recent decision in the *Bates* case. The president of the association has a task force of association members to address this issue in light of that decision, and they intend to develop recommendations for consideration by our house of delegates next month.

We have also made efforts to improve the quality of legal services, both by programs of continuing legal education for our members and by establishing a center for professional discipline to assist the States in meeting their responsibilities to protect the public from lawyers who are deficient in representing their clients. We are now beginning

to undertake another comprehensive review of our entire code of professional responsibility, to make sure it meets current needs and obligations.

We also favor several measures to improve the quality of justice rendered by the courts. I have previously mentioned our development of standards of judicial administration. In addition we have supported merit selection of judges for a number of years and are pleased that the President and various Senators have been implementing such a system.

A recommendation for expansion of this system to cover all Federal judges will be considered by our house of delegates next month. We also favor legislation such as H.R. 1850, the Judicial Tenure Act, which would provide for the creation of a judicial tenure commission to review complaints against sitting judges and which would have the power, if needed, to remove unfit judges. Finally, we have fought long and hard for increases in the compensation paid to Federal judges and other top Government officials.

The above discussion has illuminated, we hope, the association's broad concerns with problems of access to the justice system and has indicated those legislative matters to which we give high priority. I would now like to make a few general comments regarding principles which one might follow in choosing remedial proposals for the Federal court system.

First, change ought not be embraced for the sake of change alone. A judicial system acquires strength and acceptance by its stability. Legislative revisions in procedure and structure should occur in response to documented need and then serve a sizable sector of the population.

Second, justice, of course, is denied when it is delayed. Therefore, any remedial proposals should be fashioned bearing in mind that expeditious resolution of disputes is a primary goal.

Third, characterizing judicial opinions on access to the courts as probusiness or anticonsumer or pro-prisoner or antiprisoner shows little understanding of the issues. Similarly, I venture to say that simply because a revision wil lead to litigation is not sufficient reason to oppose it, any more than curtailing litigation is alone sufficent reason to endorse a change.

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In conclusion, the ABA pledges its wholehearted assistance to this subcommittee in its task. The Federal justice system must remain preeminent in the vindication of constitutional rights, and its components must be so equipped and empowered that they can respond effectively and swiftly to the changing needs of our society.

We applaud your efforts in this regard and stand ready to work with you.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you for an excellent statement.

As a matter of fact, the statement contains several issues not really raised by other witnesses, for which we are grateful.

At this point I would now like to call on Judge Hufstedler for her statement.

Judge HUFSTEDLER. Thank you very much, Mr. Chairman.

I very much appreciate the opportunity to appear before this committee.

[The statement of Shirley M. Hufstedler follows:]

STATEMENT OF HON. SHIRLEY M. HUFSTEDLER, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Mr. Chairman and members of the subcommittee, my name is Shirley M. Hufstedler. I am a judge of the United States Court of Appeals for the Ninth Circuit. I am appearing before your subcommittee primarily in my capacity as a member of the American Bar Association's Special Committee on Coordination of Federal Judicial Improvements. I have taken the liberty, however, of placing the views of the special committee of which I am a member in a larger context. In doing so, I speak only for myself, and not for the special committee, the American Bar Association, or the court of which I am a member.

Each of the proposals summarized by Mr. Justin Stanley deserves implementation. For example, expansion of judicial personnel contemplated in current bills that add judges to the district courts and the courts of appeals is essential to the present functioning of the federal judicial system. The creation of the National Court of Appeals is urgent if we are to be able to maintain stability and harmony of the national law. The repeal of statutory priorities is needed to give the most seriously overburdened circuits tools for effectively managing present caseloads. Reduction or elimination of diversity jurisdiction is a reform already two decades overdue.

I would be remiss, however, if I did not forthrightly state that these measures—necessary though they be—do not go to the heart of the matter. Access to justice involves complex problems that can never be solved by tinkering with the federal judicial system. A host of new approaches must be tried that do not involve the federal courts or any version of the litigation model if we are to make real headway in the quest for justice for all Americans.

We must confront a series of unpleasant truths and make some hard choices among limited options. One of these truths is that the federal judicial system is a relatively inelastic institution. The system as it is presently structured and staffed is inadequate to carry the present caseloads. The modest expansion of that structure horizontally (adding personnel to existing tiers of the federal judicial pyramid) and vertically (adding the National Court of Appeals) will help us. But there are severe limitations upon further growth which cannot be exceeded without destroying the very qualities which have caused these courts to be so highly valued.

As compared with other governmental institutions, the federal courts have been, or at least have been perceived to be, more accessible, visible, personal, responsive, and independent. When I say "accessible," I do not mean to imply that everyone can take his or her grievance to the federal courts. Jurisdictional limitations as well as economic barriers have limited access to the federal court system.

But for those who have surmounted these hurdles, the means of gaining entry to the federal judicial system is well known, and it is not difficult. Of equal importance, a decision will be made which can be heard or seen or both, and that decision will be made by a person or persons who can be identified. The complainant thus has some contact with a human being who is obliged to read or to hear the complaint and to make some kind of decision that must be communicated. Thus, courts have not only been responsive, but courts have also been more often responsive to the complaints of the disadvantaged, the poor, the weak, and the unpopular than their governmental counterparts. Federal judges with lifetime tenure have had the independence that permits them to make just, though unpopular decisions, without risking the wrath of political constituencies or shifting majorities. The institutional structure has assured each litigant (except the Government in criminal cases), one appeal as a matter of right, and the opportunity to apply for Supreme Court review, no matter how unlikely a hearing before the Supreme Court may be.

A judicial system cannot be expanded horizontally beyond the capacity of the next tier to process the added cases. For that reason, district courts cannot be indefinitely expanded, unless access to the appellate courts is correspondingly curtailed. A judicial system cannot be indefinitely expanded vertically because cases that should reach the top of the ladder fall by the wayside due to delay, expense, or battle fatigue.

Judicial personnel cannot be indefinitely added without imperiling the quality of persons attracted to the bench. Nonjudicial personnel cannot be perpetually increased without turning courts into the impersonal bureaucracies which the litigants are trying to escape.

In short, federal judicial time is a scarce commodity. The supply can be increased a little, but very little, without impairing or destroying its value. We must face up to the fact that we have to treat federal judicial time as we have treated other essential resources in the periods of shortage. We have to inventory our present and future supply to ascertain the totality for distribution. The materials for that inventory are already in stock. We must next identify and measure the present and future demands on that supply. As Mr. Stanley observes, the raw materials for that survey are also on hand. Next, comes the painful task: we must match the demands against the resources, assign priorities based upon an evaluation of those needs, and ration access accordingly.

Conceptually, the easiest part of the task is to enforce a limit of one trial court to a customer and to insist that the only available court be the one in greater supply. In concrete terms that means the elimination of all overlapping jurisdictions within and between judicial systems. It means that federal diversity jurisdiction must eventually be eliminated absent very strong evidence that in some classes of litigation access to the federal courts is necessary to preserve an overriding federal interest. Aggregate federal judicial time will always be in scarcer supply than aggregate state judicial time because the states have 50 judicial pyramids and the federal system has only one.

It is also easy to state abstractly the indicia for awarding the highest and lowest priorities. In the highest priority are those cases in which there is a great social need for the resolution of a particular kind of controversy and in which the federal judcial system is especially or uniquely suited to decide that controversy. For example, no one suggests that we should remove from the federal courts such cases as treaty controversies, customs and tariff controversies, or cases involving the use of national resources such as the air waves.

In the lowest priority are controversies that are exacerbated rather than resolved by judicial proceedings and those that, though not worsened, do not yield to the remedies that courts can effectively administer. In the context of the federal system, the lowest priorities should be assigned to those controversies that can be just as well or better handled by the state court systems.

In establishing a system to ration federal court time, attention should be focused on the nature of the controversy and not upon the individuals who are litigants in the controversy. The economic situation of the individuals should not be a determining factor. Both the rich and the poor need access to the federal judicial system. Thus the inquiry is not whether consumer litigation or federal securities litigation should be in or out of the federal courts. The inquiry should be: what kinds of consumer litigation and what sorts of litigation about federal securities law should be in or out of the federal courts? As unpleasant as it is, we have to ask both whether a particular class of litigation belongs in the federal courts, rather than in state court systems, or nonjudicial agencies, and whether that class of litigation is more or less worthy of retention in the federal system than other classes of cases with which it competes for the scarce resource.

Even with the expansion contemplated by proposed legislation, the federal judicial system is saturated. This means that each time Congress adds another burden to the federal judicial load, it must always consider removing federal jurisdiction that it has earlier granted. Although we may not know precisely the impact of a new grant of federal jurisdiction, we do know that every new grant of federal jurisdiction now means that either the new grantee or some previous grantee of federal jurisdiction will have to go to the end of the line awaiting its turn for access to the courts.

Speaking only for myself and not for the American Bar Association or any other member of the court upon which I sit, I suggest that Congress seriously consider some alternative approaches to access to justice that do not involve

litigation. In large measure, the press for the litigous way to justice is caused by reason of the frustration and the failure of our citizens to obtain redress from other governmental institutions which were built to serve them and by the disappearance and depersonalization of the public and private institutions that earlier served many of our needs. A large part of judicial time today is devoted to inducing courts to force public institutions to perform the functions that they were designed to serve. Can we not design other means by which public institutions may be rendered accountable? It is impossible to restructure large, depersonalized, complicated personal service bureaus to permit them, at least on a local level, to function in a more humane and personal way?

The neighborhood justice centers are a step in the right direction. I suggest, however, that other experimental models should be designed to address the problems with which our citizens, rich and poor, are faced and not simply to give each of them or masses of them a lawsuit by which to adjudicate disputes or to compel other governmental institutions to obey the law.

TESTIMONY OF HON. SHIRLEY M. HUFSTEDLER, JUDGE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Judge HUFSTEDLER. In appearing today, as the committee is well aware, I am primarily acting in my capacity as a member of the American Bar Association Special Subcommittee on Coordination of Federal Judicial Improvements.

I have taken the liberty in my prepared statement, however, of placing the views of the special committee in somewhat larger context, and in doing so I wish to be understood as speaking for myself and not for the American Bar Association or, indeed, for the court of which I am a member.

Each of the proposals summarized in Mr. Justin Stanley's statement deserves, in my opinion, implementation.

For example, expansion of judicial personnel contemplated in current bills that add judges to the district courts and the courts of appeals is essential to the present functioning of the Federal judicial system. The creation of the National Court of Appeals is urgent if we are to be able to maintain stability and harmony of the national law. The repeal of statutory priorities is needed to give the most seriously overburdened circuit courts the tools for effectively managing present caseloads. Reduction or elimination of diversity jurisdiction is a reform already two decades overdue.

I would be remiss, however, if I did not forthrightly state that these measures—necessary though they be—do not go to the heart of the matter. Access to justice involves complex problems that can never be solved by tinkering with the Federal judicial system. A host of new approaches must be tried that do not involve the Federal courts or any version of the litigation model if we are to make real headway in the quest for justice for all Americans.

We must confront a series of unpleasant truths and make some hard choices among limited options. One of these truths is that the Federal judicial system is a relatively inelastic institution.

The system as it is presently structured and staffed is inadequate to carry the present caseloads. The modest expansion of that structure horizontally—adding judicial personnel to existing tiers of the Federal judicial pyramid—and vertically—adding the National Court of Appeals—will help us. But there are severe limitations upon further growth which cannot be exceeded without destroying the very qualities which have caused these courts to be so highly valued.

As compared with other governmental institutions, the Federal courts have been, or at least have been perceived to be, more accessible, visible, personal, responsive, and independent. When I say accessible, I do not mean to imply that everyone can take his or her grievance to the Federal courts.

Jurisdictional limitations as well as economic barriers have limited access to the Federal court system. But for those who have surmounted these hurdles, the means of gaining entry to the Federal judicial system is well known, and it is not difficult. Of equal importance, a decision will be made which can be heard or seen or both, and that decision will be made by a person or persons who can be identified.

The complainant thus has some contact with a human being who is obliged to read or to hear the complaint and to make some kind of decision that must be communicated. Thus, courts have not only been responsive, but courts have also been more often responsive to the complaints of the disadvantaged, the poor, the weak, and the unpopular than their governmental counterparts.

Federal judges with lifetime tenure have had the independence that permits them to make just, though unpopular decisions, without risking the wrath of political constituencies or shifting majorities. The institutional structure has assured each litigant, except the Government in criminal cases, one appeal as a matter of right, and the opportunity to apply for Supreme Court review, no matter how unlikely a hearing before the Supreme Court may be.

A judicial system cannot be expanded horizontally beyond the capacity of the next tier above it to process the added cases. For that reason, district courts cannot be indefinitely expanded, and here, as you will see, I take strong issue with the testimony of at least one of your prior witnesses about doubling or trebling the capacity of the Federal judiciary, unless access to the appellate courts is correspondingly curtailed. A judicial system cannot be indefinitely expanded vertically because cases that should reach the top of the ladder fall by the wayside due to delay, expense, or battle fatigue.

Judicial personnel cannot be indefinitely added without imperiling the quality of persons attracted to the bench. Nonjudicial personnel cannot be perpetually increased without turning courts into the impersonal bureaucracies which the litigants are trying to escape.

In short, Federal judicial time is a scarce commodity. The supply can be increased a little, but very little, without impairing or destroying its value. We must face up to the fact that we have to treat Federal judicial time as we have treated other essential resources in the periods of shortage. We have to inventory our present and future supply to ascertain the totality for distribution. The materials for that inventory are already in stock.

We must next identify and measure the present and future demands on that supply. As Mr. Stanley observes, the raw materials for that survey are also on hand. Next comes the painful task: We must match the demands against the resources, assign priorities based upon an evaluation of those needs, and ration access accordingly.

Conceptually, the easiest part of the task is to enforce a limit of one trial court to a customer and to insist that the only available court be the one in greater supply. In concrete terms that means the elimination of all overlapping jurisdictions within and between judicial systems.

It means that Federal diversity jurisdiction must eventually be eliminated absent very strong evidence that in some classes of litigation access to the Federal courts is necessary to preserve an overriding Federal interest. Aggregate Federal judicial time will always be in scarcer supply than aggregate State judicial time because the States have together 50 judicial pyramids and the Federal system has only one.

It is also easy to state abstractly the indicia for awarding the highest and lowest priorities. In the highest priority are those cases in which there is a great social need for the resolution of a particular kind of controversy and in which the Federal judicial system is especially or uniquely suited to decide that controversy. For example, no one suggests that we should remove from the Federal courts such cases as treaty controversies, customs and tariff controversies, or cases involving the use of national resources such as air waves.

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In establishing a system to ration Federal court time, attention should be focused on the nature of the controversy and not upon the individuals who are litigants in the controversy. The economic situation of the individuals should not be a determining factor. Both the rich and the poor need access to the Federal judicial system. Thus the inquiry is not whether consumer litigation or Federal securities litigation should be in or out of the Federal courts.

The inquiry should be: What kinds of consumer litigation and what sorts of litigation about Federal securities law should be in or out of the Federal courts? As unpleasant as it is, we have to ask both whether a particular class of litigation belongs in the Federal courts rather than in State court systems, or nonjudicial agencies, and whether that class of litigation is more or less worthy of retention in the Federal system than other classes of cases with which it competes for the scarce resource.

Even with the expansion contemplated by proposed legislation, the Federal judicial system is saturated. This means that each time Congress adds another burden to the Federal judicial load, it must always consider removing Federal jurisdiction that it has earlier granted. Although we may not know precisely the impact of a new grant of Federal jurisdiction, we do know that every new grant of Federal jurisdiction now means that either the new grantee or some previous grantee of Federal jurisdiction will have to go to the end of the line awiting his or her turn for access to the courts.

Speaking only for myself and not for the American Bar Association or any other member of the court upon which I sit, I suggest that Congress seriously consider some alternative approaches to access to justice that do not involve litigation. In large measure, the pressure for the litigious way to justice is caused by reason of the frustration and the failure of our citizens to obtain redress from other governmental institutions which were built to serve them and by the disappearance and depersonalization of the public and private institutions that earlier served many of our needs.

A large part of judicial time today is devoted to inducing courts to force public institutions to perform the functions that they were designed to serve. Can we not design other means by which public institutions may be rendered accountable? Is it impossible to restructure large, depersonalized, complicated public service bureaus to permit them, at least on a local level, to function in a more humane and personal way?

The neighborhood justice centers are a step in the right direction. I suggest, however, that other experimental models should be designed to address the problems with which our citizens, rich and poor, are faced, and not simply to give each of them or masses of them a lawsuit by which to adjudicate disputes or to compel other governmental institutions to obey the law.

Thank you, Mr. Chairman.

I will be very glad to respond to any questions that the members of the committee may have.

Mr. KASTENMEIER. Thank you for an exceptional statement. As a matter of fact, it touched on a number of points the witness yesterday discussed in a slightly different context. For that reason, I think it's particularly worthwhile.

I must beg your indulgence, and the witnesses and others present in this room. We have a vote on presently. If, as I hope, you are able to remain for perhaps 10 minutes or so, we will resume at that time, and as an inducement to my colleagues, I will defer my questions until after they have an opportunity to ask theirs.

We stand in recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will reconvene.

Having just heard from Judge Hufstedler, and having previously heard from Mr. Zelenko, I will now yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

Let me just join the chairman in saying how pleased we are to have you here and also thank you, for I think both of you made very comprehensive and very helpful statements.

I believe that maybe I would like to talk kind of generally and ask questions that are maybe a little bit expansive, but I think the whole subject of judicial access is such an enormously expansive subject anyway. Right now we have something like, I think, 500 district court judges. We have something like, I think 1,000 administrative law judges. We have a number of magistrates, and now we are about, as you know, to vote in the House on really the conversion of some so-called bankruptcy judges into a new kind of article III bankruptcy judge or bankruptcy court.

I am just wondering, Judge, if you would care to comment on how you feel about that in the light of what appears to be a direction which is opposite of what has been done in many States that are going toward a unified trial court, the fact that these new article III judges would really be dealing especially with bankruptcy. In other words, what are your feelings about what has recently been done by the Judiciary Committee?

Judge HUFSTEDLER. I feel strongly that the creation of article III bankruptcy courts is unwise. It is unwise for a number of reasons.

In the first place, it is counter to the restraints to which I have already adverted; namely, one is creating not less than 90 new district courts, perhaps more, and all of that litigation in terms of appeals is poured directly into the courts of appeal which are already seriously overburdened.

Second, I question whether the priorities are straight. I will be the first to agree that bankruptcy cases are important, but the effect of what is being done under the bill as presently drafted by creating these article III courts is to give priority to bankruptcy cases that is unequaled by any other class of litigation in the Federal system except criminal cases; and I have to ask the question, on what basis has one made that kind of assignment of priority?

Bankruptcy cases are important. Are they more important than civil rights cases? Are they more important than antitrust cases? Are they more important than tax cases? And I think the burden has not been carried to show that the answer to that question is "yes."

There is no reason why the courts should not be built as article I courts. That was the recommendation of the committee which put in the most intensive study, the ad hoc committee, directed to that particular question.

It isn't a matter of saying that any litigant is not entitled to a first-class judge. Of course, every litigant is entitled to a first-class judge, but there is no reason to believe that an article I judge is not every bit as first-class for this purpose as an article III judge. In short, it is an understandable, though I think unsound, response to a very serious question.

Mr. RAILSBACK. May I just raise what I believe would be the reasons given by the very fine members of the subcommittee that did report out the bill. I think they would suggest to you, with the expansion of the plenary jurisdiction of the new bill, that an article I court would not be able to make all of the decisions that would necessarily have to be made to fulfill the new thrust of their bill.

I wonder how you would respond to that?

Judge HUFSTEDLER. Mr. Railsback, I think that I would have to file a very strong dissenting opinion to that view.

The matter was addressed with care by a number of legal scholars, including Erwin Griswold, who in anybody's terms is a man who is not unfamiliar with the dimensions of constitutional issues relating to jurisdiction, and he took the position—which I share—that constitutional limitations would not prevent article I courts from handling the broad mass of litigation which would be then triable in the bankruptcy court.

There is one caveat to that: If indeed you end up trying everything imaginable within that court, including antitrust cases and the like, there might indeed be some jurisdictional difficulties upon constitutional grounds; but if that is what one intends to do with the bankruptcy court, then are we not misrepresenting what that court is supposed to do? In short, the full weight of that kind of consideration has not been given to the legislation.

I think, after all, if the idea is that you need specialists because bankruptcy involves special considerations, by the same token the person who is all that specialized is by definition not one who is equipped

to address the kinds of major problems that I have just discussed. In short, I don't think the legislation has been thought all the way through from the standpoint of what it does to the existing system.

I remind the committee, as you are well aware, that in the omnibus bill presently before Congress, Congress has scrutinized with great care each and every request for a new U.S. judgeship, and indeed with respect to California, as Mr. Danielson also is aware, Congress decided that we had not made an effective enough showing with respect to three district judgeships.

If the kind of scrutiny were given to 90 or maybe 120 new article III bankruptcy judgeships to justify those judgeships on a cost/benefit analysis, I would be shocked if that justification could be made in respect of expanding article III courts by 90 or more.

Mr. RAILSBACK. May I just ask one concluding question, and that is, have you generally been satisified with the quality of the work of the magistrates, and have you generally been satisfied with the quality of the work of the administrative law judges, or would you recommend any procedures to further enhance their abilities?

Judge HUFSTEDLER. Well, with respect to the work of the Federal magistrates, I cannot speak about every Federal magistrate in the United States, obviously, but only those whose workmanship I have seen, and I have seen the workmanship of a great many of them; and I can say that in each instance I have been personally satisfied with the quality of work that they have performed.

I have to raise the same caveat with respect to the administrative law judges. The overall quality, I think, is fine. Of course, donning a robe, whether it is the robe that has the label "Administrative Law Judge" or an "Article III Judge" does not give you any sense of perfect assurance that you are going to have a perfect judge. In short, we have some that are better than others.

I am not sure that any selection process can give you a guilt-edged guarantee of perfection, but over all they have, been very good, from my viewpoint. We are getting better service than I think we have deserved in view of the tremendous burdens that have been placed on many of these people and their inability to have access to staff assistants which many of them needed. In short, it is from that standpoint, that is, not giving them the tools with which to work, that I say we are getting better service than we deserve.

Mr. RAILSBACK. Thank you.

Mr. ZELENKO. Mr. Chairman, may I just supplement what the judge has said?

Mr. KASTENMEIER. Mr. Zelenko.

Mr. ZELENKO. With respect to the bankruptcy bill, our special Committee on Coordination of Improvements in the Federal Courts observed at a meeting last May that the subject of article III status for bankruptcy judges was a new matter in bankruptcy legislation introduced for the first time in this Congress. Accordingly, we recommended to the president of the ABA that a task force be formed immediately to look into that matter because the prior legislation that had been commented on by the ABA had not dealt with the article III issue.

A six-member task force has been appointed. I will be happy to supply for the record the names of those individuals. They are attor-

neys and judges from different parts of the country, and they will be reporting on this issue.

[Information to be furnished follows:]

Task Force on Revision of Bankruptcy Laws: L. Stanley Chauvin, chairman, Louisville, Ky.; Justice Robert Braucher, Boston, Mass.; Gibson Harris, Richmond, Va.; Raeder Larson, Minneapolis, Minn.; Mitchell W. Miller, Philadelphia, Pa.; and U.S. District Judge Morell E. Sharp, Seattle, Wash.

Mr. ZELENKO. Whether they will be reporting by the August meeting or not, I am not sure, but it is a new issue, and this task force was just created a month ago.

With respect to magistrate competency that Mr. Railsback addressed, I note that the bill that has now been reported out by the Senate committee—and which we endorse—and recommend that the ABA endorse next month, proposes that the Judicial Conference establish procedures to assure competency of U.S. magistrates, and that the Judicial Council in each circuit certify the competence of magistrates; and there are minimum requirements contemplated so that the legislation now before the Congress is addressing itself to that problem.

Mr. DANIELSON. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. Thank you, Mr. Chairman.

I am not qualified to raise any question on the basis of your statements because I was not here. I have been so absorbed by the colloquy that I have not troubled to read it in that time.

I do thank you for coming and providing us with your points of view on these matters because they are of great concern to this subcommittee and its members.

I will advert briefly to the bankruptcy court situation. I am one who feels, or maybe I hope, that the controversy is not yet fully resolved. The bill still has a long way to go, and I personally do not favor making article III courts out of bankruptcy courts.

I would like your comment on the suggestion that has come forward which would in effect make magistrates and bankruptcy referees, fungible. It would be particularly useful in an area where you have a part-time magistrate and part-time referee. Why can't he or she do both types of work?

The way I see it, we should have one basic article III trial court, the district court. The magistrates are an arm of that court in my concept and so are the bankruptcy judges or referees. Where you come to the exercising of jurisdiction it is truly the jurisdiction of the district court, and there is plenty of that, so that there is nothing lacking to decide any kind of an issue.

The referee acts as sort of a master. In fact, I think that was the original concept, no matter what you call him, and his authority is derived from the district court; and I think it is logical chain of command, chain of authority situation, but we do have magistrates now performing the function of the old commissioners plus some added jurisdiction which we have conferred, and I think we will increase that before very long.

What would be your comments as to the advisability of perhaps making both of these two arms of the court fungible so that they could, shall I say, relieve each other or share the burden, get the work done?

Judge HUFSTEDLER. I think it would be helpful to give authorization to circuit councils to permit it to be done where it is appropriate, but the difficulty is in some respect, to pun, I suppose, they are really not as "funge" as all that, because many of the bankruptcy judges are experts dealing with extremely complex issues of bankruptcy law, and though there are magistrates who would be able to learn that task and perform it very effectively, I am not prepared to say that every one of them could.

Moreover, I am also aware of the fact that the bankruptcy judges are in many districts extremely overburdened today, and they would not, therefore, be in any situation to serve in a magistrate capacity.

It seems to me, however, that the fundamental concept is sound, Mr. Danielson, to give authority so that assignments could be made from one to the other job where it was appropriate, and certainly it would be appropriate where you have a district in which you have a part-time magistrate who could, if given the authority to do so, also perform some bankruptcy work.

In the large metropolitan districts, I think that would be a rather rare occasion.

Mr. DANIELSON. I think you for your comments.

Mr. Zelenko, do you have any different or additional comments?

Mr. ZELENKO. I would defer to the judge's expertise.

I know the Judicial Conference has raised that in a preliminary report to the Congress in its strong opposition to the article III status proposed in the bankruptcy legislation, and it has suggested the possibility of an interchange between magistrates and referees.

Mr. DANIELSON. In the event such a development should take place, with whom would you vest power to designate a magistrate to perform the function of a referee, et cetera, the district court, the court of appeals, district council, or what?

Judge HUFSTEDLER. It could be done in either one or two ways, and indeed not necessarily mutually exclusive, that the circuit councils could be given permission under their rulemaking capacity to promulgate rules which in turn could delegate some portion of that authority to local rules promulgated by the district court. That would give the circuit councils an opportunity to look over the totality of the circuit to determine in which districts it would or would not be appropriate.

Mr. DANIELSON. Thank you very much.

Mr. KASTENMEIER. The gentleman from Pennsylvania.

Mr. ERTEL. Thank you, Mr. Chairman.

I, too, was not here when you gave your initial presentations so I am not equipped to ask you any questions about that, but I am concerned about this bankruptcy and specialized bankruptcy court, and I appreciate your comments on that.

One thing that interests me, and you didn't really, directly, although tangentially you did, address it, do you agree that the Federal courts should in fact have article III judges which have a specialty, like a bankruptcy court, or in fact should they all be the generalists that we would expect at a trial court level?

Judge HUFSTEDLER. I have never been an enthusiast of specialized courts, but there is nothing wrong with having a degree of specialization built up within a court. For example, in Los Angeles County

superior court, the largest trial court in the country, it has specialized departments in which the judges rotate in and out, so that one does build up a good deal of expertise in an area when one sits by assignment to that specialized department for 2 years.

That gives you the advantage of some degree of specialization without being locked into specialized courts.

We, of course, had the experience with the tax court. The tax court is a very good specialized court, but I question whether or not it would be as good a court as it is if, at the same time, there was not also jurisdiction in the Federal district court which gives a continuing generalist view into the subject matter. Despite the most devout efforts, there is a great tendency upon the part of specialists to fall deeply in love with their own specialty and to fail to see their specialty in the broader context; so, for that reason, I do have strong reservations about creating article III specialized courts.

Of course, I am not unaware of the Court of Claims and the Court of Customs and Patent Appeals, but to have one of these is quite a different matter from creating 90 of them.

Mr. ERTEL. May I ask one other question in relation to the specialization in the code revision which is now going through the Congress?

Since bankruptcies generally tend to follow the business cycle, would it be possible that we would wind up with these bankruptcy judges at some point, instead of being overburdened, underburdened and, therefore, have you examined the administrative provisions of how they, in fact, would then function in the system?

Judge HUFSTEDLER. I have not given any study to that question. It is, of course, true that bankruptcies do follow, in part, the business cycle, but another problem with it is that it is difficult to treat bankruptcies all as a lump. You have a very large measure of consumer bankruptcies which do not have the same kinds of problems at all as the business reorganization and business bankruptcies; and the consumer bankruptcies, though they follow in a way the business cycle, do not follow it at the same course, at the same trend, as do business bankruptcies. In short, it is entirely possible that you could be seriously overstocked with article III bankruptcy judges. It is a possibility.

Mr. ERTEL. I clerked for a district court and I am not certain that all district courts operate the same, but in that district court different phases of the law seemed to get assigned to one judge because he preferred that area of the law, although he was a generalist and would take other cases as well.

Is that your understanding, coming from the ninth circuit? Is that the way the district courts tend to break down in your area as well?

Judge HUFSTEDLER. If they have done so, they have done so so quietly and inconspicuously that I have never noticed it.

Mr. ERTEL. I am not saying there was a conscious effort, but one man happened to have an area in which he would do more than the others. Have you seen that at all?

Judge HUFSTEDLER. That does not happen because the methodology of assigning cases does not permit it to happen, with the exception that with some senior judges, retired judges, they have a good deal of choice about what they do and, after all, they should, because they

have earned it; and some of them have been very fond of some kinds of specialties and they have done a great deal of work in those specialties. But with respect to the nonsenior judges, this sort of specialization does not exist.

Mr. ERTEL. Would you object if in fact in the Bankruptcy Code, since we are trying to upgrade the bankruptcy judges to article III, if we just made them article III judges, period?

Judge HUFSTEDLER. Made whom?

Mr. ERTEL. The ones that are suggested within the Bankruptcy Code as article III judges. Bankruptcy is what it would amount to, I guess.

Mr. HUFSTEDLER. I am not sure what happens when you switch labels. You still end up, I assume——

Mr. ERTEL. With more article III judges?

Judge HUFSTEDLER. With all these article III judges.

Mr. RAILSBACK. Would you yield?

Mr. ERTEL. Do you think that would be too many?

I will yield.

Mr. RAILSBACK. It is my understanding that under the bill it is envisioned that at the end of the interim period there could be 200 or whatever number.

Judge HUFSTEDLER. Or more.

Mr. RAILSBACK. Yes, or more, that would be appointed to become bankruptcy judges.

Mr. ERTEL. Article III.

Mr. RAILSBACK. Yes, and it would be a new appointment and all of the existing referees, unless they would be the appointees, would be out of existence. I think that is right.

Mr. ERTEL. That is my understanding, but what happens then if we are in a bad business cycle in which bankruptcies are extremely high? We may wind up with a glut or surplus, which, if it lasts for a 7-year period, which would not be an unusual time period, we may wind up possibly with a great number of article III bankruptcy judges.

I was asking here if in fact we now need an expansion of judges in the court system and if in fact the judgeship bill which is going through may be finally enacted, we may also be needing additional judges who do the same thing and we can make them article III judges without the "bankruptcy" specialization seven years down the road?

Judge HUFSTEDLER. I agree that the questions you are asking are the right questions, that is to say, we do need some more modest expansion of article III district judges. There is no question about that; but I am not persuaded at all that we either need, or indeed systemically can tolerate, not less than 90. I keep using the "not less than 90" because the bill is by no means clear about how many there are going to be; but it will be not less than the existing judicial districts, one court for each judicial district, and there are 90 of them, so that it means not less than 90. But possibly it might be 200, I fail to see that there has been any cost/benefit analysis at all with respect to what that means to the Federal judiciary.

It is the most dramatic change that has been suggested in the structure of the Federal judiciary since the creation of the U.S. courts of appeals and in many respects it is more drastic than that.

Mr. ZELENKO. I wish to add one thing, Mr. Chairman.

Mr. Ertel was asking about a generalized trial court on the Federal basis. We ought to say that the American Bar Association Commission on Standards of Judicial Administration has adopted standards relating to court organization, issued in 1974, and specialized article III courts violate those standards.

The standards look toward a concept of a unified trial court with broad-based jurisdiction. That point was made in one of the preliminary memoranda submitted by the Ad Hoc Committee of the Judicial Conference in opposing the article III status; that it is a violation of ABA standards with respect to court organization.

Mr. ERTEL. I can also see an argument which would distinguish the patent court and the tax court and the——

Mr. ZELENKO. Of course, the tax court is an article I court.

Mr. ERTEL. I can see why they would be specialized and they would be distinguished from article III courts, but I couldn't see the bankruptcy courts being specialized because it crosses so many broad areas of commercial law which a trial judge is handling anyway, and it seems to me that to try and specialize that court—I couldn't see the argument and I was wondering if there was something I was missing. That is why I was asking the question.

Judge HUFSTEDLER. I don't think you are missing anything. As I pointed out a little earlier, if in order to do the bankruptcy job well you must take in all of the rest of this jurisdiction, then you have to ask the question you have asked, well, why not expand article III courts generally and not make them specialists? That is the question.

Mr. ERTEL. I thank you very much for your comments and your help.

Mr. DANIELSON. Mr. Chairman, may I ask an additional question?

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. I share very much this concern that we might have a surplus of article III bankruptcy judges in the event there should be a fall-off in bankruptcies. I have been informed that currently there are about 40 percent less bankruptcies being filed than there were, say, 2 years ago. I don't know how that is allocated between business and consumer bankruptcies, but there is a rather substantial fall-off; yet I don't believe there has been any decrease in the number of referees, bankruptcy judges, functioning.

Is there any type of a monitoring that goes on to detect these surges and falloffs in the need for bankruptcy judges?

Judge HUFSTEDLER. I know of nothing in this direction other than the surveys which are constantly undertaken by the Administrative Office which keeps detailed statistics on all the work in the Federal courts, including the work of the bankruptcy referees. Of course, Mr. Danielson, you may also be aware that the Federal Judicial Center is working a good deal in this area in order to try to accumulate what are called predictors in terms of litigation, both in the trial courts and in the courts of appeals.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. May I ask the witnesses, particularly Judge Hufstedler, whether they have a time problem?

Judge HUFSTEDLER. The appointment which I earlier had was canceled because I could not get there in time; therefore, I have no further problems. My time is entirely at your disposal, Mr. Chairman.

Mr. KASTENMEIER. Since there is another vote on, I would ask your indulgence one more time, and we will recess for a period of 10 minutes. We still have Professor Cunningham as a witness who will follow. I apologize to everybody for intruding into the noon hour, the lunch hour, but we have no option, so the subcommittee will stand in recess for 10 minutes.

[Brief recess.]

Mr. KASTENMEIER. The subcommittee will reconvene.

At the conclusion of the last series of questions, it occurred to the Chair that it is unfortunate that the subcommittee responsible for the Bankruptcy Act couldn't have more fully participated in this dialog.

Many of the questions I would have asked have already been alluded to; for example, specialization in the Federal courts. I wonder whether we might be faced increasingly with the tendency to create special courts, most of which, it has been observed, other than bankruptcy courts, involve the Government as a party. In these other courts, therefore, there has been some distinguishable reason for creating specialized Federal courts; as relates to bankruptcy courts, however, I wonder whether the tendency might result in a proliferation of specialized private courts and whether that is desirable or not. I also wonder whether as a result, even if it may be desirable socially for us to do this in terms of access to justice, whether we will get into enormous controversies as to the relative sanctity accorded special groups of cases such as social security cases versus habeas corpus cases versus consumer cases and all the others. Prior witnesses who have already appeared before this subcommittee have given their own lists of priorities and they don't conform one with the other. If we get into that particular controversy, there will be no end. Sides may change from one decade to another, reflecting, I suppose, social, economic and other values of the time.

I wonder if you care to comment?

Judge HUFSTEDLER. Mr. Kastenmeier, I think you have amply summarized the views I myself have. I think that the proliferation of specialized courts would be a grievous error.

I agree with the statements heretofore made relative to the position taken by the American Bar Association on this issue.

I think that we ought to bear in mind that we have to keep as much flexibility within the system as is possible, bearing in mind the finite nature of the total resource. To put it in a rather lighthearted way, when it comes to assigning priorities, it is rather like cleaning out the family closet; everybody is always willing to throw away every other household member's things because they are all "junk" but "my things are treasures and they cannot be disposed of."

That is why, of course, the priority assignment is such an extremely difficult task, but to say you have resolved it by building more specialized courts to handle each person's "treasures," is a mistake. In short, in an effort to solve one set of problems you end up creating other problems which are even more intractable than the one that you set out to solve.

Mr. KASTENMEIER. We had, I thought, exceptionly helpful and lucid testimony from Prof. Burt Neuborne just the other day during these proceedings.

In many respects the references he used were not unlike your own. In fact, I don't find very much difference in such terminology as "limited resources" and "rationing" of Federal judicial resources. They are very similar.

He did throw out the number 1,000 Federal judges, with which you apparently take issue. For those of us who heard him and have now just heard you, we don't seem to see the difference insofar as he seemed to agree that judgeships are a limited resource and that an ultimate expansion, given society as much as we know it today, from 500 to 1,000 might be possible. Beyond that, quality and other problems would unacceptably diminish the quality of the Federal judiciary and make it difficult to find able article III judges.

Based on that characterization would you quarrel with Prof. Neuborne?

Judge HUFSTEDLER. I think it is difficult to speak in absolutes. But I think he believes that there is greater flexibility in it than I do. The problem is that while it is easy enough to add some more trial courts, adding judges at that level seems rather simple. But you still have to say either you will not have a right of appeal with respect to many of those cases or you must double or treble the existing size of the U.S. Court of Appeals.

That creates a number of extremely serious problems, because if we are going to keep the circuit law uniform, it becomes virtually an impossible task if you keep increasing the numbers of judges who are trying to deal with the problem. Then, if you break the circuit into still smaller units you have conflicts which come up between the separate units, which means you then either have to build a very expanded notion of a national court of appeals or you must cut off the right of appeal.

There just isn't any other choice, because it is evident that there is no room at the top. You cannot expand the Supreme Court of the United States. So on an individual case basis, yes, on a systemic basis, no. I think his figures are those I would find difficult to reconcile with the concept of doing business the way we traditionally have done, and to maintain the pyramidal structure of the Federal court system.

Mr. KASTENMEIER. You emphasize, however, in your reservation, the role of the circuit court of appeals in this pyramid as being the crucial factor rather than the district court.

Judge HUFSTEDLER. Yes. You can add lots more people to hear and decide cases below. But the decisions in those cases are not binding authority with respect to any other case on the same level. The way you get the law of the circuit is from the court of appeals. You cannot maintain a harmonized law of the circuit when you have expanded in a very major way the number of judges who make those decisions.

Mr. KASTENMEIER. This subcommittee has not yet studied, as it must, the question of the circuit court of appeals. It is part of our general mandate. We cannot preempt that until we have another subcommittee's work completed in terms of creating judgeships and circuit court of appeals judges, and until we know whether new problems have arisen.

Judge Ainsworth, in testifying on a different matter, raised the question that sheer size of the circuit is destructive. The necessity of

sitting *en banc*, the necessity of reconciling views and of having uniformity within the circuit, is allegedly subverted in large circuits simply because of the sheer numbers of judges, and then too, apparently, for historical and other purposes, he feels it is extremely difficult to have over nine judges. Likewise, it is not a simple solution to merely create additional circuits.

Does that also reflect your opinion?

Judge HUFSTEDLER. In part it does; in part it does not.

I fully agree that having a circuit court of active judges of more than 20 or even 15 members means that one must change the *en banc* mechanisms for the court, and here I can say that my own colleagues are agreed that whatever happens otherwise we should have authority to limit the *en banc* court to 9.

A variety of acceptable mechanisms have been used to reach that, but once the *en banc* problem is resolved, I disagree with my friend, Bob Ainsworth, on the difficulty of managing a very large court with many judges on it.

It can be very well managed. The only thing is, of course, that it cannot be managed in the identical way as managing a small court. The fact is that courts of nine, which are considered sort of an ideal number, simply don't take any management at all, and for the most part they never have had any. But it is as unpractical and unreal, in my view, to state that you cannot manage well a 9-member court, or 15-member court, or 20-member court, as it would be to say that you really can't operate a law firm efficiently with more than 9 people. You don't manage it in the same way.

Mr. KASTENMEIER. The preceding witness made an analysis for us in terms of how one might look at the shortage of judges or the lack of access or court congestion, all of these being problems in the Federal judiciary. He thought there were several methods to solve these problems. One was expansion, which has already been undertaken and is pending in the Congress.

Another is what he called substitution. That is, you substitute something else for the Federal system. You submit to arbitration; you have greater access to magistrates and the like. However, he made a very powerful plea or statement for the prestige of the article III judges. He felt, in fact, they ought to be small in number and 500, he thought, was a very, very small number, indeed, for all of the litigation filed in the Federal system. He also felt the prestige and compensation of these individuals ought to be continued at a high level as historically has been generally true, though compensation has not kept pace.

To the extent that we are willing to divert cases which would ordinarily fall into this superior Federal system to State systems or to magistrates who are not of a comparable quality, or as efficient, or able to render the same standard of justice, poses a difficult problem.

We may end up causing people to receive a poorer quality of justice by virtue of our interest in substituting other decisionmakers for the Federal system.

Judge HUFSTEDLER. I would be less than candid, Mr. Kastenmeier, if I said I thought every single State court system in the United States was of exactly equal quality to that of the Federal courts. But there

are State courts of great excellence in individual States that may be not only as good but may even be better than the Federal system for a variety of reasons. So I don't think that one can say necessarily that one is going to press litigants into a poorer quality of justice by taking them out of the Federal system and putting them into the State system.

I also would say, however, that Congress can, and I think should, consider giving some grants-in-aid to State systems where the problem is a general impoverishment of the public budget to the point that they cannot pay adequate salaries to their judges, they cannot give them adequate support, and in that kind of way Congress could give them what is in a far greater supply than otherwise.

In short, give them monetary grants-in-aid—not press it upon them but make them available—then save the scarcest resource—which is Federal judicial time—so everybody profits. It is not only those citizens who would have to go to inferior judicial systems if they are thrown out of the Federal system, but the tens of millions of people are forced into them today anyway because there isn't any Federal jurisdiction available to them now.

If our citizens are getting a poor brand of justice, it is the responsibility of all of us to see that that is improved, and one of the ways is to give sensitive grants-in-aid to beleaguered State systems.

Mr. KASTENMEIER. The American Bar Association has been very supportive certainly in recent years, much more so recently, I should say, of access to justice in a number of new ways. I guess since I have served here since 1958, resort by citizens to the Federal judicial system has increased dramatically. We in Congress, not necessarily conscientiously or intentionally, have accounted for very much of that. We do it through many ways. I think the civil rights fights, and the legislative and political fights of the 1950's and 1960's, some of which were started in the courts, tended to make us feel that the courts were an available forum for resolution of these matters.

This committee now has oversight over the Legal Services Corporation, which is supported by the ABA. Surely the judicial impact, of this important organization, in the State system as well as the Federal, has to have been enormous, and its potential is enormous.

At the same time as this is happening, the Supreme Court itself is under criticism for narrowing access to the courts in very particular ways, such as restricted notions of standing.

My question is twofold: One, do you feel access to justice, particularly in the Federal system as represented historically in the last 15 or 20 years, has moved appropriately and swiftly enough, or too fast, and two, do you see a narrowing of access in recent years in terms of the Federal system with respect to certain cases. You may not want to comment.

Judge HUFSTEDLER. I will comment about them in reverse order. It is, of course, evident that a number of Supreme Court decisions have significantly narrowed access in some kinds of cases. I would not have signed the majority opinion in some of those cases, but it is a response to the fact that we are, indeed, perilously overloaded.

The difficulty is that when one tries to handle the matter judicially, one is not necessarily going to be in a situation to have the breadth

of presentation that is possible before a committee like your own because we do our work one case at a time.

In response to the first question, I don't think I can make a sensible generalization. I think Congress has moved with admirable swiftness to some issues, and with glacial slowness on others. Of course, one's enthusiasm tends to ebb and flow depending upon whether or not the issue which is near and dear to some of our hearts happened to be in the fast class or the slow class. I think it depends upon the perspective of the individual.

I can say, Mr. Kastenmeier, that Congress has been much more sensitive to the rights of disadvantaged Americans in recent years than in much of its earlier history. My only concern in this area is that there has been a far greater concentration on trying to get courts to resolve the issues than it is to resolve the issues.

That is, of course, a much more difficult task, but in the long run we really do have to develop different institutional structures. All a court can do is decide. There is not a judge who believes that he or she is solving marital problems when the judge grants a divorce or dissolution. You simply have changed the context in which the same problems must be addressed. I am not suggesting Congress can solve marital disputes either; rather we do have to have some new institutional settings to deal with the problems.

For example, there has been a great deal of conversation about black lung cases. One thing we have to recognize is that courts cannot make the black lungs white. All courts can do is to take evidence to decide how much damages should be paid to these individuals.

Now, is it necessary to have a court do that? That is not to say these cases are not important. They are desperately important to the individuals involved, but I think we have to ask ourselves whether or not that is the best way to resolve these very serious health issues and employment issues that beset these human beings.

I think we have to ask ourselves why is it that we have people who are employed in industries under such conditions that they end up with serious pulmonary diseases.

Mr. ZELENKO. I would add one thing, Mr. Kastenmeier.

I think it was Tom Erhlich's testimony before this subcommittee on behalf of the Legal Services Corporation that said the Social Security Administration was overturned in more than 50 percent of its cases that went to court.

Now, all that seems to indicate is that certain processes we have now to handle these outside of court are not working properly. We should concentrate on the systems we are using to process issues that are factual issues not really requiring a judicial tribunal to process. That is a glaring statistic, if more than 50 percent of these administrative decisions are changed through going to court.

Mr. KASTENMEIER. As a matter of fact, we have, of course, been told that maybe the neighborhood justice centers could do this. We are not certain what the results of this experiment will be. But to the extent that citizens are frustrated in having to resort to attorneys, to formalized pleadings, to litigation, to delay, should we not think about conflict resolution of a much more informal nature?

Clearly there are some avenues or horizons for very radical changes in terms of meeting society's problems by conflict resolution.

I will ask you just one more question, Judge Hufstedler.

Since you are a member of the Judicial Conference Advisory Committee on Civil Rights, for a number of years your committee has been considering the general topic of class actions. At the present time what would you say is the prospect of a class action proposal, whether it be an amendment to the present rule or specific legislation by the Congress?

Judge HUFSTEDLER. We are going to adopt some rule changes, but I think the thrust of the question really goes to the matters that are now emerging as proposals from the Department of Justice.

I, of course, do not speak for the Rules Committee as a whole. But I think it fair to say that much of the program that is being addressed by the Department of Justice is not appropriately before the Rules Committee at all, because the jurisdictional competence of this committee is to draft rules which would be subsequently promulgated by the Supreme Court of the United States.

Because that is a fact, we jurisdictionally are in a difficult position if we decided that it would be a good idea to overturn the rules laid down in some of these cases by the Supreme Court of the United States. In short, if one is awaiting some sort of rule change to come out of this committee which relates to aggregation of claims, for example, of course it's never going to come out of this committee, because that is not the jurisdictional competence of this committee.

It is going to continue to work on a number of proposals which are before the committee. The problems involved in these actions are extremely complex, because in truth you cannot lump together class actions. They come in an incredible variety, and as a result, it is very difficult to promulgate a rule which will be sufficiently sensitive to handle all of the various kinds of issues.

I don't think I can be more specific than that, unless I were looking at a particular piece of legislation, and it would be foolish for me to attempt to summarize the substance of hundreds of hours of discussion over the course of the last 7 years in a few moments this morning. In fact, I wouldn't be up to it.

Mr. KASTENMEIER. I appreciate it.

On behalf of the committee, unless my colleague has questions.

Mr. DANIELSON. No questions, Mr. Chairman.

Mr. KASTENMEIER. I wish to expres the gratitude of the committee for your appearance, Judge Hufstedler. I would hope we would have occasion to discourse with you again.

Judge HUFSTEDLER. I very much appreciate the generosity of the chairman's remarks, and indeed, the exceeding kindness with which we have been received, and I, of course, will be at the service of the chairman and the members of the committee to give whatever assistance I am able to give if the committee requests.

Mr. KASTENMEIER. Thank you, and thanks to our friend, Mr. Zelenko. Thank you.

I appreciate the patience of our next witness, Professor Cunningham.

Prof. William C. Cunningham is a professor of law at the University of Santa Clara Law School, Santa Clara, Calif.

We are sorry our colleague, the gentleman from Massachusetts, Father Drinan, isn't here to greet Father Cunningham, but I know he wishes he were, and he would recognize him as an old friend.

I am very pleased to observe that Father Cunningham is a graduate of Marquette University Law School, highly esteemed in my own State, has a doctorate from Columbia University, and has committed himself to representing the poor and others.

He was the counsel in the Supreme Court case of *Stone* v. *Powell*, and he is well qualified to speak to the general topics of access to justice and the state of the judiciary.

We are pleased to welcome you, Father Cunningham.

TESTIMONY OF FATHER WILLIAM C. CUNNINGHAM, PROFESSOR OF LAW, SANTA CLARA SCHOOL OF LAW, SANTA CLARA, CALIF.

Father CUNNINGHAM. Thank you, Mr. Chairman and members of the committee.

I would ask that the statement I have given to the subcommittee be incorporated into the record, and perhaps I could best serve you at this time by sort of summarizing some of the comments that are made in the particular statement.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be received for the record.

It is not a long statement, and you may proceed as you wish.

[The statement of Father Cunningham follows:]

STATEMENT OF WILLIAM C. CUNNINGHAM, S.J., PROFESSOR OF LAW, UNIVERSITY OF SANTA CLARA SCHOOL OF LAW

Mr. Chairman and members of the subcommittee, I am pleased to accept your invitation to testify regarding the problems of access to the courts and congestion in the federal judicial system. I should also explain who I am and what my concerns are before I begin my specific remarks. My name is William C. Cunningham and I am an ordained member of the Society of Jesus, popularly known as the Jesuits. I am also a Professor of Law at Santa Clara School of Law. I am not, however, an official spokesperson for either my religious order or the law school at which I teach. I am a lawyer and I practice law, mostly in the service of the poor because I believe that is an integral part of both of my vocations.

My remarks are not the result of a collective study by any group or law firm. They are based upon a reading of most of the bills before this subcommittee, as well as a reading of the remarks of the four witnesses who testified before this subcommittee last month. And the remarks are based upon the experience of having participated in the "Access to Justice" Conference held in January 1977, and jointly sponsored by the Society of American Law Teachers and the Committee for Public Justice; I am a member of both of those organizations. Finally, my remarks draw upon the experience I had as legal counsel for the respondent, David L. Rice, whose case was decided by the United States Supreme Court in its decision in *Stone v. Powell*, 428 U.S. 465 (1976).

At the close of my remarks, I will make some observations about some specific pieces of legislation that have been proposed. But I think I would best serve this subcommittee by presenting in microcosm from my client's case the problems created by the decision in that case—problems not only for the federal courts but Congress as well. I say that because other witnesses have already gone over many specific decisions by the Supreme Court that they would see as being serious impediments to access to the federal courts by large classes of litigants. Perhaps by a closer look at one case you may see the kind of problems that concern not only those who would increase the efficiency of our federal courts, but those who have a serious concern for protecting the civil liberties of people in federal courts.

In *Stone* v. *Powell, supra,* the court held that when a State has provided an opportunity for a full and fair litigation of a fourth amendment claim of illegal search and seizure, a State prisoner may not be granted habeas relief on the ground that evidence illegally seized from him was used against him at the trial. In this decision the court reached the conclusion that since the fourth amendment exclusionary rule was not a personal constitutional right, and since its deterrent value was limited, the cost to society to enforce the right long after the state trial was too great to bear.

Introducing legislation to overrule that case, Senator Gaylord Nelson called the decision "lawless." He also called it a usurpation of the authority vested in Congress by Article III of the Constitution, to define the jurisdiction of the federal courts. The Chairman of this subcommittee, Robert W. Kastenmeier, has also introduced legislation to overrule the decision in *Stone* v. *Powell.* Senator Nelson put the case for overruling that decision well when he observed:

"These decisions (he was including the decision in *Francis* v. *Henderson*)," he said, "convey the impression of being justified, at least in part, by the Supreme Court's desire to cope with the increased caseload of the Federal courts. However serious this problem may be, the remedy must come from Congress, and not from the Court, in the guise of decisions on the merits."

Let me now make some of the arguments that the Court refused to heed when I urged in February, 1976, that such a drastic change in federal habeas corpus law ought to be done by Congress in a careful and studied piece of legislation.

First, the decision will probably increase the number of petitions for federal habeas corpus. For every practitioner of criminal law will have to consider what can be done in order to get some hearing on his federal constitutional claim when the Supreme Court denies his petition for certiorari on direct review. If the procedure demands direct review by a petition for certiorari, then the Court which, we are told, is already overburdened will bear the additional burden that used to be shared by the lower federal courts. And when the Supreme Court denies review, the petitioner is left to the lower federal court to attempt to get a hearing on his federal constitutional claim. In short, both avenues of possible relief will have to be pursued and this will result in a multiplication of cases and petitions filed.

Secondly, in our case the respondent was left with no federal court review, at any level, of his federal constitutional claim. And the Supreme Court of the State of Nebraska was permitted to validate the showing of probable cause for a search warrant by resorting to evidence produced at the suppression hearing. In a subsequent case that mistake of federal constitutional dimension was erected into an explicit rule of law in the State of Nebraska, and no lower federal court was allowed to use its power to correct that error. And the only court that could correct that error refused to grant an out-of-time petition for certiorari to correct that obvious error of law. How this action could foster respect for the judiciary and the administration escapes me.

Thirdly, the Supreme Court of the United States spoke about the cost to society of enforcing this constitutional right against unreasonable search and seizure being too great for society to bear. In this case, as no doubt in others, it will require additional litigation in federal courts to prove that the respondent's confinement is in violation of the Constitution. This will have to be done in our case now in a combination of a Freedom of Information Act case and another petition for a writ of habeas corpus. For what the decision in our case does not say sufficiently clearly was that the respondent was a vocal leader of the Black Panther Party, and that two of the grounds for the search warrant approved in his case by all the state courts in Nebraska were his membership in the Party and the Party's political advocacy. What was a fourth amendment case must now be broadened to include other amendments that are still protected by the Supreme Court's rulings. In short, it will require another petition on separate constitutional grounds, at an increased cost to society, and the additional cost to him of the prolonged denial of his constitutional rights.

Fourthly, the Supreme Court created serious problems when it argued that the application of the exclusionary rule "deflects the truthfinding process and often frees the guilty." *Stone* v. *Powell, supra,* . Guilt is a conclusion that ought to come at the end of a complete process, including appeals to federal courts, not at the beginning of a process, so somewhere short of a trial free from fundamental error. In his concurring opinion in *Schneckloth* v. *Bustamonte,* 412 U.S.

218, Justice Powell admitted that historically guilt or innocence had nothing to do with the granting of a petition for federal habeas corpus. To make this determination of guilt short of the complete process is to justify the means because of a conclusion arrived at despite strictures of due process of law. It separates a class of those concluded to be "obviously guilty" and devalues not only their constitutional rights but the rights of every citizen.

Finally, the decision in this case robbed the respondent of any federal review of his constitutional claim, and a rule announced for the first time on July 6, 1976, was made, in the Court's last footnote, retroactively applicable to the respondent's admittedly legal and proper choice of a federal forum in 1972. This refusal to make the rule in the case effective only prospectively confronted the respondent with what Lon Fuller has called "the brutal absurdity of commanding a man today to do something yesterday." It also showed that the highest federal court in the land is not bound by the requirements of due process of law.

I think Senator Nelson was correct in his assessment that however serious the problem (of the increased caseload of the federal courts, "the remedy must come from Congress, and not from the Court. in the guise of decisions on the merits."

What can and should Congress do in the face of caseloads in federal courts that are steadily increasing? To deny that the caseloads increase annually in the federal courts would be to blink the facts. I cannot say that there should not be some modification of the jurisdictional requirements in diversity cases to alleviate some of the burden of cases. But I cannot believe that society will be the winner by reducing case loads by the courts seriously curtailing such things as class actions. I think that the task falls to Congress to pass legislation that takes into account not only an increased case load but also protects the poor, and especially insures over one-quarter of a million state prisoners an effective federal forum for the vindication of their federal constitutional rights. The legislative measures introduced by the Chairman of the House Judiciary Committee, Mr. Rodino, especially those dealing with enlarging and increasing the civil and criminal jurisdiction of United States Magistrates would, I believe, be especially helpful in freeing federal judges to do the other more complex work of the federal court. H.R. 7241, which provides for the defense of federal judges when they are sued in their official capacity would be an additional help to an overburdened judiciary. Having defended a federal judge in Minnesota from litigation against him by the Justice Department, I know this by experience. And I know, too, from having appeared before a U.S. Magistrate in San Francisco that he was more than adequate to deal with a rather routine postal theft that did not need to be handled by a federal judge.

Finally, any resolution for increased federal caseloads that fails to comprehend the serious need for protection of civil liberties of the poor and less vocal segments of our society will be purchased at a price too costy for us as a civilized people.

I thank the committee for this opportunity to discuss the problems that you face as legislators.

Father CUNNINGHAM. Thank you, Mr. Chairman.

As I said in the statement, the remarks I made are not the result of a collective study by a group of people, that while I am a member of the Society of Jesus, as is our colleague, Congressman Drinan, I do not speak as an official spokesperson either for them or for the University of Santa Clara School of Law. Rather, I speak from having read some of the pieces of legislation before this committee and the remarks of some of the previous witnesses who testified before the committee, as well as counsel for David Rice, whose case was disposed of in the Supreme Court's opinion of last July, *Stone* v. *Powell.*

I would like to make some specific statements about some of those pieces of legislation at the end of these remarks.

I thought I could best serve the subcommittee by focusing on sort of a microcosm instead of speaking about the broad range of legislation proposed to this committee. Previous witnesses have argued that certain cases restricted access to the Federal courts at all levels, district,

court of appeals, and Supreme Court, but perhaps by taking this one case which seriously encroached upon the constitutional jurisdiction of Congress to define the jurisdiction of the lower Federal courts for the purpose of State prisoners seeking Federal habeas corpus, perhaps that will focus the subcommittee's attention. *Stone* v. *Powell* was really an attempt, as Senator Nelson called it when introducing legislation to overrule that decision in the Senate in April of this year, an attempt by the Supreme Court to deal with the problem as they saw it, of caseloads in Federal district courts. But that decision created more of a problem for Congress, for the lower Federal courts, and for themselves as well than it really solved in its narrowing of the availability of Federal habeas corpus jurisdiction.

Lon Fuller has said very well that when the Supreme Court attempts to legislate they create more problems than they solve. He said this one time in "The Morality of Law":

> The supreme court of a jurisdiction, it may seem, cannot be out of step since it calls the tune. But the tune called may be quite undanceable by anyone, including the tunecaller. All of the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes the law, produce equally damaging departures from other principles of legality; a failure to articulate reasonably clear general rules and an inconstancy in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law.

Such a set of problems really arises when one looks at the consequences of the Supreme Court's decision in *Stone* v. *Powell*.

The subcommittee members are no doubt aware of the fact that *Stone* v. *Powell* held that when a State has provided an opportunity for full and fair litigation of a fourth amendment claim of illegal search and seizure, that a State prisoner may not be granted habeas relief on the ground that evidence illegally seized from him was used as evidence at the trial.

In that particular decision there was no definition of what was an opportunity for full and fair hearing. It gave simply a cryphic and laconic citation to *Townsend* v. *Sain*, 372 U.S. 293 (1963). But if Congress really meant what it said in the habeas corpus statute in 28 O.S.C. § 2254, the Supreme Court seriously encroached upon that kind of jurisdiction for Federal courts to review habeas court petitions coming from State prisoners and took from them what we have regarded, I think, as lawyers and as citizens in this country, as the traditional centerpiece of Anglo-American jurisprudence, the writ of habeas corpus.

Senator Nelson in the preceding session of Congress in the 94th session introduced Senate bill 3686, and he said he did that in order to stimulate discussion about how Congress felt about the fact that this kind of jurisdiction had been taken from State prisoners in Federal courts. He reintroduced in April of this year in Senate bill 1314 legislation which is really the same kind of legislation, Mr. Chairman, that you have introduced into the House, legislation, frankly, to overrule *Stone* v. *Powell*, and *Wolff* v. *Rice*, and to restore once again to State prisoners—that would be about a quarter of a million people—that precious constitutional right to question the validity or legality of their confinement when it is in violation of the Constitution.

It is news, I think, when a U.S. Senator calls a decision of the Supreme Court lawless, and Senator Nelson said precisely that of the decisions in *Stone* v. *Powell* and *Francis* v. *Henderson* when he addressed the members of a conference that was held in January of this year here in Washington, D.C. dealing with the access to justice.

I wanted to take a look at that decision, for example, question some of the assumptions that seem implicit in the court's decision, and point up some of the problems that it created, not only for Federal courts at every level, but also for Congress as well, when the Supreme Court undertakes to encroach upon Congress right to set jurisdiction of lower Federal courts.

The Supreme Court gets about 4,000 petitions per year to deal with, not all of them petitions for certiorari but a large number of them petitions for certiorari. The Federal district courts, we are told by the Office of Administration of the U.S. Courts, in the fiscal year 1976 got almost 8,000 petitions for habeas corpus.

It seems to me that if we take this decision seriously, and Federal courts have to because it is the Supreme Court's decision, that the only remedy after you have had an opportunity for a full and fair hearing in a State proceeding is to petition directly to the Supreme Court for review, not collaterally, as Congress has seen fit to give petitioners the right to do. If the only remedy for State court prisoners in fourth amendment claims is to go directly to the Supreme Court, as the price of being alive and a practitioner of criminal law on behalf of a State prisoner, you would have to file a petition for certiorari in the Supreme Court in every case in which—or in most of the cases in which you are filing or attempt for a petition for habeas corpus. So there is the possibility that if the Supreme Court now is getting 4,000 petitions per year, that they could be getting anywhere from 10,000 to 12,000 petitions just by dint of this one decision, because we are told that the remedy sought on behalf of the State prisoner should have been to go directly to the Supreme Court, despite the fact that the Supreme Court had said clearly in *Fay* v. *Noia*, 372 U.S. 391 (1963), and Congress had said clearly in 28 U.S.C. 2254, that that kind of remedy in the Federal district court was available, at least until the court pronounced this rule in July 1976.

So the Supreme Court then, by legislating, and legislating not, as Justice Holmes said so well, when the Supreme Court legislates, they should do so only interstitially, in the gaps—he said in *Southern Pacific R.R.* v. *Jensen* that they are limited "from molar to molecular motions." But this was a rather large piece of legislation on the part of the Supreme Court, and I think they have created a tremendous problem that Congress has to solve in some reasonable way.

Second, it seems that the decision in this case left this respondent without any Federal review of his claim, either in district court, circuit court of appeals, or the United States Court of Appeals, or the United States Supreme Court.

Two Federal courts had passed without dissent on his claim and found it valid. Those decisions were erased by the Supreme Court in a simple reversal, and when the Supreme Court announced that it was the only court that should have been petitioned directly to solve the problem on direct review, they refused to do it, either in the case itself

or in an out-of-time petition for certiorari which we filed subsequent to their decision; it left the Supreme Court of Nebraska in the position of being able to announce a rule frankly at war with everything in the fourth amendment and previous decisions of the Supreme Court. I say that because both in *State* v. *Dussault*, 225 N.W. 2d 558 (1975)—I allude to that in the prepared remarks before the subcommittee—and *State* v. *Graves*, 229 N.W. 2d 538 (1975), in the year 1975 the Supreme Court of Nebraska announced that the rule henceforth in the State of Nebraska would be, "We now expressly hold that at a hearing on a motion to suppress, the contents of the affidavit for arrest or search may be supplemented by additional information proved to have been known by the police at the time the affidavit was made and the warrant issued, but not set forth in the affidavit." *Dussault*, *supra*, at 562.

Nebraska now holds that at the time of a motion to suppress evidence may be introduced to make the showing of probable cause that the magistrate should have made when the application for a search warrant was made before him. All the Supreme Court law says that the magistrate must make such a prior determination, the fourth amendment says that "no warrants shall issue, but upon probable cause, supported by oath or affirmation." The Supreme Court of Nebraska has defied that, and the Supreme Court of the United States has allowed Nebraska to maintain that position by refusing in this case to allow Federal courts to review that claim. Now, if that fosters respect for the law and the administration of justice, I cannot understand how it does. In this particular case we are going to have to go back now, since the fourth amendment claim is devalued, and relitigate the case in terms of other amendments that may currently find favor with the Supreme Court. One argument made in *Stone* v. *Powell* was that the cost to society to enforce the exclusionary rule, this long after the initial search and the initial trial of it in the State court, the cost to society, the Supreme Court said, would be too great.

Well, the cost to society is going to be greater in this and subsequent cases if successive petitions are required in order to vindicate constitutional rights; and so, as Judge Hufstedler said so well, I would like to see some sort of cost/benefit analysis of this unquestioned assumption on the part of the Supreme Court.

In this case, then, the Supreme Court set up an obvious demarcation between fourth amendment rights and other constitutional rights, and yet there is not a single word in the legislative history of the habeas corpus legislation that Congress has passed that one right should be valued any more highly than another.

When Judge Hufstedler spoke before of setting priorities for bankruptcy over other kinds of constitutional claims or legal claims, she said that it is difficult to say what is going to order those priorities. I strongly urge this subcommittee to pass legislation establishing clearly that there are no second-class constitutional rights, fourth amendment, or any other amendment.

Finally, the decision in this case, as I have said, robbed the respondent of any Federal review of his constitutional claim, and it was then made retroactively applicable to a choice counsel made back in 1972 to go to the Federal district court to have a hearing which

was conducted carefully, painstakingly, by Judge Urbom, and then reviewed painstakingly by the Eighth Circuit Court of Appeals. All of that work was set at naught in order to achieve what Senator Nelson referred to as some sort of promise that the caseload in Federal courts would be reduced in some way. I question the assumption that the caseload will be reduced for Senator Nelson put it well I think, when he said, "The remedy must come from Congress, and not from the court, in the guise of decisions on the merits."

What can Congress do in the face of an increased caseload in the Federal courts? It would be fatuous on my part to say that there isn't an increased caseload, and you must be concerned, as is the judiciary, with the resources that they presently have available.

I would advocate a number of things which I did in the remarks that I placed before the subcommittee.

I cannot believe that society will be the winner, though, by reducing caseloads at the cost of curtailing such things as class actions. I think that the task falls to Congress to pass legislation that takes into account not only increased caseloads, but also protects the poor and insures State prisoners of their right to a Federal forum to vindicate the Federal constitutional claim when a State supreme court has turned its back on Federal constitutional law for the Supreme Court, which says that they could and should conduct the review directly from the State supreme court, is too busy now to handle the matters before it and is calling for a national court of appeals.

I think that the legislative measures introduced and pending before this subcommittee for consideration and before the House, especially those dealing with enlarging and increasing civil and criminal jurisdiction of United States magistrates, would be especially helpful in freeing Federal district court judges to deal with larger constitutional claims.

If Congressman Drinan has a problem with the constitutionality of the magistrates dealing with certain kinds of claims, I think that when consent is required of the petitioner before the court to submit the matter to a magistrate, that that takes care of the problem.

The Supreme Court said in *Faretta* v. *California*, 422 U.S. 806 (1975), that because a prisoner has a constitutional right to the assistance of counsel guaranteed by the sixth amendment, it does not mean that he does not also have a right to waive that and represent himself if he sees fit. Otherwise, you run counter to what Justice Frankfurter said in *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, where he said, to hold otherwise would be "to imprison a man in his privileges and call it the Constitution." (*Id.*, 280.)

If a person makes a knowing and intelligent waiver of a constitutional right to an article III judge, then I think he should be allowed to do that. I say this from experience because I represented a person in a rather routine postal theft before a new magistrate in San Francisco. He was kind, cordial, capable, and really, I think, achieved a completely just result for our client, and he did that, I think, and at the same time made it possible for the Federal judge and the Federal judges in that district to be freer to handle larger, more complex matters. We didn't have to use judicial overkill to handle a rather simple misdemeanor or petty offense.

I think, too, that H.R. 7241, which provides for the defense of Federal judges when they are sued in their official capacity, would be an enormous help to Federal judges. I represented Judge Miles Lord one time in Minnesota and it was my privilege to do so at no cost or compensation. I considered it a privilege to do that, and I did that because he was then being sued by the Justice Department in a petition for mandamus to revoke a bail that he had made. I think, too, from having worked for a Federal judge back in the sixties, that oftentimes when they are sued it is rather difficult to go with your hat in your hand looking for counsel. Something like this, I think, would give Federal judges generally more of a sense that they were being protected and cared for at the same time that they are trying to dispose of a rather heavy caseload.

Again, I advert to the remarks—they are in the Congressional Record for April 20, 1977, and they run from pages 6025 to 6041—of Senator Nelson when he introduced the bill, which I say is comparable to the bill introduced by you, Mr. Kastenmeier, to restore Federal habeas corpus to State prisoners; he made clear at that time that he saw problems for Federal judicial caseloads and congestion in courts and he said at that time:

> We need to create additional judgeships; pay Federal judges salaries needed to attract and keep our finest lawyers on the bench; and we have to reduce or eliminate diversity of citizenship as a basis for Federal jurisdiction.

I would concur with that.

And, again, I focus more attention on the impact that our legislature will have on the operation of the courts.

Those were some of the things that he urged, but he was careful to say, and I would echo that, that all of these things to alleviate problems in access to justice, to improve the services, the number of Federal judges, and at all levels, is not something that should be achieved apart from guaranteeing access for State prisoners that Congress has given in 280 U.S.C. 2254. In other words, what I am saying is, it is not a fallback position. After this is done, then we should take care of the writ of habeas corpus. We should restore it in reality to State court prisoners. We should do that, and I think quickly. Congress should do that quickly and they should do that before we create more judgeships or magistracies or article III bankruptcy judges, because it seems to me that without some sort of concern like that, we have just made certain second-class citizens of State prisoners and taken from them the traditional remedy of habeas corpus.

Those are some of the things that I would like to focus on, and I really welcome the piece of legislation that you put before the House making real again the remedy of habeas corpus for State court prisoners, to guarantee that Congress can set the jurisdiction of lower Federal courts, and that Congress when they enacted 28 U.S.C. 2254 really meant what it said. They meant to give a Federal forum to State court prisoners to review Federal constitutional claims. I know of no other way to guarantee the supremacy of the Federal law.

Mr. KASTENMEIER. Thank you. Father Cunningham.

I would like to yield to my colleague.

Mr. DANIELSON. I have no questions.

I wish to thank you though for a very wide-ranging and very informative presentation. It will be of great value to have in the provision we have before us.

Father CUNNINGHAM. Thank you.

Mr. KASTENMEIER. I have just a couple of questions.

Several of our witnesses appearing today or in preceding sessions on the general question of access to justice and other methods of improving the judiciary, stated that enlarging and increasing civil and criminal jurisdiction of the Federal magistrates, within their view, dilutes the quality of justice rendered by Federal courts.

From your statements, I take it you do not agree with that?

Father CUNNINGHAM. I was torn when I heard that exchange, and when Congressman Drinan asked the question and when it was reiterated by other members of the subcommittee; I thought to myself, would I hold out for an article III judge or would I accept a magistrate to give me a hearing on what I thought was a rather simple question solved admirably by Judge Urbom, and by the Eighth Circuit Court without dissent? I don't know of a magistrate in the United States that could have missed a ruling like this, and so given the fact that no Federal forum is available now, unless a Federal judge is very ingenious in reading *Stone* v. *Powell*—as some have been, saying, well, they didn't litigate whether there was an opportunity for a full and fair hearing, so despite *Stone* v. *Powell*, we will have a go at it—there have been a few circuits that have done that, including the second circuit—and given the fact that a claim has to be presented together with so many other claims to the Supreme Court on direct review, I think I would take the option of going to the magistrate because I think they are equipped to hold some sort of factual hearing.

I don't really know what will happen once the Supreme Court accepts a case on direct review, if they find that an evidentiary hearing is necessary. How is the Supreme Court going to hold a hearing? What will they do? Will they send it back to the Federal Court? There will be, almost inescapably, a duplication of effort. They take it on direct review and find out that they have to have an evidentiary hearing, and so they send it back to the Federal district court where Congress said it could begin in the first place. In fact, given the fact that there is no Federal forum available except the Supreme Court on direct review and the option of going to a U.S. magistrate, I would take going to a U.S. magistrate.

Mr. KASTENMEIER. Another question: I realize as every member of the subcommittee does that the rights of prisoners really are often unrepresented because of the nature of their incarceration, this large group of individuals often has important claims, but their pleas go unheeded. It is in this regard that your own personal commitment to aid members of this group is laudable. It is my impression, however, although you criticize the Burger Court, that this court has in many instances recognized that inmates possess substantive rights that were unrecognized by the previous Warren Court.

As a matter of fact, isn't that correct?

Father CUNNINGHAM. In some areas, yes, with regard to access to the press and things like that; but in this specific decision, for example, the Supreme Court in the opinion written for the court by Justice

Powell did not even mention 28 United States Code, section 2254, did not even mention that after the parties had been told to brief and argue whether or not the claim is cognizable under 28 United States Code, section 2254. It was decided on constitutional grounds; and I don't see a concern for the poor and for the prisoners there. In fact, it took away a Federal forum from the group that you said so well has no voice. It was for that reason that Senator Nelson in making his remarks on the legislation to overrule *Stone* v. *Powell* said, here the court abandoned its traditional role that was delineated in that famous fourth footnote in *Carolene Products*, that when there is a discrete and insular minority that lacks any voice in our society, it is that kind of claim that the court should come to assist. Here I find far from that.

That class, that discrete and insular minority, were not spoken for by the court at all, and Congress said more for that class when they granted them in 28 United States Code section 2254 the right to go to a Federal forum. So, quite simply, I think you have shown more of a solicitude than the courts have for prisoners and you have been more of a voice for them, and I would be less than honest if I said that I thought that there was any ringing voice in the present Burger Court for those discrete and insular minorities, especially prisoners.

Mr. KASTENMEIER. Not precisely in the context of these hearings but we have had hearings on a collateral matter which is somewhat similar, H.R. 2439, that is to say, the civil rights of institutionalized persons generally as a class, whether these are prisoners, whether these are the mentally retarded, the insane, the elderly, juveniles, all the people in this country who have lost their freedom.

There have been very grave problems raised in courts which have considered the claims of institutionalized persons. Some judges have taken upon themselves enormous burdens to try to rectify the unlawful situations; they have made decisions which perhaps could be called courageous.

I take it you are equally interested in such legislation?

Father CUNNINGHAM. Indeed. Counsel for the committee described to me that kind of legislation and although I have not read the provisions of that bill, I think that that would be an admirable and economic use of the court's time to deal with a class of litigants to remedy a problem for, again, a discrete and insular minority group, by addressing itself to a particular problem.

It seems to me if one gave the Attorney General the right to bring a suit on behalf of a class like that, it would hopefully vindicate the claims of many without subjecting them to the repetitious suits on the same point in different districts. I think that would be fine.

Mr. KASTENMEIER. Father Cunningham, we thank you for your statement here this morning and we wish you a pleasant trip back.

Father CUNNINGHAM. Thank you.

Mr. KASTENMEIER. The committee is adjourned.

[Whereupon, at 1:15 p.m. the subcommittee was adjourned.]

STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

THURSDAY, JULY 28, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE
ADMINISTRATION OF JUSTICE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Railsback, and Butler.

Also present: Michael J. Remington, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning we are pleased to continue our hearings on the subject of the State of the Judiciary and Access to Justice.

I am very happy to introduce Hon. Robert J. Sheran, Chief Justice of the Supreme Court, State of Minnesota.

Chief Justice Sheran has served in that capacity since 1973. Prior to becoming Chief Justice of the Minnesota Supreme Court, he was Associate Justice on the same court. Chief Justice Sheran has been active in the American Law Institute and the American Bar Association, and he is currently the chairman of the Committee on Federal-State Relations of the Conference of Chief Justices.

This morning we are very pleased to greet Justice Sheran.

Justice Sheran, we have your statement. It is not a long statement, sir, and you may proceed from it if you wish, or in any other form.

TESTIMONY OF HON. ROBERT J. SHERAN, CHIEF JUSTICE OF THE SUPREME COURT, STATE OF MINNESOTA, AND CHAIRMAN OF THE FEDERAL-STATE RELATIONS COMMITTEE OF THE CONFERENCE OF CHIEF JUSTICES

Judge SHERAN. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, with your permission I would like to cover the material that is contained in the written statement. I may add some comments to it, and I would be glad to respond to any questions that the chairman or the members of the committee might have with respect to the statements that are being made.

Mr. KASTENMEIER. To the extent that you interrelate on the statement, for the reporter's purposes, we will introduce your statement in its entirety, and your other statements can run alongside or can be substituted therefor.

Judge SHERAN. Thank you.

[The prepared statement of Hon. Robert J. Sheran follows:]

STATEMENT OF ROBERT J. SHERAN, CHIEF JUSTICE OF THE SUPREME COURT, STATE OF MINNESOTA AND CHAIRMAN OF THE FEDERAL-STATE RELATIONS COMMITTEE OF THE CONFERENCE OF CHIEF JUSTICES

Mr. Chairman and Members of the Subcommittee. As Chief Justice of the State of Minnesota and Chairman of the Federal-State Judiciary Committee of the Conference of Chief Justices, I consider it a privilege to appear before this subcommittee of the House Judiciary Committee to express the view of a State court judge on the subject: "The State of the Judiciary and Access to Justice."

I speak from the viewpoint of a State judge. My views are conditioned by commitment to this provision of the Constitution of the State of Minnesota (art. 1, § 8):

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

From the perspective of those who supply judicial services, we have in this country two separate and independent systems—the one Federal, the other State. The members of this committee are acutely aware that the primary responsibility for the support and development of the Federal judicial system rests with the United States Congress. As the chief justice of a State court system, I know that the comparable responsibility for the support and development of the state courts falls upon the legislatures of the respective States.

But from the standpoint of the citizen-user, the distinction between Federal and State courts carries no real meaning. He knows that he has a legal problem which must be solved, sometimes by proceedings in court. Whether access to justice is by way of a Federal court or a State court is, to him, immaterial. If he is a defendant in a criminal case, he is entitled to and expects a fair and speedy trial in one court system or the other. To an individual who sues or is sued for damages or other civil relief, it is important that a judicial tribunal be available where his problem can receive expeditious and skilled attention. Whether such a court is supervised by a Federal judge or a State judge makes no difference to the litigants.

It is axiomatic that access to the courts is sometimes made difficult by the congestion caused by ever-increasing demands for assistance in the resolution of disputes. We know that the business of the courts has greatly increased as a result of changes in our national life. Two hundred years ago the United States was made up of 13 colonies with about 3 million people engaged in an essentially agrarian economy. Today, our population is well in excess of 200 million, and the increasing complexities of an industrial society have brought more than a corresponding increase in the number of conflicts and controversies which our courts are called upon to decide. Especially during the last 20 or 30 years, citizens have become alert to and insistent upon asserting the conviction that the Declaration of Independence meant what it said in declaring that all men are created equal and endowed equally with the inalienable rights of life, liberty, and the pursuit of happiness.

In my judgment, these changes constitute progress and are all to the good. But we must deal effectively with the mass of litigation now reaching the courts. If we do not provide a forum for the rational solution of these controversies, alternative methods of dispute resolution may be found. And the most tempting alternatives—self-help or a more authoritarian system—are unacceptable in a civilized and democratic society.

The increasing caseload problem is particularly acute in the Federal system. Federal district court filings have increased over 100 percent since 1960. The increase in appealed cases in the federal system has been even more dramatic.

The statistics and personal observations have convinced me that the federal courts desperately need relief.

The trends and circumstances which produced a doubling of the Federal case load in 15 years persist and may accelerate. For example, Federal-question cases now represent about 45 percent of the total civil filings in the Federal district courts. Every year, many new Federal laws and regulations are enacted, and justifiably so, at least to the extent that the problems addressed can more effectively be dealt with on a national rather than a local basis. But new Federal law generates more Federal-question litigation. The truth of this statement finds support in these statistics: In 1960 there were some 13,000 Federal-question cases: by 1975, the number had reached 52,000. This is a trend which will continue for the foreseeable future, I believe, notwithstanding the legitimate concerns and prudent admonitions which have been expressed on the subject.

Although antitrust litigation accounts for only 1.2 percent of the civil filings, the complexity of these cases adds greatly to the over-all burden. Because there is a broad public consensus that competition serves the public interest and should be stimulated, the likelihood is that antitrust litigation will increase rather than decrease in the years ahead. The same considerations apply to the environmental cases now reaching the Federal courts in increasing numbers.

Civil rights cases and prisoners' petitions together account for about 25 percent of the Federal filings. Of these, almost half are habeas corpus proceedings following criminal convictions in the State courts. Because the decisions of the U.S. Supreme Court upon which these petitions are based have come to be accepted as sound in principle, it is unlikely that such appeals for postconviction relief will diminish.

Federal diversity-jurisdiction cases account for 26 percent of the civil filings in Federal district court. Since the free and extensive movement of goods, services, and people among the states is a fact of life in the 20th century, we must anticipate that cases pitting citizens of one State against citizens of another will continue, and perhaps multiply.

One "logical" solution to the problem would be to increase the number of Federal judges to make it possible for them to handle the work coming into the courts. Legislation is making its way through Congress which represents movement in this direction. But even when enacted, this legislation may not provide a sufficient number of additional judges to enable the Federal courts to deal with their present and projected case-load problem.

If the logical solution to the Federal caseload problem is not fully attainable, other measures must be taken if our citizens are to have adequate access to our courts.

An alternative or complement to increased judicial manpower is the diversion of cases to forums other than the Federal courts. Diverted cases might be resolved by judicial or nonjudicial means. Arbitration, mediation, and conciliation, for example, are nonjudicial methods of dispute resolution which have enjoyed greatly increased usage in recent years. This is a trend which should be encouraged in appropriate types of cases. But we cannot realistically expect nonjudicial methods of dispute resolution to siphon off more than a small percentage of the cases which will reach Federal courts. If substantial assistance is to be provided, it probably must come from the State courts.

To what extent are the State courts to be in a position to help? State courts, too, have experienced increasing demands upon their facilities. The rate of case-load growth in the Federal courts over the last 15 years figures out to about a 7-percent annual increase. The rate of increase seems, however, to be progressive. The comparable rate of growth in the State courts of Minnesota, Kansas, and Iowa figures to 3 to 4 percent annually. But in more populated and industrial States, such as Ohio and Michigan, the average annual rate of growth has been 7 to 8 percent.

These statistics give us reason to pause, but I nonetheless believe that the State court system could satisfactorily assimilate and handle a fairly large proportion of the cases now heard in Federal district court. The number of State court judges of general jurisdiction available to assume the additional work amounts to a sizable figure. In Minnesota, for example, we have four Federal district court judges and one senior Federal district judge available for the trial of cases. But there are 72 State district court judges, 31 of whom sit in the Minneapolis-St. Paul area. And under the Minnesota Reorganization Act of 1977, it will be possible to employ the services of an additional 100 or more county court and municipal court judges to handle trial work in courts of general jurisdiction.

My conviction is this: If there is litigation now being handled in the Federal Courts which could be handled as well, or almost as well, in the State court system, then it would be better in the long run for the State judges to hear the cases. For the first 100 years of our national history, State courts heard cases involving questions of Federal law. It was not until 1876 that this category of cases was moved to the Federal system. Federal-question cases could be moved back to the State courts again, in whole or in part.

Diversity jurisdiction, on the other hand, has always been exercised by the Federal courts, on the premise, originally true, that the State courts might not deal fairly with the parties who were "foreigners." Whatever the historical reasons for the rule, exclusive Federal diversity jurisdiction is not currently justified by either pragmatic or logical reasons. These cases should be left to the States. The State courts would be as able to handle cases where diversity exists as they are able to handle the many cases now coming before them where the subject matter is almost identical but where the cases are not eligible for Federal court treatment on diversity grounds. The assumption that State court systems are prejudiced and provincial and that Federal courts are needed to protect nonresidents from unfair treatment cannot be justified generally. The extension of the jurisdiction of State courts over nonresidents resulting from State and Federal interpretation of State long-arm statutes has already brought a significant number of diversity cases to the State court systems where the amount involved is less than $10,000; and the litigants are being treated fairly without regard to whether they are or are not residents of the forum State.

It has been suggested that the shift of diversity cases from Federal to State court should be limited to situations where the plaintiff is a resident of the forum State, and that the minimum amount in controversy should be increased from $10.000 to $25,000. To my mind, the reasons which support this modification of Federal diversity jurisdiction support with equal validity the transfer of all Federal diversity jurisdiction to State courts.

Diversity jurisdiction now entertained by the Federal courts where the amount in controversy exceeds $10,000 should be returned to the states, as recommended by such authorities on judicial administration as Chief Justice Warren E. Burger, who, in his 1977 report to the American Bar Association at Seattle, said:

> "* * * I would strongly urge that Congress totally eliminate diversity of citizenship cases from the Federal courts. * * * I urge you to give full support to the elimination of diversity jurisdiction from the Federal courts without further delay."

The change recommended by Chief Justice Burger would transfer nearly one-fourth of the filings from the four Federal district judges in Minnesota and spread them among about 200 State judges. I believe that the trial courts of Minnesota are prepared to accept responsibility for this litigation which is naturally within the area of their competence, and join in urging that diversity jurisdiction be transferred to the State courts. I believe other States are similarly situated.

In the other areas where the burdens of our Federal courts are increasing, the possibility of assistance from the State courts may be more limited. It is doubtful that the State courts are as capable as are the Federal courts in dealing with complicated antitrust and environmental litigation having multistate impact. Federal judges, appointed for life, are probably best able to deal with civil rights problems, particularly in cases where the constitutional right asserted is one for which there is little or no local sympathy. However, in the last few years, decisions of the final appellate courts in many of our states have given proof of a willingness to accept political risk in defense of the rights of the individual. The national implications of many labor disputes, likewise, seem to justify Federal preemption in this area.

Finally, the Federal caseload problem could be significantly improved if Federal district court habeas corpus review of State court convictions could be made unnecessary. I do not mean to suggest that we turn back the clock to a pre-*Gideon* v. *Wainwright* era. On the contrary, I applaud the *Gideon* decision and *Fay* v. *Nola* and the other United States Supreme Court decisions which have broadened the scope of the due process clause of the Fourteenth Amendment so as to extend the protections of the Federal Bill of Rights to persons accused of crimes in State court proceedings.

Nonetheless, Federal district court habeas corpus review of State court convictions is a high-volume, time-consuming and essentially duplicative endeavor

which could be made unnecessary. The best way to eliminate this duplication of effort is to establish in the State criminal procedures which satisfy fully all Federal constitutional requirements. Appellate and postconviction review of these cases can then be handled at the State level, permitting the Federal courts to accept the State court dispositions without repetition of the process of review. Such is the present state of affairs in Minnesota, and similar results can be achieved in all other State jurisdictions.

The suggestion has been made in testimony before this subcommittee that State courts are not as alert to the necessity of protecting the constitutional rights of defendants in criminal cases as are the Federal courts. Our experience in Minnesota is to the contrary. The Federal district courts in our State and our circuit court of appeals have, for practical purposes, no occasion to review the trial of criminal cases in our State courts. The reason for this is that from the time the March 18, 1963, decisions of the United States Supreme Court were announced we have made it our business to assure that the constitutional rights, both State and Federal, of defendants tried in our criminal court system are fully protected.

The specific methods employed to assure the soundness of our convictions in criminal cases include these:

(1) Statutory provision for counsel in all criminal cases involving imprisonment, regardless of demand or waiver;

(2) A routine pretrial hearing, actively directed by the trial judge, the purpose of which is to surface all claims of constitutional infringement;

(3) A transcript of the trial court proceedings at public expense, without technical requirements to prove indigency;

(4) Automatic postconviction review, unimpeded by time limitations or procedural niceties;

(5) Routine review of all criminal convictions, where the defendant has been sentenced to imprisonment, by the Supreme Court of Minnesota, with remand readily available where claims of constitutional infringement are made on appeal but were not presented to or considered by the trial court.

Our experience has told us that a State court system which is determined to avoid infringement of federally protected constitutional rights can accomplish this objective without imposing upon the Federal court system for help.

The relief which will thus be given to the Federal courts will, to be sure, increase the burdens of our State courts. But additional expenses incurred as a result should be, and I think will be, shared by the Federal government. The method by which this objective is to be accomplished is now being carefully analyzed by both Federal and State entities for ultimate decision. These comments on current developments in this area:

It is imperative that the State court systems maintain their identity and independence. I am confident that our State courts and our State court judges will do everything feasible to make the judicial system as a whole acceptable to as many of our citizens as possible and will be willing to integrate their efforts in any reasonable way with that of the Federal court system. But this assumes allocation of responsibility on terms which are neither demeaning nor intrusive. Federal funding or revenue sharing must be looked upon as a means of adding strength to the State judicial systems and not as a method for extending Federal authority to areas better managed on a State or local basis. The preservation of the independence of the State judicial systems is, I believe, the imperative which must undergird all joint efforts to deal with common problems relating to access to the courts.

If it can be assumed that the employment of Federal funds for the improvement of judicial services in the States can be accomplished without impingement upon the independence of the State judiciary, the question becomes one of the form and method by which this is to be accomplished.

In analyzing the problem it is important to keep in mind that the funding requirements of the State court systems fall into two general categories:

(1) The support and maintenance of institutions, such as the National Center for State Courts and the National College of the State Judiciary, which operate on a national level in providing service and assistance to the court systems of the several States; and

(2) The funding of activities directed by the several State court systems, either statewide or in localized areas.

CONTINUED

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As of now, the principal source of Federal funding for the needs of State courts is the Law Enforcement Assistance Administration. The State court systems have been strengthened by block and discretionary grants received through the LEAA, particularly in the development of improved methods of court administration. Prior to 1976, the judicial systems of many of the States felt handicapped in applying for LEAA funds by being placed in competition with the apprehension and corrections agencies in their respective States. The restraints upon the judiciary, both traditional and ethical, make it difficult for judges to engage freely in this kind of competition. The result was that in many of the States the share of LEAA funds employed for the improvement of the judiciary was insignificant or disproportionate. Amendments to the Safe Streets Act adopted in 1976 by the Congress seek to alleviate this situation by establishing a priority for funding of judicial branch programs; for judicial participation on State planning agencies; and for the establishment of judicial planning agencies whose recommendation for the disbursement of funds allocated to the judiciary were to be, except in rare instances, binding on the planning agencies in the several States. These reassuring steps taken by the Congress in 1976, however, seem to be jeopardized currently by reductions in the budget of the LEAA for 1977–78 which may fall more heavily on the judiciary than on any other of the elements involved in law enforcement.

A further limitation upon the effectiveness of LEAA funding so far as the State court systems are concerned is the limitation which has been placed upon the use of such funds within the States by the requirement that the funds be employed for the improvement of "criminal justice." Justice—including criminal justice—in the State court systems can be best achieved if the entire system is strengthened, including the components which are employed in the trial of criminal cases.

Even more important, the funds made available through LEAA for national projects affecting State court programs—such as the National Center for State Courts—should continue until some adequate substitute provisions for support of these institutions has been achieved. The National Center for State Courts, soon to be centered at Williamsburg, Virginia and the National College of the State Judiciary in Reno, Nevada, have provided the perspective and much of the initiative which has made the dramatic improvement in our State court systems in recent years possible. This could not have been accomplished without Federal funding through the LEAA; and the preservation of these institutions with the assistance of Federal funding is of paramount importance to the State court systems, which have benefited so significantly from their existence.

We are informed that changes in the structure of the LEAA are in the making. This being the case, there are certain principles or approaches which, it seems to me, are of the utmost importance from the standpoint of our State judicial systems:

(1) The National Center for State Courts and the National College of the State Judiciary should receive priority attention, at least until the states are able to assume financial responsibility for these essential undertakings;

(2) Whether in the form of block grants or revenue sharing, Federal financial support for State judicial systems should be assured;

(3) The deployment of Federal funds for the improvement of State judicial systems on a statewide or local-area basis should be determined entirely or in significant part by those charged with the responsibility for the operation of the judicial system in each of the several States;

(4) The employment of a national entity such as the National Institute of Justice to direct and monitor the allocation and use of Federal funds by State court systems should be structured in such a way that the State judicial systems will have a participating voice in the formulation of plans and policies.

VIII.

While the employment of Federal funds to assist in the improvement of State judicial systems is important, it is but one of many facets of the problems of coordinating the State and Federal judicial systems to increase the accessibility of justice in our courts. Other illustrations are: The efforts which are currently under way to coordinate Federal and State rules of criminal procedure; the Consumers Controversies Resolution Act; Federal programs with respect to the treatment of juveniles; the employment of Federal resources to control the use

and traffic in drugs; the employment of the services of expert mediators for complicated disputes—these are matters which are and in the future will increasingly become matters of joint concern to the Federal government and the judicial systems of the several States. The belief is that the State court systems through the Conference of Chief Justices should establish communication with the significant committees of Congress so that you will have access to our views in formulating Federal legislation which has impact on the operation of the State court systems. The fact that you have invited me to be here today on behalf of the Conference of Chief Justices is an appreciated step forward in achieving this goal. My hope is that we will be able to continue these methods of communication on a regular and well-defined basis in the future.

In summary, I believe:

(1) Every citizen should have access to our court systems as the r[illegible]ate forum for the resolution of unavoidable disputes and the protector[illegible]stitutional rights.

(2) The demand for access to our court systems in this country can be expected to increase significantly in the years ahead—a demand which will be implemented by plans for prepaid legal insurance and other methods of making legal services more generally available.

(3) Efforts to divert, where appropriate, the processes of dispute resolution from the Federal and State court systems are to be encouraged and accelerated, but such diversion is only a partial answer to the problem.

(4) Notwithstanding reasonable expectations of dispute diversion, it can be expected that our Federal court system will continue to be overburdened unless a significant part of the jurisdiction presently exercised by the Federal courts is assigned to our State court systems.

(5) Our State court systems are able and, I hope, willing to provide needed relief to the Federal court system in such areas as:

(a) More complete review of State court criminal proceedings to assure that federally defined constitutional rights have been fully protected;

(b) Increased participation in the resolution of Federal-question cases;

(c) The assumption of all or part of the diversity jurisdiction presently exercised by the Federal courts.

(6) The State court systems will be able to carry an increased share of the judicial burden, to the extent that their progress is adequately funded in part from Federal resources.

(7) Increased communication between congressional committees considering legislation affecting State courts and such entities as the Conference of Chief Justices will be useful.

(8) The constitutional structures and procedures by which Federal funds can appropriately be used to achieve national goals in the delivery of justice while respecting the independence of the State judicial system require further study, but difference of opinion as to the method of achievement of the goals should not obscure the importance and necessity of Federal-State cooperation in improving the administration of justice in all of our courts.

Judge SHERAN. Mr. Chairman and members of the subcommittee, as Chief Justice of the State of Minnesota and Chairman of the Federal-State Judiciary Committee of the Conference of Chief Justices, I consider it a privilege to appear before this subcommittee of the House Judiciary Committee to express the views of a State court judge on the subject: "The State of the Judiciary and Access to Justice."

I speak from the viewpoint of a State judge. My views are conditioned by deep commitment to this provision of the constitution of the State of Minnesota (art. 1, sec. 8):

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

To me, it is interesting that this same concept is contained in the Constitution of many of our States. The presence of this provision in State constitutions suggests that the concern that State courts would

not be as sensitive as are Federal courts to the problems of protecting constitutional rights may not be wholly accurate.

From the perspective of those who supply judicial services, we have in this country two separate and independent systems, the one Federal, the other State. The members of this committee are acutely aware that the primary responsibility for the support and development of the Federal judicial system rests with the U.S. Congress. As the chief justice of a State court system, I know that the comparable responsibility for the support and development of the State courts falls upon the legislatures of the respective States.

From the standpoint of the citizen-user, from the standpoint of the person who has a problem that is to be dealt with in a court system, the distinction between Federal and State courts carries no real meaning. He knows that he has a legal problem which must be solved, sometimes by proceedings in court. Whether access to justice is by way of a Federal court or a State court is, to him, immaterial. If he is a defendant in a criminal case, he is entitled to and expects a fair and speedy trial in one court system or the other.

To an individual who sues or is sued for damages or other civil relief, it is important that a judicial tribunal be available where his problem can receive expeditious and skilled attention. Whether such a court is supervised by a Federal judge or a State judge makes no difference to the litigants.

I realize that from the standpoint of the practicing lawyers, there are sometimes advantages in localized situations for dealing with a problem in a Federal court, depending on the circumstances peculiar to the area. But this approach to the problem is irrelevant to the considerations that should move the Congress and the Conference of Chief Justices to whatever judgment we ultimately accept.

It is axiomatic that access to the courts is sometimes made difficult by the congestion caused by ever-increasing demands for assistance in the resolution of disputes. We know that the business of the courts has greatly increased as a result of changes in our national life. Two hundred years ago the United States was made up of 13 Colonies with about 3 million people engaged in an essentially agrarian economy.

Today, our population is well in excess of 200 million, and the increasing complexities of an industrial society have brought more than a corresponding increase in the number of conflicts and controversies which our courts are called upon to decide. Especially during the last 20 to 30 years, citizens have become alert to and insistent upon asserting the conviction that the Declaration of Independence meant what it said in declaring that all men are created equal and endowed equally with the inalienable rights of life, liberty, and the pursuit of happiness.

In my judgment, these changes constitute progress and are all to the good. But we must deal effectively with the mass of litigation now reaching the courts. If we do not provide a forum for the rational solution of these controversies, alternative methods of dispute resolution may be found. And the most tempting alternatives—self-help or a more authoritarian system—are unacceptable in a civilized and democratic society.

The increasing caseload problem is particularly acute in the Federal system. Federal district court filings have increased over 100 percent

since 1960. The increase in appealed cases in the Federal system, as you know, has been even more dramatic. The statistics and personal observations have convinced me that the Federal courts desperately need relief. Although I am presently serving as chief justice of Minnesota, my background of experience is primarily in the trial courts; for about 20 years as a trial lawyer active more in State courts than in the Federal court, and then, for approximately 4 years (between my service as associate justice of the Minnesota Supreme Court and my present responsibilities, while practicing law in Minneapolis, Minn.) almost exclusively in the Federal courts. In addition to the statistics that are readily available, my conviction that the Federal courts are overburdened in the areas where I have direct knowledge is supported by personal experience.

The trends and circumstances which produced a doubling of the Federal caseload in 15 years persist and indeed may accelerate. For example, Federal-question cases now represent about 45 percent of the total civil filings in the Federal district courts. Every year many new Federal laws and regulations are enacted, and in my judgment, justifiably so, at least to the extent that the problems addressed can more effectively be dealt with on a national rather than a local basis. But new Federal law generates more Federal-question litigation.

The truth of this statment finds support in these statistics: In 1960 there were some 13,000 Federal-question cases; by 1975 the number had reached 52,000. This is a trend which will continue for the foreseeable future, I believe, notwithstanding the legitimate concerns and prudent admonitions which have been expressed on the subject.

Although antitrust litigation accounts for only 1.2 percent of the civil filings, the complexity of these cases adds greatly to the overall burden. Because there is a broad public consensus that competition serves the public interest and should be stimulated, the likelihood is that antitrust litigation will increase rather than decrease in the years ahead.

The same considerations apply to the environmental cases now reaching the Federal courts in increasing numbers. By the very nature of an environmental case, the factual issues are extremely technical and complex; the litigation is important; it has great impact on individuals and groups of individuals, even States. The Federal courts and other courts will be called upon increasingly to deal with these problems.

Civil rights cases and prisoners' petitions together account for about 25 percent of the Federal filings. Of these, almost half are habeas corpus proceedings following criminal convictions in the State courts. Because the decisions of the U.S. Supreme Court upon which these petitions are based have come to be accepted as sound in principle, it is unlikely that such appeals for postconviction relief will diminish.

Federal diversity-jurisdiction cases account for 26 percent of the civil filings in Federal district court. Since the free and extensive movement of goods, services, and people among the States is a fact of life in the 20th century, we must anticipate that cases pitting citizens of one State against citizens of another will continue, and, in my judgment, multiply.

One logical solution to the problem would be to increase the number of Federal judges to make it possible for them to handle the work

coming into the courts. Legislation is making its way through Congress which represents movement in this direction, as I am sure you are aware. But even when enacted, this legislation may not provide a sufficient number of additional judges to enable the Federal courts to deal with their present and projected caseload problem.

If the logical solution to the Federal caseload problem is not fully attainable, other measures must be taken if our citizens are to have adequate access to our courts.

An alternative or complement to increased judicial manpower is the diversion of cases to forums other than the Federal courts. Methods of dispute resolution, such as mediation, arbitration, conciliation, should receive and are receiving support and impetus. But no matter what we do in those areas, my impression is that the litigation which must be handled in court systems, either Federal or State, will continue to increase in the future.

Coming now to the area with respect to which, as a chief justice of a State court system and responsible for its administration, I feel I may have some points of view to offer, which will be of interest to you.

To what extent are the State courts to be in a position to help? State courts, too, have experienced increasing demands upon their facilities, although the process acceleration is perhaps more in the Federal system than in the State system.

I am aware, too, that in some of our States, the State court systems haven't been able to deal effectively with their backlog problems. But we are entitled to assume that the condition of the State court systems will be measured by that which prevails in the great majority of the States, rather than by the exceptional case where backlogs run as far as 5 years. So, while the statistics give us reason to pause, I nonetheless believe that the State court system could satisfactorily assimilate and handle a fairly large proportion of the cases now heard in Federal district court.

Using the Minnesota statistics, which I think are fairly comparable as a guide: In Minnesota we have four Federal district court judges who are in active service, and one senior Federal district judge.

In our State system we have 72 State district court judges presiding over courts of general jurisdiction, 31 of whom sit in the Metropolitan Minneapolis-St. Paul area. Under the Minnesota Court Reorganization Act of 1977, it will now be possible for us to employ the services of an additional 100 county court and municipal courts judges to handle trial court work in courts of general jurisdiction.

This progress in integrating the operations of our State court system is the result of advances in judicial administration for which the Law Enforcement Assistance Administration is entitled to claim some credit. The thinking processes which brought this about, not only in the State of Minnesota but in our adjoining States as well, came about in part because of new approaches that were instigated, supported, and aided by that part of the Law Enforcement Assistance Administration program which allocated funds to improvements of the administration of the State court systems.

I think in fairness to the LEAA, in this day when it's subject to vigorous attack, the statement should be made that funds made available to State court systems yield excellent results.

If there is litigation now being handled in the Federal courts which could be handled as well, or almost as well, in the State court system, then it would be better in the long run for the State judges to hear the cases.

For the first 100 years of our national history, State courts heard cases involving questions of Federal law. It was not until the Judiciary Act of 1875 that this category of cases was moved to the Federal system. Federal-question cases could be moved back to the State courts again, in whole or in part. Here I would have to concede that with respect to certain kinds of Federal question cases that the Federal judges who are accustomed to dealing with them are probably better able to deal with these matters than their counterparts in the State system. But there are many Federal-question cases that could be allocated to the State court systems, I believe with results at least the equivalent of those presently being experienced; FELA cases would be one example.

Diversity jurisdiction, on the other hand, has always been exercised by the Federal courts, on the premise, originally true, that the State courts might not deal fairly with the parties who were "foreigners." Whatever the historical reasons for the rule, exclusive Federal diversity jurisdiction is not currently justified by either pragmatic or logical reasons. These cases should be left to the States. The State courts would be as able to handle cases where diversity exists as they are able to handle the many cases now coming before them where the subject matter is almost identical but where the cases are not eligible for Federal court treatment on diversity grounds.

The assumption that State court systems are prejudiced and provincial and that Federal courts are needed to protect nonresidents from unfair treatment cannot be justified generally. The extension of the jurisdiction of State courts over nonresidents resulting from State and Federal interpretation of State long-arm statutes has already brought a significant number of diversity cases to the State court systems where the amount involved is less than $10,000, and the litigants are being treated fairly without regard to whether they are or are not residents of the forum State.

I might expand on this thought a bit, because it may not be altogether self-evident. The fact is that in most States these days we have statutes for service on foreign corporations, for example, that, in effect, permit service by mail and the assertion of jurisdiction, if the transaction occurs or the tort is committed in whole or in part within the forum State.

The decisions of the courts have gone to the point, for example, that if a person engaged in manufacturing places a manufactured article into the channels of commerce, knowing that it is probably going to end up in a given State, that is said to be a sufficient contact with the State to justify the assertion of jurisdiction under the long-arm statutes. This obviously extends the jurisdiction of State courts significantly in areas where there is diversity but where the jurisdictional amount dosen't exist, and my impression from dealing with these cases both as an attorney and as a judge, is that jurors have too much pride in themselves to let decisions depend on the residence of one party or the other. Jurors generally are well-informed and extremely conscientious

people, and do not permit residences to be a significant decisionmaking factor.

It has been suggested that the shift of diversity cases from Federal to State court should be limited to situations where the plaintiff is a resident of the forum State, and that the minimum amount in controversy should be increased from $10,000 to $25,000. To my mind, the reasons which support this modification of Federal diversity jurisdiction support with equal validity the transfer of all Federal diversity jurisdiction to State courts.

The recommendation I am making in this regard is one which has also been made on behalf of the Federal system by the Chief Justice of the United States. I have read the testimony of other witnesses who have appeared before this committee, and it seems that there is a fairly good consensus on this point from people interested in the field who approach the problem from diverse points of view.

So, I think it's reasonable to expect that diversity jurisdiction in whole or in part will be transferred to the State courts. Then the problem will be to see that the State courts handle these cases effectively so that the Members of Congress who transfer the cases will feel that they have discharged their responsibilities in an acceptable way.

Mr. KASTENMEIER. In this regard, if I may interrupt, Justice Sheran, this subcommittee will be taking up the question of diversity in September, along with magistrates as two of several areas of concern that directly affect congestion within the Federal system, and so your comthe aberrations of a particular area.

Judge SHERAN. Thank you, Mr. Chairman. I make these comments with some concern about the situation in some States where I understand that there is a backlog in the State court system, that seems to be unmanageable, and my only thought would be that to the extent that this poses a problem, it's a problem that should be isolated, and that the overall, general program should not be made to depend upon the abberations of a particular area.

In the other areas where the burdens of our Federal courts are increasing, the possibility of assistance from the State courts may be more limited. It is doubtful that the State courts are as capable as are the Federal courts in dealing with complicated antitrust and environmental litigation having multistate impact. I think those who are students of the matter are aware of how extremely difficult some of the antitrust and environmental cases are.

I have mentioned the environmental cases and the antitrust cases. In fairness I must say that the Federal courts who are managing these cases seem to be doing a remarkably fine job under the circumstances. I don't suggest that State judges could deal with those particular problems more effectively than they are being dealt with currently in the Federal courts.

Federal judges, appointed for life, are probably best able to deal with civil rights problems, particularly in cases where the constitutional right asserted is one for which there is little or no local sympathy. However, in the last few years, decisions of the final appellate courts in many of our States have given proof of a willingness to accept political risk in defense of the rights of the individual. The national implications of many labor disputes, likewise, seem to justify Federal preemption in this area.

The extension of the definition of interstate commerce has moved significant litigation in the labor area into the Federal system. My impression is, it is being dealt with there effectively. I wouldn't say that the State courts are able to be of any great assistance there.

Civil rights problems always pose a great deal of difficulty. I realize that lifetime appointment on the part of the Federal judges gives them a greater sense of objectivity in these cases, and yet as a State court judge I am reluctant to concede that we would not be as determined as our Federal counterparts in dealing with these situations.

Also, I feel obligated to express what may be a personal judgment, and that is that in developing concepts of individual rights, in the long run, it may not be unwise or unimportant to give consideration to the reaction of the general public, to the particular case employed to establish the principle. It may well be that the right could be asserted and protected in the court system, and still not receive the kind of support from people generally that must be there if the right is to be a viable one rather than merely a nominal one. The fact that State court judges are subject to election is not necessarily a reason for having reservations about their competence in this field.

Finally, the Federal caseload problem could be significantly improved if Federal district court habeas corpus review of State court convictions could be made unnecessary. I do not mean to suggest that we turn back the clock of the U.S. Supreme Court decisions that have made State court decisions subject to the scrutiny of Federal courts.

My impression is, and I think this is an impression that has come to be shared quite generally by those of us in the judicial system, both State and Federal, is that these decisions have been all to the good and have improved the quality of the administration of justice in all segments of it, and there is no question but what the basic principles of those decisions are going to be a permanent part of the scheme of things.

The suggestion has been made in testimony before this subcommittee that State courts are not as alert to the necessity of protecting the constitutional rights of defendants in criminal cases as are the Federal courts.

Our experience in Minnesota is to the contrary. The Federal district courts in our State and our circuit court of appeals have, for practical purposes, no occasion to review the trial of criminal cases in our State courts. The reason for this is that from the time the March 18, 1963 decisions of the U.S. Supreme Court were announced we have made it our business to assure that the constitutional rights, both State and Federal, of defendants tried in our criminal court system are fully protected.

The specific methods employed to assure the soundness of our convictions in criminal cases include these:

First, statutory provision for counsel in all criminal cases involving imprisonment, regardless of demand or waiver; in other words, an attorney is made available to the defendant in these cases, even though he makes a statement to the court that he doesn't want an attorney. An attorney is available to give such counsel and advice as might seem appropriate, even though his presence is not solicited, and sometimes not particularly welcomed.

Second, a routine pretrial hearing, actively directed by the trial judge, the purpose of which is to surface all claims of constitutional infringement. Here the process is just reversed on the old process. The trial court judge assumes a measure of responsibility of bringing forward, surfacing any possible complaints of constitutional infringement, so that this case, when it goes to trial, can be tried properly and without the necessity of the strain on the system which results from repeated trials of the same case.

Third, a transcript of the trial court proceedings at public expense, without technical requirements to provide indigency. Here the key is the matter of indigency, and if an elaborate method is prescribed for approving the indigency that is needed to procure a transcript, it's an impediment to the process, and a State court systems should avoid that.

Fourth, automatic post conviction review, unimpeded, by time limitations or procedural niceties, the point being in criminal cases where imprisonment is involved, time limitations to appeal or even general time limitations should not be determinative of the action taken by your State appellate court.

Finally, routine review of all criminal convictions, where the defendant has been sentenced to imprisonment by the Supreme Court of Minnesota with remand readily available where claims of constitutional infringement are made on appeal but were not presented to or considered by the trial court. I realize from the standpoint of this committee that you cannot judge these matters in terms of the experience of one State.

My point is that the effort that has been made in Minnesota is, I believe, reasonably typical of the efforts that have been made and are in the process of being made in other State court systems. I use it to demonstrate what I firmly believe: State court judges are not hostile to the goals established by the U.S. Supreme Court, but on the contrary are, as they should be, committed to the implementation of those principles.

The relief which will thus be given to the Federal courts will, to be sure, increase the burdens of our State courts. But additional expenses incurred as a result should be, and I think will be, shared by the Federal Government. The method by which this objective is to be accomplished is now being carefully analyzed by both Federal and State entities for ultimate decision.

These comments on current developments in this area: The comments that I am about to make go to the essence of it in terms of both the political and theoretical implications of the process in which I believe both the Congress and State legislatures are now engaged.

It is imperative that the State court systems maintain their identity and independence. I am confident that our State courts and our State court judges will do everything feasible to make the judicial system as a whole acceptable to as many of our citizens as possible and will be willing to integrate their efforts in any reasonable way with that of the Federal court system. But this assumes allocation of responsibility on terms which are neither demeaning nor intrusive. Federal funding or revenue sharing must be looked upon as a means of adding strength to the State judicial systems and not as a method of extending Federal authority to areas better managed on a State or local basis.

The preservation of the independence of the State judicial systems is, I believe, the imperative which must undergird all joint efforts to deal with common problems relating to access to the courts.

If it can be assumed that the employment of Federal funds for the improvement of judicial services in the States can be accomplished without impingement upon the independence of the State judiciary, the question becomes one of the form and method by which this is to be accomplished.

In analyzing the problem it is important to keep in mind that the funding requirements of the State court systems fall into two general categories:

First. The support and maintenance of institutions such as the National Center for State Courts and the National College of the State Judiciary, which operate on a national level in providing service and assistance to the court systems of the several States; and

Second. The funding of activities directed by the several State court systems, either statewide or in localized areas.

As of now, the principal source of Federal funding for the needs of State courts is the Law Enforcement Assistance Administration. The State court systems have been strengthened by block and discretionary grants received through the LEAA, particularly in the development of improved methods of court administration.

Prior to 1976, the judicial system of many of the States felt handicapped in applying for LEAA funds by being placed in competition with the apprehension and corrections agencies in their respective States. The restraints upon the judiciary, both traditional and ethical, make it difficult for judges to engage freely in this kind of competition. The result was that in many of the States the share of LEAA funds employed for the improvement of the judiciary was insignificant or disproportionate.

Amendments to the Safe Streets Act adopted in 1976 by the Congress seek to alleviate this situation by establishing a priority for funding of judicial branch programs; for judicial participation on State planning agencies; and for the establishment of judicial planning agencies whose recommendation for the disbursement of funds allocated to the judiciary were to be, except in rare instances, binding on the planning agencies in the several States.

These reassuring steps taken by the Congress in 1976, however, seem to be jeopardized currently by reductions in the budget of the LEAA for 1977–78 fiscal year, which may fall more heavily on the judiciary than on any other of the elements involved in law enforcement.

A further limitation upon the effectiveness of LEAA funding so far as the State court systems are concerned is the limitation which has been placed upon the use of such funds within the States by the requirement that the funds be employed for the improvement of "criminal justice." Justice, including criminal justice in the State court systems, can be best achieved if the entire system is strengthened, including the components which are employed in the trial of criminal cases.

Indeed, the major problem that many State court systems have in dealing with the cases and controversies coming before them is attrib-

attable to the priority of attention, which must be given to criminal cases. It imposes strains on our capacity for dealing with noncriminal matters. And that, in turn, has a backlash effect making the careful attention to those matters more difficult than it would otherwise be. So my suggestion to this subcommittee and to the House Judiciary Committee generally is to give thought to the desirability of considering the functioning of the judicial systems in the States as unitary rather than undertaking to separate the criminal from the civil jurisidiction.

Even more important, the funds made available through LEAA for national projects affecting State court systems such as the National Center for State Courts should continue until some adequate substitute provisions for support of these institutions has been achieved.

The National Center for State Courts, soon to be centered at Williamsburg, Va., and the National College of the State Judiciary in Reno, Nev., have provided the perspective and much of the initative which has made the dramatic improvement in our State court systems in recent years possible.

We are informed that changes in the structure of the LEAA are in the making. This being the case, there are certain principles or approaches which, it seems to me, are of the utmost importance from the standpoint of our State judicial systems:

(1) The National Center for State Courts and the National College of the State Judiciary should receive priority attention.

In the long run the States should carry the responsibility of funding entities such as the National Center and the National College. I think the reason they should do so is enlightened self-interest. But the problem of persuading the separate State legislatures of all of the States to move with some degree of uniformity in this direction is a time-consuming one. We need time to achieve it and in the meantime if the institutions show they are performing a service in the interest of the citizens in general, then it seems to be reasonable that their needs should receive priority attention from you.

(2) Whether in the form of block grants or revenue sharing, Federal financial support for State judicial systems should be assured so long as Federal aid is available to other branches of State government.

(3) The deployment of Federal funds for the improvement of State judicial systems on a statewide or local area basis should be determined entirely or in significant part by those charged with the responsibility for the operation of the judicial system in each of the several States.

Most people concerned on an objective level with improving the operation of the State court systems agree that State court systems should function on a statewide basis.

The quality of judicial administration and of justice available to the people will be improved if we think, plan, and act as a statewide entity rather than exclusively in terms of the immediate needs of our own municipality or locality. Insofar as the Congress is persuaded that the national interest is served by providing means to carry out some past of these programs, the approach, should be to deal with State systems on a statewide basis.

(4) The employment of a national entity such as the National Institute of Justice to direct and monitor the allocation and use of Fed-

eral funds by State court systems should be structured in such a way that the State judicial systems will have a participating voice in the formulation of plans and policies.

While the employment of Federal funds to assist in the improvement of State judicial systems is important, it is but one of many facets of the problems of coordinating the State and Federal judicial systems to increase the accessibility of justice in our courts. While funding is always important, I sometimes find myself reluctant to spend too much time talking about this aspect of the matter, because it tends to divert our attention from the fact that the business of administering justice should not be influenced by or restricted by or hampered by the necessity of providing financial resources. The considerations involved are of such magnitude and delicacy that over-emphasis on the funding part of the program tends, I think, to distract attention from its more aspirational and moving elements.

The efforts which are currently underway to have codes of evidence that apply the same whether you are in the development of new rules of criminal procedure, in Federal court or in State court; the Consumers Controversies Resolution Act, a fine effort to deal with the problems of people who find it difficult to gain access to courts; Federal programs with respect to the treatment of juveniles; the employment of Federal resources to control the use of and traffic in drugs; the employment of the services of expert mediators for complicated disputes; these are matters which are and in the future will increasingly become matters of joint concern to the Federal Government and the judicial systems of the several States.

The belief is that the State court systems through the Conference of Chief Justices should establish communication with the significant committees of Congress so that you will have access to our views in formulating Federal legislation which has impact on the operation of the State court systems.

The fact that you have invited me to be here today on behalf of the Conference of Chief Justices is an appreciated step forward in achieving this goal. My hope is that we will be able to continue these methods of communication on a regular and well-defined basis in the future.

The Conference of Chief Justices, as you know, consists of the chief justices of each of the several States. We meet in annual convention once a year. The conference will be meeting in St. Paul-Minneapolis beginning Sunday of this week. It will be a distinct privilege for me as chairman of the Federal-State Relations Committee to report to them the courtesy extended to me here.

As part of our meeting, we are going to try to develop some methods by which the views that are expressed to the various committees of Congress will, so far as possible, represent a consensus judgment on the part of as many of the chief justices as is possible. As you can well visualize, there will be different shades of opinion amongst the chief justices, as there would be amongst Members of the House of Representatives, and the views I am expressing here, while based upon conversations I have had with chief justices whose judgments I hold in high regard are not the official views of the conference until and unless

they are adopted as such. My impression is that views I have expressed here are shared by many of the other chief justices of the country.

In summary, I believe:

(1) Every citizen should have access to our court system as the ultimate forum for the resolution of unavoidable disputes and the protector of his constitutional rights. I emphasize the word "ultimate." My conviction is that the function of a judicial system is to make it possible for people to avoid disputes; to settle controversies which can be avoided; to bring into the court system only those disputes which cannot be avoided or otherwise settled. Perhaps a part of the answer to our problem of congestion in the courts is to repeatedly impress upon the legal profession its ethical obligation of making it possible for people to avoid the kind of strains on their energies and resources that come about because of extensive litigation.

But if the litigation is necessary, then it seems to me the courts have to welcome the opportunity of providing an effective way of solving the problem.

(2) The demand for access to our court systems in this country can be expected to increase significantly in the years ahead, a demand which will be implemented by plans for prepaid legal insurance and other methods of making legal services more generally available. Members of this committee, there is just no question in my mind but what some form of anticipation of legal needs on the part of people, whether it be a form of prepaid legal insurance or some plan of rearrangement for the availability of legal services, is just about a certainty within the next 10 years. Two million people are covered by such plans currently in the United States. Our population is over 200 million. The demand is there, and when organizations such as the American Bar Association recognize this as being necessary and seek to implement such plans, we can be reasonably sure we will be moving in that direction.

(3) Efforts to divert, where appropriate, the processes of dispute resolution from the Federal and State court systems are to be encouraged and accelerated, but such diversion is only a partial answer to the problem.

(4) Notwithstanding reasonable expectations of dispute diversion, it can be expected that our Federal court system will continue to be overburdened unless a significant part of the jurisdiction presently exercised by the Federal courts is assigned to our State court systems.

(5) Our State court systems are able and, I hope, willing to provide needed relief to the Federal court system in such areas as: (*a*) more complete review of State court criminal proceedings to assure that federally defined constitutional rights have been fully protected; (*b*) increased participation in the resolution of Federal-question cases, to the extent the Supreme Court deems it advisable to move those cases from the Supreme Court to State court jurisdiction; (*c*) the assumption of all or part of the diversity jurisdiction presently exercised by the Federal courts.

(6) The State court systems will be able to carry an increased share of the judicial burden, to the extent that their progress is adequately funded in part from Federal resources but assistance from Federal

resources, given the flow of funds under current tax structures, would certainly seem to be appropriate.

(7) Increased communication between congressional committees considering legislation affecting State courts and such entities as the Conference of Chief Justices will be, it seems to me, useful.

(8) The constitutional structures and procedures by which Federal funds can appropriately be used to achieve national goals in the delivery of justice while respecting the independence of the State judicial system require further study, but difference of opinion as to the method of achievement of the goals should not obscure the importance and necessity of Federal-State cooperation in improving the administration of justice in all of our courts.

So, Mr. Chairman and members of the subcommittee, I do appreciate your patience in listening to this rather extensive and detailed statement. I feel that you, as Members of the House of Representatives of the United States, and myself, as the chief justice of a State court system, have a common concern for and devotion to the principle that the citizens of this country should have access to our courts where their differences can be resolved fairly, expeditiously, economically, and in a way consistent with the traditions which have made our country great.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Chief Justice Sheran, for a most excellent statement. It is not only very helpful, but I personally agree with almost everything you have said, including your contentions on diversity jurisdiction, judgeships, the National Institute of Justice, and the independence of the State judiciary.

I would like to make a couple of comments.

I have some questions I am going to defer until my colleagues have had an opportunity to ask questions.

I think it's ironic that the State court systems have successfully used LEAA funds. The original and primary rationale for creation of LEAA was to directly meet the challenge of rising national crime by aiding law enforcement officials and was not, in a somewhat belated sense, to aid either State court systems or the State correctional facilities.

Essentially, the Congress was motivated by a need to apprehend criminals and to bring them to justice.

For that reason I, for one, would prefer a better way of aiding the State court systems through some of the instrumentalities you have discussed, because some of the present dissatisfaction for LEAA nationally does not stem from the State court systems at all but from other aspects of the program. Stated otherwise, you should not be innocent victims of that dissatifaction, it seems to me.

Second, there may have been some criticism of the State courts as compared to Federal courts in at least one area I am aware of. This subcommittee has recently concerned itself with the civil rights of institutionalized persons, a very large and relatively new amorphous question which has surfaced and produced a great deal of controversy.

I might add that one of our discouraging discoveries has been the role of State attorneys general in the area of vindicating rights of institutionalized persons. Ostensibly, they feel that they should regard

themselves more in the role of corporation counsel for State agencies rather than as a vindicator of the civil rights, either under their State constitutions or the Federal Constitution, of persons institutionalized within their States. That many of the States' attorneys general defend practices and agencies rather than rights was a discovery that concerned me more than perhaps the role of the State courts in that connection.

At this point I would like to yield to the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman and chief justice. Does the Conference of the Chief Justices support your views on diversity? Is this a recommendation from the chief justices?

Judge SHERAN. No.

Mr. DRINAN. Can we get that recommendation? That would help us in the legislation here.

Judge SHERAN. The views I have expressed here today will be submitted to the Conference of Chief Justices at the meeting which begins on Sunday, and I am sure that the conference will act. I think it would be premature for me to suggest what actions it will take, but the action that it takes, whatever it may be, will be conveyed to the committee, with your permission.

Mr. DRINAN. After your fine comments, chief, I don't see how anyone could dissent. Could we anticipate having a recommendation?

Judge SHERAN. I am hopeful they will agree, but judges, like others, sometimes don't.

Mr. DRINAN. All right. I thank you for your comments and yield back the balance of my time.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

One question which is not exactly related to what you have been testifying, but there seems to be some question with reference to how many additional Federal judges might be needed in the State of Minnesota. Do you have any views on that?

Judge SHERAN. I do have a view on that, Representative Butler, which I am reluctant to express in my capacity as Chief Justice of Minnesota, because I think it's essentially a personal view. But given that qualification, my impression is that in addition to the additional judge who is to be named, if the Congress were to add still another judge, on what I understand would be something less than a permanent basis, somewhere along the line that an individual could be shifted to other things perhaps, that that would be consistent with the situation as we have it there.

Now, in saying that, I am hopeful that you will understand that this is a personal impression, and I don't regard myself as an authority on the subject, and I think I am somewhat moved by the local feelings in the matter.

Mr. BUTLER. Well, I thank you very much and I didn't mean to catch you by surprise on this.

Judge SHERAN. It's a subject that has been discussed in Minnesota.

Mr. BUTLER. That is what I thought. I would have thought there would have been quite a bit of discussion about it. I think that satisfies my question with reference to that.

One other problem which you touched on here, I had the impression from your statement that you have the impression that a lifetime tenure strengthens the objectivity of the judiciary in certain areas of, I guess, we would call it political litigation as opposed to commercial litigation.

Is that a fair statement?

Judge SHERAN. I think that. My impression is that especially in the area of civil rights, the assertion of which on the short term and in a localized area may create hostilities, that the Federal judge is better able perhaps to deal with that than a local judge who, though he would prefer it otherwise, may in subtle ways feel the impact of what he does on his prospects of being reelected.

In saying that I don't mean to suggest that that is a general attitude amongst judges. I am convinced that no judge worthy of the name is going to permit a political impact to influence his decision, but it is possible, and in some cases in subtle, unexpressed ways that it feeds into the picture.

The other side of it, Congressman Butler, that I would like to emphasize and I find it difficult for me to articulate this as accurately as I would like. I don't think that the business of protecting civil rights should be althogther disassociated with the long-term consensus judgments of the community in which those rights are being asserted, whatever that community might be.

I am convinced that the ultimate support for the rights of the individual has to be the agreement on the part of a concerned and educated public that those rights should be protected.

Mr. BUTLER. I yield back my time.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Judge, I wonder what has been your experience as far as the salary schedule for the different State court judges?

I know somebody told me that in the State of Oregon that some of the State judges actually want to become Federal magistrates because of the salary variances, and I wonder how much of a problem that is or is it your experience that now they are raising the salaries of the State court judges.

Judge SHERAN. I would like to address myself to that subject, because I think it 's significant.

Undoubtedly in the past, State court judges have been inadequately compensated and the result of that, in my judgment, has been that highly motivated and competent people who could serve admirably in State judicial systems have just felt in fairness to their families perhaps they couldn't do it.

It's generally accepted that State legislatures these days are hostile to the judiciary and the prospect of getting adequate compensation from State legislatures is not good. My experience hasn't been that way. The attitude of the State legislators, with lawyers moving out of the picture, is simply this: That if the State judiciary system can make a case that they are rendering skilled and diligent service, they are perfectly willing to compensate adequately.

So, in Minnesota our last session of the legislature decided to pay all judges of our State all through the system a minimum of $42,000, except for a few judges that we have who are not law trained.

Mr. RAILSBACK. Is that true generally?

Judge SHERAN. I think it's not true generally, but my point is that I think that if we deal with these problems diligently and carefully we can make the case so that State court system salaries will be brought up. It isn't true generally, and what you said about some State court judges liking these Federal magistrate positions is probably true. I couldn't blame them.

Mr. RAILSBACK. Well, it bothers me because in Illinois I happen to think we have a very fine State judiciary, but we have had testimony before this subcommittee that has indicated a great deal of concern about turning back too much to the State courts, and the reason being one or two witnesses said the quality is simply not at good as going before an article III judge. I honestly think in Illinois that after practicing before those courts I had no desire, for instance, to forum shop or file a case in our Federal district court, even though it was very accessible, because I thought I could get a fair hearing and a very good hearing before my circuit judge of the State court.

Let me ask you this: How many States have appointment procedures for State court judges, if any? In other words, nonelected judges, but they are appointed by a panel or by the Governor with advice and consent or whatever.

Judge SHERAN. Through a merit system?

Mr. RAILSBACK. Yes.

Judge SHERAN. I am not certain of my response to this, and I would like to check this figure.

Mr. RAILSBACK. Would you get that for us?

Judge SHERAN. But it's roughly half, I am told, and this in varying degrees of merit system. A full merit system, a qualified merit system, a formal recommendation, and informal recommendation, all of those together I am told come to about a half, but with your permission I would like to check and get a more accurate statement.

Mr. RAILSBACK. That would be very helpful. For instance, in Illinois now we have judges who are initially elected but then run against their record, and, of course, it's very difficult to defeat one that is running against his record every 10 years.

Judge SHERAN. My own impression, Congressman, is the selection process is more important than the retention process in State court systems.

Mr. RAILSBACK. Yes; I would agree with that.

Thank you, and I would appreciate it if you can get those figures.

[The information requested by Mr. Railsback appears in app. 8a–b at p. 464.]

Judge SHERAN. I will be certain to do it, Congressman Railsback. I would like to make this additional comment with respect to the difference between the quality of service as between the Federal and State judicial systems.

The chief judge in our Federal district is Hon. Edward Devitt, who at one time was a Member of Congress and who has served with distinction as a Federal judge for many years. He is now chief judge. Before coming to testify before this committee I called Judge Devitt to see if he shared my views on two points.

The first point: the State court system, if it's really determined to do so, can handle these State court convictions without imposing on the Federal system. He agrees with me.

The second point that I raised with him was whether he felt our State court judges could handle diversity jurisdiction cases as effectively as could the Federal courts. On that point his views and mine are the same.

Mr. RAILSBACK. Good. Could you also do one other thing, could you obtain the salary schedules of the various States? I think that would be very interesting. I know in the State of Iowa, until recently the judges didn't make very much, and they had trouble getting good quality people to be judges. Now that is changing. I think it would be helpful to us to see just how it is changing.

Judge SHERAN. I have those figures, and I will make them available to the committee. [See app. 8c at p. 483.]

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. I do have one question in regard to an area in which I may differ with you: that is whether or not the Minnesota experience is typical. I suggest that it is not, especially with reference to salary and number of judges and the ability of your legislature to provide assistance for your State judical system. Minnesota is probably superior to many other States. I am not sure about that, but that is at least true in Wisconsin.

Judge SHERAN. I think in fairness I would have to acknowledge that the situation I have described may not be fully typical. But I think it's supportive of this proposition: if there is a commitment in a State court system to insulate the soundness of our convictions in the criminal court system from attack in a Federal forum, it's achievable. It's not all that difficult.

The other point I would make, and this, in a sense, is a point being made to my colleagues in the State system, that I think our State legislatures are ready to strengthen our State court systems if we put the case together in terms that they find consistent with their views of the public good.

Mr. KASTENMEIER. The hour is late, and I would only like to briefly explore with you the question of habeas corpus, since you indicated you thought the caseload problem could be significantly improved if Federal habeas corpus review of State court convictions could be made unnecessary.

Could you amplify on that a bit? Do you favor, for example, foreclosing habeas corpus review in the Federal courts as the Supreme Court did in *Stone* v. *Powell* as to fourth amendment claims?

Judge SHERAN. The approach, Mr. Chairman, that I think is a preferred approach, is not to foreclose access to the Federal courts in these cases, but to improve the handling of the cases in the State court system so that resort becomes unnecessary. I have listed in my statement the five measures that I think are readily achievable in the State court systems, which will make resort to Federal courts unnecessary.

Review of State court convictions represents 12½ percent of the total caseload in the Federal courts. Given these five precautions that I have mentioned, resort to the Federal courts in these cases will reduce this to 1 percent.

Mr. BUTLER. Mr. Chairman, would you yield there?

Mr. KASTENMEIER. Yes.

Mr. BUTLER. Is it your thought that we should establish legislative jurisdictional requirements for the States, for State court systems in

these habeas corpus cases, so that if those jurisdictional requirements are met, then the access to the Federal courts would be somewhat limited?

Judge SHERAN. I hadn't thought of it in those terms, Congressman Butler.

Mr. BUTLER. How would you go about imposing what you have done on the other States?

Judge SHERAN. I prefer to think it should be done by persuasion rather than by mandate. I have a conviction that if the case is properly made that persuasion will get the job done. I realize there might be a difference of opinion on that. My conviction is that unless people are persuaded to a point of view the results aren't going to be all that good anyhow.

Mr. KASTENMEIER. The Attorney General has suggested several interesting innovations in terms of conflict resolution at other than a formal level. One is the creation of neighborhood justice centers, and he is presently contemplating even other ways of alternative conflict resolution.

What would be your reaction to such proposals?

Judge SHERAN. Our experience in dealing with neighborhood disputes in the neighborhood, in Minnesota, has been good. I believe that it is something that affords great promise. My present belief is, however, that the approach should be to resolve neighborhood conflicts within neighborhoods, on a basis of voluntary submission and voluntary acceptance of the determination made at a neighborhood level.

My concern is that to do otherwise would be to in effect, reestablish justice of the peace courts, which we have tried to eliminate, and finally have eliminated.

Now, the experience that they are having in Minneapolis through the city attorney's office there with working in the neighborhoods as reported to me, is very promising and I think much can be done.

Here again, though, I realize that there are some neighborhoods that are going to find it difficult to deal with these problems in that way. But by and large I think the concept is good.

Mr. KASTENMEIER. In conclusion, I would like to express to you, Chief Justice Sheran, our gratitude for your appearance this morning and for all that you have communicated to us. We totally agree with your contention that there ought to be greater communication between not only the Conference of Chief Justices but generally between the State systems and commissions and the Federal. Many of the questions we confront are the same, and if not the same are certainly interrelated.

I extend the very best for a successful conference, and I hope your recommendations prevail.

Thank you.

Judge SHERAN. Thank you very much.

Mr. KASTENMEIER. Next, the Chair is very pleased to greet one of our distinguished colleagues, Hon. Charles Wiggins, of California, who has served on this subcommittee and has been very familiar with the questions we are endeavoring to look into. Particularly we greet our colleague because he has had the occasion to serve on the Com-

mission on Revision of the Federal Appellate System. With Congressman Wiggins this morning is also a distinguished individual who has contributed enormously to our areas of concern not only as Executive Director of that Commission, but in numerous other capacities such as new Director of the Federal Judicial Center, as consultant to the Pound Conference, and as a professor of law at the University of Pennsylvania. I welcome the presence of Prof. Leo Levin.

We welcome you both, and I know Walter Flowers would also be here if he were able to, and he might be able to join us a bit later. At this time I would like to recognize our colleagues.

TESTIMONY OF HON. CHARLES WIGGINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA AND A. LEO LEVIN, EXECUTIVE DIRECTOR, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM AND DIRECTOR, FEDERAL JUDICIAL CENTER

Mr. WIGGINS. Thank you, Mr. Chairman and members of the committee.

With your permission I would like very briefly to introduce Professor Levin, and then to follow his remarks with some of my own, in which I amplify on his report of the work of the Commission.

Professor Levin and I became acquainted several years ago when he was appointed Director of the Commission on the Revision of the Federal Appellate Court System. As I am sure all of you know, he comes from the University of Pennsylvania, where he was not only a distinguished professor but was really a genuinely recognized national scholar on Federal jurisdiction. Since then he has gotten Potomac fever, and he is staying now as Director of the Federal Judicial Center, but, gentlemen, be assured that the experience which Professor Levin has is worthy of being shared with this subcommittee, and I hope you will pay close attention to his remarks.

Mr. KASTENMEIER. Thank you.

Mr. LEVIN. Mr. Chairman and members of the subcommittee, my name is A. Leo Levin.

I had the honor to serve as Executive Director of the Commission on Revision of the Federal Court Appellate System from the time it came into being in 1973 until it concluded its work and went out of existence in 1975. The Commission was created by Act of Congress, and consisted of 16 members, four appointed from the House, four appointed from the Senate, four appointed by the President and four by the Chief Justice. It was chaired by Senator Roman L. Hruska. I have included the membership in my statement for the record.

I am really deeply honored to be allowed this opportunity of sharing some of these recommendations with you.

The Commission was given two major assignments, each with its own time table. In phase I, the Commission was to "study the present division of the United States into the several circuits and to report * * * its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business."

What is very interesting is that Congress gave a deadline of 180 days to make that report, because it was considered so pressing and so urgent, and pursuant to the congressional mandate, the first report was filed on December 18, 1973. The Commission concluded that creation of two new circuits, one in the fifth and one in the ninth was urgent and imperative.

The Commission took testimony in 10 cities in this phase of its work. It heard a very wide variety of interested persons. It was, of course, concerned with a wide range of technical issues and statistical data.

Of primary interest to the Commission, I think it fair to say, was the "quality of justice" afforded the litigants by overburdened, oversized courts. In this connection we noted the concern expressed in 1971 by a resolution of the judges of the fifth circuit that to increase the number of judges on that court beyond 15 "would diminish the quality of justice" and the effectiveness of the court as an institution. What follows is an attempt to expand on that concern.

Permit me briefly to review the statistics.

In fiscal 1976 there were 3,629 filings in the U.S. Court of Appeals for the Fifth Circuit. This represents an increase of almost 57 percent since 1971. a brief 5-year period.

The fifth circuit, in an attempt to accommodate the flood of appellate litigation and to avoid a total failure of judicial administration, adopted a number of innovative and imaginative procedures; oral argument was denied in almost 60 percent of the cases at the time of the Commission's report.

I think the percentage is now well over 50, perhaps 55. The proportion of cases decided without written opinion—there are hundreds such cases per year—was increased, and the conference of the judges was likewise eliminated in a large volume of cases. These truncated procedures, however, have necessarily exacted a high price in terms of the quality of the judicial process itself.

More judges are certainly needed. There is, however, a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. It becomes far more difficult for a larger court to sit en banc despite the need to maintain the law of the circuit.

Indeed, precisely as the number of judges increases and the number of possible combinations of judges who will sit together on panels of three increases geometrically, the difficulty of empaneling the full complement of judges for an en banc determination of the law of the circuit similarly increases.

There are the obvious problems of time and efficiency, traveling, and scheduling. But this is a part, a small part. The very process of the conference changes; it comes to resemble a legislative committee meeting rather than a judicial procedure. This is the considered view of judges who have participated in en banc hearings on a court of 15.

En banc with less than the full complement of the active judges of a circuit is highly unsatisfactory. It depends on what you do. Some people suggest a random selection so all judges could be eligible to take part, but then it becomes exceedingly difficult to obtain any stability in the law of the circuit.

To use a seniority system makes it difficult for more recently appointed judges to have their views reflected in the law of the circuit. It makes change much harder to come by. The important point, however, is that when there is a partial en banc with a court of 16 or 17 or even 18, at least half of the active judges sit on the en banc. When two-thirds of the active judges on a court of appeals are precluded from sitting en banc, as would be the case with a court of 27 judges, the situation is exacerbated. There are some ninth circuit opinions that in effect say close to that: let the Supreme Court resolve these difficulties if we can't agree in the circuit—I have in mind a concurring opinion by the then-chief judge.

Moreover, the Supreme Court's review of decisions of the courts of appeals has been reduced to the level of about 1 in a 100.

Permit me to make the point another way: It is not a healthy situation when lawyers must advise their clients that the decision in a particular case will depend on the "luck of the draw" which will determine the composition of the panel of three who will sit on their case. It is an unhappy situation when neither lawyers nor litigants nor judges really know the law of the circuit, and, as the Commission's hearings developed, this had become a problem in the ninth. It is doubly unfortunate when the size of the court precludes an efficient, effective mechanism, responsive to change, that is, a properly functioning en banc, for defining that law for that circuit.

Mr. KASTENMEIER. On that point, as I recall, when confronted, at least one circuit judge suggested that this is not an insurmountable problem, that there are other ways to resolve it. For example, the circuit could have the 9 judges with the most seniority constitute the en banc panel rather than 15, 18, or any other number that arises.

Mr. LEVIN. Let me respond to that. It seems to me, Mr. Chairman, that all things, in one sense, are possible; I mean it's possible if we get down to that, but let's analyze what we are paying for that type of en banc.

We are paying a tremendous price. If you take the most senior, even if you exclude those eligible for senior status, in a circuit let's say of 18, it's half bad, and we have suggested—the Commission said—if a court grows to a certain point you may have to do this, for example, to have a limited en banc. But it wouldn't take very long before each of the judges gains sufficient seniority to serve on the en banc. However, if you get to circuits of the size that are now proposed—26, 23, 25—and you limit the en banc to the nine most senior, it will take a very long period of time for newly appointed judges to get to sit en banc and influence the law of the circuit directly. I think you are stultifying the growth of the law.

What is even worse, they—the judges, junior in service—feel offended; but even more than that, there are all kinds of ways by which a panel will try to distinguish the en banc holding. It's a familiar phenomenon. You are going to get all kinds of hairline distinctions. It is not a bad method of growth.

Now, the problem really becomes a bad one, and precisely because it's so bad, some judges have said they prefer the luck of the draw. That becomes totally undesirable of an en banc because the attorneys consistently ask for a new en banc, because it's not simply a matter of

guessing whether the court will adhere to precedent, it's a matter of who will sit now on the en banc, and I think it's totally impossible to get any stability in this manner.

So whereas in certain situations you can use the limited en banc instead of circuit realinement, and in some situations this may be indicated for other reasons, I think it would be a very unfortunate thing.

Mr. WIGGINS. Leo, would you yield?

I think it's most appropriate to interject a thought on the minds of the judges themselves in considering the problem of mini en banc composed only of the most senior judges. The reality is that the most senior judges are at least one generation removed from the junior judges in terms of politics. That is to say, the senior judges may well be all Eisenhower appointees, or they may be Johnson appointees. That is a practical problem. But it increases the malcontent on a court if the law of the circuit is determined by an administration's judges which is one or two administrations removed from that administration currently in power, and it's a reality that the subcommittee ought to be aware of.

Mr. KASTENMEIER. I did not mean to suggest by my question that that was a preferred solution.

Mr. LEVIN. I understand.

Mr. KASTENMEIER. Indeed, I wanted to present it as an option which exists which might be preferred to something else.

Mr. LEVIN. Mr. Chairman, I am grateful for the question. The Commission confronted this directly quite a while, and came out clearly not only in the first report but in the second. The Commission recommended that first you examine the possibilities of circuit realinement, by whatever term you call it, new divisions or whatever; and only as really a last alternative, particularly if geography is no problem, should you attempt to go the route of partial en banc, and then try to have the en banc as large a fraction of the court itself as is possible in terms of its tremendous function.

Let me turn to the situation in the ninth, if I may, Mr. Chairman, at this juncture.

Mr. DRINAN. Mr. Chairman, I wonder if I can ask Mr. Levin, at this point, for a comment on the opposition from the civil rights community with regard to dividing the fifth circuit?

Mr. LEVIN. The Attorney General informed me—I didn't put it in the statement because it was just a conversation at a meeting, that with respect to the fifth circuit, Martin Luther King, Sr., is in favor of dividing the circuit, Corretta King is in favor of it. Mostly there have been some sections of Texas which are opposing realinement of the fifth and some other people in other areas of the country. The Commission considered this, probably not formally. We had on the Commission people like Bernard Segal who had taken a very strong, active role, in the civil rights movement, and the best judgment we could find was that this would not at all be a reason for not doing it.

More than that, as others pointed out, with the circuit the way it is and the backlogs increasing—indeed, it was Attorney General Bell before he became Attorney General who said—so, you have hundreds of civil rights cases not being heard now, simply because the problem of judicial administration is such they can't be heard, or they are being

delayed; I don't mean they are forever not being heard. So, all I can answer, Congressman, is that to our best notion, this is not a reason for not dividing the circuit at this juncture.

Mr. DRINAN. One additional question, Mr. Chairman.

Is there any formal opposition from the civil rights community from the Leadership Conference, or from anyone else as to the division of the fifth?

Mr. LEVIN. I cannot directly answer that question now. We made every effort at that time; we sent every notice of a hearing to all of those groups that might conceivably be opposed and have a contrary view. We have nothing in the record indicating that at all.

Mr. DRINAN. Thank you very much.

Mr. LEVIN. I will say this, if I may, just to supplement the answer, Congressman Drinan, because I felt very strongly, there were those who felt so proud of the record of the fifth historically in the civil rights movement during the whole crucial period that they didn't really want to "retire the number," as it were, or have that circuit divided and find themselves in a different circuit; Judge Wisdom felt that way, although he may have had other reasons for opposing division of the Fifth; and that led to the proposal to name the new courts the fifth East and the fifth West, with a strong feeling historically that the whole fifth had performed a tremendous service at a crucial period.

Afterwards there were statements by some that they felt history had moved on to the point where today this would not be a problem.

I turn to the ninth circuit, if I may, Mr. Chairman.

The situation in the ninth circuit is, in many ways, worse. The ninth circuit today handles more cases annually than any circuit other than the beleaguered fifth. Moreover, in the 5 years since 1971, its filings have grown by over 50 percent. Delay in the adjudication of civil cases at the appellate level was a source of serious complaint by lawyers who testified at the Commission hearings.

Similarly, attorneys and judges testified that they were troubled by apparently inconsistent decisions by different panels of a court which was already large.

The difficulty of any en banc was such that they had stopped the practice for a number of years and then they began the practice again after our hearings. The situation with respect to delay has since deteriorated further. In fiscal 1976, the median time from the filing of the complete record to final disposition for civil cases in the ninth circuit was almost 16 months, 15.9 to be exact. The median time from filing in the lower court to final disposition in the appellate court was 31.9 months. Of course, the statistics are not totally reflective of the situation; they include many habeas cases which are rapidly disposed of. If you eliminate the frivolous ones of that group—I am not saying all of the habeas cases—you eliminate a large number of cases which are disposed of rapidly and the situation would appear worse. The attorneys who appeared at the hearings were quite bitter about the delays, even though they were testifying in the presence of judges of the circuit.

Civil cases in the ninth circuit that wait 2 years for adjudication at the appellate level alone were described to the Commission as commonplace.

A word on geographical size. Sometimes what you really have in a picture is better than a thousand words. The fifth circuit stretches from the Atlantic Ocean to the Rio Grande. The ninth presents an even more striking picture: it ranges from the Arctic Circle to the Mexican border, from Hawaii and Guam to Montana and Idaho. It is indeed difficult to avoid the conclusion that some realinement of these circuits, by creation of a new circuit or of divisions, each a separate court of record, is required.

If anything, the Commission was conservative in its approach. I attach, as an appendix to this statement, a statement by the Chief Justice in his annual report delivered to the ABA during the current year. He believes it would be more prudent now to create three divisions, or entities, in each of these circuits because of the tremendous volume of cases in both the fifth and the ninth [see app. 1b at p. 279].

Since the Commission's report, there have been all kinds of discussions of variations that would provide alternatives to pure circuit splitting. These include divisions which would be courts of record, joint-partial en banc to resolve differences between two divisions, since today Supreme Court decision is the only way of resolving intercircuit conflicts.

I don't speak to any of these variations now. My own personal view is that we desperately need some movement in the area.

The picture in the ninth, if I can speak informally, is of judges flitting all over. There is good reason for this and the judges are to be commended for trying to keep the court operating as an entity. However, it sometimes seems that they are constantly in airplanes. Some of the judges testified that they get on the airplane, and promptly study pending motions, and start the reading of briefs. It reached the point where someone quipped, "The way to increase efficiency all over the country is to put every judge on an airplane." But it's difficult to keep the circuit operating as a group. They do want each judge to sit with the others, and they must therefore fly around over this vast expanse which has so many different places for hearing appeals. Whether or not we postpone the decision for a year, as has been suggested, I do think some remedial action is needed.

Let me acknowledge that there has been a terrible problem of the psychological impact of the Commission's proposal in California. People speak of splitting the State. We don't like to talk about dividing California, and I am sure Congressman Wiggins will speak more directly to this.

We have simply referred to an allocation of two judicial districts to one court of appeals, or division, and two judicial districts to another. I think part of what happened was the development of the idea that the Federal Government was going to split California, and I think it's a most unfortunate notion, and one not really reflective of what would actually be involved in an attempt to change the administration of that court to avoid the present problems.

Perhaps I should suggest Congressman Wiggins may like to speak to the situation now before I turn to the National Court of Appeals. It's subject to your pleasure, Mr. Chairman, and his.

Mr. KASTENMEIER. It's up to you.

Mr. WIGGINS. I will be happy to do so.

I do not share all of Leo's observations with respect to the ninth circuit, although he clearly does report the consensus views of the Commission to this subcommittee.

The problem of the ninth circuit is California, it's not geography. The geography cannot be repealed by this subcommittee. The problem is California. Under the judgeship bill now pending before our committee, the ninth circuit will have 23 judges. The caseload generated from California alone will fully justify 18 of them. And so if we are concerned about a court over the traditional appellate court, with the traditional size of 9, 10, or 11, that problem is going to exist with respect to California alone in the future, and it's going to get worse before it gets better.

Accordingly, in order to cut down the size of the court, it's going to be necessary to do something to California. If three circuits are required, then California will have to be divided into three; if two are required, in the present area of the ninth, then California will have to be divided into two. Any combination of the other States doesn't deal with the problem.

This is a very emotional, controversial subject in California. If this subcommittee were to recommend a physical division of the circuit, to divide California in any form, I think it likely that you are apt to have a united California delegation, which is significant in numbers, against the proposal.

Yet the problem won't go away. What I suggest, Mr. Charman, is that the problem not be ducked because it's controversial, that you proceed with hearings, and that you hear from the ninth circuit judges themselves who deal daily with this problem. They have some views.

I think you will find that their views are not unanimous, but the consensus of the ninth circuit judges is that the problem can be solved other than by a physical division. It can be solved, as the Chief Justice has suggested, by some administrative division of the circuit.

Now, that has some practical beauty, as well as the beauty of solving the problem politically.

Californians are properly concerned about being subjected to two circuits with possibly two rules of law applicable over parts of the State. That is particularly important when we are talking about the possible conflicts between the division of the circuit in an interpretation of a Federal statute, for example, which affects the administration of a welfare program, perhaps, throughout the State.

Now, that is a real concern. I understand that there are ways to resolve that. Of course, maybe some expected review by the Supreme Court might be possible. But, administrators and lawyers in California are horrified at the prospect of the State being subjected to two rules of law with respect to ongoing Federal programs which, of course, is possible if the circuit divides California physically.

I will summarize this by saying that we have some time to solve this. Even if the Congress acts immediately on the creation of the 23-judge ninth circuit court, it's going to be a year to 18 months before those judges can be brought on line. And you should hold hearings, and I would suggest in California, permitting Judge Browning and other

interested judges to comment on some of the options. They will tell you they are not afraid of the mini en banc to the same extent that Leo here is, and they are willing to experiment.

I would recommend to the committee that the court be permitted to do so by rule on an experimental basis rather than to amend our fundamental law to authorize a truncated en banc procedure, when it may not work out for many of the reasons that Leo fears.

Authority to enact local rules within the circuit on a trial basis, it seems to me, would be more sensible for dealing with that problem.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. I appreciate the comments of both our colleagues on that point. One of the difficulties this subcommittee has had in considering those problems arises due to the division of jurisdiction within the full committee on the Judiciary; the other question of judgeships, both district and appellate, resides in another subcommittee, which is not moving with very great expedition, I must say, hopefully, this situation will be altered in the future, and the question of judgeships will come to this subcommittee. Then, at least, there will be some unity connected with consideration of problems affecting the courts. Nevertheless, as it relates to the circuit courts of appeals, we are not quite sure what we will be dealing with in the wake of what may be done in the omnibus judgeship bill. Presumably, and we do presume this, there will be residual problems that will have to be confronted, notwithstanding what is done in the bill.

It's ironic that the three Members of the House who served on the Commission are residents of the fifth and ninth circuits, and indeed represent both the fifth and ninth districts in Congress. In addition, the two circuit judges (Judges Ainsworth and Hufstedler) who have appeared before us, are in the center of activity in both those two circuits. They, of course, have made their own appropriate comments, and have helped us enormously.

There is a question of what are the historic, geographic, and legal difficulties, as there must be, of creating altogether new circuits. For those of us who are not well informed, would you embellish on this?

For example, New England or some other such area, why is that so difficult, what does it do to the state of the law within the new or old circuits?

Mr. LEVIN. If I understand the question, you ask: "Why didn't the Commission approach the map of the United States without any preconceived lines, and make a more rational allocation?" I think there are two reasons. First, a major trouble spot was California, in the sense that California generates a tremendous volume of litigation. Whatever would have been done elsewhere we would have had to face the problem of California. So long as we were worried about federalism and Federal interests not being served best by a one State circuit—simply because there would not be the cross-fertilization of different points of view—the problem of California would remain until you put some judicial districts in one circuit and some in another. I should note that in the Commission there was deep concern about creating a one-State circuit. The precedent was considered a bad one.

The other point to be made is this: We did attempt a broader view as a start. What made real sense was to take the first circuit, which can

almost be referred to as a mini-circuit—it's the smallest and it could absorb the greatest number of additional judges—and see if we couldn't work out something with the second, by redrawing the lines of these two circuits into two new circuits. It would have represented a modest change.

It finally turned out we could not get a single witness to testify in favor of that kind of realinement, because of the historical roots. When we are thinking of minor adjustments affecting the sixth circuit, we received a flood of letters and statements saying, in effect: "Make no change; we are committed; there is a tradition." As a matter of fact, when it came to the first circuit and the question of Connecticut's being moved out of the second circuit into the first, the then chief judge of the District of Connecticut wrote a marvelous letter which said: "To divide Connecticut from New York would be like building a wall in the marital bedroom."

Well, we saw differences, but nonetheless, it became clear this wouldn't be a practical solution, and so after attempting to explore it as best we could, the Commission simply bowed to the force of history, tradition, and strongly felt allegiances which had many affirmative aspects, I must say. But that is the answer, I think.

Mr. DRINAN. Mr. Chairman?

Mr. KASTENMEIER. I understand the powerful question raised by Chuck Wiggins as to why one State would not want to be divided into two or three parts, but I was not convinced that there were compelling reasons for not dividing geographical areas.

Mr. LEVIN. As I say, we explored it. To me the most striking thing was when we came into hearings held in New York City; we tried very hard simply to build a record both ways. We finally could not get a single witness who would testify in favor of that kind of fresh look. And, in any event, with California the problem was that two-thirds of the cases in the circuit originated in that one State.

Mr. DRINAN. Mr. Chairman, is there any suggestion that *Baker* v. *Carr* should apply to the Federal courts?

Mr. LEVIN. No.

Mr. DRINAN. It would be a gorgeous question to litigate.

Mr. LEVIN. Yes. If you can get it heard.

Mr. DRINAN. It's a good case for the National Court of Appeals.

Mr. LEVIN. Yes.

If I may, Mr. Chairman, I will turn to the National Court of Appeals, and I will try to make the presentation relatively brief, and I therefore invite any questions where the presentation may be too truncated, and I invite interruptions for questions or comments.

The Commission was further charged by the Congress:

> To study the structure and internal procedures of the Federal courts of appeal system and to report . . . its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process.

The Commission held 12 days of further hearings in various cities; a preliminary report was widely circulated. There are a total of three volumes of hearings, fairly substantial volumes of hearings, of the Commission's work, two volumes on this phase alone, and we had a variety of recommendations. But the proposal embodied in H.R. 3969,

introduced by Congressman Wiggins, one calling for a National Court of Appeals, has already spawned what I think may fairly be termed a substantial literature. I must add, in all candor, the articles are divided between proponent and opponent.

I would like to put the proposal for a National Court of Appeals in context and then describe its major provisions.

The Federal judical system, with about 600 judges by the time you include the senior judges who are actively involved in disposition of litigation, has approximately 175,000 new cases which come into the system each year. This figure really almost eliminates duplication between district court and appellate cases; others would put the figure much higher.

The first appellate review of the trial court decisions and administrative agency decisions is entrusted to a cadre of more than 140 judges. They sit almost always in panels of three; the number heard en banc is very small. The primary task of assuring harmony and stability in the law of the system is entrusted to the U.S. Supreme Court. Divergent approaches to common problems are familiar enough in the court of appeals: Intercircuit conflicts develop, ultimately to be resolved—or so the familiar learning has it—by the Supreme Court.

Certainly the resolution of such conflicts is an important part of the Court's work, a "prime function" of its certiorari jurisdiction. Yet none would contend that achieving harmony and stability is the only thing, or even, I must say, the most important thing done by the U.S. Supreme Court, and the crucial question is, is there adequate appellate capacity for definition of the national law for the needs of this country today?

I must say, if I can just depart from the statement for a moment, that what has heartened me most about what has happened to the proposal for the National Court of Appeals is that it is absolutely clear today, reading the record, that we do not have a liberal versus conservative polarization. There are liberals with impeccable credentials who have testified in support of it. Some of them support it on the theory that that's the only way that the Federal judicial system is going to be able to grow. The problem, not only tomorrow, but today is that there are many litigants with problems which cannot be considered major national, constitutional issues, but which are important to them. We have social security laws, and we have tax laws for the little guy, and we have employment regulations and the whole field of labor, and we have a number of environmental questions. In all of these the time it takes to have national law established is such that it's really unfair to the litigant.

This is really the focus of the kind of concern with capacity on the appellate level for the smooth functioning of the system today, and to provide for some growth in the system, because I am quite confident the system has to grow to meet the needs of the country.

The Commission, relying on the view of the participants in the system, including the Justices themselves, on research by staff and consultants, and on the analysis of a profusion of data, has concluded that the capacity is not adequate. Because of the plethora of proposals for a new appellate court, I think it is important to state clearly what the new court would do and what it would not do under this particular proposal.

It would not screen cases for the Supreme Court. It would not cut off access to the Supreme Court. Its decisions would be subject to Supreme Court review, even though every case there was sent down to it by the Supreme Court.

It would be empowered to resolve existing conflicts among the circuits in appropriate cases, further reducing uncertainty for judges, lawyers and litigants. It would, in addition, be empowered, in appropriate cases, to resolve nationally questions of law before conflicts had arisen.

I might say, parenthetically, that we were at one of the agencies, and they said very proudly that they had lost on one issue in five circuits, but kept going because they were convinced they could only get to the Supreme Court with an intercircuit conflict, and they were convinced they were right. But somewhere there are citizens being brought into court time and again to relitigate issues, which really, because of inadequate appellate capacity, are not being resolved.

How would the court operate? The jurisdiction of the National Court would extend to cases referred to it by the U.S. Supreme Court. The Supreme Court would be empowered to refer individual cases, either with instructions to decide them—and I think this is most important—or the Court would be empowered to send down hundreds of cases and say to the National Court, decide them or not as you see fit.

Let me give you an example. The Supreme Court might refer a group of patent cases, for example, which the Supreme Court knew it did not want to handle. Suppose none of these cases presented the kind of policy question the Justices wanted to hear and yet because forum-shopping in patents has become what some have termed scandalous, the Justices might say "supervise this area: take the cases you deem appropriate." Intercircuit conflicts are alleged with profusion, beyond what really exists, and the Supreme Court might say, "This is a case we don't really want to decide, and we don't even need to pause to find out if there is an intercircuit conflict; take care of the problem, if you need to." The Supreme Court would have these options.

A colleague, about a year ago asked why the Supreme Court was wasting time taking a particular case; it was an ICC lease case. He put it this way: Why should the Court take the time to decide that case when I don't even want to spend time to read the decision? The answer was simple. If you look at the footnotes in the opinion, you will find that there are many citizens with leases and they had to know an answer one way or another concerning the law governing them; and there was a conflict on the issue. There was no other way of resolving the conflict. Sometimes it takes 18 years to interpret a new statute, particularly in a tax case. A leading tax attorney told me only this week, about one case decided recently after almost two decades of uncertainty. The lower courts had all been going one way and finally the Supreme Court went the other way. Until the Supreme Court spoke there was uncertainty. It's that kind of thing we are talking about.

The Commission, in its hearings, heard testimony that the U.S. Supreme Court, if only it did a little bit more, could handle the problem. This is one idea that we rejected.

Mr. Justice White wrote that he was convinced that there are today an adequate number of cases which the Supreme Court either doesn't decide or decides summarily to warrant a National Court.

Let me explain his reference to summary decisions. That is something not many people are pleased to talk about. Such decisions, with no oral argument and without full briefing, have the force of precedents. The late Mr. Justice Clark had a sharp comment on the precedential value of such decisions. I am not criticizing the Court; Mr. Justice Clark, in an opinion, put it this way:

> I don't know why this summary decision should be binding on the merits when the Supreme Court, during the 18 terms I was there, gave such cases no more time than a denial of certiorari.

The short answer is that the Congress said that the Justices had to take certain cases by way of appeal and this means decide them on the merits, and so the Court itself has changed its procedures to handle the volume. Mr. Justice White is convinced there are an adequate number of these cases today to take care of the docket of a new National Court.

Mr. Justice Powell expressed agreement with Mr. Justice White. Mr. Justice Blackmun said there are many on the Court today who "worry" because they deny certiorari in cases that almost assuredly would have been taken 20 years ago, and Mr. Justice Rehnquist agreed.

To me, the most striking comment really came from the Chief Justice, who put it in terms of the risk of erosion of quality of what the Court was doing. His point was that the volume of cases, the pressure to take care of conflicts and pressures to divide other cases, is so great that he warned about the risk of erosion of quality over a period of time.

This seems to me to be a serious matter. Let us consider what has happened in the courts of appeals, with so many cases denied oral argument, so many without written explanation of the decision, a vast number of staff people known to be working for the court, this is a matter of concern. The courts draw their power and their strength and obedience because of the judicial process. I suggest to you that part of what we are dealing with here is the risk of deterioration of the process, because of what has aptly been termed a crisis of volume.

I, for one, confess to you I worry about that, because I think it's a serious matter. The pressure has just grown.

Mr. KASTENMEIER. I yield to Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

I want to clarify one thing that Mr. Levin has just said. As I understand his concept or the Commission's concept of this National Court of Appeals, it would not be for the monumental, urgent constitutional questions, but rather as a factfinding group to resolve ambiguities or conflicts in the law, and not policy questions.

Mr. LEVIN. Well, Congressmen, let me agree in part, but allow me to state my understanding of what you are suggesting.

I do think that major constitutional issues will not be referred by the U.S. Supreme Court to this court. I do not think it would be helpful unless they reached them where they were very dissatisfied with the opinions below or something like that. But in the normal course, I do not envision its being used for this purpose.

I do suggest that there are a vast number of cases, and many do involve policy questions—every adjudication with respect to interpretation of a statute may involve a level of policy—in which it becomes

terribly important to have an answer, a reasoned answer, but yet one that the Supreme Court feels can go either way, and control the whole country and can be uniform. Sometimes we find this even with procedural matters, which are sometimes the toughest to resolve, and yet continue to bedevil the lawyers, and cost the clients money as a result of uncertainty over a long period of time.

Let me mention one example of a procedural question in the area of the environment: What should be included in the record as a case went from the agency to the U.S. court of appeals? It's not easy to get that resolved nationally. Litigants, however, woud love to know. It's the kind of question the Supreme Court is highly unlikely to take, except in another kind of context.

Mr. KASTENMEIER. One of the real problems we face, not only at this level but at any level in devising new judicial institutions or procedures whether we are talking about magistrates or this type of modification in the appellate structure, is that by its very nature change invites, and we had this problem with the extinction of the three judge court, fears by those who feel that they will have diminished status within the new structure. There are clearly those who fear denial of access to the Supreme Court by being shunted to a different system or, rather than having the article III judge handling their claim, by having it referred to a magistrate.

As a result of these fears, these unknowns about reclassifying types of cases to a diminished status these individual feel that they must politically oppose any reforms.

Mr. LEVIN. Mr. Chairman, I recognize that, and it can be a very real problem. That is one reason the Commission didn't attempt to have categories, but said it would be for the Supreme Court itself to decide what cases to refer to the National Court. We had our notion of what they are likely to refer. I think it's clear from the record that the Justices view this as a practicable proposal, whether they are for it or against it. They view it as practicable in the sense that it would impose no undue burden on the Justices. They said so, even the dissenters. That is the first thing, we agree completely, and we said that would be for the Court to determine when it wanted to keep a case or when it should be referred to the National Court.

Perhaps I should add another point. You know, a lot of the problem, it seems to me, is the question of formal access versus the reality of access. We had this in 1925 when we developed a genuine certiorari jurisdiction through the judges bill. A lot of people complained that access to the Supreme Court was being denied. Nothing I say here is in opposition, or in dissent from what the chairman has suggested, but sometimes there is the difference between a formal, psychological kind of availability versus the reality, because if the dockets are so clogged that the U.S. Supreme Court will never take the case anyway, then it does little good to say, well, I am right up there with everybody else, I just never can get there. So, I agree this is an issue, but it's one I think I would respond to this way.

Let me go on further to mention just one thing, and that is there are many cases which never come to the court, which ought to be resolved rapidly. Former Solicitor General Griswold testified there were 20 cases a year, in which he did not even petition for certiorari be-

cause of the huge docket of the Supreme Court in 1946. That figure of 20 should be considered in the light of what the total number of cases heard per term should be. Mr. Justice White said, the total in 1977 accorded plenary consideration ought to be only 100 a year and 20 a year the Solicitor General didn't even send up. Many attorneys indicate there are cases they think the Supreme Court should hear, but in which they wouldn't even petition for certiorari. It is not that the case isn't deserving, it is that the probability of a grant is too low to warrant the expense and delay. These cases, in which no petition is even filed, have been referred to as the hidden docket.

I will skip a description of all of the research we did, but I think I would like to note really the four evils, the four consequences or inadequacies of the present system.

First, there are the unresolved intercircuit conflicts. Should the Social Security Act mean one thing for a citizen in Mississippi and something different for a citizen in Oregon simply because of the accident of geography? That is the first. That is the most obvious, dramatic result.

Second, today there may be a delay of several years before a conflict ever develops and is resolved. Substantial delay is not unusual, and this imposes added costs and difficulties on the litigants.

Third, the Supreme Court is obligated to take cases it really shouldn't be bothered with, in the face of the press of important things it has to do, with its heavy docket. This, again, raises the problem of quality.

Finally, even in cases where a conflict never develops, where nobody ever dissents from a particular interpretation of a statute, you can go on for years before a lawyer can advise his clients with confidence: "This is the law." He must wait until enough circuits have spoken or until somehow the issue gets to the Supreme Court in some other way, which is rare. And these are, in our view, genuine inadequacies in terms of serving the interests of litigants.

I would like simply to point out that for the last decade, one group after another has pointed to the need for a new court: The Study Group on the Caseload of the Supreme Court, the Advisory Council for Appellate Justice, the American Bar Association, twice—and, earlier, an American Bar Foundation report that foreshadowed later recommendations—and the American Judicature Society, have all agreed in principle that there is need for additional appellate capacity. There have been varying views as to precisely what ought to be done, although all of the latest statements have approved the basic approach of the Commission.

Let me repeat one observation of Senator Hruska that seems to be pertinent. I think it would be wrong for the Congress hastily to adopt even the Commission's proposal. I have no illusions about the risk of this happening, but we are not urging it, and we never did urge precipitous action. It is too important a question, the Federal judicial system is too precious for that kind of thing. I think, however, that it is terribly important for the proposal to be kept on the agenda. Senator Hruska observed as follows:

> From the vantage point in history we recognize that if those who in 1891 were wise enough to create the United States Court of Appeals system had not pre-

vailed, our system could not function today. Similarly, if those who in 1925 were wise enough to effect a mechanism—the petition for certiorari—which allowed the United States Supreme Court to develop a siginificant control over its own docket had not prevailed, that Court would now be in an impossible position.

There comes a time when in deliberative fashion all of us have to face up to the question of whether we really do not need to begin to fashion a mechanism to take care of both present and future needs.

Mr. Chairman, let me just indicate most briefly that there are some other recommendations in the Commission's report. There are 22 in all. I will not refer to any of them here, partially because, subject to your pleasure and to Congressman Wiggins' desire to make any additional comment, I would like to leave a little time to get to my other statement. I am at your pleasure for both whether you want to put any questions and to whether Congressman Wiggins would like to comment.

Mr. WIGGINS. Mr. Chairman, I wish to underscore the need for the subcommittee to confront the National Court of Appeal issue, bearing in mind that the present need of a Federal appellate court has not always been with us. Back in 1890 or thereabouts the population of this country was under 100 million. We are now well over 200 million. Within the next 25 years I am confident we will pass through the 250 million number.

More than just an increase in numbers, we have become a more litigious society, and Congress has played a role in that. To believe that we can maintain the present structure in perpetuity to accommodate increased population, an increasingly urban population as well, where frictions develop amongst people, all of which promote litigation, is, I think, an unreasonable expectation.

We have to deal with this issue in some way. What are the options? One is for Congress to be silent on the subject. In that event I am confident the court itself will deal with it somehow in cases like *Stone* against *Powell*, which was mentioned earlier. They involve a consideration of administration of justice. If we had no flood of prisoner petitions, I guess *Stone* against *Powell* would never have come down. The court is dealing with the problem. That is one way, and I am confident the court will, as a matter of practical necessity, do something if we fail to act.

Another approach is to support spinoff legislation in specialized areas to provide for a separate appellate system with ultimate connection to the U.S. Supreme Court. That has a set of disabilities as well. The National Court of Appeals is another option. I hope as you consider the issues you will consider all these options as well.

It has been my observation that the controversy over the National Court of Appeals is not whether we have one, but what should be its jurisdiction if we do? We have had much comment with respect to the reference jurisdiction of the court and the transfer jurisdiction of the court. I do not think that we need be wedded to one or the other but to lay the proposition on the table and have hearings and select from amongst the available options.

I am personally persuaded that the only major drawback to a National Court of Appeals is possibly the transfer jurisdiction which we originally envisaged and now we have drawn back from, and the pos-

sibility that the court will not have the kind of prestige that it ought to have.

If in fact it becomes a tribunal for the resolution of statutory construction cases, I am confident that the Supreme Court will not permit it to be that kind of court, that it will in appropriate cases yield to important issues of national policy, always reserving unto itself the right to take a case back or to overrule a decision of the National Court of Appeals.

That is really all I have to say, Mr. Chairman. The controversy should be no reason for this subcommittee drawing back from a consideration of the subject, because it must be resolved and in fact will be resolved by somebody, and I would hope the Congress plays a role in that decision.

Mr. KASTENMEIER. Let me make a brief comment. In making the argument for the appellate court system it was stated that it is important to define clearly what the new court would and would not do under the Commission proposal. Likewise, we were told not to be alarmed that we are going to take away any ultimate decisionmaking from the highest Court. Hypothetically—and this will never eventuate, but nonetheless, from what you have said in these statements—it could be concluded that if we had nine super productive individuals who were members of the U.S. Supreme Court, they would still theoretically hold all the powers they presently do. The seven-member new tribunal would still in the final analysis be an adjunct which would only be used to the extent that the court chose not to emphasize its powers.

What I am saying, therefore, is that if there is an attempt to persuade people that the resolution of ultimate conflicts would always rest with the Supreme Court itself, you might be promising too much at least as to what the role of the new lower court would be.

Mr. WIGGINS. Just a word, then I will yield to Leo.

Most Americans feel they have a right to take their case to the Supreme Court, but it is an illusory right really. We seriously impacted that right—and I put quotes around it—when we gave jurisdiction to the U.S. Supreme Court. I do not think that we would be denying anything of substance by the creation of a court just below the U.S. Supreme Court. The concern is whether we are denying reality, rather the appearance as distinguished from reality, of review by the U.S. Supreme Court.

I really do not think we can buttress that appearance by any legislation. It is sort of part of the American dream, and that is still with us. People still would have under this new proposal the opportunity of access to the U.S. Suprme Court and that is really all they have now.

Mr. LEVIN. If I may supplement that, I would like to say that I am pleased that these issues are addressed. We found a great deal of confusion by people who assumed we were repeating proposals of other groups when in fact we disagreed with some of the important provisions put forth by others.

Second, our best judgment is that the Supreme Court is overburdened—they should not be obligated to decide so many cases in plenary fashion, with the summary affirmances having the force of precedent.

Then we find the Supreme Court saying, sure the summary affirmance is precedent, but you did not look carefully enough; we did not tell you what we were holding, therefore you should have gone further to inquire what we did mean when we did not say anything in a summary affirmance.

Mr. Justice White has put it formally that he is convinced the Court would refer cases to the National Court; that the Supreme Court should cut back substantially from the size of its present docket.

In addition, I agree with the statement earlier that there will be constitutional questions referred to the National Court of Appeals. I do not think the kind of novel constitutional question which is dramatic is the kind that it would be helpful for the National Court to decide, but frequently you have a constitutional principle that needs to be fleshed out. This can be terribly important, but we felt ultimate power should remain in the U.S. Supreme Court. I would not denigrate the role of the new court even with that ultimate power in the Supreme Court; but in the rare case if the U.S. Supreme Court justices felt they had to use their power, they should have review available.

Mr. KASTENMEIER. There is a vote on. I just want to ask one other question and I do not think it can be answered. It is a question I wanted to ask while all of the members were here. The full committee has resolved this question; there is a background to the question. It goes to the creation of article III bankruptcy courts. Mr. Wiggins, Mr. Railsback and Father Drinan all have strong views about this question. The Chief Justice has expressed his views on this subject. Our last witnesses all addressed themselves to the issue. Professor Neuborne suggested there is the very high quality of Federal judges by and large, and stated there had to be a limit perhaps of a thousand individuals. He felt that our society could not bureaucratically support more than a thousand Federal judges. Judge Hufstedler stated that the worst thing in the world we could do is create 92 new article III bankruptcy judges in addition to those we are already creating presumably under a pending judgeship bill.

First of all, she stated that we would create a fantastic amount of new appellate work for the courts of appeals.

Second, she noted that bankruptcy is essentially a private matter. These are not Federal agencies involved. Thus for private litigants, we would be providing a Federal specialized court. I note additionally that the Chief Justice feels that between magistrates and bankruptcy judges, the former is the more important judicial officer.

With all this in mind, how many article III judges do we want to create and what kind of judicial structure do we want in the year 2000?

I wanted to ask both of you about that. We have to prepare for a vote, but if you are willing to remain I ask that you please do so.

Mr. LEVIN. It will be my pleasure.

[Recess taken.]

Mr. RAILSBACK. Why don't we proceed. Inasmuch as this is the first time the minority has ever had the majority, there are a number of things we may want to consider. Actually, the chairman is going to be back in about 10 minutes, and I think maybe we ought not to go into the matter that he brought up.

Do you have any questions?

Mr. BUTLER. Yes. I would like to turn my attention to the other statement of the witness which we had read. I assume all of us have read that statement. I would like to have some thoughts that you might have with reference to the question of class actions. We are going to control the apparent expansion of this area of jurisdiction within the courts. My concern is, as pointed out by Congressman Wiggins, what happens is the Supreme Court has a kind of self-correcting device for when it is overloaded, then it starts throwing up procedural and jurisdictional hurdles. I wondered if you had some legislative suggestions as to how we might control proliferated class actions.

Mrs. LEVIN. Congressman Butler, I think on the class action issue it would be helpful to note preliminarily two things. There is a lot of action going on in the States. There are some very thoughtful statutes. They are really proving to be laboratories for change—California has a very interesting statute, New York has one—tying together substantive law with procedural devices available. That is one thing we ought to be aware of.

There is a second thing we ought to be aware of. If I can be simplistic, there are basically two types of class actions. In one, people have suffered substantial losses and each individual wants to recover his or her loss. There may be 100 or 150 such people and there is no alternative but to have a court fixing an amount. It is a very different thing than when the amount suffered by each of the class is a de minimis amount.

The primary function of the latter type of class action is to force a defendant to disgorge illegally gotten gains and to deter future action in which, as Kalven and Rosenfeld pointed out 30-odd years ago, the major party in interest in the lawsuit, the entrepreneur, is the lawyer.

One of the things I think is worthy of exploration—and it is not original with me—is that we may really advance the underlying goals if we develop an appropriate administrative solution for some of these problems. The class action originally came into being because there was financial incentive for the attorney and there was inadequate Government policing of telephone companies, utility companies, for example, some of them in Illinois.

Supposing we were to work out a system where basically you dealt with the problem administratively where you had such a thing as a finder's fee appropriatly worked out. If a commission was not doing its job and someone pointed that out, I think you could have a far more efficient method of dealing with the problems than running through our present litigation which is cast in the mold of an individual versus an individual, adapted to litigation by a huge class, but nonetheless the same model.

I am not prepared to draft such a statute this afternoon. I am not suggesting there would not be some problems, but I think this is really a promising way of looking forward. It would eliminate tremendous amounts of litigation costs which are wasted, such as long discovery over whether a particular named plaintiff is an adequate representative of a class, when really that plaintiff is just one individual. I think we would avoid other kinds of wasteful procedures and really do better in many ways.

I must say I am particularly concerned about a number of reports of corporate entities of relatively modest means who really have been bludgeoned into settlements, not because they thought the claim against them was justified, but because the sheer cost of litigation is so tremendously high, particularly where there are other, larger co-defendants adding to the complexity and the risk. I think an administrative effort to deal with a lot of those kinds of cases would be warranted and could well be an alternative to some of the methods we are using today.

Mr. BUTLER. Let me pursue a question you raise in that area. What is your view from your experience and observation of the value or lack of value of permitting recovery of attorney's fees by plaintiffs, which is now getting to be the style? The suggestion is often made now that the prevailing defendant ought to recover attorney's fees, particularly when the Federal Government is the plaintiff. Do you have a view on that?

Mr. LEVIN. I take it we have left the class action as such?

Mr. BUTLER. This is one aspect which is suggested because of the tremendous attorneys' fees small representative defendants wind up having to bear, so I was considering that possibility as to class actions in general.

Mr. LEVIN. We have to distinguish between different kinds of litigation, but on the question generally let me say that I am not immediately adverse to the notion that in certain kinds of cases where the Government is litigating against a citizen or a citizen has been obliged to litigate against the Government, and the Government has been shown not be be justified in its position, I think there is something to be said for the question of whether the Government should not bear part of the expense of the litigation.

I think we ought to proceed very cautiously in this area. I think it ought not be done in a way that is simply automatic; if you win 20 cents, I would say you cannot automatically get a $100 million attorney fee or some other enormous sum. I think huge figures for attorney fees are not as out of line with reality as one might have expected years ago.

Mr. RAILSBACK. Would the gentleman yield?

Mr. BUTLER. Yes.

Mr. RAILSBACK. I take it you would not favor an automatic prevailing party recovering? It should be discretionary?

Mr. LEVIN. I think so. I worry about the automatic in many kinds of cases. Indeed, there are cases involving nominal damages where there are risks involved. I would worry about an automatic rule at this stage although I can not claim to be that expert in this area. I have been concerned for some time with attorneys' fees as a function of access to courts because really this is frequently part of the problem and it operates on several levels with both plaintiffs and defendants.

I think the cost of litigation, reflected in attorneys' fees, is denying many defendants realistic access to the courts and to justice. I think this has become a fair statement.

Mr. RAILSBACK. Do you have any further questions?

Mr. BUTLER. Not for the present.

Mr. RAILSBACK. I think maybe what we ought to do is vote and I think the chairman will be back. Is that all right with you?

Mr. LEVIN. I am at the pleasure of the subcommittee, Mr. Chairman.

[Recess taken.]

Mr. KASTENMEIER. We are on the record now. We reconvene the hearing. Mr. Levin.

Mr. LEVIN. May I explain the reason for my having submitted two statements? I was invited to appear in two capacities; one as the former Executive Director for the Commission to discuss its recommendations and the other as the freshman in the Office of Director of the Federal Judicial Center, a position I assumed only last week. With the approval of your staff, I thought it would be well not to confuse the two roles; therefore I submitted two separate statements so the one would be clearly different from the other.

Mr. KASTENMEIER. I think that was a wise decision, and both statements without objection will appear in the record.

[The statements follow:]

STATEMENT OF A. LEO LEVIN AS EXECUTIVE DIRECTOR OF THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, JULY 28, 1977

Mr. Chairman and members of the subcommittee; my name is A. Leo Levin. I had the honor to serve as Executive Director of the Commission on Revision of the Federal Court Appellate System from the time it came into being in 1973 until it concluded its work and went out of existence in 1975. The Commission was created by Act of Congress and consisted of 16 Members, from the four appointed from the House, four appointed from the Senate, four appointed by the President, and four by the Chief Justice.

The Commission was chaired by Senator Roman L. Hruska and its members included: Congressman Jack Brooks, Congressman Walter Flowers, Congressman Edward Hutchinson, Congressman Charles E. Wiggins from the House; Senator Quentin N. Burdick, Senator Hiram L. Fong, Senator Roman L. Hruska, Senator John L. McClellan from the Senate; Honorable Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Esq., Judge Alfred T. Sulmonetti, appointed by the President; and Judge J. Edward Lumbard, Judge Roger Robb, Bernard G. Segal, Esq. and Professor Herbert Wechsler, appointed by the Chief Justice.

The Commission was given two major assignments, each with its own time table. In phase I, the Commission was to "study the present division of the United States into the several circuits and to report * * * its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business." In recognition of the urgency of the need to deal with the problem, the statute provided that the Commission report to the President, the Congress, and the Chief Justice with respect to circuit realignment within 180 days.

Pursuant to that mandate, the Commission filed its first report on December 18, 1973. The Commission concluded that creation of two new circuits, one in the fifth and one in the ninth, was urgent and imperative.

In connection with its work in circuit realinement, the Commission took testimony in 10 cities and heard from a wide variety of interested persons. There was, of course, concern with a wide range of technical issues and statistical data. Of primary interest to the Commission, I think it fair to say, was the "quality of justice" afforded the litigants by overburdened, oversized courts. In this connection we noted the concern expressed in 1971 by a resolution of the judges of the fifth circuit that to increase the number of judges on that court beyond 15 "would diminish the quality of justice" and the effectiveness of the court as an institution. What follows is an attempt to expand on that concern.

Permit me briefly to review the statistics. In fiscal 1976, there were 3,629 filings in the U.S. Court of Appeals for the Fifth Circuit. This represents an increase of almost 57 percent since 1971, a brief 5-year period. The fifth circuit, in an attempt to accommodate the flood of appellate litigation and to avoid a total

failure of judicial administration, adopted a number of innovative and imaginative procedures: oral argument was denied in almost 60 percent of the cases at the time of the Commission's report; the proportion of cases decided without written opinion—hundreds per year—was increased, and the conference of the judges was likewise eliminated in a large volume of cases. These truncated procedures, however, have necessarily exacted a high price in terms of the quality of the judicial process itself.

More judges are certainly needed. There is, however, a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. It becomes far more difficult for a larger court to sit en banc despite the need to maintain the law of the circuit. Indeed, precisely as the number of judges increases, and the number of possible combinations of judges who will sit together on panels of three increases geometrically, the difficult of empaneling the full complement of judges for an en banc determination of the law of the circuit similarly increases. There are the obvious problems of time and efficiency. Eighteen judges, sitting en banc, could otherwise be hearing six cases, not to mention the problems of scheduling and of traveling time. This, however, is a small part of it. The very process of the conference changes; it comes to resemble a legislative committee meeting rather than a judicial procedure. This is the considered view of judges who have participated in en banc hearings on a court of fifteen.

En banc with less than the full complement of the active judges of a circuit is highly unsatisfactory. The precise nature of the loss involved depends on the method chosen to select the judges who are given the power to determine for their colleagues the law of the circuit. To use a random selection, as some have suggested, would make it exceedingly difficult to attain any stability in the law of the circuit. To use a seniority system makes it difficult for more recently appointed judges to have their views reflected in the law of the circuit. It makes change much harder to come by. The important point, however, is that when there is a partial en banc with a court of 16 or 17 or even 18, at least half of the active judges sit on the en banc. When two thirds of the active judges on a court of appeals are precluded from sitting en banc, as would be the case on a court of 27 judges, the situation is exacerbated. Moreover, the Supreme Court can hardly be expected to alleviate the situation, for Supreme Court review of decisions of the courts of appeals has been reduced to the level of about one in a hundred.

Permit me to make the point another way: it is not a healthy situation when lawyers must advise their clients that the decision in a particular case will depend on the "luck of the draw" which will determine the composition of the panel of three who will sit on their case. It is an unhappy situation when neither lawyers nor litigants, nor judges, really know the law of the circuit. It is doubly unfortunate when the size of the court precludes an efficient, effective mechanism, responsive to change—that is, a properly functioning en banc—for defining that law for that circuit.

The situation in the ninth circuit is, in many ways, worse. The ninth circuit today handles more cases annually than any circuit other than the beleaguered fifth. Moreover, in the 5 years since 1971, its filings have grown by over 50 percent. Delay in the adjudication of civil cases at the appellate level was a source of serious complaint by lawyers who testified at the Commission hearings. Similarly, attorneys and judges testified that they were troubled by apparently inconsistent decisions by different panels of a court which was already large. The situation with respect to delay has since deteriorated further. In fiscal 1976, the median time from the filing of the complete record to final disposition for disposition for civil cases in the ninth circuit was almost 16 months, 15.9 to be exact; the median time from filing in the lower court to final disposition in the appellate court was 31.9 months. This means, of course, that half of these cases took longer. Moreover, in a very real sense these statistics do not adequately portray how unfortunate the situation really is: They include as civil cases a large number of habeas petitions which are disposed of expeditiously. Civil cases in the ninth circuit which wait 2 years for adjudication at the appellate level alone were described to the commission as commonplace.

It is well to pause to consider geographical size. The fifth circuit stretches from the Atlantic Ocean to the Rio Grande. The ninth presents an even more striking picture; it ranges from the Arctic Circle to the Mexican border, from Hawaii and Guam to Montana and Idaho. It is indeed difficult to avoid the conclusion that some realignment of these circuits, by creation of a new circuit or of divisions, each a separate court of record, is required.

If anything, the Commission was conservative in its approach. I attach, as an appendix to this statement, the relevant portions of the annual report of the Chief Justice of the United States, delivered to the American Bar Association earlier this year, emphasizing the need for prompt relief and calling for Congress to create not two, but three divisions to accommodate sorely needed additional judges in each of these areas. [See app. 1b at p. 279.]

NATIONAL COURT OF APPEALS

The Commission was further charged by the Congress "to study the structure and internal procedures of the Federal courts of appeal system and to report * * * its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process."

The Commission held 12 days of further hearings in various cities; a preliminary report was widely circulated. The Commission received ideas and opinions from the bench and bar of every section of the Nation.

In its final report the Commission ranged widely over a variety of problems and offered a substantial number of recommendations. No one of these has commanded more attention, both before and after the filing of the final report, than that which called for creation of a National Court of Appeals. The proposal, embodied in H.R. 3969, has already spawned what may be termed a substantial literature, divided between proponent and opponent. I should like to put the proposal in context and to describe its major provisions.

It is certainly clear to the members of this subcommittee that the Federal judicial system is so small enterprise. Some 600 judges are actively involved in disposing of the business of these courts with approximately 175,000 new Federal cases entering the system each year. First appellate review of trial court and administrative agency decisions is entrusted to a cadre of more than 140 judges organized in 11 circuits, and sitting for the most part in panels of 3, each of which serves as a court of last resort in all but a relatively few cases.

The primary task of assuring harmony and stability in the law of this system is entrusted to the U.S. Supreme Court. Divergent approaches to common problems are familiar enough in the courts of appeals: Inter-circuit conflicts develop, ultimately to be resolved—or so the familiar learning has it—by the Supreme Court. Certainly the resolution of such conflicts is an important part of the Court's work, a "prime function" of its certiorari jurisdiction. Yet none would content that achieving harmony and stability can, in itself, adequately describe the role of our one Supreme Court, charged as it is with developing the law of the Nation to met the needs of contemporary society.

With burgeoning caseloads presenting new and difficult problems in unprecedented profusion, the crucial question is whether the Supreme Court can be expected to perform these functions in a measure adequate to the needs of the Nation. Phrased differently, is the appellate capacity for the declaration of national law adequate to the needs of the country as they exist today and as they are likely to develop tomorrow?

The Commission, relying on the views of participants in the system, (including the Justices themselves), on research by staff and consultants, and on the analysis of a profusion of data, has concluded that it is not. To meet the need for increased appellate capacity for declaration of the national law, the Commission proposes creation of a National Court of Appeals, composed of seven judges appointed by the President and confirmed by the Senate.

In view of the plethora of proposals for a new appellate court and their differences, both in detail and in the very functions envisioned for the new tribunal, it is important to state clearly what the new court would and would not do under the Commission's proposal. It would not screen cases for the Supreme Court; it would not cut off access to the Supreme Court; moreover, its decisions would be subject to Supreme Court review even in cases referred to it by the Supreme Court itself. It would be empowered to resolve existing conflicts among the circuits in appropriate cases and further to reduce uncertainty for judges, lawyers and litigants alike by providing authoritative determinations of some recurring issues even before a conflict had arisen. In short, the court would "bring greater clarity and stability to the national law" with less delay and less cost than is possible today.

How the court would operate is best described by considering its jurisdiction. The jurisdiction of the National Court of Appeals would extend to cases referred to it by the U.S. Supreme Court. [I omit discussion of another source of jurisdiction, transfer from the courts of appeals, which has found little favor and which is not included in a second bill introduced in the Senate.] The Supreme Court would be empowered to refer individual cases with instructions that the National Court decide them, or it might send down large numbers of cases with authority in the new tribunal to accept them for decision or not, as that court saw fit. For example, a petition for certiorari might allege an inter-circuit conflict. The Justices of the Supreme Court might agree that whether or not there was a true conflict, the case was not one which the Supreme Court ought to decide, but that it might well be appropriate for the National Court to do so. That case, and literally hundreds of similar cases, could be referred to the National Court for that court to determine whether or not it should be heard.

To assess the proposal for creation of a new tribunal and, indeed, to understand the reasoning underlying the specific provisions concerning its jurisdiction, it is necessary to consider the nature of the needs perceived by the Commission and the consequences of the present lack of adequate capacity for the declaration of national law—the price which our present deficiencies exact from Federal litigants in particular and, of no less significance, from citizens generally.

First, however, it may be well to lay to rest the recurring suggestion that the U.S. Supreme Court—if only if did a little more, or perhaps even without change—can prove adequate to whatever needs may exist or are likely to develop. As to this, the views of the Justices are particularly instructive.

Mr. Justice White, in a letter to the Commission, states that he is convinced that there are substantial numbers of cases "which should be decided after plenary consideration but which the Supreme Court now either declines to review or resolves summarily," numbers which in his view are clearly sufficient "to warrant the creation of another appellate court."

Mr. Justice Powell, concurring in the views of Justice White, explains that the Supreme Court "can hardly serve the national appellate needs of our country as adequately today as it could when petitions filed were about 1,000 per year as contrasted with the present 4,000-plus."

The change in two brief decades is dramatized by Mr. Justice Blackmun who refers to the cases "that almost assuredly would have been taken 20 years ago," but which today are denied review, and the "worry" among some members of the Court concerning the cases that they "'barely' do not take." Mr. Justice Rehnquist elaborated on the same concerns.

Among the most striking comments are those of the Chief Justice. He, too, refers to the increased demands being made on the Court and lists a number of remedial measures, from the abolition of diversity jurisdiction to elimination of all direct appeals, adding that without the adoption of such remedial measures—and perhaps even with them—the creation of such an intermediate court is "inevitable". Of greater significance, however, is the risk which the Chief Justice perceives in allowing the present situation to continue, the risk that the increasing demands being placed upon the Supreme Court will affect the quality of its work:

"[O]ne element of the Court's historic function is to give binding resolution to important questions of national law. Under present conditions, filings have almost tripled in the past 20 years; even assuming that levels off, the quality of the Court's work will be eroded over a period of time."

The Justices, of course, are not all of one mind and it is instructive to examine the views of the dissenters. Mr. Justice Stewart, although "not convinced that there [is] a need for the creation of a new national court at this time," thought it "likely that the day would come when a new court would be needed." Mr. Justice Marshall, who does not hesitate to suggest that the more drastic proposals for a new court offer "overly strong medicine", nonetheless concludes that permitting the Supreme Court to refer cases to a national intermediate appellate court "might be a good move", one deserving serious consideration. Justice Marshall is not altogether convinced that specialized courts in "areas such as tax, patent, anti-trust, and administrative law" might not be preferable to a National Court of Appeals. This proffered alternative does not deny the existence of a serious problem; rather it represents a difference concerning the preferred solution.

There remains for consideration the views of Mr. Justice Douglas and Mr. Justice Brennan. The former, with his insistence that "the total work amounts to no more than 4 days a week," can only be viewed as idiosyncratic. Indeed, his concession that those who come to the Court from a lower court, from teaching or from the practice of law soon discovery that they "have never been busier in their lives" is significant.

Mr. Justice Brennan "remains completely unpersuaded" of the need for a new court. Moreover, he believes that such a change in structure is not justified "at least and until available alternatives for better management of court work loads—such as abolition of requirements for three-judge courts, for example—are tried and are proved to be ineffective."

In assessing the views of the Justices, and indeed in evaluating the studies which the Commission considered, it is important to be aware of the cases which are never brought before the Supreme Court, either because the proabilities of review are so insubstantial or because institutional considerations impel rigorous selectivity. Erwin Griswold, who served as Solicitor General for six terms of Court, speaks of the "20 Government cases every year which are fully worthy of review by an appellate court with national jurisdiction", but in which he, as Solicitor General, refused to recommend Supreme Court review because of the workload of the Court. He concludes that "the Government and the legal system suffer from the rationing we now impose and from the lack of authoritative decisions which would come from such review and would serve as a guide to Government agencies and the lower courts."

The research done by the Commission in this phase of its work supports the inference that private practitioners, too, often do not petition for certiorari in cases which are "cert worthy" simply because of the low probability that the writ will be granted and the case heard.

I shall not detail the various research projects undertaken by the Commission and its consultants. They are described in the text of the Commission's report and detailed in more than 100 pages of appendices thereto. I would, however, point to the data concerning relitigation as a Government policy, the refusal of the Government to acquiesce in an adverse ruling or series of rulings in the effort to create intercircuit conflict and ultimately to obtain Supreme Court review. There have been those who have urged a new rule of res judicata, to preclude such relitigation and prevent citizens from being subjected to litigation on issues which have already been determined adversely to the government in other cases. Government attorneys, however, have argued with some cogency that the accident of an adverse decision by a single panel in one circuit, or even by two different panels, is no reason for precluding a national determination by a national tribunal. Only the Supreme Court can today provide that review and the realities are such that, without inter-circuit conflict, Supreme Court review is virtually impossible with respect to so many of these statutory problems.

Permit me to refer briefly to what the Commission considers the four major consequences of the inadequacies of the present system. First, there is the unresolved inter-circuit conflict, where the rights and liabilities of citizens are dependent on the accident of geography—an accident which assumes legal significance because the Supreme Court is unable or unwilling to resolve the conflict. If the Social Security Act means one thing in terms of eligibility for benefits in Mississippi, shall it mean the opposite solely because the aggrieved litigant lives in Ohio?

Second, as the system presently operates, there may be a delay of several years before a conflict develops and is resolved. The result is uncertainty and confusion for the litigant and his attorney and, almost inevitably, forum shopping for which the judicial system itself pays a heavy price.

Third, since the Supreme court is at present the only judicial body with the power to resolve inter-circuit conflicts, the Court must frequently take a case merely because two circuits have differed. These cases, which are otherwise not worthy of the Court's limited resources, place a burden on the justices which could and should be removed.

Finally, even when a conflict never develops, we presently must live with uncertainty as parties continue to relitigate issues in circuit after circuit until each circuit has spoken or until the government acquiesces in the adverse decision of several courts of appeals.

We recognize, of course, that the quest for certainty is often illusory and predictability is sometimes synonymous with inflexibility. The potential for growth

of the law in a common law system, with incremental change based on nice distinctions and factual differences, implies a measure of uncertainty and unpredictability even in the fact of what may appear to be unambiguous judicial pronouncements. Unresolved inter-circuit conflicts, particularly in the interpretation of Federal statutes, are not, however, part of this common law process. Too often, diametrically opposed results represent no more than unequal treatment to the litigants, without contribution to the maturation of the law.

Closely related to uncertainty as part of the process of growth, and yet analytically distinguishable, is the phenomenon known as "percolation," of allowing different aspects of the same problem, or a series of related problems, to be considered by a number of courts, each contributing to a better understanding of the whole and hopefully, yielding at last a more enlightened and more desirable result. One may recognize the desirability of percolation where appropriate and yet also recognize that a large number of cases present technical questions requiring definitive answers within a reasonable period rather than seemingly ceaseless exploration and reexamination. Whatever the advantages of according freedom for diversity of decision in the early stages of interpreting a new statute or developing an emerging rule of law, they hardly serve to explain or to justify decades of uncertainty or discrimination in result based solely on the accident of the place of litigation.

It bears noting that there appears to be little doubt, particularly among the justices of the Supreme Court, that reference jurisdiction is practicable and that it would not add to the burdens of the Court or of the Justices. This much is conceded even by Mr. Justice Brennan and is specifically confirmed by Mr. Justice Stewart. The views of the other justices, already described in some detail, need not be rehearsed here. Whatever the aspects of the National Court concerning which reasonable men may differ, feasibility of the proposed reference jurisdiction does not appear to be one of them.

Any case decided by the National Court of Appeals would be subject to Supreme Court review upon petition for certiorari. This would be true even though the cases were referred by the Supreme Court as well; it is important to preserve the ultimate authority of our one Supreme Court in every case. Of course, in those cases as to which the high Court itself has already determined that decision by the National Court would not be inappropriate one would expect relatively few grants; it would be the rare case in which the Supreme Court would have reason to accept for review a case which it had already determined not to hear. To avoid prolonging the appellate process unduly the Commission has recommended expedited treatment of petitions in such cases.

The Commission on Revision of the Federal Court Appellate System is not the first to point to the lack of adequate appellate capacity for declaration of National law. On the contrary, it is the fourth body to come to this conclusion within the past few years: there was the Study Group on the Caseload of the Supreme Court, appointed under the aegis of the Federal Judicial Center, which reported in 1972, the Advisory Council for Appellate Justice in 1974, and the American Bar Association, acting at the 1974 midwinter meeting and again in 1976. Moreover, their work was foreshadowed by the prestigious American Bar Foundation report on Accommodating the Workload of the United States Courts of Appeals, filed in 1968. The Board of the American Judicature Society, in a resolution adopted in August, 1975, also expressed its support of "the concept of a National Court of Appeals."

Proposals for change in the structure of the Federal Judicial System should not be enacted hastily. The Congress wisely tends to allow such proposals to remain in the arena of public debate for some time. There is, of course, an understandable reluctance to change any aspect of the Federal judicial system and particularly to refrain from change which would affect, to any degree, the U.S. Supreme Court. Yet, to fail to act when action is clearly indicated is neither the course of wisdom nor a prudent method of preserving institutions which deserve the greatest measure of protection. As the chairman of the Commission, Senator Roman L. Hruska, has observed:

"From this vantage point in history we recognize that if those who in 1891 were wise enough to create the U.S. court of appeals system had not prevailed, our system could not function today. Similarly, if those who in 1925 were wise enough to effect a mechanism—the petition for certiorari—which allowed the U.S. Supreme Court to develop a significant control over its own dockets had not prevailed, that Court would now be in an impossible position."

Today, too, we must be willing to recognize the need for prudent change. We can no longer afford to be satisfied with a structure unable to meet the needs of today and tomorrow no matter how grateful we may be that it has worked well in the past. The demands of a developing society, and the needs of a judicial system which must respond effectively to continued growth, require no less.

OTHER RECOMMENDATIONS

Appended, for the record, is a summary of the recommendations of the Commission as presented in its final report. They are 22 in number. Those requiring congressional action are embodied in H.R. 3971, introduced by Congressman Wiggins. Permit me to refer briefly to only two, illustrating both the variety of subjects considered and the approach of the Commission.

Recommendation No. 5, in the section on Internal Operating procedures, calls for greater participation of the bar in the formulation of circuit procedures. It calls for publication of a court's internal operating procedures and for an advisory committee, representative of bench and bar, to aid the court. I am pleased to report that a number of circuits have implemented, or are in the process of implementing these proposals. They reflect a basic attitude concerning the desirability of involving the "consumers of the system" or their representatives in certain types of policy decisions, an attitude which I consider relevant to the national rulemaking process as well and which, I think, will prove beneficent at every level.

Finally, I refer to Recommendation No. 14 which would effect a modest easing of the requirements for taking senior status. Today, by statute, a judge may take senior status on the completion of 15 years of service at age 65 or 10 years' service at age 70. These particular provisions would remain in effect, but the proposal would provide additional circumstances under which judges might take senior status. As matters now stand, a judge aged 70 may retire with 10 years of service while another aged 69 with 14 years of service may not. A third judge with 19 years of service at age 62 must wait 3 more years. The Commission recommended that the statute be revised to allow retirement after 20 years of service on the bench at age 60. In addition, it would provide that a judge may qualify under what has been colloquially referred to as the "rule of eighty." That is, a judge should be eligible for retirement when the number of years he has served on the bench, added to his age, equals 80, assuming always a minimum period of one decade of service and a minimum age of 60. By this revision a judge who has given substantial service to the judicial system, and who is likely to continue to carry a heavy caseload even on retirement, would not need to defer taking senior status beyond what we consider the equitable equivalents of the present statutory scheme.

I thank you for the privilege of appearing before you to describe these recommendations of the Commission on Revision of the Federal Court appellate System.

Attachments:

Annual Report of the Chief Justice, 1977. [See app. 1b, at p. 279.]

Summary of Recommendations of Commission on Revision of the Federal Appellate Court System.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM

Structure and Internal Procedures: Recommendations for Change, Washington, D.C., June 1975

SUMMARY OF RECOMMENDATIONS

I. A National Court of Appeals

1. The Commission recommends that Congress establish a National Court of Appeals, consisting of seven Article III judges appointed by the President with the advice and consent of the Senate.

2. The court would sit only en banc and its decisions would constitute precedents binding upon all other federal courts and, as to federal questions, upon state courts as well, unless modified or overruled by the Supreme Court.

3. The National Court of Appeals would have jurisdiction to hear cases (a) referred to it by the Supreme Court (reference jurisdiction), or (b) transferred to it from the regional courts of appeals, the Court of Claims and the Court of Customs and Patent Appeals (transfer jurisdiction).

(a) *Reference jurisdiction.*—With respect to any case before it on petition for certiorari, the Supreme Court would be authorized:

(1) to retain the case and render a decision on the merits;

(2) to deny certiorari without more, thus terminating the litigation;

(3) to deny certiorari and refer the case to the National Court of Appeals for that court to decide on the merits;

(4) to deny certiorari and refer the case to the National Court, giving that court discretion either to decide the case on the merits or to deny review and thus terminate the litigation.

The Supreme Court would also be authorized to refer cases within its obligatory jurisdiction, excepting only those which the Constitution requires it to accept. Referral in such cases would always be for decision on the merits.

(b) *Transfer jurisdiction.*—If a case filed in a court of appeals, the Court of Claims or the Court of Customs and Patent Appeals is one in which an immediate decision by the National Court of Appeals is in the public interest, it may be transferred to the National Court provided it falls within one of the following categories:

(1) the case turns on a rule of federal law and federal courts have reached inconsistent conclusions with respect to it; or

(2) the case turns on a rule of federal law applicable to a recurring factual situation, and a showing is made that the advantages of a prompt and definitive determination of that rule by the National Court of Appeals outweigh any potential disadvantages of transfer; or

(3) the case turns on a rule of federal law which has theretofore been announced by the National Court of Appeals, and there is a substantial question about the proper interpretation or application of that rule in the pending case.

The National Court would be empowered to decline to accept the transfer of any case. Decisions granting or denying transfer, and decisions by the National Court accepting or rejecting cases, would not be reviewable under any circumstances, by extraordinary writ or otherwise.

4. Any case decided by the National Court of Appeals, whether upon reference or after transfer, would be subject to review by the Supreme Court upon petition for certiorari.

II. Internal operating procedures

5. *Mechanism for circuit procedures.*—Each circuit court of appeals should establish a mechanism for formulating, implementing, monitoring, and revising circuit procedures. The mechanism should include three essential elements:

(a) publication of the court's internal operating procedures;

(b) notice-and-comment rule-making as the normal instrument of procedural change; and

(c) an advisory committee, representative of bench and bar.

6. *Oral argument.*—Standards for the grant or denial of oral argument, and the procedures by which those standards are implemented, are appropriately dealt with through the rule-making process. We recommend the following as an appropriate minimum national standard for inclusion in the Federal Rules of Appellate Procedure:

(1) In any appeal in a civil or criminal case, the appellant should be entitled as a matter of right to present oral argument, unless:

(a) the appeal is frivolous;

(b) the dispositive issue or set of issues has been recently authoritatively decided; or

(c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument.

(2) Oral argument is appropriately shortened in cases in which the dispositive points can be adequately presented in less than the usual time allowable.

Because conditions vary substantially from circuit to circuit, each court of appeals should have the authority to establish its own standards, so long as the na-

tional minimum is satisfied, and to provide procedures for implementation which are particularly suited to local needs.

7. Opinion writing and publication.—The Commission recommends that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief and whatever the form, of the reasoning which underlies the decision.

The Commission strongly encourages the use of memoranda, brief per curiam opinions, and other alternatives to the traditional, signed opinion in cases where they are appropriate.

The Commission strongly encourages a program of selective publication of opinions.

8. Central staff.—The Commission, recognizing the contribution which central staff can make to the effective functioning of the courts of appeals, recommends that Congress provide funds adequate for optimal utilization of such staff. Duties appropriate for central staff include research, preparation of memoranda, and the management and monitoring of appeals to assure that cases move toward disposition with minimum delay. Central staff attorneys should not draft opinions, nor should they screen cases for denial of oral argument. To minimize the risk of undue delegation of judicial authority, or even the appearance thereof, the published internal operating procedures of each court should carefully define the responsibilities assigned to central staff attorneys.

III. Accommodating mounting caseloads: judgeships, judges and structure

9. Creation of needed judgeships.—The creation of additional appellate judgeships is the only method of accommodating mounting caseloads without introducing undesirable structural change or impairing the appellate process. Accordingly, the Commission recommends that Congress create new appellate judgeships wherever caseloads require them.

As the Commission recognized in its report on circuit realignment, an appellate court composed of more than nine judgeships loses in efficiency and in the collegiality essential to the optimum functioning of the judicial process; the principles stated in that report should guide the Congress in considering circuit realignment.

A. Managing a large circuit

10. En banc hearings in large circuits.—In order to make possible the effective functioning of large circuits, the Commission recommends that participation in en banc hearings and determinations should be limited to the chief judge and the eight other active judges of the circuit who are senior in commission but not eligible for senior status, subject to the following qualifications:

(a) Judges eligible for senior status may continue to participate so long as, and to the extent that, the total number of participants does not exceed nine.

(b) When the nine-judge en banc court becomes a minority of the authorized judgeships on any court of appeals, the method of selecting judges for the en banc court should be reconsidered by the Congress.

Regardless of the size of the en banc court, all of the active judges of the circuit would be eligible to vote on whether to grant hearing or rehearing en banc.

11. Amendments to the en banc statute.—Section 46(c) of the Judicial Code should be revised to provide that:

(a) En banc consideration would be granted upon the affirmative vote of a majority of the active judges of the circuit who are not disqualified from sitting in the matter, rather than a majority of all active judges; and

(b) Judges who sit on a panel should not be eligible, for that reason alone, to sit on the en banc court in the rehearing of the case.

B. Assuring judges of superior quality in adequate numbers

12. Filling of vacancies.—The Executive and Legislative branches should act expeditiously to fill all judicial vacancies.

13. Inter-circuit assignments.—The procedure for making inter-circuit assignments of active judges should be simplified. Specifically, the judiciary should return to the simple procedure established by Congress: certification of necessity by the borrowing court, consent by the lending court, and designation by the Chief Justice.

14. Easing of senior status requirements.—The requirements for taking senior status should be eased; a judge should be eligible for retirement when the number of years he has served on the beach, added to his age, equals eighty, as long as the judge has served a minimum period of ten years and has attained age sixty.

15. Adequate judicial salaries.—Federal judicial salaries should be raised to a level that will make it possible for outstanding individuals to accept appointment to the bench and adequately compensate those now serving.

IV. OTHER RECOMMENDATIONS

16. Commission on the federal judicial system.—The Commission recommends that Congress consider the desirability of creating a standing commission to study and to make recommendations with respect to problems of the federal courts.

17. District court judges of high quality in adequate numbers.—The Commission recommends that the Congress assure to each of the districts courts judges of superior quality in sufficient numbers and with adequate support facilities, not only because of the importance of their function, but because of the resultant significant impact on the work of the appellate courts.

18. Tenure of chief judges.—The Judicial Code should be amended to provide for a maximum term of seven years for the chief judge of a circuit, who would continue to be selected on the basis of seniority.

19. Selection of the presiding judge of a panel.—Congress should amend section 45(b) of the Judicial Code to provide that the presiding judge on a panel shall be the active judge of the circuit who is senior in commission.

20. Adequate staffing and support.—Congress should provide adequate staff and support facilities for each of the courts of appeals as well as for all of the judges.

21. Discipline of judges.—The Commission recognizes that a mechanism for handling allegations of judicial misconduct and incapacity is an important matter and recommends that Congress turn its attention to this subject.

22. Availability of court of appeals documents.—The Library of Congress should serve as a national depository for briefs and other appropriate documents in cases in the federal intermediate appellate courts. The Library of Congress should micro-copy such materials and make them available to the public at cost.

A substantial majority of the Commission supports each of the recommendations set forth above. We are not, however, of one mind on all issues. We have neither sought nor achieved unanimity with respect to all of our recommendations nor with respect to the reasoning underlying them. Though we have not attempted to submerge our differences, we have not thought it useful to articulate all of them in our report, since we are convinced that the larger purpose of furthering discussion and debate will be adequately served by the recommendations that a substantial majority of our membership approve. We are, moreover, unanimous in our recognition of the serious problems presently besetting the federal courts and of the need for sustained concern to the end that appropriate and enduring solutions be achieved.

STATEMENT OF LEO LEVIN AS DIRECTOR OF THE FEDERAL JUDICIAL CENTER, JULY 28, 1977

Mr. Chairman and members of the subcommittee, my name is A. Leo Levin. I have been Professor of Law at the University of Pennsylvania for over twenty-five years. Last week I assumed office as Director of the Federal Judicial Center. I am honored to be invited to appear before you and to share some thoughts on the State of the Judiciary and Access to Justice.

On important matters of policy, the Center speaks only through its Board. The Board of the Center has not spoken on the issues which I will treat today, and I am presenting only my personal views.

I would like to suggest three major issues which should be addressed in the effort to assure the delivery of justice to all. First, we should inquire whether there are preferable alternatives to litigation as a means of redressing wrongs and preventing them. Second, it is necessary to consider the proper allocation of responsibility between the Federal judicial system and the judicial systems of

the several states and, finally, it is important to consider the nitty gritty of judicial administration, to inquire whether the courts are in fact discharging to the fullest the responsibilities imposed upon them, and whether litigants are in fact receiving resolution of their cases promptly and properly, as is their due.

At the outset, however, I want to assert—or rather reassert—as emphatically as I can, what I consider the crucial importance of the availability of justice for all Americans. Justice for all has long been a national goal. The goal is not easily realized and, quite properly, there has been serious concern with how we can come closer to achieving the reality for all of our citizens.

A year ago a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice was convened in St. Paul, jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices and the American Bar Association. It commemorated the 70th anniversary of Dean Pound's classic address of the same name, but it was intended to look forward, to plan an agenda for the future.

Following the Conference, there was appointed a Follow-Up Task Force, chaired by the present Attorney General. I had the privilege of serving as Conference Coordinator and as consultant to the Follow-Up Task Force. Both the Conference and the Task Force were well aware that in planning the agenda for the future it was essential that human rights be given the highest priority and that justice be made a reality for all segments of our society. A portion of the Task Force report bears quotation in this context:

"The Conference heard an eloquent and vigorous reaffirmation of "The Priority of Human Rights in Court Reform." It heard the hope expressed that "the weak, the poor, the powerless" would be among the beneficiaries of whatever change the Conference generated. The recommendations presented were intended to achieve the delivery of justice to all; none presented at St. Paul, no recommendation presented in this report, is intended to detract from that goal."

My comments here rest on that same point of view.

Much of the confusion in our search for means of delivering justice to all derives from the difficulty of distinguishing between Access to Justice if the phrase is used to describe the fact that a citizen enjoys the formal right to file a law suit, and delivery of justice which implies that the relief due an aggrieved litigant will, in fact, be afforded him, that his wrongs will be redressed. As the Task Force report referred to above observed, "Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it."

1. ALTERNATIVES TO LITIGATION

Courts are one among a large number of agencies and forums for resolving disputes. The hard fact is that they are not the optimal forum for the vindication of every type of right in every circumstance. Some grievances between consumers and suppliers, some neighborhood disputes are resolved more rapidly, more efficiently and with greater satisfaction to both parties by informal procedures such as arbitration and mediation. In this connection I note that the Michigan legislature only last month provided for the creation of a commission to explore alternative methods of dispute resolution in the effort to make justice more accessible to all.

In some situations the creative combination of judicial and nonjudicial procedures may provide the best method. Some three decades ago Kalven and Rosenfeld recognized that class actions can provide an effective means of enforcing laws governing the rates which public utilities may charge; they viewed the class action as an alternative to policing by government agencies. The key to the effective use of the class action was the financial incentive provided the attorney, particularly where the recovery for each member of the class was relatively small.

I doubt that they envisoned then either the enormous cost of litigation, which has now become commonplace, or the order of magnitude of the fees recovered by some of the attorneys. They were concerned that government agencies were often ineffective and that an individual law suit against a utility for over-charging was normally out of the question.

Class suits have burgeoned since. No doubt they have done much good. They promise to be with us for a long time. Much has happened in the Federal system, and a great deal of promising innovation is evident in a number of the states.

There have, however, also been many complaints about the operation of class suits and some appear quite justified. The allegation that concerns me most, perhaps, is that some defendants are forced to settle claims they consider unjust only because they can afford neither the cost of litigation nor the risk of huge judgments, often representing treble damages, which are always a possibility.

I think all would agree that when corporations obtain money illegally, it should be disgorged and that there are situations in which some financial incentives for private individuals are desirable if they serve to assure that government agencies properly discharge their assigned functions to protect consumers.

Might it not be better, however, to provide for an appropriate government agency, perhaps one representing consumers, to bear the major burden of assuring that illegal gains are disgorged, with appropriate deterrents against future offenses? (I have in mind particularly class actions in which the loss by each member of the class is de minimis.) If such an agency were effective, it would not be necessary to have countless hours of expensive depositions devoted to the question of whether a named plaintiff was an adequate representative of the class, a fruitless time-consuming inquiry unrelated to the merits of the cause and almost humorous in cases where everyone must be aware that in no event would the named plaintiff be controlling the course of litigation. Substituting administrative determinations for litigation as a first step in appropriate cases can, if properly implemented, add efficiency and effectiveness and also aid the courts.

There are those who view any proposal for an alternative to class actions as inviting the risk of reducing the effectiveness of what we have now with little likelihood that the substitute will ever come into being. It is perfectly possible to avoid that risk. One might provide, for example, that the availability *in fact* of an administrative alternative will be the significant factor in the judicial determination of whether the class action is a preferred procedural device in a given situation.

The alternative I have described so sketchily here is intended only as an example of the creative use of alternatives to litigating in courts of law. It will not eliminate lawsuits in this area; it is, however, likely to reduce their number, to make the procedures more efficient and effective and the results far more equitable. At the least, it appears worthy of study.

2. ALLOCATION OF RESPONSIBILITIES BETWEEN STATE AND FEDERAL COURTS

Despite occasional loose language to the contrary, the Congress has never seen fit to grant the Federal courts the full range of jurisdiction which it might constitutionally bestow. A number of factors should be borne in mind in determining what should be the business of the Federal courts and what, correspondingly, should remain with the state courts. It is appropriate first to take note of the contributions made by the Federal judicial system. It is difficult to conceive of the progress we have made in such fundamental areas as civil rights and liberties, or reapportionment—or in holding that no man, whatever his office, is above the law—without our present system of Federal courts. No rationale for the division of jurisdiction between state and Federal tribunals can fail to entrust to the Federal judiciary a central role in developing and implementing evolving constitutional standards. Indeed, in the protection of what Chief Justice Stone called "insular minorities" from the pressure of local majorities, a preeminent role for Federal courts is dictated by the theory of our republican system. Fiercely independent, well selected and, on the whole, highly qualified, the Federal bench has been widely credited, and I think justly credited, with important contributions to the stability of our government and to the welfare of the society as a whole during difficult and troubled times.

Because the Federal judicial system has performed so well, because it is typically in the forefront of the effort to broaden human rights, none should be surprised at the constant efforts to add to its jurisdiction and to assign to it more and more types of cases. There is serious risk that, in the long run, this approach will be self-defeating. First, it will not increase the courts' ability to deliver justice but only invite both delay and hurried deliberation with respect to all litigants. As more and more cases come to the Federal courts, the pressure to keep current grows correspondingly. Most visibly at the appellate level, the choice is between a backlogged docket and methods of expediting caseflow that leave observers of the system less than confident that there has been the time for the deliberation and reflection that must be central to it.

An enduring admonition of one of our great jurists and legal scholars, Felix Frankfurter, is that undue expansion of the Federal judicial system involves serious risks. Such an expansion, Justice Frankfurter warned in 1954, cannot but lead to "a depreciation of the judicial currency and the consequent impairment of the efficacy of the federal courts." 'The business of courts, particularly of the federal courts, is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle, but far-reaching, which cannot be satisfied by enlarging the judicial plant."

Thus, continued expansion of the Federal courts is not an acceptable solution. This is not to say that a gradual increase—such as that contained in the Bill presently before Congress—is not long overdue. It is, and the Bill should be passed, but such legislation cannot be the appropriate long-term answer.

An appropriate answer can be found in reexamining the proper allocation of judicial responsibility between state and Federal courts. This has been the approach taken by the Congress beginning with the first Judiciary Act, the Act of 1789. It has been the approach advocated consistently by most students of the law, starting in the 1920's, and seen in the study of the American Law Institute published in 1965–69.

Pragmatic considerations lend force to the argument that we should not attempt to provide a remedy for every wrong in the Federal forum. Vast numbers of cases presently in the Federal courts are founded on state law concerning which state judges are far more expert. Certainly, these are appropriately heard in state rather than Federal courts. Drastic curtailment, if not elimination of diversity jurisdiction is indicated. We are faced, though, with another manifestation of the "brute fact" that Frankfurter and Landis documented repeatedly in their study of Federal jurisdiction: "the need for judicial reorganization was recognized by all parties and its fulfillment was indefinitely postponed."

3. PROBLEMS OF JUDICIAL ADMINISTRATION

This subcommittee has already heard much about the evils of delay and the risks inherent in overburdening courts to the point where less than satisfactory procedures are employed in the effort to spare the litigants the hardships of delay. I will not rehearse the relevant data nor repeat the litany. I should like to suggest, however, that in considering the needs of the courts, particularly the need for new judgeships, it would be fruitful to plan ahead rather than seeking only to remedy the inadequacies of the past. Two mechanisms designed to this end deserve comment.

The Chief Justice has proposed that legislation which would add to the work of the Federal courts should include an impact statement, forecasting, as well as one can, the additional resources which the legislation would require. There have been those who view such a forecast as a negative requirement, one which would make it more difficult to enact needed legislative reforms or to expand the rights of our citizens. I do not view the proposal in that light. I have every confidences that the Congress will continue to assess the desirability of proposed legislation on the merits. However, I do believe that it would help immeasurably to attempt to provide needed judicial manpower early enough so that it would be available for whatever tasks the Congress chooses to assign the court at the time the tasks are to be performed. The litigants are entitled to no less.

Second, I should like to invite your consideration of the desirability of a continuing Commission on the Federal judicial system, one designed to anticipate problems and develop suitable solutions before crises and emergencies preclude the opportunity for needed study and thoughtful response. Creation of a Commission of this type was proposed by the Chief Justice and was included among the recommendations of the Commission on Revision of the Federal Court Appellate System. Clearly, the Congress, acting through its respective Committees on the Judiciary, will maintain a continuing concern for the system as a whole and, indeed, for the delivery of justice generally in the country. The present hearings of this subcommittee, designed toward that end, have been widely applauded and are a source of genuine encouragement. Yet, there would be advantage in a continuing body, broadly representative of the legal profession and of others concerned with our Federal judicial system, which would report to the Congress, to the President and to the Chief Justice.

We are brought back to the distinction made forcefully in the Pound Conference Followup Report, between formal access to the court and the delivery of justice in fact, the vindication of rights and the redress of wrongs, efficiently and effectively. We are unlikely to see a sharp diminution in the volume of Federal litigation, even if diversity were abolished and precipitous, large-scale expansion of the jurisdiction of the district courts were to be avoided. We may succeed in slowing the rate of increase; we may even effect a slight dip in filings. The crisis of volume—and Professor Dan Meador has given currency to the term—is likely to remain with us. It is essential that we provide the Federal courts with the resources, particularly an adequate number of the highest quality judges, with which to do the job. And, in our continuing concern for the well-being of the Federal judicial system, a precious national resources, we will need a pragmatic approach, to be ever concerned that the system is working in fact.

I have been honored by this opportunity to share these thoughts with you. I know that I do speak for the Federal Judicial Center in saying that all of us are deeply appreciative of the support which the Center has consistently received from the Congress. I look forward to a close, continuing relationship with this subcommittee and assure you of my desire to be of service in whatever way I can.

Mr. KASTENMEIER. Did you wish to proceed with your second statement?

Mr. LEVIN. If I may, subject to your pleasure, I will summarize it briefly. If you take too long, I would be grateful——

Mr. BUTLER. I would like to say for the record I have read the statement, the second statement.

Mr. KASTENMEIER. All right.

Mr. BUTLER. Since he is going to come back and since it is going to be in the record——

Mr. KASTENMEIER. Let me then invite you to submit the statement for the record with the caveat that when you are invited back you have not in fact had an opportunity to deliver this statement, you may wish to cover the same ground for members other than Mr. Butler here who have not been assiduous enough to have read it.

Mr. LEVIN. Thank you very much, Mr. Chairman.

Then I take it that I stand available for questions, if any there be?

Mr. BUTLER. If I may refresh your recollection, Mr. Chairman, we had a question pending when you recessed.

Mr. KASTENMEIER. We did. The question I had asked Mr. Levin in any capacity he cares to answer, and I am sure his colleagues in and out of the judicial area have different views about it, relates to the future of the judiciary as affected by the possible creation of article III bankruptcy courts. The implication is that he agrees with the Judicial Conference and the Chief Justice and others who are in general opposition. I wanted to hear any other observations he cared to make.

I preface the question by saying one of the reasons we are interested is, unlike a brother subcommittee which is interested in bankruptcy law alone, we are interested in the character of the Federal system in its entirety. We are interested in the precedent it creates; we are interested in knowing whether we should create specialized article III courts; whether this is somewhat of a different notion than a Court of Claims where you have indeed the Government itself as a party; whether these new judges should be flexible in terms of having to handle matters other than bankruptcy; and what this would do to the Federal appellate system in terms of creating direct appeals from perhaps as many as 100 or more, or less, depending on whether each circuit has its own article III judge.

All of these questions concern this subcommittee apart from whatever concern the Bankruptcy Subcommittee displayed in its deliberations. I am asking you for comment.

Mr. LEVIN. The problem is a very difficult one for me in the sense that people whom I respect very much have come out for the article III judgeship provision and yet some of the factors which I have attempted to outline in the statement lead me to the opposite conclusion, and I think candor impels that I share with you my views when I answer that question.

There are two problems involved. One is the specialized court and the other is the article III judgeships.

Insofar as there may be need for dealing with the problem of the structure of judicial resolution of disputes connected with bankruptcy, I have a lot of respect for the Commission on which Congressman Wiggins serves and of which a former colleague, Professor Kennedy, was the reporter or executive director, and I will not speak to that issue.

As to whether it ought to be an article III judge, the problem is very interesting. I hold article III judges on a very high pedestal. I think they have been terribly important in recent history, in terms of the problems of reappointment and in terms of the rule of law applying to any individual no matter how high his position in Government—to cite two examples. The crucial, difficult question we have turns on the point Frankfurter made long ago: Are we likely to cheapen the coin at the point where we proliferate them too much? How much is too much? How fast is too fast? At one time a Federal judge was something "supertremendous." One Federal judge on the appellate level once put it to me—and he was already on the bench—that the issue is not whether you can always get good people who will serve; the issue is whether the position is so attractive that the best people will fight hard to be appointed.

I think it is a special problem. I am very much concerned that having too many judges would run the risk of cheapening the article III coin, and on balance, since I think the same ends can be achieved in other ways, I would be obliged to say the present bankruptcy proposal leaves me with a very unhappy sense. This is particularly true since I have already heard it asked whether we should not do the same for magistrates. I was asked at a congressional hearing, whether magistrates should be appointed by the President, subject to confirmation by the Senate.

I share this concern with you. Now, "how much is too much?" is another kind of question. I have seen some of the other statements before the subcommittee. This gives me pause.

Let me go to the second issue. The issue is whether we ought to have specialized courts. Congressman Wiggins referred to this earlier. We are not talking now about specialized administrative or article I courts such as the tax court, which I think is rather separate. The commission struggled long and hard with the problem. I, too, became persuaded to the view—and I am not talking about the notion of an article I bankruptcy court at the moment; I am talking in general. I confess to you that it is an occupational hazard of professors that we like to talk "up in the air," and some of us try to avoid a decision on a particular case. But let me continue with the general issue.

As a general principle it worries me to have specialized judges and specialized courts. We considered it in the area of patents, particularly where the strongest argument might have been for centralizing all patent and patent-related appeals in the Court of Customs and Patent Appeals. The Anti-Trust Division of the Department of Justice opposed the proposal vehemently where it would have done a lot to relieve the system. Judge Simon Rifkind long ago spoke of the risk of "tunnel vision." Dean Griswold long ago in an article had urged creation of one tax court, but he came to change his view and testified against it; he was strong for a national court of appeals but not an article III tax court as such. Dean Bernard Wolfman, an eminent tax scholar, testified to the effect there was too much risk that you get out of the mainstream of the judical process, if you leave tax cases to the specialists at that level.

I must say to you, these are difficult things to decide in the ultimate. I have struggled long and hard on it. This is how I come out. Candor impels me to indicate that my own view is that current proposals are a source of serious concern. I have heard figures ranging from 40 new bankruptcy judges to 240. I have no notion of what the correct figure is, but I would very much worry about suddenly, at one fell swoop, adding so many. If we take all the active judgeships at 500 and add close to 150 by way of the omnibus bill—judges for whom we have present need—and then add 100 more or 250—it is a tremendous percentage at once and there are serious risks.

I talk in generalities about these factors, and with sadness that I cannot be on the side of so many whom I respect.

Mr. KASTENMEIER. I appreciate that. I am sorry that Father Drinan could not be here as well as Tom Railsback, who has strong views. I do not suppose anyone is better qualified to speak on the issue among all the colleagues we know than the man who sits beside you. He had the distinction of serving on both commissions, the Bankruptcy Commission and the Commission on Review of the Federal Court Appellate System.

Mr. WIGGINS. It is a tough problem but I do not regard it as a difficult intellectual problem. It is a tough emotional problem. First of all, I think some guidance should be taken from the history of the tenure clause and the reason it is in article III and some guidance from the history of the compensation clause and the reason it is in article III.

Frankly, the literature I have been exposed to with respect to that history evolves around the question of independence. That is the value that our Founding Fathers sought to achieve by providing tenure of Federal judges and provided for no diminution in their compensation. Unstated but I am sure on the minds of these Founding Fathers was also the question of quality of the court by not permitting their office to be terminated at the political whim of an administration or their salary diminished. It probably induces a higher quality of applicant to the bench.

If that is the reason for article III, then I think we ought to apply those reasons with respect to the kind of power we seek to have exercised by individuals, however we wish to characterize them in the bankruptcy context.

There are some who make a powerful argument that the jurisdiction of the new bankruptcy court is an exercise of the judical power of the United States which must be exercised. It is a matter of constitutional law under article III, but let's suppose for the sake of argument that question is open, that we have some choice on which way to go, article I or article III, and I frankly think we do.

It seems to me the presumption ought to be in favor of article III rather than the other way around. I read a scholarly piece by Shirley Hufstedler, in which she said the burden is upon us to establish the need for an article III judge. If the values to be served are independence and quality, I would think we would presume that and we would only move away from that upon an extraordinary showing rather than the other way around.

Mr. KASTENMEIER. When you refer to the value of independence and quality, that would really refer to all judical and semijudical functions?

Mr. WIGGINS. Yes; it would. You are speaking to the obvious practical problem. If it is good for the bankruptcy judges, why is it not good for a magistrate, and then on down the line. I separate the problem of magistrates because I deal with them on the level of a master, I put them in the category of an agent of the district as distinguished from a separate entity, a separate judicial entity.

I think the argument needs a better answer than that. I will tell you, if we are concerned about proliferation of judges, we ought not to respond to that concern by accepting the notion that some judges may be of an inferior quality; rather, we ought to have a uniform high quality of judges and if we want fewer of them, deal with the question of jurisdiction, that is, let's pour less into the judicial system which requires high quality judges.

For all the reasons that I would support as a matter of policy if there were no article III in the Constitution, high quality Federal district judges, I have to say apply with equal force to anyone else who exercises important judicial functions on behalf of the United States. We all want quality people in the bankruptcy court whether they are article I or article III. If the article III judges are accurate, the way you get quality is to give them tenure, protection from the diminution in salary.

I think at the bottom of this is macho. It is exclusivity. We do not want our club intruded by too many strangers, particularly those we suspect are of an inferior quality. People who make that argument either do not know or choose to overlook the fact that existing referees are out of the picture unless they are separately dominated and separately confirmed by the Senate. Goodness knows, we all hope that the highest quality of men and women will come forward seeking those positions for the very same reason that high quality people come forward and seek positions on the district bench.

I don't want to see the numbers diminished either. But I tell you, we crossed that Rubicon years ago when we opened up a whole vast area of new jurisdiction for the Federal court.

We see article III judges arguing on the one hand for at least 100 new colleagues, and on the other hand for some lesser status for 90 others. I would think their arguments tend to go at cross-purposes.

Mr. KASTENMEIER. Of course, we'd have article I courts in existence, the District of Columbia, the territorial courts, and the Tax Court.

Mr. WIGGINS. Sure.

Mr. KASTENMEIER. I am wondering why, take the Tax Court, if one compares tax judges to referees in bankruptcy, why that wouldn't be an adequate equivalent in terms of judicial quality?

Mr. WIGGINS. Well, Bob, there is no bright line between judicial functions which must be exercised by article III judges and those which may and often are exercised by article I judges. But the Supreme Court has attempted to deal with some rationale for this, and I think it's probably yet to articulate a clear definition of what should be article III and what is not.

But it has carved out certain areas. One of them is the territorial area. Nothing in the Constitution implicitly requires it. This is an explanation that is judge-created, and I buy that. I don't apply that with the Tax Court analogy where you are dealing with one statute. I don't apply that with the kind of broad based general jurisdiction which is involved in a bankruptcy court. It is true that they are applying a statute, but in a context that is utterly unrelated, the tax statute.

The issues are judicial issues, normally and historically resolved by judges. They cut across the broad spectrum of trusts, of property, of contracts, of patent, literally everything that is now done by article III judges as a matter of course are yielded to these new courts. We spinoff their administrative functions, which many article III judges still assume will be performed by the new bankruptcy judges.

We make them judges in the classic sense of the word.

It's difficult for me, as others have said, to say that the issue of whether or not corporal punishment is to be administered to a fourth grader must be decided by an article III judge, but equity funding involving billions of dollars in assets and affecting millions of people can be handled by some administrative functionary.

Mr. KASTENMEIER. Of course, that is presently very much like a master. We often have masters handle some of the most complex problems we have, including busing problems, and the like.

Mr. WIGGINS. Sure, but under the supervision of a district judge, and the district judges, of their own act, have neglected to supervise bankruptcy. They, frankly, in my observation, are happy to be rid of it. They haven't maintained the day-to-day supervision over the bankruptcy referees, and now judges. They still have the right under present law to entertain a petition of review, sort of an appellate function, but most article III judges I have talked to have very little understanding or concern about bankruptcy, and they are very pleased to let the referees continue to function independently of the courts so long as their legal independence is not established.

Mr. KASTENMEIER. I think that is a correct observation, but that that should somehow lead us to make them article III judges does not persuade me at all. I don't think there is any connection with that. In fact, I think perhaps it's the technicality of the work and some of the nonjudicial aspects of the work that causes them, in fact, to eschew getting involved very deeply in bankruptcy. At the same time, this is one of the reasons why district judges traditionally would resist or resent embracing them as colleagues several years hence.

Mr. WIGGINS. As Caldwell knows, we have gone to great lengths in the statutes to spinoff administrative functions, and which have historically plagued a referee, and perhaps justifiably has permitted his characterization as something less than a judge. But under the new statute, we have only disputed issues in fact or law which are to be decided by that person.

These are historic functions performed by the judicial officers around the country.

Mr. BUTLER. If you would yield.

Mr. KASTENMEIER. I yield to the gentleman.

Mr. BUTLER. Just a few reactions, since my view is fairly well known. But I do have the feeling that, from the testimony of the chief justice from Minnesota, and I questioned him on this, his feeling that a tenured judge is very important in a constitutional question, but not so important in a commercial situation, because he seemed to think that you need to be defended against the masses in a constitutional question, but I think it goes a little bit deeper than that.

I think it's just the general feeling that the commercial litigation is entitled to the same respect in the courts that the existing issues are. This has developed because historically our bankruptcy courts were simply not that busy. But within the last 20 years, the volume of commercial litigation in this country and the volume, the sophisticated nature of all our transactions is such that that is the most important function of the courts today, in terms of keeping our economy going and updating our Nation to that problem.

It concerns me that not many of these problems reach the Supreme Court, because they are so wrapped up in constitutional questions. It's just the people who are now speaking for the Judicial Conference are those people who have been around for a long time, and they don't appreciate the really commercial nature of our society today, and the importance of high quality people in this level of litigation.

The emphasis placed on the quality that results from tenure is to me a recognition of this as the way to upgrade your judges, and this is the way to upgrade the whole process. So, I am not upset about the proliferation of article III judges, because they are not multiplying as fast as the American people are multiplying, and we simply need them.

I, of course, am so much younger than anybody here, that is the reason I have the refreshing, young approach to this. But I do think that we ought to recognize this reaction against the article III bankruptcy courts is steeped in a historical approach to bankruptcy, which simply does not recognize its significance in the economy today.

Mr. KASTENMEIER. I accept the characterization my friend from Virginia gave to Chief Justice Sheran's point of view. As a matter of fact, I would suggest an extension of his view, where it's constitutionally and otherwise possible, bankruptcy cases should be referred to the State courts. We could go in just the opposite direction, of what has heretofore been recommended.

Mr. BUTLER. That is the problem in the bankruptcy court today. We have to refer so much of it back to the State courts. But instead of expending our energy on resolving the questions either in the bankruptcy courts or the State courts, we expend our energy resolving them, on the jurisdiction question, on whether it goes back or stays

here. So, the proposal is to elevate the bankruptcy court to a decision-making process for all of the related transactions, which is what I call the judicial power, and is what article III of the Constitution requires a tenured judge for.

Mr. KASTENMEIER. I consider this a valuable and interesting dialog. In one way or the other the Congress will soon resolve that particular question. Its implications, however, for the future, leave me, if not worried, at least concerned by it. I don't know whether it means that in the year 1990 we will have antitrust judges, so-called and other specialities if we desire to raise commerce to that extent, insurance judges, and social security judges, among others, in the Federal system. Perhaps not.

But I think one of the problems we have is whether we can go on indefinitely expanding the size of the Federal judiciary. There are those scholars, quite apart from the question as to what should be done about article III bankruptcy courts, who claim that we will reach a point where we will diminish the quality, the justice rendered by our courts. Furthermore, specialization may lead to fragmented justice and may politicize it in the Federal system to an extent we never contemplated or wanted.

In any event, we will continue our dialog another time.

I am very appreciative of our colleague, Chuck Wiggins, being here. He has already contributed enormously over the years in these areas, and of course, Mr. Levin, whom we hope to have back again, because we have not completed our discussion.

On behalf of the committee, interrupted as we were today by other floor business, we are grateful for your patience. We thank you for your contribution.

Mr. LEVIN. Thank you very much.

Mr. KASTENMEIER. The subcommittee will adjourn.

[Whereupon, at 2:15 the subcommittee adjourned.]

STATE OF THE JUDICIARY AND ACCESS TO JUSTICE

FRIDAY, JULY 29, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
OF THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2226, Rayburn Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Railsback, and Butler.

Also present: Michael J. Remington, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

This morning the subcommittee is continuing its inquiry into the state of the judiciary and access to justice.

To restate something I guess the Chair has stated in the past, these are not mutually exclusive notions, but they are questions which are closely intertwined. There is a tendency for some to place emphasis on one and others to place emphasis on the other.

I think it is probably the consensus of the committee that it is our duty to attempt to achieve both; that is, to improve the state of the judiciary insofar as the burdens of congestion and structure of the court systems are concerned, and at the same time to insure for all adequate access to justice.

I am very pleased this morning to greet Prof. Robert H. Bork as our first witness.

Mr. Bork is a professor of law at Yale University and served with very great distinction as Solicitor General in the Justice Department during some very turbulent years.

Accompanying Professor Bork is Raymond Randolph, Jr., who was Deputy Solicitor General in the years 1975 and 1976.

We greet you both. I must sadly observe at this moment that there is another vote.

The committee will stand in recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order to resume deliberations.

We are pleased to hear our first witness this morning. Prof. Robert H. Bork, whom the Chair has already introduced.

TESTIMONY OF ROBERT H. BORK, CHANCELLOR KENT PROFESSOR OF LAW AT YALE UNIVERSITY, FORMER SOLICITOR GENERAL, JUSTICE DEPARTMENT, ACCOMPANIED BY A. RAYMOND RANDOLPH, JR., SHARP, RANDOLPH & JANIS, WASHINGTON, D.C., FORMER DEPUTY SOLICITOR GENERAL

Mr. BORK. Mr. Chairman and members of the subcommittee, my name is Robert H. Bork. I am Chancellor Kent professor of law at Yale University.

I am pleased to be here at your invitation to discuss the needs of the Federal judicial system and the question of access to justice.

[The prepared statement of Mr. Bork follows:]

STATEMENT OF ROBERT H. BORK, PROFESSOR OF LAW, YALE UNIVERSITY

Mr. Chairman and Members of the Subcommittee, my name is Robert H. Bork. I am Chancellor Kent Professor of Law at Yale University. I am pleased to be here at your invitation to discuss the needs of the federal judicial system and the question of access to justice.

At the outset I should like to put the topic in perspective. The problems of the state of the judiciary and of access to justice seem to me to be two ways of stating a single problem. Concern for the state of the judiciary and concern for the preservation and extension of access to justice are not in opposition.

Statistics and common experience show that our Article III federal courts are in serious trouble because of an overwhelming workload created by an explosion of federal litigation. The prospects for the future are bleak because there is every reason to believe that the workload will continue to grow.

Yet proposals to deal with the situation by reducing the jurisdiction of the Article III courts are often met with the objection that this would reduce access to justice for the poor and minorities. I think that a thoroughly mistaken objection. Access to justice is now being lessened, not just for the poor and minorities but for all litigants, because the quality of the federal judicial system is being damaged.

Access to justice cannot be defined simply and solely as access to a federal Article III court. Most litigation in this nation always has and always will take place in other tribunals, state and municipal courts and federal agencies and Article I courts.

My point goes deeper than that, however. Access to justice is access to a competent tribunal that has the time to give the issues mature consideration, can deliver a just decision in reasonable time, and can explain the reasons for its decision. That is precisely what our Article III federal courts are not going to be able to provide as they are overwhelmed by the torrent of cases we are thrusting upon them. That is what we are losing in the federal courts right now as cases back up, judges decide with a speed and under pressure that prevents deliberation, oral argument is compressed or eliminated, conferences of judges on cases they have heard are frequently eliminated, and decisions (up to one third in the courts of appeals) are delivered without opinion or explanation of the results. There has been testimony before one congressional committee by a federal court of appeals judge that he decides some cases in a total of five or six minutes. This is apparently done, according to other stories I have heard, by a rapid perusal of a clerk's memorandum and without hearing argument, reading the briefs, or conferring with the other judges on the panel. I do not claim this is typical but it suggests the extreme to which the courts are being pushed.

Let me make it clear that I am not being critical of the federal judiciary. I have gotten to know many of them and in my opinion they are a highly talented, conscientious, and hard-working body of men and women. The fault is ours rather than theirs, for we have thoughtlessly pressed a caseload upon them that is beyond the capacity of the system. That our courts continue to perform as well as they do is a tribute to their response to a crisis but no organization can cope with a permanent crisis.

In the near future we will be confronted with a choice between continued formal access to Article III courts and real access to justice.

Considerations such as these led the Department of Justice in 1975 to undertake a study of the needs of the federal judicial system. That study was conducted by a committee which I, as the then Solicitor General, had the privilege of chairing. We completed our work in 1976 and it was released as a printed report in January of 1977.

We concluded early in our deliberations that the only long-range solution to the problem of judicial workload was a substantial reduction in the jurisdiction of Article III courts. We decided, for reasons that I will be glad to discuss after this statement if you so desire, that continually enlarging the number of Article III judges was not a solution.

We also decided that our object should be to preserve the central functions of the Article III judiciary. Those functions, we thought, are the protections of individual liberties and freedoms, the definitive interpretation of federal laws, and the preservation of democratic processes of government. These functions are crucial, in ways that many of the other functions the federal courts now perform are not, to the continued health and vitality of the nation.

I should like, rather briefly, to summarize the two major recommendations made by the Department of Justice Committee on Revision of the Federal Judicial System.

The first recommendation was the abolition of diversity jurisdiction. I would be inclined to make an exception only for the case where one of the parties is a foreign national. That is justified by consideration of foreign relations and the very small number of cases involved.

We noted that more than 30,000 diversity cases were filed in the district courts during 1975, constituting about one fifth of total filings. Diversity cases accounted for more than one fourth of all jury trials. There is no longer adequate reason for federal courts to bear the burden of applying state law in so many cases. They have no particular expertise in the subject and the historic fear of bias in local courts, however justified it may or may not have been at one time, is much weakened and perhaps eliminated by the modern rise of transportation and communication facilities that have knit more closely the parts of the nation together and have led to sharp declines in regional feeling. The awkwardness of diversity jurisdiction becomes particularly apparent when a federal judge must apply state law that the state courts have not yet settled. That creates tension between the state and federal systems and may create injustice because the federal court may guess wrongly what the state rule will ultimately turn out to be.

Diversity cases impose a major burden on the federal courts but shifting them to the much larger state court systems would impose only a minor burden there, about a one and a half per cent increase in their dockets on the average. Since so much has been said and written upon this topic I will not devote further time to it, but I recommend to the members of the subcommittee the excellent chapter on the subject in Judge Henry Friendly's book, "Federal Jurisdiction: A General View."

Our committee made another proposal that I think has more importance for the future. The source of much judicial business is the regulatory and entitlement programs that Congress enacts. These appear to be the primary causes for the explosion of federal litigation both in absolute terms and as a proportion of all litigation in the federal courts. I came to realize something of the proportions of the problem during the time I was Solicitor General. During a period of eleven years the workload of that office increased by two and one half times, from an annual caseload in the Supreme Court of over 900 cases to one of almost 2500. Part of the increase was in prisoner petitions, but by no means all. That was a period of extraordinary growth in federal programs, and every federal program brings a new wave of litigation. These things level out after an initial period of rapid increase but the growth always comes again. Unless we can predict that there will be no additional federal regulatory and entitlement programs in the future, and that is hardly worth considering, then we must project very substantial future increases in federal litigation. That federal government litigation is growing much more rapidly than other types of litigation is shown by the fact that the absolute increase I have cited also meant that our office's litigation in those same eleven years went from 33 per cent of the Supreme Court's docket to 48 per cent.

There will be no long-run solution to the overload problem created by the growth of the regulated welfare state unless it proves possible to move some of the controversies it creates out of the Article III courts. For that reason we recommended the creation of new tribunals to take over completely types of litigation for which Article III courts are not realistically required. These would be Article I courts. Among the criteria for assigning categories of litigation to these new tribunals would be: (1) the disposition of cases in the category turns upon the resolution of repetitious factual issues; and (2) the category of cases consumes a large amount of Article III judicial resources. In a word, I am describing cases that can be handled as well and as justly be a person resembling an administrative law judge as an Article III judge. Moreover, placing such cases and the cases remaining in the Article III courts would be handled with greater speed and lower cost to the litigants.

Among the categories of disputes that might be transferred to the new tribunals, for example, might be claims arising under the Social Security Act, the Federal Employers Liability Act, the Consumer Products Safety Act, the Truth in Lending Act, the Mine Safety Act, and perhaps the Occupational Health and Safety Act. There are others. Something of the importance of this proposal may be seen in the fact that the Mine Safety Act alone has the potential to generate more than 20,000 full jury trials each year in the district courts. The burden that exists and that is potential in our various programs is capable of overwhelming the courts and defeating the very rights the new legislative programs are designed to extend.

The new tribunals could be set up in a variety of ways. I will describe the structure we envisioned.

The new administrative tribunals would be outside any administrative agency and would not specialize in work coming from any particular agency. We set some store in this degree of independence and of generalism. These aspects should allay fears, justified or not, of agency influence upon judges within the agency and also avoid the dangers of narrow specialization.

There would be a trial division in which all appeals from agency determinations would be filed in the first instance. The trial division would serve the function now served by administrative law judges within the agencies—those functions need not be duplicated—and that would shorten the time for internal agency review. Procedures could be varied according to the type of case and many cases could be handled informally without counsel unless the claimant desired one, as is now the case before administrative law judges within some agencies.

Appeals from the trial division would go to an Article I appellate tribunal for review. Cases would not go into the Article III system unless a significant point of federal statutory or constitutional law were raised. Such legal issues could be certified either to a district court or to a court of appeals.

I think there would be very few certifications. Some of the testimony before this subcommittee suggests that there are complex legal issues in the categories of cases we are talking about. I can only say that my experience as Solicitor General indicated that the vast majority of these cases involved no legal issues and only the most straightforward factual cases. The Civil Division of the Department, to my recollection, never once in three and one half years recommended an appeal on a point other than exhaustion of remedies and neither did anyone in my office. In all of that mass of cases there was simply never a legal issue that concerned the government. And our threshhold of concern was fairly low.

This system, I believe, gives litigants everything they now have and more. It is in no sense a system that threats the poor as a separate class. The poor would still have access to Article III courts in these categories of cases as they do in all other cases when a statutory or constitutional issue is to be litigated. Moreover, persons and businesses who are not poor could easily find themselves before these Article I tribunals if they were allowed to handle, as I would recommend, such questions as the sufficiency of environmental impact statements or issues arising under the Mine Safety Act. Cases would go to those Article I tribunals not because of the character or identity of the party but because of the nature of the issue to be litigated.

I think this proposal is much to be preferred to the suggestion from the Department of Justice in this administration that Article III judges be given relief by expanding the role of the magistrates. There are several reasons for that. Magistrates are chosen by the federal district judges in each district and the quality of the persons chosen varies enormously. The administrative judges I

have proposed could be selected by a central agency to ensure uniformity of quality. Moreover, the magistrate system contains possibilities for abuse that are not present in the formal Article I structure we proposed. The magistrate is reviewed, if at all, by the district judge. Since the object of the system is to relieve an overworked judge and he has chosen the magistrate, it is to be feared that the review may often be pro forma. The system looks too much like a proliferation of the old practice of constant reference of tedious, complex matters to special masters, which, in practical terms, usually meant that the special master and not the judge decided the case. Using magistrates as trial judges also adds an additional level to the federal court system. For the litigant who wants to pursue his rights all the way, that will mean additional expense and delay. The expansion of the magistrates' jurisdiction is essentially a stopgap proposal and, in my opinion, not a very good one. The Committee I chaired within the Department considered the use of magistrates and rejected the idea. I have mentioned some of the reasons for that rejection.

There is considerably more in the Report to the Department of Justice Committee on Revision of the Federal Judicial System. Rather than take the time of this subcommittee with further summary, I ask that the Report be made part of the record. We opposed, for example, the proposal for a National Court of Appeals. I would be glad to discuss with the subcommittee any aspects of that Report or any other matter relevant to your deliberations to the extent that I can be of any help.

Mr. BORK. At the outset I should like to put the topic in perspective. The problems of the state of the judiciary and of access to justice seem to me to be two ways of stating a single problem. Concern for the state of the judiciary and concern for the preservation and extension of access to justice are not in opposition, as I think some witnesses here have suggested.

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That is what we are losing in the Federal courts right now as cases back up, judges decide with a speed and under pressure that prevents deliberation, oral argument is compressed or eliminated, conferences of judges on cases they have heard are frequently eliminated, and up to one-third of the decisions in the courts of appeals are delivered without opinion or explanation of the results.

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Mr. KASTENMEIER. At this point, if I may interrupt, we have before us a copy of that report, and I would like to receive that report and make it a part of the record, and would comment on the fact you served as chairman and the gentleman who accompanies you, Mr. Randolph, was the executive secretary of that enterprise. [See app. 9a at p. 521.]

Mr. BORK. Thank you, Mr. Chairman.

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They have no particular expertise in the subject and the historic fear of bias in local courts, however justified it may or may not have been at one time, is much weakened and perhaps eliminated by the modern rise of transportation and communication facilities that have knit more closely the parts of the Nation together and have led to sharp declines in regional feeling.

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turns upon the resolution of repetitious factual issues, and second, the category of cases consumes a large amount of article III judicial resources.

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Among the categories of disputes that might be transferred to the new tribunals, for example, are claims arising under the Social Security Act, particularly disability cases, the Federal Employers Liability Act, the Consumer Products Safety Act, the Truth in Lending Act, the Mine Safety Act, perhaps the Occupational Safety and Health Act, and perhaps the Food Stamp Act as well. There are others.

Something of the importance of this proposal may be seen in the fact that the Mine Safety Act alone has the potential to generate more than 20,000 full jury trials each year in the district courts. The burden that exists and that is potential in our various programs is capable of overwhelming the courts and defeating the very rights that the new legislative programs are designed to extend.

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Moreover, persons and businesses who are not poor could easily find themselves before these article I tribunals if these tribunals were allowed to handle, as I would recommend, such questions as the sufficiency of environmental impact statements or issues arising under the Mine Safety Act. Cases would go to these article I tribunals not because of the character or identity of the party but because of the nature of the issue to be litigated.

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Magistrates are chosen by the Federal district judges in each district and the quality of the persons chosen varies enormously. The administrative judges I have proposed could be selected by a central agency to insure uniformity of quality. Moreover, the magistrate system contains possibilities for abuse that are not present in the formal article I structure we proposed. The magistrate is reviewed, if at all, by the district judge. Since the object of the system is to relieve an overworked judge and he has chosen the magistrate, it is to be feared that the review may often be pro forma.

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There is considerably more in the report of the Department of Justice Committee on Revision of the Federal Judicial System. Since you have put it in the record, Mr. Chairman, I will not summarize it further.

Perhaps I should say a word about the National Court of Appeals, which we opposed in the report.

The National Court of Appeals was suggested by the Commission not as a way of relieving the overload in the Supreme Court, which is a problem, but was suggested as a way of doubling our national appellate capacity, that is doubling our capacity to settle issues for the entire Nation, although the National Court is also often supported by people who believe it would relieve the Supreme Court of its workload. I think both reasons inadequate for a major change in the Federal system of that sort.

In the first place, I don't think the National Court of Appeals would reduce the Supreme Court's workload. When a case comes to the Su-

preme Court, the Supreme Court is then charged with the responsibility of deciding whether there should be no review, whether the Supreme Court should review it, or whether the National Court of Appeals should review it. In order to decide whether the Supreme Court or the National Court of Appeals should review that case, the Supreme Court would have to find what the pivotal issues are, which often takes a lot of digging, because you don't know that when the case first come up, and decide how important those issues are and what ramifications they have.

Once the Supreme Court has done that, it has almost decided the case. But instead of going on to decide the case, The Supreme Court would refer some cases to the National Court of Appeals. It would have to scrutinize very carefully the disposition given by the National Court of Appeals, because we don't want final, definitive, national rules laid down which the Supreme Court doesn't agree with. In fact, it would have to scrutinize very carefully the rationale given by the court of appeals, and any dicta pronounced. So I think it's hardly likely the Supreme Court burden would be lightened.

That leaves the question of do we need additional national appellate capacity?

These judgments are necesarily rather impressionistic, but it was not my impression that any really important conflicts between circuit court decisions went unresolved for any considerable period of time. The commission that recommended the National Court of Appeals cited only patent and tax cases as those which require resolution.

It would seem to me much preferable to establish a tax court of appeals, to which tax matters would go. That would eliminate the possibility of conflicts between the circuits that go unresolved. It would be a specialized court, but I think it's an area in which there is considerable justification for specialization and it would relieve the Supreme Court of the burden of deciding tax cases. As one professor once said, the time has come to rescue the Supreme Court from the tax law and to rescue the tax law from the Supreme Court.

So, if there is this problem of unresolved conflicts in the tax and patent fields, I think it would make much more sense to have specialized courts for those kinds of cases, perhaps with certiorari jurisdiction to the Supreme Court, than it would to add a National Court of Appeals with all of the other difficulties that would create.

I will be glad to discuss any of this with the members of the committee.

Mr. KASTENMEIER. Thank you for your statement, Professor Bork.

There are several issues, and I don't know again how far we are going to be able to go. There is a vote on and those members who care to leave at this time are urged to vote quickly.

I am particularly interested in your statements about article III courts and their role. In particular, you stated that the article III court should have as its central function the protection of individual liberties, the definitive interpretation of Federal laws, and the preservation of the democratic processes. How does this framework handle the creation of article III bankruptcy courts?

Incidentally, as you well know, there is pending legislation before the House at this very moment, and which, in several years hence, could create 40, 80, 90, 94 or 240 new article III judges.

Mr. BORK. Mr. Chairman, I have only recently become aware of that proposal and that legislation, and I haven't studied it. But I must say my initial impression—and I suspect it will be my continuing impression—is that I do not see the need to make bankruptcy referees into article III judges. It seems to me not a function that requires that status, and it is apparent, I would think, that once such persons become article III judges they will gradually be used by the judicial system, both at the district court and the court of appeals level.

If you do that, you will have enormously expanded the corps of article III judges. I leave aside the question of the quality of those judges, because I am not familiar with them. But, in general terms, I would oppose an enormous expansion of the article III judiciary because I think that is a sure way to make the article III judiciary poorer in performance.

Mr. KASTENMEIER. Two former witnesses within the last week similarly testified. One of them, Professor Neuborne, suggested, and it was rather brave of him to do so, that the quantitative limit to the article III courts—he was talking about the Federal judiciary entirely, including the appellate structure—should be not more than about double of what it presently is, from 500 to 1,000. After a rather eloquent statement about the need to preserve the quality of our Federal courts, he made this conclusion.

What Professor Neuborne set forth was the outer limit of Federal judicial expansion, not in this year or next, but in the foreseeable future. He emphasized that the quality of Federal judges was a limited resource, and furthermore, that a limitation of some sort was required for bureaucratic reasons.

Without having asked the question, I think that he would also oppose the creation of article III bankruptcy courts.

My second question is how do you respond to that? Does that seem to be a reasonable limitation for us to respect during the next 10 or 15 or more years? Is it safe to envision a Federal judicial system with up to 1,000 judges?

Mr. BORK. Mr. Chairman, my belief is that the Federal judiciary is now too large as it stands. I think that doubling it would be, perhaps disastrous would be too strong a word, quite injurious to it. It's not simply a question of whether there are men and women good enough to create a judiciary of that size. It is also that when you get a very large judiciary you dilute the prestige and make recruitment more difficult, and also, perhaps more importantly, the communication between members of the judiciary who no longer know each other is lessened.

I think that damages more than esprit. I think it leads to conflicting decisions. You get, as we now do, conflicting decisions within a district court or conflicting decisions within the same circuit, and that is bound to grow as you increase the size of the judiciary, which will increase litigation and make things worse.

The proposals we advanced for eliminating jurisdiction were designed to make it possible to hold the judiciary to the present size or perhaps even decrease it.

Mr. KASTENMEIER. May I ask whether the witness can remain?

Mr. BORK. Yes.

Mr. KASTENMEIER. Pending another recess.

The committee will recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

Without referring to the specifics of the Bankruptcy Reform Act, do you think it would be constitutionally permissible to create new bankruptcy courts under article I of the Constitution?

Mr. BORK. Mr. Chairman, are you asking about the bankruptcy courts or the ones I have suggested?

Mr. KASTENMEIER. The bankruptcy courts.

Mr. BORK. I do think it would be constitutionally permissible.

Mr. RAILSBACK. Mr. Chairman, would you yield for just a minute for a question?

Mr. KASTENMEIER. Yes. I yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I really wanted to just pursue that question. What would be the difficulties encountered, in your judgment, if instead of converting bankruptcy referees, at the expiration of an interim period, into article III judges, what could be some of the problems if we expanded the jurisdiction of bankruptcy judges to handle some plenary actions, some more State actions that were related to the bankruptcy?

In other words, would there be problems as far as an article I judge in respect to enforceability of his orders or what is your feeling about that? That has been suggested, by the way, by some of the proponents of the article III judges.

Mr. BORK. I confess, Congressman Railsback, I don't see a problem about enforceability of an article I court's orders. Nor do I see a constitutional problem about putting even complex matters and important matters in an article I court.

Mr. RAILSBACK. All right.

Mr. BORK. May I add, Mr. Railsback, the thought that for many years in this country Federal law was administered by State court judges who were, by definition, not article III judges, and there was no constitutional objection to that.

Mr. RAILSBACK. Including even at one time, indeed, the resolution of Federal questions.

Mr. BORK. That is precisely what I meant. Federal jurisdiction was really in State courts for many years.

Mr. RAILSBACK. Let me ask you, I have a number of questions I would like to ask, but I am going to try to hold it down because I know my colleagues also want to ask you some questions.

We are considering a bill now dealing with permitting the national Attorney General to intervene in certain, or not just intervene, but actually to initiate suits relating to institutional abuses of American citizens, for instance, in prisons, in mental institutions and other similar type facilities.

One of the things we are considering is to also have the Attorney General promulgate minimum guidelines that would establish grievance mechanisms on the State level, which would require, upon certification by the Attorney General, that a prisoner, putting aside anybody

in a mental institution because they cannot be expected to do this, but it would require a prisoner to exhaust his State grievance procedures before being able to file section 1983 petitions.

What is your feeling both about permitting the Attorney General to go in where there has been a pattern and practice of institutional abuse, within certain State institutions, and requiring an exhaustion of remedies?

Mr. BORK. I think that the requirements of exhaustion of remedies is very good. Many prisoners are coming instantly to the Federal courts today without exhausting their remedies.

As a matter of fact, that is not only bad for the Federal courts, I am convinced that some of those petitions are not getting the scrutiny they might if there weren't such a flood of them, so I am not sure we wouldn't get better justice for the prisoner if the State court remedies were exhausted.

I think there is a considerable safeguard in adding to that the ability of the Attorney General to institute a suit where there has been a pattern of practices of abuse. One has to be careful there, and I hope the Attorney General will be, because it is quite easy to demand of various prison systems and so forth a level of resource expenditure that is simply not practical. But there obviously are abuses of a kind that ought not to be tolerated.

Mr. RAILSBACK. Now, just one last question.

I think that we are intrigued by your suggestion of the expanded use of administrative law judges, or, I am, anyway, but I am a little bit concerned about who would do the appointing. How can we upgrade their qualifications, and I think in your report you suggested that it should be done by a central agency. I don't quite understand that.

Can you elaborate and be a little more specific?

Mr. BORK. One suggestion, and I don't necessarily say this is the best, I think the subject requires further thought, but one suggestion was to allow the various agencies to nominate people for these jobs, thus creating a panel of names from which the Civil Service Commission would select.

Mr. RAILSBACK. Can I just interrupt to say that personally I like that part of your statement that seemed to indicate you favored more independence for these administrative law judges, and it kind of bothers me to have the agencies have anything whatsoever to do with their selection, and I certainly don't like the idea, as you point out in your report, that right now there are some valid criticisms that some of these people are hired by the agencies to actually act as the hearing chambers or the administrative law judges.

Mr. BORK. I thought that the possibilities of undue influences would be minimized if the agencies knew they were nominating people who would not necessarily become judges, because the Civil Service Commission would select from the panel, but not select all of the people nominated, and if, in addition, the agency understood that the person they were nominating would, in fact, only occasionally sit on their cases, because they will be sitting on all kinds of cases.

Mr. DRINAN. Would the gentleman yield?

They are less than article I judges; they are not appointed by the President.

Mr. BORK. They could be article I judges, or they could be less than——

Mr. DRINAN. Right now they are less than that. These administrative law judges, in the Social Security Administration, for example, have 38 percent of their cases reversed by a Federal court. So how does the Civil Service Commission pick the judges? Do they select those that haven't been reversed?

Mr. BORK. You won't necessarily, Congressman Drinan, have the same administrative law judges now in use. But I am told, I confess not to being an expert on the internal work of the agencies——

Mr. DRINAN. What does all of this mean? You are proposing a new tribunal, and you don't have the fundamentals spelled out.

Mr. BORK. No; I don't, and quite deliberately did not, because it seemed to me this was a proposal that was going to require a good deal of study and care in its implementation. But the Civil Service Commission certainly could select them, or we could have them nominated and approved by the Senate, if you wish.

Mr. RAILSBACK. That is all I have, Mr. Chairman.

Mr. KASTENMEIER. Let me ask you this: The Chief Justice of the United States, among others, is very concerned about the quality of justice of the Supreme Court. He fears that the quality of its work may suffer because of the mass of cases before it.

In your experience or otherwise, have you seen a diminution of the quality of the Court's work because of the additional burdens put on it in recent years?

Mr. BORK. That requires an impression, because I can't prove it, and it also requires, perhaps, tactful statement, but I think, indeed, one does perceive longer opinions because they haven't got time to tighten them up. Perhaps there is some decline in craftsmanship as the Court gets pressed, so that it is less than clear sometimes exactly what the rationale of a case is. I think there has been some damage, not necessarily to the quality of the outcome of the case, but perhaps to the quality of the way it is expressed, which is not only too bad in and of itself, but I think creates additional litigation, because nobody is quite sure what the rule really means.

Mr. KASTENMEIER. Thank you. I think that due to the circumstances of the day we will not ask Mr. Bork to remain.

We thank you. This is a continuing dialog, and we may wish to pursue some of these matters with you later, in correspondence or otherwise. I am only sorry we cannot take the full opportunity today to further examine your suggestions and to ask other questions about issues affecting the subject before us.

Mr. BORK. Thank you.

Mr. KASTENMEIER. We will recess for 10 minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

We are pleased to reach our second set of witnesses this morning, Mr. Steven Steinglass, director, Legal Action of Wisconsin, a program funded by Legal Services Corp.; and also Mr. Dennis Sweeney, who is chief attorney, Administrative Law Center, Baltimore Legal Aid Bureau. Mr. Sweeney, that is your statement, is it not?

TESTIMONY OF STEVEN STEINGLASS, DIRECTOR, LEGAL ACTION OF WISCONSIN (LAW), AND DENNIS SWEENEY, CHIEF ATTORNEY, ADMINISTRATIVE LAW CENTER, BALTIMORE LEGAL AID BUREAU

Mr. STEINGLASS. We decided that I would make the opening statement and summarize our statement because of its length.

Mr. KASTENMEIER. You may proceed as you wish, Mr. Steinglass.

Mr. STEINGLASS. Thank you, Mr. Chairman, members of the subcommittee. My name is Steven Steinglass. I am an attorney and have practiced in Wisconsin for 9 years, 8 of which have been in legal services. I am presently the director of Legal Action of Wisconsin, the legal services corporation program funded to serve low income citizens of Wisconsin in civil matters in Milwaukee and Dane Counties and migrant farm workers throughout the State of Wisconsin.

Mr. Sweeney, appearing with me, is the chief attorney of the Administrative Law Center of the Baltimore Legal Aid Bureau. Both Mr. Sweeney and myself have practiced primarily in the area of Federal benefit and State benefit programs, although both of our programs represent low income individuals in a wide range of civil matters—housing, mental health, consumer and other areas.

We appear today to express our own views, but we have consulted with other lawyers in legal services throughout the country and we feel that these views are generally consistent with the views of many lawyers within legal services programs.

As I indicated, we have a prepared statement, but I will only summarize it because of its length.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be made part of the record.

Mr. STEINGLASS. Thank you, Mr. Chairman.

[The prepared statements of Messrs. Steinglass and Sweeney follow:]

STATEMENT OF DENNIS M. SWEENEY, CHIEF ATTORNEY, ADMINISTRATIVE LAW CENTER, BALTIMORE LEGAL AID BUREAU AND STEVEN STEINGLASS, DIRECTOR, LEGAL ACTION OF WISCONSIN

Mr. Chairman, I am Dennis M. Sweeney, an attorney with the Baltimore Legal Aid Bureau, a large metropolitan legal services program designed to assist low income persons in Maryland with their legal problems. Most of my practice in the past several years has centered around the complex federal and state benefit programs for low income persons. Other attorneys in my program deal with the legal problems of our indigent clients in the housing, mental health, consumer and employment areas.

With me today is Steven Steinglass, the Director of another legal services program, Legal Action of Wisconsin, which serves the low income residents of Milwaukee and Dane County. Mr. Steinglass' program also operates a state-wide project in Wisconsin to provide legal assistance to migratory farm workers.

We are appearing here today expressing our own views, but we have consulted with many legal services attorneys throughout the country and we feel that our views are consistent with the views of most legal services attorneys who regularly practice in the Federal Courts.

As legal services attorneys, we often find it necessary to assert our clients' rights by litigation in the Federal Courts. We are thus deeply concerned about the two major and closely-tied problems facing this committee, congestion and delay in the Courts and the access of citizens to those Courts.

A. CONGESTION AND DELAY

Our Federal Courts have faced a tremendous rise in the volume of cases filed both in the United States District Courts and Courts of Appeals. With the rise in volume has also come a situation in which many District Court Judges have been unable to speedily resolve motions, hold civil trials, or write decisions in complex cases before them. Often times our indigent clients' cases have suffered most from this delay, both because their cases are often the ones shoved to the side for the Courts to handle other business and because our clients are least able to absorb the cost of the delay since their claims often concern basic subsistence matters.

It is tempting for us, therefore, to suggest that Congress fashion radical solutions which greatly alter the ways in which the Federal Courts handle the cases of American citizens. We, however, feel that the Federal Courts are such a valuable institution vital to us all that changes in the structure of the Courts or the types of protection it provides for citizens should be approached soberly, with full knowledge of the specific problems and full understanding of the consequences of any proposed changes. We would therefore suggest a step-by-step approach to the problems of congestion and delay in the Federal Courts in which Congress demonstrates its commitment to resolve the problem, but only on the basis of full knowledge and understanding. We suggest that the following steps be taken in the order we outline:

First. We feel Congress should speedily provide to the Federal Courts over 100 new District Court judgeships and 25 to 35 new appellate judgeships. The increase of over 100 judges to the 399 currently authorized judgeships in the District Courts represents an approximately 25% manpower increase. Congress should also appropriate funds for any new Federal Magistrate positions authorized by the Judicial Conference. This step is not a long-term panacea, but should provide some breathing space while a more detailed examination can be brought to bear on the problems.

Second. Congress should fund a comprehensive and independent study of the Federal Courts. Such a study would attempt to sharply define the precise problems faced by the Courts and hopefully identify which of the problems can be controlled by better management of the loads. This study group would recommend changes it felt was necessary based on objective evidence rather than impressionistic feelings. We would hope that any such study done of the Courts would be an independent one, free from the control or undue influence of any agency or group with a personal stake in the outcome of such a study.

Third. If action is needed to be taken on the volume of cases in the Federal Courts before a study could be completed, we would strongly suggest that Congress move to eliminate open-ended diversity jurisdiction which encourages the litigants to select the Federal Courts for the resolution of contract, tort and other actions which generally involve only issues of state law. In this day, diversity cases have the most tenuous claim of all matters for continuing to need the Federal Courts as a forum.

These three steps are not novel suggestions, but provide a sequential approach to relieve on the short-term the most severe pressures exerted on the Federal Court system and will provide on the long-term a reasoned and supportable program for the Federal Courts. This subcommittee has heard, and will hear, calls for "bolder" action to eliminate from the Courts other classes of cases and to act immediately. We feel this subcommittee and Congress should act deliberately in this area and not be panicked into excluding people or cases which have valid claims to Federal Court jurisdiction in the interest of reducing volume in the Federal Courts.

Having told the committee what we feel should be done at this time, we now turn to telling the committee what we feel should *not* currently be done.

We do not believe that Federal Magistrates should at this time have their powers extended to consider all civil cases within the jurisdiction of the Federal Courts, even where the parties consent. This proposal could create a "shadow judiciary" exercising all Article III jurisdiction but without the safeguards inherent in Article III judges.

We do not believe that Congress should try to exclude from the Federal Courts any specific types of federal claims where the Courts have traditionally provided judicial review and control of agency or private party action. We are particularly

fearful that proponents of controlling volume in the Courts will suggest that so-called "minor disputes" be excluded from the Federal Court system. In fact, so-called minor disputes usually are cases concerning one individual citizen. To exclude such cases on the civil side would turn the Federal Courts into the Courts of those having "big disputes" which is usually corporate interests. We feel that such moves are neither legally nor politically wise.

We approach with great caution ideas such as that contained in the Bork Committee Report[1] that special administrative tribunals be established to hear appeals from some or all of the federal administrative agencies. This idea is interesting, but needs much more development and discussion before it can seriously be considered by the legislature. A premature proposal to create such a tribunal or Article I Court to handle Social Security disability claims is now before the Judiciary Committee in H.R. 8076. This proposal should be rejected at this time.

Mr. Chairman, we feel that the problems of the Federal Courts are serious, but not terminal. With the application of the conservative plan outlined above, we feel that we can begin to see immediate improvement in the Courts without need for radical surgery that would adversely impact all Americans, especially the indigent.

B. ACCESS FOR CITIZENS

Under the leadership of the *Burger* Court, the past five or six years have been difficult ones for the individual citizen litigant seeking access to the Federal Courts. If that individual is also poor like our clients, these years have been calamitous.

At virtually every turn, access to the Courts has been narrowed or limited. Even if the litigant gains access to the Courts initially by asserting an appropriate jurisdictional base, he must surmount the judicially imposed hurdles of mootness, standing, abstention, exhaustion and ripeness before the Court is allowed to rule on the merits of the claim. Even if these hurdles are surmounted in the trial Court after much litigation, briefing and arguing, they can reoccur on appeal and become a handy "monkey wrench" to throw into the works of even the most artfully prepared and skillfully presented cases.

An example that comes quickly to mind from my own practice is *Morris* v. *Weinberger*, 401 F.Supp. 1071 (D. Md. 1975). In that case, several patients in Maryland's mental hospitals brought suit to enjoin a wide-spread practice whereby the Social Security Administration without hearing, appointed the Maryland Department of Health and Mental Hygiene, a creditor of the mental patients, to receive Social Security payments for them. This money was then utilized by the Department of Health and Mental Hygiene. The patient had no opportunity to contest the transfer of his funds or question the use of his money. The plaintiffs, on behalf of all similarly situated mental patients, sought relief from both the Social Security Administration and the state agency. They desired an opportunity to contest the appointment of the state as their payee and the return of all sums of their money paid to the state by the Social Security Administration.

The case was fully briefed and argued by all parties. Initially, a class action was certified. A standing defense was resolved in favor of plaintiffs and plaintiffs' right to relief on the merits appeared clear under a Supreme Court decision But then, the Supreme Court ruled in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). On the basis of the *Salfi* decision, the District Court felt that it became necessary to dissolve the class action and find that the named plaintiffs who were virtually at the final stage of District Court litigation with relief in sight, would now have to begin at the first level of agency decision making and exhaust each step in that multi-tiered process before the Court could rule on this case.

Over two years later, the original litigant, Mr. Norris, is still on that odyssey and still far from any relief. The members of his original class, all indigent mental patients harmed by the same practice, will probably never obtain any relief since they will not fulfill the rigid exhaustion or class action requirements of the *Salfi* decision.

The threshold doctrines, of course, have a proper place and Courts have responsibility under the Constitution to insure that a case or controversy is before it; however, under the *Burger* Court new twists continually develop which undercut scores of litigants with serious and meritorious claims for relief.

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[1] "Report on the Needs of the Federal Courts," United States Department of Justice (January 1977).

This subcommittee has been fully briefed by other witnesses and materials before it about such Supreme Court decisions as *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) ; *Rizzo* v. *Goode*, 423 U.S. 362 (1976) and *Kremens* v. *Bartley*, No. 75, 1064, 45 U.S. L.W. 4451 (May 16, 1977). These and other cases in the new litany of the Burger Court are creating what Justice Brennan dissenting in the *Kremens* case calls "an obstacle course of confusing standardless rule to be fathomed by the Courts and litigants . . ."

This situation leads to several consequences:

(*a*) Lower courts and litigants must spend inordinate amounts of time and money dealing with threshold issues. This situation is intolerable when Court time and the time of legal services attorneys are such scarce resources for the public;

(*b*) With the standards being so uncertain and variable, cases will continue to reoccur on lower court dockets like bad nightmares after reversal by appellate courts on one of these issues; and, most importantly,

(*c*) The litigants who are the people the Courts are supposed to serve are denied rulings on the merits on important public issues which only become exacerbated by delay.

Even if the civil litigant survives the initial trial by ordeal, he must still face other barriers fashioned by the Courts. One of the most significant is the current restrictive view of class actions. The list in this area is also familiar to the subcommittee. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 456 (1974) ; *Zahn* v. *International Paper*, 414 U.S. 291 (1973) ; and *Snyder* v. *Harris*, 394 U.S. 332 (1969). Added to this could be such new entries as *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) referred to previously.

These judicially imposed limitations on class actions do not bar the individual litigent *per se*, but they may make it impractical for any single individual to bring an action and insure that if relief is granted, it is granted to only a selected few with the resources to litigate—the very antithesis of equal justice. Heaped on top of these problems for the litigants are several others. For example, in most cases, the successful civil litigant cannot collect reasonable attorney fees and full costs if he prevails.

A special burden for low income litigants seeking redress against state governments in Federal Courts is a lack of an effective monetary remedy that will make them whole in the traditional sense. The Supreme Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974) has relegated poor litigants so heavily dependent on federal programs administered by the states to a truly second class type of justice. If we had to pick one decision which has hurt our clients the most, it would certainly be the *Edelman* case. An example of one case brought by experienced legal services attorneys in Philadelphia illustrates how *Edelman* has become both a trap for the litigator and lower Court, and a tool for denying justice. In *Fanty* v. *Commonwealth*, 551 F. 2d 2 (3rd Cir. 1977), a class of low income persons asserted that the Pennsylvania Department of Public Welfare had used improper collection practices to obtain reimbursement for debts from their Social Security benefits. The District Court found for the plaintiffs, and although the Court felt barred from granting restitution of benefits to the recipients by the *Edelman* decision, it did grant "limited prospective relief" by ordering the state defendants to serve written notice on all class members from whom the defendants had been collecting improperly stating that they no longer had to pay their money to the state and that they may have a cause of action under state law for the state's illegal action.

The Third Circuit, however, struck down this reasonable and sensible relief in a collection of opinions that graphically illustrate how poor litigants have become second class citizens. In the first opinion, one Circuit Judge felt that the lower court was trying to indirectly correct a past breech of legal duty by notifying welfare recipients of their possible right to file state petitions for refunds. This mild and fair remedy was felt to be proscribed by the *Edelman* decision.

The second Circuit Judge in a separate opinion, agreed with the result of the first, but for different reasons. He felt the plaintiffs who had improperly been led to pay their federal benefits to the states had not established a "case or controversy" and thus should have been excluded from the Court by this threshold requirement. He also felt that the class had been improperly certified.

The third Circuit Judge dissented and found that neither *Edelman* nor the case and controversy requirement called for dismissal of the complaint.

What is compelling about the *Fanty* case is that it was abundantly clear that plaintiff's class had in fact suffered from the illegal conduct of the defendants,

but were not entitled to any relief from the Federal Courts, a situation which would certainly encourage state defendants to engage in illegal conduct without fear that any future plaintiff would be able to obtain meaningful relief from the Federal Courts for past harm done.

These multiple barriers to access so carefully crafted by the Supreme Court to restrict access to the Federal Courts are ones the Congress, to the extent of its powers, should work to remove. We have specific recommendations that this Congress should pursue and we outline these below:

1. Congress can quickly act on H.R. 7053, a bill which would authorize the Attorney General in appropriate cases to assert the rights of institutionalized individuals such as the mentally ill and prisoners. This action would provide greater access to the Courts for this most abused and usually poorest class of citizens.

2. Congress can act to improve the effectiveness of Section 1983 actions for violation of civil rights by allowing among other remedies judgments against municipalities that violated rights and also allow such actions for patterns of abuses of rights. H.R. 4514, Representative Mitchell's bill, is a good base from which discussion can begin on these issues.

3. Congress can act to provide reasonable attorney fees and costs for litigants (including plaintiffs) who prevail in actions against the federal government. The passage of the Civil Rights Attorney Fee Act, Public Law No. 94-559 (Oct. 19, 1976), was a good first step in the attorney fees area. It is not too soon for Congress to take this second step.

4. Congress should encourage the development of remedial legislation to make the class action once again the efficient and effective tool for justice that it was intended to be.

5. Congress should limit the ability of Federal Courts to abstain in civil cases where federal rights are asserted and should allow temporary abstension only in states which adopt the Uniform Certification of State Law Questions Act and thus provide a speedy method for resolution of state law issues in the highest state appellate court.

6. Congress should develop legislation which would ameliorate the adverse impact of the Supreme Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), limiting challenges to provisions of the Social Security Act. This legislation would abolish unnecessary exhaustion requirements, permit realistic class actions and allow claimants to request injunctive relief against the Social Security Administration and the Department of Health, Education and Welfare. Congress should also legislatively reverse the decision in *Califano* v. *Sanders*, 45 U.S. L.W. 4209 (1977) and allow judicial review of *all* final agency decisions rendered under the Social Security Act.

7. Congress should legislatively provide for judicial review of final decisions of the Board of Veterans Appeals, so that veterans, their survivors and dependents have access to the Courts to challenge arbitrary and capricious decision making by that agency. An excellent bill (S. 364) has been introduced in the Senate by Senator Gary Hart to remedy this problem.

8. Congress should closely inspect legislative routes for limiting the harmful impact of *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Congress should especially be able to condition federal financial grants to the states for social programs, so that the states will be financially responsible for illegal actions taken against the intended beneficiaries of these programs. We urge this committee to give this area the highest priority.

9. Congress should consider expanding the scope of the federal *in forma pauperis* statutes to include all expenses of civil litigation.

10. Finally, access to justice may not be found only in the Courts. Congress should seek to investigate making our federal and state agencies more effective tools for doing justice thus decreasing litigants' needs to resort to the Federal Courts for remedy. Along these lines, the Public Participation in Government Proceedings Act introduced by Representatives Rodino and Koch (H.R. 3361) contains many excellent methods for improving the federal administrative process.

Mr. Chairman, we thank you for the opportunity to express our views on the very important subjects before this committee. We must begin to address the problems of delay and congestion in a reasonable and sober manner, but we must avoid unduly restricting access to the Courts, especially for our most disadvantaged citizens. Justice Brennan has best outlined the problem:

"A solution that shuts the Court House door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived and minorities. The very lifeblood of courts is popular confidence that they mete out even-handed justice and any discrimination that denies these groups access to the Courts for resolution of their meritorious claims unnecessarily risk loss of that confidence. [Brennan, W. J., Jr., "State Constitutions and The Protection of Individual Rights," 90 Harv. L. Rev. 489, 498 (Jan., 1977)].

Mr. STEINGLASS. As attorneys representing low income individuals, we often find it necessary to appear on their behalf in many forums, including the Federal courts.

What I would like to do is very briefly give a sense of perspective of the issues with which we are involved. Much of what is said before committees such as this, having read many of the statements, seems very abstract and I would like to focus on what happens at the trial level of the Federal courts.

I think it is important to point out that most often we are not involved in addressing novel constitutional or threshold-type issues, but rather are representing individuals in many forums. However, in the Federal courts in particular we often represent individuals who are seeking to enforce statutory enactments of Congress or who are seeking to have well-settled constitutional doctrines applied in their own particular case. It is these areas in which the district courts have been most active, we believe, in vindicating rights of low-income individuals.

We are all aware and have heard a great deal about the congestion and delay in the Federal courts. That delay also takes place in many other forums. Notwithstanding the delays that do in fact exist and sometimes create problems of access for low income and other individuals, we would suggest that Congress approach the problem of congestion and delay very, very carefully and very deliberately, and not accept—as I am sure it will not—any far-reaching solutions unless and until they are carefully thought through and presented.

We would, however, make a number of specific suggestions that can be dealt with in the near future.

First, we suggest that Congress act speedily to provide the Federal courts with the additional judgeships authorized in the bills pending before the Congress. Notwithstanding Professor Bork's statement, I hardly think that the four Federal judges in Wisconsin represent an overcommitment of judicial resources to that State, if I may be allowed such a parochial statement.

Second, Congress should fund a comprehensive and independent study of the Federal courts. We believe that not a great deal is known about the sources of delays within the Federal system. Much raw statistical material is gathered by the Administrative Office of the U.S. Courts, but how judges actually spend their time, which cases really take their time, is a question that ought to be addressed more carefully.

Third, we would suggest that if something is to be done immediately concerning the volume of cases in the Federal courts, Congress act to eliminate the open-ended diversity jurisdiction which encourages litigants to select the Federal courts in cases involving only issues of State law.

Having told the committee what we feel should be done, we would also suggest a number of things which we do not think should be done at the present time.

First, we have serious questions about the proposal to expand the jurisdiction of Federal magistrates in civil matters. We think that such proposal may well create a shadow judiciary without many of the safeguards inherent in article III judges.

Second, we have reservations concerning any proposal that would relegate or channel specific types of Federal claims to specialized courts. We think that the article III courts as they exist now should continue to maintain this jurisdiction and we feel that many low income individuals that we represent would be hurt if they were relegated to another system.

Third, we have questions concerning the general administrative tribunal that Professor Bork's committee recommended.

Mr. DRINAN. Would the gentleman yield?

Mr. STEINGLASS. Certainly.

Mr. DRINAN. Mr. Chairman. You don't have to argue that Mr. Bork is wrong. I didn't get my 5 minutes to cross-examine him, but I commend you for what you are doing here.

I just want to say that you don't have to give him any exultation or give him the courtesy of rejecting him. His idea was so poorly thought out that I was just astonished.

I thank you for yielding.

Mr. STEINGLASS. With respect to actions that can be taken in order to assure access, this Congress, and in particular this subcommittee, has already taken a major step with respect to low income people, not just to assure access to the Federal courts but to assure access to justice in many other forums, and that is by the action taken with respect to the expansion of legal services.

I think perhaps that may be one of the most important steps that has been taken to assure that low income people will have representation in a variety of forums.

I think the passage of the 1976 Civil Rights Attorney Fee Act was an important step in trying to expand resources in civil rights-civil liberties matters, and that is a step that should be expanded.

The partial waiver of sovereign immunity that took place in Public Law 94–574 represented another step in trying to reduce complexity and increase access to the Federal system.

There is, however, much else that needs be done. I will not go into the problems of mootness, standing, abstention, exhaustion and ripeness, procedural hurdles that litigants in the Federal courts are often faced with and must spend a great deal of time in overcoming. Other witnesses have gone into many of those doctrines in more depth, but it is worth pointing out that the time spent by litigants in courts trying to resolve many of those issues is time that could be much better spent addressing the merits of issues before the courts.

I would also observe that the overreliance on doctrines such as these forces issues to be litigated and relitigated. That time, too, could be better spent in reducing backlogs and addressing issues that need to be resolved.

In addition to the procedural barriers inherent in many of those doctrines, I want to call particular attention to a doctrine which has

quite seriously denied the ability of the Federal courts to provide full relief in actions, especially actions that are involved in the Federal benefits area.

The Supreme Court decision in *Edelman* v. *Jordan*, although raising many complex issues, is the particular decision I have in mind. It is a decision which in many ways helps contribute to problems that many low-income people face. At the present time Federal courts are effectively precluded from providing full relief to beneficiaries of various Federal welfare programs. This has resulted in officials administering those programs being able to act in violation of law with impunity, knowing well that the Federal courts will not have power to redress those violations.

The specific suggestions that we recommend follow. Then if the committee has questions, Mr. Sweeney and myself would be most pleased to try to answer them.

One. We would suggest that Congress act and act quickly on H.R. 7053, I believe also known as H.R. 2439, a bill which would authorize the Attorney General in appropriate cases to assert the rights of institutionalized individuals. I think that putting both the prestige and the resources of the Department of Justice into cases such as this will have an important effect in trying to encourage those who administer such institutions to begin to make improvements that in many cases are long overdue.

Two. We would urge that Congress act to improve the effectiveness of section 1983 of title 42 of the United States Code.

Three. We would suggest that Congress address and broaden the 1976 Civil Rights Attorney Fee Act by allowing such fees in litigation commenced against the Federal Government. That statute presently is generally felt to only allow fees in cases against State or local officials.

Mr. KASTENMEIER. On that point, if I may interrupt, would you have any objection to providing reasonable attorney fees and costs for litigants who prevail in actions pursued by legal service programs?

Mr. STEINGLASS. I believe the compromise that was worked out on the floor of the House which would permit such recoveries, I believe in cases where there was bad faith——

Mr. KASTENMEIER. Or harassment.

Mr. STEINGLASS [continuing]. Or harassment, might make some sense.

I would think going beyond that might make problems.

Mr. KASTENMEIER. What I am asking you is, would you apply the same standard to Legal Services Corporation funded programs as you would under No. 3 in your statement?

Mr. STEINGLASS. First, I think there is a special obligation of Government when Government is in fact the defendant in these matters, and I think we expect a very high standard when Government forces plaintiffs to go into court to litigate that which they should not otherwise have to litigate.

I think the standards in terms of the situations in which plaintiffs would have to pay fees are more narrowly drawn even in the 1976 act than situations in which defendants would have to pay, and I think that is appropriate. Otherwise, I think you would have a danger that

we might move totally to the English system in which plaintiffs simply would be discouraged from ever commencing even meritorious litigation because that might well bankrupt them if they turn out to have not acted correctly in their judgment as to whether it was in fact meritorious.

Mr. KASTENMEIER. The reason I ask the question is because this subcommittee will soon be entering into the area of attorney fees and costs. Consistent with your suggestions we took a small but significant step last year. Nonetheless, we also have the obligation of defending or answering similar recommendations for legal services programs, some of which would go very far indeed. During the legal services' appropriations debate, this subcommittee was in the position of having to argue that it would be unreasonable to go literally beyond what was already in law. Although we did end up making a modest concession, we tactically defended the legal services programs on the grounds that during 7 years of operation they had used appropriate discretion and there were few abuses. However, there is a feeling within the Congress that so long as we are essentially funding programs with the taxpayers' money, no matter how indirect, and so long as these programs sue private and independent entities, we may have to be the ultimate insurer of attorney fees and costs for prevailing parties other than the programs.

This question will be raised, and as you both are so close to it and working for local programs, I thought it well to raise it in the context of your third suggestion.

Mr. STEINGLASS. The fourth suggestion that we had made is that Congress should encourage the development of remedial legislation to make the class actions the effective tool that it was intended to be. We see no reason that claims aggregating many tens of thousands of dollars should not be heard because each plaintiff has less than $10,000 at issue; nor do we see any utility or need for the stringent notice requirements in (b)(3) class actions that in many cases make persons with only small amounts of money at stake effectively unable to commence such litigation.

Five. We suggest that Congress should limit the ability of Federal courts to abstain in civil cases where Federal rights are asserted and should allow temporary abstention only in those cases in which States adopt the Uniform Certification of State Law Questions Act and thus provide speedy methods for resolving State law issues in the highest State appellate court.

Six. We would suggest that Congress develop legislation which would ameliorate the adverse impact of the Supreme Court's decision in *Weinberger* v. *Salfi* which limits the ability of beneficiaries of the Social Security Act to challenge provisions or determinations made in their cases.

Seven. We would suggest that Congress provide for judicial review of final decisions of the Board of Veterans Appeals so that veterans, their survivors and dependents have access to the courts to challenge arbitrary and capricious decisions made by that agency.

Eight. We would suggest that Congress closely inspect the legislative routes for limiting the harmful impact of *Edelman* v. *Jordan*, the case I referred to earlier. That area raises many difficult constitutional questions, as I am sure the committee is aware, but I think the effort

should be begun to start thinking of ways in which the adverse impact of that case can be either removed or at least lessened.

Nine. Congress should consider expanding the scope of the Federal in forma pauperis statutes.

Ten. Congress should seek to investigate ways of making alternative forums more effective tools for doing justice and thus decreasing the need of litigants to resort to the Federal courts. The general observation I would make with respect to that final recommendation relates to a question that was asked earlier with respect to exhaustion of remedies.

It seems to me and has always seemed to me that the best way to reduce the reliance on Federal courts, or even State courts for that matter, is for there to be effective administrative remedies existing at the appropriate State or Federal level.

The way to accomplish that is not to require such exhaustion but to encourage the development of those remedies. If, in fact, effective remedies are developed, it has always seemed that people will in fact seek them out.

I think it says a great deal about the quality of alternative remedies when one realizes how infrequently, for example, prisoners are willing to use those remedies; and so I would suggest that alternative remedies, if effective, would lessen the need to resort to Federal forums.

The fact that the Federal forum would in fact still be available, that those doors would still be open, would be an encouragement for those setting up such administrative forums, for those responsible for State court systems, to apply the law, often Federal law, in the same even-handed way that the Federal courts have been willing to apply the law in cases involving low income and other individuals.

In conclusion, we would point to the statement Justice Brennan made in his influential Harvard Law Review article and agree with the Justice that a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief seems to be not only the wrong tool but also a dangerous tool for solving the problems that people face.

Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Steinglass. I compliment you and Mr. Sweeney on your fine statement.

What are your feelings about recent proposals to create new informal dispute-settling devices, such as mediation, arbitration, and neighborhoood justice centers, as proposed by the Attorney General?

Mr. SWEENEY. Mr. Chairman, I think that those ideas merit careful consideration and I believe that generally most legal services attorneys would like to see an informal dispute-setting-type procedure that is available to persons who wish to utilize it without unduly restricting their ability to utilize article III courts where necessary. It should not become a strict and formalistic method that they would have to follow, where that alternative would not be the best route, but I think it is certainly an interesting and intriguing idea and one that I think has much benefit in, say, such areas as domestic relations where those disputes now often get channeled into the criminal area.

Mr. KASTENMEIER. Going to the next point, if these offer possibilities, let me ask you about magistrates and the extension of their powers and jurisdiction.

As you undoubtedly know, the present proposal as passed by the Senate requires that parties consent to have the magistrate settle their dispute, so to speak, to really get around the question you raise in terms of the neighborhood justice center and other forums of mediation or arbitration.

Under what circumstances would you advise your client to go to trial before a magistrate?

Mr. SWEENEY. Mr. Chairman, that is a very difficult question. It takes in such factors as the personality and past performance of both the magistrate and the district court judge.

I would not want to give up any significant right of appeal to go to a magistrate to serve the convenience of the district courts while fully realizing that there may be delays, which exist for my clients in the courts.

I testified before Senator DeConcini's subcommittee about the magistrates bill and I think there was a good case made that our current magistrate system has not been utilized sufficiently to offset the work from the district court judges.

For example, in social security cases, which are always pointed to as being a case that needs some control in the district courts, there is a present procedure by which the district court judge can delegate a lot of the responsibility to magistrates, but statistics indicate that in 1976 only 15 percent of the social security cases were handled by magistrates under that present procedure.

My first choice would be to work with the present law and then if that doesn't work out think about other solutions.

Mr. KASTENMEIER. Professor Bork raised the question of creation of administrative tribunals. While I think you perhaps may have some reservations about them, I don't know that you reject them as being out of hand. They may have been used successfully in other countries, in Europe and so forth.

One of the difficulties is that while we all favor full access to justice, exploding caseloads make litigants compete for access to the Chief Justice of the United States himself or to an article III judge. It doesn't matter whether the case involves a bankruptcy determination or whether it is a social security claim. I wonder if you can appreciate, not only the dilemma, but also the contradiction raised by those who seem to have most to gain by providing additional tools (new methods of conflict resolution, at less cost, more expeditiously, with less formality), also have at the same time seemed to want to defeat any diminution of resort, let's say, to Chief Justice Burger himself.

I overdramatize the situation.

We are somewhat caught in that dilemma. In fact, in some respects those who represent the poor and underprivileged agree with Mr. Bork that burgeoning caseloads have created an intolerable situation; both don't want a National Court of Appeals to replace access to the Supreme Court.

There is some agreement there, but unless we are able to create additional judicial alternatives, access to justice may continue to be denied.

Do you care to comment?

Mr. SWEENEY. Mr. Chairman, that is extremely and obviously the crux of the matter before this subcommittee, and we certainly recog-

nize both elements of the matter, that there is a volume and there is a load and it has to be dealt with by decisionmakers, and we in the legal services community, I don't think, wish to be in any way obstructionists as far as proposals or ideas that come along, but we are very conservative in our approach to the Federal judicial system because it has constitutional foundations. There is an inherent value in our system of article III judges. It is in the Constitution. There is some value and worth there.

It seems to me if that worth and value can be translated into another forum or mechanism and if sufficient safeguards can be put around the decisionmakers to insulate them, then perhaps some of those ideas ought to be looked at and taken carefully into consideration, because, as lawyers, our concern, I guess, is the result rather than the mechanism, the result being justice for our clients, and the mechanism we are concerned about only insofar as it better can provide justice or not do such a good job in providing justice.

Mr. KASTENMEIER. I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman. I commend both of you for your statement.

Do you think it is possible to draw up a bill, an omnibus bill, undoing all that the Court has done in the last 6 or 8 years with regard to standing, mootness, abstention, class actions, and so on? Has that come to you and your associates?

Mr. STEINGLASS. I think it is possible. I think a start has been made in a bill referred to in our statement.

Mr. DRINAN. Which number is that?

Mr. STEINGLASS. I think it is H.R. 4514.

Mr. DRINAN. What page is that on?

Mr. STEINGLASS. It is referred to on page 13. I believe it is either the same or quite similar to Senate bill 35 that has been introduced by Senator Brooke.

Mr. DRINAN. Is that Congressman Mitchell's bill?

Mr. STEINGLASS. Yes. I think that bill represents a starting point. I think most people who have looked at that, including the American Civil Liberties Union, believe that a considerable amount of additional work has to be done on it, but I think that it is possible to address most of those issues in a constitutionally permissible manner.

Mr. DRINAN. I agree with all the things that you are saying. I am just anxious to get down and begin marking up. I think we all agree on these things and that we know we just have to undo what they have done. They have locked out litigants, particularly poor people.

On page 9 you mention all of the things that they have done, and restrictive, too. Would you feel that Congress has the right to set aside all of the restrictions they have placed on litigants? Or do some of those things have a constitutional basis?

Mr. STEINGLASS. I think there may well be some. I mean to say that the fact that the Court has gone too far in areas like standing or mootness or even ripeness, isn't to say that those doctrines don't have some value or some role. I think cases should not be litigated until they really are cases or controversies, and that is more than a preference; that is a constitutional requirement. So I think it would be a mistake to attempt to completely eliminate those doctrines. The Federal courts are not

there to give advisory opinions to anyone who has a concern, so I think the case or controversy requirement clearly has to be thought of and not violated.

With regard to our suggestions with respect to *Edelman* v. *Jordan*, our statement is quite guarded in terms of a recommendation on that because that decision was made on constitutional grounds with respect to the role of the 11th amendment. While we believe that Congress can condition receipt of benefits in various Federal benefit programs on the State's willingness to waive its 11th amendment rights, we also believe it is possible to go further than that in order to assure that Federal courts have the full authority to grant complete remedies. However, there may well be a point beyond which Congress cannot go, and that is a topic that I think clearly requires further consideration.

Mr. DRINAN. Was there a majority in that case for the 11th amendment argument?

Mr. STEINGLASS. Yes; there was.

Mr. DRINAN. What does this case of *Califano* v. *Sanders* on page 14 say?

Mr. SWEENEY. It is a somewhat narrow decision but very troublesome to a group of social security claimants. The impact of the decision is that determinations not to reopen a social security claim or final decisions denying extension of times by the Social Security Administration or certain other final decisions, cannot be judicially reviewed.

In that case, in the specific *Sanders* case, it was a petition to reopen, and the individual had not had an attorney the first time through the proceedings, was retarded, had many other drawbacks. He was a poor black man in East Chicago, Ind., and that decision said that there would be no judicial review of the Secretary's final decision denying reopening of the claim, and it also applies to some other, albeit limited, areas of final decisions in social security matters.

It could easily be overturned by an amendment to section 205(g) of the Social Security Act.

Mr. DRINAN. When did that come down this year? Very recently?

Mr. SWEENEY. The spring of 1977.

Mr. DRINAN. I just want to commend you. You put it all together here. Going back to what Mr. Bork said, just to make a record of it, do you have anything further to say with regard to his very amorphous proposal?

Mr. SWEENEY. Father Drinan, one thing that I would point to is that Mr. Bork seemed to have great confidence in Civil Service Commission appointment of administrative law judges. There has been a lot of question about that in connection with the temporary administrative law judges which Social Security has right now, and there is a detailed subcommittee or committee print put out by the Social Security Subcommittee on the whole method in which the Civil Service Commission has dealt with the appointment of temporary ALJ's, raising substantial questions about their methods and favoritism of certain classes or groups of applicants.

There may be some personal interest in this, since one of the groups they appear to be disfavoring is Legal Services attorneys who are applying to be administrative law judges, just to make sure that——

Mr. DRINAN. Favoring or disfavoring?

Mr. SWEENEY. Disfavoring the experience of Legal Services attorneys. That is just my own analysis from reading the subcommittee's print. They have a list in there of people that are high on the list and people that are low on the list; and generally, Legal Services attorneys fall low on the list.

A lot of private practitioners fall very low on the list. Government attorneys are very high on the list. That may or may not present problems, but it certainly presents a question to me about the independence of your adjudicator when there is question about the appointing authority.

Mr. DRINAN. And the VA is the same way or worse.

Mr. SWEENEY. The VA is a no man's land of procedural protections, primarily because there is no judicial review and it is kept in the closet, so to speak, from the scrutiny of article III tribunals; and to those few of us who have entered it from the outside, it is a no man's land for many legal principles and such elemental procedures as due process.

Mr. DRINAN. It really is a no woman's land. They say that no one can be an administrative law judge unless he has been a veteran.

Mr. SWEENEY. Right.

Mr. DRINAN. I once again commend you for your paper, and I look for legislation proposed by groups like yours. It would seem to me that an omnibus bill would be the best approach so that Congress can overrule those adverse decisions.

Mr. Chairman, I hope that these gentlemen just stay in touch with us and their associates in public interest law. Please give us the benefit of all your experience in the pit, as they say. Thank you.

Mr. KASTENMEIER. I thank my colleague for his questions of the witnesses. I have a legal services program question: Do you practice any bankruptcy law? It would seem to me that the class of individuals who would be bankrupt would very possibly qualify as poor people. It is my impression, however, that most programs don't entertain bankruptcy cases. Correct me if I am wrong.

Mr. STEINGLASS. Our program does very little, if any, of that.

Mr. SWEENEY. Our program, Mr. Chairman, is kind of in and out, depending on availability of resources, and we will do bankruptcies, but we consider them to be somewhat of a low-priority area because of the fact that oftentimes the very poor person—and because of restrictions we are really representing the lowest level of income individuals—is usually so immune to judgments as a practical matter that bankruptcy becomes a nice thing to have but somewhat of a luxury.

I would note that I think that if there is concern about the bankruptcy matter in the legal services community, there is a support center, the Consumer Law Center, located in Boston, which I know has dealt extensively in the bankruptcy area. They may be of some support as far as information is concerned.

Mr. KASTENMEIER. Does your limited practice in that area suggest to you another question which has been raised before this committee: That is, whether bankruptcy referees or judges should be granted article III status?

Mr. SWEENEY. Mr. Chairman, I don't know that much about bankruptcy, but I am just very, very conservative on the whole question of

solving court congestion problems by making individuals article III judges. I just think, as said before, there is a value there, in article III of the Constitution, and it seems that many proposals have been very loose and fast with making individuals de facto or actually article III judges without really considering the full ramifications.

The same questions I have about the magistrates, I would translate over to the bankruptcy judges, and especially would note serious questions about grandfathering current bankruptcy judges into any new system that was created.

I think there is substantial question about many bankruptcy judges.

Mr. DRINAN. On that point, we in no way do that. In fact, we fire all of the referees, not merely because of *Buckley* v. *Valeo*, but because of the intrinsic nature of the new court. We do not want to grandfather them in; we just fire them.

Mr. KASTENMEIER. Presumably these individuals would also be fungible, that is, they could try a felony case or anything else once they were so created.

I have another question and sometimes these questions are easy and sometimes difficult. I want to pose a more difficult question than that posed by my colleague from Massachusetts, who inquired as to the possibility of drafting an omnibus bill to try to reverse the Supreme Court in a number of areas—mootness, abstention, standing, and so forth? Maybe such a bill is possible to draw up. I think it might be extremely difficult to pass, however; no matter how supportable my colleague and I might feel it is, we must be realistic.

Our first witness, Mr. Nader, alleged the existence of a conspiracy on the Supreme Court to pinch off access through various decisions based on threshold grounds. For purposes of argument, if we accept that and if we also accept the argument made by the Chief Justice and Mr. Bork that the quality of the Court's decisions is diminishing or is likely to diminish because the Court is drastically overburdened, whether it cares to admit it or not, then it can be concluded that tactically the Court is denying access because it is overburdened and cannot render the quality of justice it might have been able to in a former time.

Taking this point of view, and assuming one cannot through an omnibus bill successfully legislatively do away with many recent decisions, would it be a plausible alternative to create a national court of appeals?

Would this tool aid the Supreme Court in terms of possibly providing, among other things, more access again to a High Court judgment and to also relieve the burden that is noted?

Mr. SWEENEY. Mr. Chairman, I personally found Mr. Bork's report on that particular matter to be somewhat persuasive. The very decisionmaking process by which the Court decides if it is going to take it, means the Supreme Court has to review the case closely. This doesn't seem to really offload the Supreme Court from volume substantially. It certainly doesn't offload the district courts substantially and I am not sure it really offloads the regular court of appeals substantially.

It sounds like an attractive idea up front, but the more I think about it, the more I think that Mr. Bork's objections to it do indeed

have merit and that it may just be another tier of review. I am particularly concerned about this because in the social security area, which is sort of my specialty, we are constantly dealing with that problem. In that system there are so many tiers of review which have been put into the process, supposedly to help claimants, and sometimes they do, but other times it just creates delay and creates a passing-the-buck-upstairs type of mentality which I realize is maybe not transferable directly to the court system, but it is an interesting analogy when you look at the problems of the Social Security Administration adjudication system which are very parallel to the problems of the courts. We are trying in the social security area to cut out tiers of review because of all the problems.

I am somewhat hesitant to support extra tiers of review in the judicial system because I have seen the problems in social security.

Mr. KASTENMEIER. I appreciate your answer and I don't necessarily disagree with it. I haven't made up my mind; I do note that we have a dilemma. We have to at least give some credence to claims of overburdening, and have to agree with Mr. Bork's statement that we can assume not less, but greater, legal activity in the years to come. This Congress, as immediate past Congresses and the next one, is likely to create both more laws and more programs to cope with an increasingly complex society, so that the result will be greater judicial burdens. Since we are all mutually interested in the quality of justice, we may have to look at alternative mechanisms.

Whether an additional appellate tier is an answer is a good question. I don't know whether one can force the court to make itself more accessible. That is another question.

We have a number of these questions before us and, of course, we solicit your advice on them. To the extent that you made a contribution this morning, we are grateful for your appearance.

I thank you both, Mr. Steinglass, from my native State, and Mr. Sweeney.

Mr. SWEENEY. Thank you.

Mr. KASTENMEIER. The subcommittee is adjourned.

[Whereupon, at 12:30 p.m. the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

Appendix 1.—Recent speeches of Chief Justice Warren E. Burger:

(*a*) Keynote Address by the Honorable Warren E. Burger at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7, 1976).

(*b*) Annual Report by the Honorable Warren E. Burger to the American Bar Association (February 13, 1977).

(*c*) Remarks by the Honorable Warren E. Burger to the American Law Institute (May 1, 1977).

(*d*) Remarks by the Honorable Warren E. Burger to the American Bar Association Minor Disputes Resolution Conference (May 27, 1977).

Appendix 2.—William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

Appendix 3.—Supplemental material submitted by Ralph Nader: Taxpayer Standing: Survey of State Laws.

Appendix 4.—Supplemental materials submitted by Thomas Ehrlich:

(*a*) Michael B. Trister, Federal Access Legislation: Proposals Introduced in the 95th Congress.

(*b*) Michael B. Trister, Legislative Proposals to Improve Access to Federal Courts and Administrative Agencies.

Appendix 5.—Supplemental materials submitted by Attorney General Griffin B. Bell:

(*a*) Report of Pound Conference Follow-Up Task Force (August 1976); and Supplemental Report.

(*b*) A Program for Improvements in the Administration of Justice, U.S. Dept. of Justice (May 9, 1977).

(*c*) Goshko, United States to Fund Neighborhood Justice Center Tests in 3 Cities, Washington Post, June 13, 1977 at A5, col. 1.

Appendix 6.—Supplemental materials submitted by Judge Robert A. Ainsworth, Jr.:

(*a*) Memorandum, Ninety-Fifth Congress Bills to Amend 28 U.S.C. 142 and additional materials.

(*b*) Letter and attached materials relating to Judicial Conference's approval, in principle, of Judicial Tenure Act.

Appendix 7.—Supplemental materials submitted by Professor Burt Neuborne:

(*a*) Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977).

(*b*) Burt Neuborne, The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection, 5 Hofstra L. Rev. 545 (1977).

Appendix 8.—Supplemental materials submitted by Chief Justice Robert J. Sheran:

(*a*) Final Selection of Judges in the State Court Systems from State Court Systems (Revised 1976).

(*b*) "Judicial Nominating Commissions", from A. Ashman and J. Alfini, The Key to Judicial Merit Selection: The Nominating Process (1974).

(*c*) Survey of Judicial Salaries in State Court Systems (April 1977).

(*d*) Report of the Executive Council of the Conference of Chief Justices in Response to the Department of Justice Study Group Report on the Law Enforcement Assistance Administration.

(*e*) Resolution of the Conference of Chief Justices (August 3, 1977).

Appendix 9.—Supplemental materials submitted by Robert H. Bork:

(*a*) The Needs of the Federal Courts, Report of the Department of Justice Committee on Revision of the Federal Judicial System (January 1977).

(*b*) H. Friendly, "Diversity Jurisdiction", from Federal Jurisdiction: A General View (1973).

Appendix 10.—Additional materials:

(*a*) H. Friendly, "The explosion of Federal Court Litigation and the Consequent Problems of the District Courts, the Courts of Appeals and the Supreme Court" from Federal Jurisdiction—A General View (1973).

(*b*) G. Hazard, Rationing Justice, 8 J. Law & Econ. 1 (1965).

(*c*) A. Goldberg, There Shall Be "One Supreme Court", 3 Hast. Const. L.Q. 339 (1976).

(*d*) T. Clark A Commentary on Congestion in the Federal Court, 8 St. Mary's L.J. 407 (1976).

(*e*) Report of the Study Group (Freund Committee) on the caseload of the Supreme Court (1972).

(*f*) Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised", 59 A.B.A.J. 835 (1973).

(*g*) Supreme Court Denial of Citizen Access to Federal Courts to Challenge Unconstitutional or other Unlawful Actions: The Record of the Burger Court. A statement of the Board of Governors of the Society of American Law Teachers (Prepared by C. Goldberg and H. Schwartz).

(*h*) Address by the Honorable A. Leon Higginbotham, Jr., at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice on "The Priority of Human Rights in Court Reform" April 7–9, 1976).

(*i*) Address by the Honorable Frank M. Johnson, Jr., for the School of Law, University of Georgia on "The Role of the Judiciary with Respect to the Other Branches of Government (February 17, 1977).

(*j*) Address by Solicitor General Wade H. McCree, Jr., to the 1977 Law Alumni Reunion Banquet, Georgetown University Law Center (April 30, 1977).

(*k*) Address by Mayor Kenneth Gibson, Newark, New Jersey, Law Day (May 1) 1977.

(*l*) Address by Vice President Walter F. Mondale to the Second Judicial Circuit Conference (September 10, 1977).

(*m*) Address by Assistant Attorney General Daniel J. Meador before the National College of the State Judiciary on "The Federal Government and the State Courts (October 14, 1977).

Appendix 1

(*a*)

Agenda for 2000 A.D.—Need for Systematic Anticipation

Keynote Address by Warren E. Burger, Chief Justice of the United States at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, House Chamber, State Capitol, St. Paul, Minnesota, Wednesday, April 7, 1976.

(*Prepared text substantially as delivered*)

We open this meeting of judges, lawyers and scholars here at the scene of Roscoe Pound's 1906 speech in order to remind ourselves of what he said and to underscore the sobering reality that progress is slow and that much remains to be done. On that occasion Pound gave to our profession, and to the country, the first truly comprehensive, critical analysis of American justice and of problems that had accumulated in the first 130 years of our independence. In that span of time our country had grown from three million people in a largely rural society on the Eastern seaboard to 85 million people spread over a continent with rapidly expanding cities built around a dynamic industrial economy.

The conference we open tonight is significant because it is the first time that the chief justices of the highest state courts, the leaders of the federal courts, leaders of the organized bar, legal scholars and thoughtful members of other disciplines have joined forces to take a hard look at how our system of justice is working. We will ask whether it can cope with the demands of the future, and begin a process of inquiry into needed change. But this meeting will be judged not on its unique composition but on what it stimulates for the years ahead.

If we are to justify taking two days' time of more than 200 leaders of the law, it will be useful to make clear what we are not here to do. That is a task easier, perhaps, than to say with precision what we hope to accomplish. We are not here to deal primarily with specifics and details but with fundamentals.

Since Pound spoke here 70 years ago, there have been countless conferences, seminars, and studies on every aspect of the administration of justice. A review of those gatherings demonstrates, however, that, as Pound said, we have been "tinkering where comprehensive reform is needed." Although we have indeed been tinkering, we have also been doing a good deal more than in some earlier periods, when, as Pound said, our profession thought it was making progress by eliminating "all Latin and law-French terms from the law books." But any suggestion that nothing has been done in these 70 years would be very wrong. A great deal was done, and much of it was due to what he set in motion here.

But we have not really faced up to whether there are other mechanisms and procedures to meet the needs of society and of individuals. And, even if what we now have is presently tolerable, we must ask whether it will be adequate to cope with what will come in the next 25 or 50 years given the dynamic expansion of litigation in the past ten years, the growth of the country, and the increasing complexity of both. When a city or state grows from three to four million, that increase brings tensions in labor-management relations, in schools, in zoning and housing problems, in civil rights claims, and in a host of other areas. In this final quarter of the 20th century we will see changes in our society that will create even more demands on the judicial systems.

Because the world has experienced more changes in these 70 years than in the preceding 700, we must be prepared to lift our sights higher than Pound had in mind for the year 2000 will be on us swiftly. Today many nations, most agencies of our own government, and private industry have long had studies underway to prepare them to cope with the future. One writer calls this "systematic anticipation," and he notes that the judiciary is lagging in this process and needs the help of other disciplines.[1] So I submit that as long as we are inquiring and probing, not proposing or deciding, we do it boldly, not timidly—candidly, not apologetically.

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As we begin, it may be beneficial to consider the conditions that Pound and his generation confronted in 1906, to see how they and later generations responded to those conditions. An examination of their successes and failures will help us decide how we should begin to prepare for the next 25 years and beyond.

At the turn of the century Pound and others were attempting to bring rationality and order to the judicial system arising out of the economic and social chaos caused by the industrial revolution. The growth of our cities, the waves of immigration transformed this country in the second half of the 19th century. The major concern of the Pound group was fashioning better means by which people could have their disputes resolved because it was apparent to them as they entered the 20th century that the institutions of the 19th were not adequate.

Many years after the St. Paul meeting of 1906, Herbert Harley characterized Pound's speech as a "map to the territory, with the roads plainly shown," but no transportation provided. Pound knew, as we know, that no one speech, no one conference, would solve the problems, and after 1906 he and a few others set out to create the "vehicles" necessary to get from where they were to where they wanted to go. Pound was not satisfied with anything less than fundamental changes.

Our task, then, once we review what has gone before, is to reexamine the "map" Pound drew. To assess the direction of the roads he laid out, and to consider whether we need, not just to tighten "nuts and bolts," but to begin work on the design of some new—even radically new—"vehicles" to take us where we want to go in the years ahead.

It may be worth more than a footnote, and help us to gain perspective, to remember that when Pound spoke in this chamber many of the audience came from the downtown hotels by trolley car that had just replaced the horse cars, and some perhaps by horse and buggy. Where the parking meters now stand were hitching posts for horses. The horses and buggies are gone—even the trolley cars are gone—and men like Henry Ford, Louis Chevrolet, and the Wright Broth-

[1] Perloff, *The Future of the United States Government* (1971).

ers have altered our lives drastically. Yet we see that, fundamentally, the methods for settling disputes remain essentially what they were in that day.

Perhaps what we need now are some imaginative Wright Brothers of the law to invent and Henry Fords of the law to perfect new machinery for resolving disputes.

In considering new approaches we must not be deluded by the kind of pleasant, but erroneous assumptions, held by Pound, that America was entering a period of relative tranquility in which it could concentrate on providing efficient means to remedy old wrongs and create a better, fairer society. Of course, he did not foresee the terrible destruction of World War I, or the upheavals that would follow it, spawning more wars and disorders down to this day. And although Pound was sensitive to the legitimate complaints of the great mass of working people, he had not yet grasped fully the needs of racial minorities nor the changes that would be stimulated when those rights gained recognition. But Pound clearly saw the need to fashion systems of dispute settlement to meet the conditions of 1906, in which working and middle income citizens were more and more crowded into the large cities and were increasingly frustrated by the tensions, the demands, the physical and emotional abrasiveness of a new way of life, far removed from life in a small town or on a farm.

Pound understood that the old tests based on 19th century notions of liberty of contract did not meet the needs of people for compensation for on-the-job injuries, for protection against such things as tainted food and against exploitation of child labor. Added to all this was a growing crime rate and the advent of the automobile, bringing with it a whole new set of social and economic consequences—all having an impact on the courts.

He recognized that no one would ever be fully satisfied with law or with any system of justice. That dissatisfaction, as he said, was "as old as law" itself, but he felt much of it was justified, for the court seemed powerless to give relief to the victims of harsh new conditions of industrial and big city life.

Pound focused on the court system, which he called "archaic," and on court procedures, which he said were "behind the times" and wasteful of judicial time. He condemned (to use his words) "the sporting theory of justice . . . so rooted in the profession in America that most of us take it for a fundamental legal tenet." What he meant by the sporting theory was that lawyers, instead of searching for truth and justice, often tended to seek private advantage, forgetting they were officers of the court with a monopoly on legal services that mandated duties to the public as well as to clients.

Pound called on the leaders of the profession to act. Remember that in 1906 the American Bar Association was a small, conservative organization, there was no American Judicature Society, no American Law Institute, no Institute of Judicial Administration. Only a few lawers and judges and a handful of legal scholars were willing to examine the deficiencies of the court systems in relation to peoples' needs.

Since 1906 an array of dynamic organizations devoted to improving justice has come into being. We realize that no one speech or conference can change things overnight. But the long range reaction of the legal community to Pound's speech suggests that speeches and conferences can indeed lead to action in a free society. When he spoke here the A.B.A. delegates greeted his address without enthusiasm, and although the next year the Association created a special committee to investigate the complaints he made, the report of that committee was never adopted. Yet the influence of what he said is illustrated in our using the title of his speech to describe this conference.

The American Judicature Society was organized in 1913 largely due to Pound's influence, and it is perhaps the classic example of the value of enlisting nonlawyers in the search for better justice. Experience has shown, however, that it is not easy to make use of other disciplines except by constant emphasis that specialists in public and business administration of the social sciences can help us. In the ultimate sense Pound considered the function of the courts to deliver social and economic justice according to standards established by law. That is very different from social and economic justice according to the philosophy of judges. In this limited sense those adjectives are clearly implied in the words "equal justice." That, of course, was the objective of the Declaration of Independence, the Constitution, the Bill of Rights.

Another measure of the change in attitudes of our profession is shown in the American Bar Association's transition from the elite group that reacted with

hostility to Pound in 1906, into a progressive body composed of 210,000 representative lawyers.

The American Bar Association was one of the moving forces in the 1971 National Conference of the Judiciary in Williamsburg, Virginia, where the National Center for State Courts was conceived and very soon brought into operation. The A.B.A. was the chief instrument in 1969 in developing the Institute for Court Management which has stimulated a great expansion in the use of court administrators in both state and federal courts.

No review of the new organizations can fail to mention the change in attitudes of leaders of the bench and bar. Chief Justice Taft took the lead in creating what is now the Judicial Conference of the United States, one of the three sponsors of this conference, and the momentum of his efforts is still felt to this day. The presence here of representatives of the Supreme Courts of 50 states, their counterparts in the federal system, and other leaders, demonstrates that those who now hold positions of responsibility acknowledge an obligation to do something to improve the administration of justice.

In 1906 there was profound concern over processes of judicial selection and what we now call the "merit section system" emerged. Later this week, Justice Finch (Mo. Sup. Ct.), the President of the National Center for State Courts, will discuss that subject.

If there have been disappointments with some of the new developments, a major one was the failure of small claims courts to fulfill their early promise. These courts appeared in some Midwestern States soon after Pound spoke, and by the 1920's they were used in many large American cities. In many places they have gradually drifted away from the simplified processes essential for speedy and inexpensive disposition and they need a fresh look.

Many valuable studies have been made of the work of the trial courts and appellate courts, including the Supreme Court of the United States, but they will have value only if they serve to persuade legislators to act, and to rely on those studies for guidance.

Now pending in Congress is a four-year-old request for 65 desperately needed district and circuit judges, based on studies the Administrative Office of the United States Courts made at the request of the Congress. The Senate has now approved 52 new judgeships, but we will have no additional judges until the House acts. While we wait there is a near crisis situation, particularly in the courts of appeals. This leads me to suggest that it may be time to consider whether providing an adequate number of judges can be better dealt with in some other way. In Florida, for example, the governor of the state in cooperation with its legislation can create new judgeships based on precise criteria of population, caseloads, and other relevant factors prescribed in a statutory formula. Political factors are virtually eliminated. Were a similar measure adopted on the federal level, the need for judgeships would not be caught up in the complexities of politics, elections and other irrelevant considerations, when both the executive and legislative branches are preoccupied with matters totally foreign to the needs of the courts.

This procedure should be studied to see if it would fit the federal system.

Since Pound spoke, other improvements that can fairly be called "tinkering" were developed—the merger of law and equity, the requirement that federal courts apply state law in diversity of citizenship cases and the Administrative Procedures Act. Diversity jurisdiction, which Pound characterized in 1914 as a cause of "delay, expense, and uncertainty," still plagues us despite numerous studies which advocate such jurisdiction of federal courts be curtailed or abolished. Also worth noting is the use of six-member juries in civil cases, a practice first introduced by Chief Judge Devitt and his colleagues here in Minnesota and subsequently adopted almost universally by the federal courts.[2] This has saved time and expense with no adverse effect on litigants.

After the event it is easy enough to regard some of this progress as "petty tinkering," but without it the administration of justice might well have collapsed by now. It is far easier to do what we lawyers often do—praise our system as the best ever devised and denounce anyone who dares to suggest that we consider, not only periodic adjustment, but major and systemic changes. The inertia of some

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[2] Another example of continuing a wasteful and judicially costly, but unnecessary, procedure is found in the three-judge district courts. They were useful and even necessary up to perhaps 20 years ago. They are not necessary today.

lawyers, judges, and legislators is such that nothing less than a collapse of the system will bring them to consider change.

There are others, however, with a passion for reform which can be a valuable asset, but like all passions it needs to be regulated and channeled if we are to avoid hasty and ill-considered change. We sometimes develop an alleged "reform" and then turn to new fields and assume that the first effort has no flaws. It might be helpful when we enact "reforms" to give them a short term—five or ten years—and then subject them to audit and critical analysis. My colleagues, Justice Black and Douglas—not in jest but in complete seriousness—said many years ago that new regulatory agencies and new government programs should be dismantled after a fixed period—ten years or so—and not reinstated unless a compelling need were shown. Coming from two architects of the massive changes of the 1930's the Black-Douglas admonition should carry weight.

Whatever risks may be involved in our probing and talking, we must be prepared to take them. There is nothing dangerous about studying and considering basic change, if the alterations will preserve old values and "deliver" justice at the lowest possible cost in the shortest feasible time. I do not, for example, think it subversive to ask why England, the source of all our legal institutions, found it prudent and helpful 40 years ago to abandon jury trials for most civil cases. A whole range of important kinds of civil cases have been tried without juries since the beginning of the republic. If, as some American lawyers ardently advocate, it is sound to consider adopting British concepts of pretrial disclosure of all prosecution evidence in criminal cases, I hardly think we endanger the republic if we also make thoughtful inquiries into England's civil procedures, and their ideas of finality of judgments, short of three or four appeals and retrials.

When we make changes, their operation must be monitored to be sure they are working as we intended. One example will make this point: The 1964 Criminal Justice Act and the 1966 Bail Reform Act were major developments responding to need in the federal system, but we cannot assume that such important programs were perfect on "the first try." Each of these acts was one that most informed people would call "good" legislation. Now, a decade and more of actual experience shows that the interaction of these two improvements created vexing problems not anticipated. Lawyers supplied to indigent defendants at public expense do, as they should, what privately paid lawyers do for their clients, which means satisfying the clients' lawful requests. Inevitably, the first request is "get me out." Here the Bail Reform Act comes into play and the odds are that the accused will be released pending trial in all but a rare case involving a murder charge.

It now appears, especially in larger cities, that crimes are committed by persons while released pending trial on earlier charges. It is not uncommon for an accused, when finally tried, to have other indictments pending. If the matter is disposed of by a guilty plea, after conviction on one charge, there is some evidence of a tendency to dismiss or defer other charges and to impose a single sentence. In high crime rate communities, law abiding citizens must be forgiven if they ask whether such practices are giving rise to a belief that a criminal can commit two, or even three, crimes and pay the price for only one. That this reaction may not withstand careful analysis does not alter the disturbing reality of public opinion engendered by the evening newscast reporting homicides and other serious crimes.

This phenomenon is related to the actual operation of the Bail Reform Act in which likelihood of flight in most cases is the only test, and no consideration is given to possible danger to the community. Here, we cannot be sure of the answers because we do not know all the facts. The facts we need can be found only by a careful study in one or more sample jurisdictions to probe, case by case, name by name, and determine how many arrests have been made of persons who were on release pending trial on a prior charge.[3] Only then will we know whether the Bail Reform Act needs reexamination and amendment.

It is a very serious matter when whole communities become emotionally aroused—as they are these days—by a constant pattern of serious crimes. We should not be heard to complain at the loss of public confidence in our legal institutions if people come to think that government is impotent to protect its citizens.

[3] In October, November and December the Washington, D.C. Police Department reported that of all the persons arrested on charges for serious crimes, 569 were at the time of arrest on release pending trial on a prior indictment. In the same period 402 persons arrested were, at the time, at liberty on parole, probation or conditional release from a penitentiary. Under the District of Columbia Code, §§ 23-1322-25, judges may take danger to the community into account.

If Pound was correct in his analysis that excessive contentiousness was an impediment to fair administration of justice in 1906, I doubt that anyone could prove it is less so today. Correct or not, there is also a widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense. The willingness of some of the participants to elevate procedural maneuvering above the search for truth, as Pound said, sends out "to the whole community a false notion of the purpose and end of law." And he saw this as a large factor in the American cynicism about the law and the urge to want to "beat the law."

When Pound challenged the exaggerated contentiousness of the adversary system, the aggressive spirit of some American lawyers—the contentiousness that Pound said was perverting the adversary idea into a sporting contest—asserted itself in attacks on Pound. Some of these lawyer critics spoke as though the courts were the private property of lawyers, rather than instruments for the benefit of people.

Those few critics of Pound did not seem to know—or perhaps care—that England, the cradle in which the adversary system was nurtured, had worked out ways to control the damaging excesses of the contentious spirit. And anyone who has observed both the American and British courts at close range knows that there is no more vigorous advocacy or fairer justice than in British courts, and at the same time they maintain strict regulation of lawyers' professional conduct, as we do not. When juries are used, England's courts manage to do without spending days and weeks selecting a jury. Even the most ardent opponents of stricter regulation of lawyers are beginning to have some doubts, for example, about whether the jury selection process, which is provided as a means to insure fair, impartial jurors, should be used as a means to select a favorable jury.

Other conditions that caused dissatisfaction in 1906 are still with us. Jurors, witnesses and litigants continue to have their time squandered. They are often shuffled about courthouses in confusion caused by poor management within the courts. The delays and high costs in resolving civil disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by fees and expenses. Inordinate delay in criminal trials and our propensity for multiple trials and appeals shock lawyers, judges and social scientists of other countries.

I believe the American lawyers, by and large, are the equal of any in the world, but a handful of members of any profession can inflict harm out of proportion to their number, on both the public and on the image of their profession.

There is nothing incompatible between efficiency and justice. Inefficient courts cause delay and expense, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited—to use the words of Moorfield Story, a former president of the American Bar Association[4]—by the litigant "with the longest purse." Every person in this conference knows how the "long purse" has been used to produce long delay and a depreciated settlement. Efficiency—like the trial itself—is not an end in itself. It has as its objective the very purpose of the whole system—to do justice. Inefficiency drains the value of even a just result either by delay or excessive cost, or both.

It is time, therefore, to ask ourselves whether the tools of procedure, the methods of judicial process that developed slowly through the evolution of the common law, and fitted to a rural, agrarian society, are entirely suited, without change, to the complex modern society of the late 20th and the 21st centuries.

III

Only when we see that some of the causes of the dissatisfaction of 1906 are still with us, and when we contemplate the enormous array of new problems that have accumulated and those yet to come do the dimensions of our problems emerge.

The topics selected for this conference may raise in some minds the idea that our objective is to reduce access to the courts. Of course, that is not the objective, for what we seek is the most satisfactory, the speediest and the least expensive means of meeting the legitimate needs of the people in resolving disputes. We must therefore open our minds to consideration of means and forums that have

[4] And one of the founders of the NAACP.

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not been tried before. Even if what we have now has been tolerable for the first three-quarters of this century, there are grave questions whether that will do for the final quarter, or for the next century.

To illustrate, but by no means to limit, let me suggest some areas of concern to all Americans, whatever place they occupy in our society. In these areas we must probe for fundamental changes and major overhaul rather than simply "tinkering."

First: Ways must be found to resolve minor disputes fairly and more swiftly than any present judicial mechanisms make possible. The late Edmund Cahn, of New York University, reminded us that few things rankle in the human breast like a sense of injustice. With few exceptions, it is no longer economically feasible to employ lawyers and conventional litigation processes for many "minor" or small claims, and what is "minor" is a subjective and variable factor. This means that there are few truly effective remedies for usury, for shoddy merchandise, shoddy services on a TV, a washing machine, a refrigerator, or a poor roofing job on a home. This also means lawyers must reexamine what constitutes practice of law, for if lawyers refuse minor cases on economic grounds they ought not insist that only lawyers may deal with such cases.

It is time to consider a new concept that has been approached from time to time and has a background in other countries. To illustrate rather than propose, we could consider the value of a tribunal consisting of three representative citizens, or two non-lawyer citizens and one specially trained lawyer or para-legal, and vest in them final unreviewable authority to decide certain kinds of minor claims. Flexibility and informality should be the keynote in such tribunals and they should be available at a neighborhood or community level and during some evening hours.

Japan, for example, has only a fraction of the lawyers and judges we have per 100,000 population. In Japan, formal litigation is far less than in the United States, due to a long history of informal "community" and private processes for resolving disputes without litigation and, hence, without lawyers, judges and the attendant expense and delays.

Second: As the work of the courts increases, delays and costs will rise and the well-developed forms of arbitration should have a wider use. Lawyers, judges and social scientists of other countries cannot understand our failure to make greater use of the arbitration process to settle disputes. I submit a reappraisal of the values of the arbitration process is in order, to determine whether, like the Administrative Procedures Act, arbitration can divert litigation to other channels.

Third: Ways must be found to simplify and reduce the cost of land title searches and related expenses of home purchasing and financing, in order to help offset the great rise in land and construction costs that have created barriers to home ownership. With the developments in recent years, I can think of few things that are more likely "candidates" for use of modern computer technology than maintenance of land records and the process of examining land titles. Having spent some time in my early years of law practice in the musty, but cool vaults of courthouses, manually and painstakingly charting out multiple transactions in a chain of title, and having now seen something of what a computer can do, I am persuaded that this is one area in which the legal profession should take the lead for a change that will reduce the cost of examining titles to a fraction of the present figures and release lawyers for other useful tasks.

Fourth: Ways must be found to simplify and reduce the cost of transmitting property at death. Probate procedures can be simplified without diminishing certainty of title. As a native Minnesotan, I yield again to the temptation to note that a wholesome step has been taken by the Minnesota Legislature in the form of a modern probate code, and although I must not let my loyalties lead me to say Minnesota has spoken the "last word" or that it has the "perfect" probate code, it has taken a significant step forward, typical of this progressive state.

Fifth: Ways must be found to give appropriate weight to ecological and environmental factors without foreclosing development of needed public works and industrial expansion by inordinate delays in litigation. The accommodation of the conflicting values demands that there be a swift resolution of those cases, so as to avoid the waste involved in suspending execution of large projects to which vast public or private resources are committed. This country has appropriately committed itself to protecting our environment, but we must also build needed schools, homes, and roads, and in the process provide jobs.

Sixth: New ways must be found to provide reasonable compensation for injuries resulting from negligence of hospitals and doctors, without the distortion in the cost of medical and hospital care witnessed in the past few years. This is a high priority.

Seventh: New ways must be found to compensate people for injuries from negligence of others without having the process take years to complete and consume up to half the damages awarded. The workmen's compensation statutes may be a useful guide in developing new processes and essential standards.

Eighth: It is time to explore new ways to deal with such family problems as marriage, child custody and adoptions. We must see whether it is feasible to have relationships of such intimacy and sensitivity dealt with outside the formality and potentially traumatic atmosphere of courts.

Ninth: The 70 years since Pound criticized the "sporting theor[illegible]ice" have seen some major advances aimed at simplifying procedure at [illegible]he trial and appellate levels. Some state courts developed pretrial procedures in the 1920's. The adoption in 1938 of the Federal Rules of Civil Procedure was a major step toward a pervasive simplification of procedure. Here, my native Minnesotan loyalties again prompt me to recall that one of the most distinguished lawyers ever to come out of Minnesota, William D. Mitchell, who was Solicitor General and later Attorney General of the United States, chaired the committee that drafted the Federal Rules of Civil Procedure. Now, however, after more than 35 years' experience with pretrial procedures, we hear widespread complaints that they are being misused and overused. Increasingly in the past 20 years, however, responsible lawyers have pointed to abuses of the pretrial processes in civil cases. The complaint is that misuse of pretrial procedures means that "the case must be tried twice." The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands.

The Judicial Conference of the United States has a standing committee on Rules an Advisory Committee on Civil Rules. I have requested the Judicial Conference Standing Committee on Rules to conduct hearings on any proposals the legal profession considers appropriate. We must have an obligation to provide all necessary legal services at the lowest reasonable cost, and when procedures become obsolete and increase the expense, they should be corrected.

This conference will not settle or solve problems, but we hope it will unsettle some of our assumptions that are no longer valid. Our objective is to stimulate future studies and conferences to treat in depth the unsatisfied needs we hope to identify in these next few days.

Ever since Magna Carta, common law lawyers have recognized that the law is a generative mechanism sharing with nature the capacity for growth and adaptation. The changes in seven and a half centuries since then demonstrate that change is a fundamental law of life and even our need for stability and continuity must yield to that immutable law. What is important is that lawyers fulfill their historic function as the healers of society's conflicts and fulfill their responsibility to preside over orderly evolution. It is now up to us to demonstrate whether we will be able to adapt the basically sound mechanisms of our system of laws to new conditions.

[Dean Pound's Speech to the ABA at its 1906 Annual Meeting in St. Paul, Minnesota, on "The Causes of Popular Dissatisfaction with the Administration of Justice" was published in 29 ABA Reports p. 395 (1906); an abridged version was republished in 1971, See 57 ABA Journal p. 348 (1971).]

(b)

1977 Report to the American Bar Association by Warren E. Burger, Chief Justice of the United States, Seattle, Washington, February 13, 1977

This is the ninth year you have afforded me the opportunity to place before you some of the problems of our system of justice, as I see them from where I sit.

You may recall that in 1969, soon after taking office,, I came to the Association meeting in Dallas and outlined an agenda of needs of our system. To the extent that we have made progress—and I believe we have—much of it is due to the consistent support you have given. The Association deserves the thanks of the American people.

Immediately after the first discussion of our problems with you in 1969, you took the leadership in creating the Institute for Court Management to provide modern management personnel and methods in the courts. Since 1969 it

has provided a wide range of valuable training programs for both state and federal court personnel and has virtually created a new profession. You then gave your support to legislation to create the new position of Circuit Executive for each of the federal circuits, and Congress responded. Later you took the leadership in creating the National Center for State Courts, another institution which was long overdue. It is now making excellent progress on the deferred maintenance of the state court systems. Had those two organizations and the Office of Circuit Executive existed forty or fifty years ago, I doubt that we would have today nearly as many vexing problems of delay, congestion, and excessive expense, that we experience in the resolution of disputes. Since then, you have also given support to the proposal to create a National Institute of Justice, and I will have more to say of that later.

The administration of justice at every level has always rested to some extent upon competing philosophical attitudes concerning concepts of justice, of individual liberty and the security of society, but the mechanisms of justice, the means to implement the ideals that we accept, are largely neutral concepts on which most can agree. It is heartening to see a growing realization in our profession that ideals and concepts alone are of relatively little use without the "wheels" to make delivery—to deliver justice. We have, I think, reached the point where there is no significant acceptance of the notion that in some strange way, efficient modern methods of administration are incompatible with the purity of the ideals and the objectives of justice.

Whatever may have been the situation two centuries ago, or even a century ago, today the administration of justice is a highly complex and technical enterprise. What we must face up to is whether a process so intricate and so complex can continue to be guided—if the term "guided" is the correct word—by haphazard, casual and uncoordinated approaches.

The very complexity of government today seriously impedes communication among its parts and branches. The Judicial Branch lacks the facilities generally available to the departments of the Executive in pressing their positions on the Congress. As a result, badly needed legislative action is often delayed and sometimes legislative action is taken without awareness of the consequences on the work of the courts.

IMPACT STATEMENT

In 1972 I urged that Congress establish, by rule or resolution, a procedure requiring each committee, upon reporting a bill affecting the federal courts, to submit with the legislation an impact statement. That statement would embrace a good faith effort to predict the consequences of the legislation on the day-to-day work of the federal courts, especially in terms of jurisdiction and personnel needs. There was some impression at the time that the term "impact statement" was a figure of speech, but I wish to make it clear that it was very literal and not, in any sense, rhetorical.

In a recent issue of the American Bar Journal, my colleague Judge Carl McGowan, of the United States Court of Appeals, commented on the tendency of Congress constantly to add to the jurisdiction and functions of the federal courts without providing the people necessary to do the work. One example of this lack of attention as to the impact of legislation on the courts is found in the Speedy Trial Act. That Act was passed by Congress in the face of the unanimous action of the Judicial Conference of the United States opposing that legislation as unnecessary. The Judicial Conference of course is the very body created by Congress to advise it on such matters. I have since discovered that relatively few members of Congress were aware of the views of the Judicial Conference or were conscious of the impact of that Act on the courts.

The now well established requirement of environmental impact statements is a recognition by Congress that there should be full awareness by the Executive, the Congress and the public, of the consequences of a particular project before it is finally carried out.

Congress has now taken another step applying the concept of an impact statement to itself when it considers new programs. It has established the requirement that its members and the public be made aware of the costs of the first five years' operations of any proposed program. Congress has discovered that many programs were being enacted on a misapprehension of their probable cost, either by deliberate or by inadvertent understatement of cost. Obviously the prediction of the cost impact of some of the new programs presented to the Congress is

difficult, as it will be difficult in many instances, to describe fully the probable impact on the courts of a particular piece of legislation. The critical factor is that Congress should act with an awareness of the consequences on the courts when it legislates and should provide adequate tools.

RAILROAD COURT

Another manifestation of this unfortunate propensity to legislate increased judicial work, without providing people to perform the work, was the enactment of the Regional Rail Reorganization Act of 1973. That Act was understandably passed on an emergency basis, with the admirable objective of trying to keep the bankrupt eastern railroads running while efforts were made to reorganize them on a unified basis. The Act created a special three-judge court to serve, in effect, as the reorganization court for the stven northeastern railroads. But no provision was made for the three aditional judges.[1] The judicial system, already overtaxed in 1973, was expected to absorb this additional assignment out of existing resources.[2]

EMERGENCY COURT OF APPEALS

A third example will suffice to illustrate this point. In 1973, the Congress created the Emergency Court of Appeals and, again, no provision was made for judges except that the Chief Justice was directed to designate members of that court from judges then in service.[3] Ultimately we had to designate thirteen federal judges in order to spread the work of this new court.

NEEDED JUDGESHIPS

Meanwhile, the Congress had taken no action on the obvious need for sixty-five additional judgeships badly needed for five years. All this time the growth of new filings has continued, and it is now imperative that we have, not sixty-five new judgeships, but approximately one hundred thirty-two—one hundred seven district judgeships and twenty-five circuit judgeships. I am hopeful now, with the election behind us, there will be no further delay in the creation of these desperately needed judgeships.

DIVERSITY JURISDICTION

I turn now to some specific problems, none of which will be very new to you. Eight years ago, the American Law Institute completed its monumental study on the fair distribution of jurisdiction between state and federal courts. That report recommended that the diversity of citizenship jurisdiction of the federal courts be substantially eliminated. That report has now, presumably, been under study in the Congress for the past eight years, but I am unable to report any very startling progress. Candor compels me to say here, that the fault must be shared by a small segment of the legal profession within the American Bar Association itself. A few members of this Association, representing only a tiny proportion of the legal profession, have opposed the return to the state courts of what must reasonably be recognized as state court jurisdiction by any twentieth century standard.

Opposition to the A.L.I. proposal rests on a fear that in some kinds of civil cases there is a possibility of local bias against citizens of another state that will preclude a fair trial in a state court. This was a reasonable factor in 1789, and perhaps even 1889, but it is unfounded today as a basis for asking federal courts to try state cases and apply state law. This change would transfer nearly one-fifth of the filings from about four hundred federal district judges, and spread them among about 4,000 state judges. The elimination of diversity jurisdiction will have no effect on access to a federal court on federal questions.

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[1] The subject of the creation of this court was never presented to the Judicial Conference of the United States, or, so far as I know, to any official spokesman or representatives of the United States Courts.

[2] Three distinguished federal judges were designated as members of this court, but one of them, because of the press of duties of his own court, soon was required to resign. A substitute had to be found, again, in the person of a judge in active service on one of the busiest courts of the country.

[3] On Feb. 2, 1977, Congress passed the Emergency Natural Gas Act and conferred exclusive original jurisdiction on the existing Emergency Court of Appeals as to all cases arising under the Act.

Since the 1969 study of jurisdiction, events have overtaken the validity of even that great report, and today I would strongly urge that the Congress totally eliminate diversity of citizenship cases from the federal courts. As a precautionary measure, Congress might well provide that, on a showing of good cause, as in other change of venue situations, a particular non-federal case may be tried in a federal court.

I urge you to give full support to the elimination of diversity jurisdiction from the federal courts without further delay.

CIRCUIT REVISION

In 1970 I urged the Congress to create a commission representing the three branches of government to reexamine the structure of the circuits of the federal system. Congress responded, and created the Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman Hruska. After intensive study, it has recommended that the Ninth and Fifth Circuits be divided. The Ninth Circuit is roughly a mammoth triangle extending from the Mexican border north beyond the Arctic Circle, west beyond Hawaii to Guam, and back to the Mexican border. By any measurement of logic, reason or standards of judicial administration, that circuit cannot function effectively as one unit with thirteen circuit judges. It is only due to strong leadership, the dedication of its judges, and the assistance of senior judges and visiting judges that it has been able to keep up with its work. In the past fiscal year alone fifty-seven judges, other than the thirteen regular active circuit judges were called in to hear cases in the Court of Appeals for the Ninth Circuit. This is a costly, cumbersome, and inefficient substitute for having judges who devote all their time and energies to the tasks of one court. My original view was that this circuit be divided into two parts, as the Commission ultimately concluded, but here, too, events since the studies of the Hruska Commission began have overtaken us. Unless we want a temporary solution that will call for an additional dividing of that circuit in three or five or seven years, Congress should now proceed promptly to divide or authorize the division of the Ninth Circuit into not two but three administrative units.

I am well aware that we lawyers and judges, addicted as we are to tradition—and sometimes sentiment—do not like changes in old patterns, but it borders on a "dreamworld" approach to think that we can administer justice properly in so large an area as the Ninth Circuit under present conditions with thirteen appellate judges. But perhaps the Congress can accommodate tradition and sentiment, and still accomplish the desired and sensible administrative results. This could be done by dividing the Ninth Circuit into three divisions, none of which would require more than nine circuit judges in the foreseeable future. This would involve placing part of California in one division of the Ninth Circuit and part in another. Now this prospect has disturbed some people almost as much as the dilemma posed in the biblical account involving Solomon's dividing the baby when two women claimed motherhood. I suggest that sober and mature analysis must tell us there is no more reason why an entire state need be within a single unit for federal appellate purposes than for trial court purposes. There are some differences, but none that cannot be worked out.

As our California colleagues of the bench and bar consider this problem, I suggest they remember that the number of appeals has gone up six hundred fifty percent while the number of judges has gone up only forty percent—and all this since 1962. They should also consider what will happen—and it will happen soon—when the bottom of the barrel is reached and I can no longer assign outside judges to sit in the Ninth Circuit.

And we know that California is already divided into four districts for the federal trial courts, each district having a chief judge. I, therefore, strongly urge that the Congress promptly reexamine the current statistics and projections on case-load and recognize that the area now embraced within your circuit requires not the thirteen circuit judges, which they have, but at least ten more if they are to keep reasonably current.[4] Projections suggest that twenty-five circuit judges will be needed in the next decade. Therefore, unless we are to have only a temporary solution, and are prepared to repeat the painful and

[4] The Judicial Conference of the United States recently approved ten additional judges for the Ninth Circuit.

complicated process of restructuring the Ninth Circuit five to eight years from now, the time has come to "bite this bullet". Meanwhile I urge that Congress authorize the Judicial Conference of the United States to make these needed changes subject to a veto by the Congress.

What I have just said applies fully, in administrative terms, to the Fifth Circuit, which extends from Key West, Florida, around the Gulf to the western boundary of Texas. It is now served by seventy-five active district judges and fifteen active circuit judges; nineteen senior district and circuit judges also perform substantial judicial work along with numerous visiting judges. That is almost as many federal judges as the entire country had when Taft was Chief Justice and he complained of the mounting administrative problems of that day. Any solution that will be realistic for the next ten years should create three divisions of the Fifth Circuit with at least twenty-five circuit judges, allowing some room for future expansion without creating courts of appeals so large as to be unmanageable. Appeals in the Fifth Circuit increased from seven hundred fifteen in 1962 to three thousand six hundred twenty nine in 1976.

These steps will call for the Fifth and Ninth Circuits to develop workable procedures for dealing with conflicting holdings among their several divisions, but this is not beyond the innovative capacities of these judges. Some proposals have already been developed and can be adapted to meet all reasonable objections. The harsh, intractable reality is we really have no choice.

Other circuits have similar "growing pains". The Second Circuit, for example, has nine authorized circuit judges but the caseload from its constituent states of New York, Connecticut and Vermont, reasonably require thirteen to fifteen circuit judges. Were it not for eight senior circuit judges, visiting judges, and innovative measures developed to dispose of appeals, that circuit could not have kept its work up-to-date as it has.

The only significant change in federal circuits made in nearly one half-century was to create the Tenth Circuit largely out of the Eighth Circuit. No comprehensive plan has ever existed for the arrangement of the eleven circuits. They evolved largely by accident. Like "Topsey," they simply grew.

We ought not delay facing up to this matter until oral argument—dear to the advocates and already seriously curtailed in some circuits—is reduced to an unacceptable level, or totally eliminated as the general practice, or until other drastic measures are taken by the overburdened courts of appeals.

JUDICIAL COMPENSATION

No change of jurisdiction or organization can equal in significance the need to maintain and improve the generally high quality of the federal bench. The outpouring of activity of state and local bar associations—of this Association—and of countless editorials in support of adoption of the Presidential pay and ethics recommendations will help maintain high standards of judicial appointments.[5] The federal judiciary is grateful for your efforts to rectify eight years of neglect.

JUDICIAL SELECTION

There is discussion about the proposal for a Presidential judicial nominating commission in each circuit to evaluate appointments for courts of appeals. Some leading members of the Senate have already declared their support for merit nominating commissions. It is to be hoped that this concept will also evolve on a state basis also to evaluate lawyers considered for district court appointments. If bona fide—and that is the key—bona fide screening commissions are established, I believe we will find a higher proportion of nominees who will be ranked "exceptionally well-qualified" by the American Bar Association.

The experience in the merit selection of state court judges strongly suggests that these screening commissions should include lawyers, non-lawyers, and experienced judges who have special qualifications to evaluate judicial candidates, based on their own background as judges, and observation of lawyers.[6]

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[5] During the period since March 1969 when judicial salaries have increased only five percent, cost of living rose more than sixty percent. It is also significant that the average federal judge has become much more productive, currently disposing of 36 percent more cases than eight years ago.

[6] Richard A. Watson and Rondal G. Downing, *The Politics of Bench and Bar* (New York: John Wiley and Sons, 1969).

JUDICIARY COMMISSION

In 1970 I suggested that Congress create permanent Commission on the Judiciary representing all three branches to carry on continuing studies of the problems and the needs of the courts, and report directly to the Judiciary Committees of the House and Senate, to the President, and to the Judicial Conference of the United States. I believe the time is now ripe for such a Commission, and on another occasion I hope to be more definitive about its functions and purposes. I will leave it now by saying that it would fulfill part of the needs of the lack of communication that exists between the Judicial, Legislative and Executive Branches of the government. The statements of President Carter suggest that he would be prepared to consider a proposal to accomplish these objectives.

NATIONAL INSTITUTE OF JUSTICE

The Judiciary has long had effective support from a wide range of private, volunteer organizations—this Association, the American Judicature Society, the Institute of Judicial Administration and others. There is, however, a limit to the capacity of private, volunteer organizations to meet all the needs of the state and federal courts, particularly the state courts. However slow may be our progress in the federal system, we are able, through the Judicial Conference of the United States and the Federal Judicial Center, to present our programs and requests to the Congress and on the whole we have had reasonable cooperation. The state courts had no clearinghouse or spokesman until the National Center for State Courts came into being. Because even something more is needed for the state courts, the idea of a National Institute of Justice was proposed a few years ago and this Association again took leadership in formulating a specific plan. Reasonable people can have a variety of positions as to how the basic concept of a N.I.J. should be implemented but the idea now has wide acceptance.

My own view is that the National Institute of Justice should be essentially a grant organization, a highly specialized extension, if you will, of the concept of revenue sharing. By whatever name, we need a mechanism to give to state courts the financial aid which, realistically, they are unable to secure from their own hard-pressed state legislatures. A National Institute of Justice, functioning essentially as a grant organization, can be a very modest operation in terms of personnel. I doubt it should engage in research. No single federal institution should every try to press all state courts into a common mold. One of the great values of our federalism lies in the freedom of states to experiment in governmental concepts in their own way.

I therefore urge the Association to renew its efforts to persuade Congress to create a National Institute of Justice along these lines.

With the Association's support Congress has substantially limited the three-judge district court jurisdiction, it has expanded the powers of federal magistrates, and progress is being made on other problems. I commend the Association for its continuing efforts, with state and local bar associations, to protect the public from the unworthy members of the profession. Periodic changes in the office of the President, the advent of the new administration, is accompanied by a change in the leadership in both houses of the Congress. During the campaign in 1976, and since then, President Carter has expressed his concern for the problems of the administration of justice, and he has exhibited a grasp of the problems of the courts that should give encouragement to our profession.

Obviously, no new administration and leadership, either in the Executive Branch or in the Congress, can accomplish immediately all of the needs we have discussed over a period of years. With Griffin Bell, a former federal judge, as Attorney General, and Judge Wade McCree of the Court of Appeals for the Sixth Circuit, as the announced designate for Solicitor General, we are assured of strong leadership in the Department. It will be strong professionally and will provide leadership that will have a sympathetic grasp of our problems based on the long experience of these two distinguished men in the Judicial Branch.

With your support—and theirs—I look to the future, confident that we will continue to make progress on the agenda for change developed, with your help, in the past eight years.

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REMARKS OF WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AMERICAN LAW INSTITUTE, MAYFLOWER HOTEL, WASHINGTON, D.C., TUESDAY, MAY 17, 1977, 9:30 A.M.

This is the eighth year that you have given me the pleasure of welcoming you to Washington for the annual meeting of the Institute. With your indulgence I have used this occasion as an opportunity to present some particular problem which seemed to me to be of importance in the administration of justice, and particularly in the operations of the Federal courts. This morning, for a number of reasons, I shall not burden you with any single weighty problem, but rather ask you to reflect with me in a random way on some significant changes taking place in the work coming to the Federal courts.

On some of these occassions over the past eight years, as with my reports to the American Bar Association, I have discussed the problems of the increasing volume of work in the District Courts, the Courts of Appeals, and the Supreme Court. These figures are of interest for my purposes this morning only by way of background, and I will try not to weigh you down with too many figures. To recapitulate briefly, in the eight years from 1969 to the present, the District Court civil caseload has gone from 77,000 to 130,000 and the criminal filings from 35,000 to 41,000. The Courts of Appeals caseload has gone from 10,000 to 18,000. Of course, this becomes particularly important because since 1970 Congress, notwithstanding repeated urgings by major legal organizations in the country—occasionally seconded by me—failed to add a single judgeship to the Federal system. Since 1969 the Congress, as of the last count that I made, had passed 47 statutes which increased the work of the Federal courts—and many of them imposed very substantial increases. However, it appears that the problem of judgeships is about to be remedied. Thanks to Senator McClellan and Senator Kennedy, among others, the Senate recently approved 146 new judgeships. This includes large increases in the Courts of Appeals of the Fifth and Ninth Circuits.

While I am on the painful subject of those two Circuits, you may recall that beginning eight years ago I urged that they each be divided into two administrative units. Congress is now seriously considering that proposition. But with the passage of time and the enormous increase in the work of those two dynamic areas, the division into two units will be entirely inadequate to meet the basic problems. As a result, in my annual report to the American Bar Association in Seattle in February, I urged that these Circuits—that is the Fifth and the Ninth—each be divided for administrative purposes into three divisions. To meet the objections of those who were deeply concerned about tradition and sentiment (and I assure you I do not undervalue tradition or sentiment), I suggested that the Circuits be retained in their present form as the Fifth and Ninth Circuits but with administrative divisions such as we have long had for District Courts.

The Fifth Circuit should be divided into Eastern, Central, and Western Divisions. The Ninth Circuit should be divided into Southern, Central, and Northwest Divisions. The imperative need for dividing each of these Circuits into three operating divisions is now demonstrated by the fact that Congress is apparently about to approve the addition of eleven judges to the Fifth Circuit and ten judges to the Ninth Circuit, giving them 26 and 23 judges, respectively. Those numbers—26 and 23—will barely be enough to meet current caseloads, and within five years those courts will need yet more judges.[1] It is therefore plain and beyond debate that to have any kind of reasonable judicial administration, the division of these Circuits, for administrative purposes, should be accomplished so that there will not be more than nine judges in any one Circuit—that means three divisions for each.[2]

Before I leave the subject of the Circuits it is worth mentioning that the entire Circuit structure of of the country needs reexamination. It makes no sense to have the First Circuit with a Court of Appeals of three Circuit judges (when it probably needs some additional help) and the Second Circuit with nine Circuit judges (when it probably needs about 14 with its present caseload and in its present form). Only the services of its Senior Judges and unusually strong leadership have kept the Second Circuit "in business."

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[1] Arguing a case to a court of 26 judges will be like making a speech to a legislature! Twenty-six is the precise number of Senators we had in 1789!

[2] The Ninth Circuit called in 57 specially assigned judges to assist the 13 regular Circuit judges last year. The expense and administrative cumbersomeness of this process is an obvious flaw.

It no longer makes sense to approach these problems one Circuit at a time. The Congress should reexamine the entire structure of all the Circuits even though all of them may not need this kind of subdivision. It illustrates one of the difficulties in the management of the Federal system that the sound and sensible solutions occur—with good luck—15 to 20 or more years after reasonable and objective analysis demonstrates the need.

However, I think we should not be disheartened. Chief Justice Marshall, as early as 1810 or thereabouts, urged the creation of the Circuit Courts of Appeals and it was not until 1891 that this was accomplished.

Now let me turn to a subject that may be of some interest to you. The problems in caseload or quantitative terms which have engaged a great deal of our attention in the past eight years have led me to give some thought to the qualitative changes, particularly in the cases in the Supreme Court. Of course, we know that any analysis of the nature of the cases before our Court is simply a reflection of the kind of litigation that is being brought in the District Courts and to some extent in the state courts. I have found it interesting to look at the volumes of the United States Reports in the early and middle 1920's. I suggest that you will find it interesting to do, and a great deal can be gleaned in even a half-hour. You will find case after case of opinions one and a half, two pages, or three pages long.[3] You will find in those years an astonishing number of cases that might be classified, not technically, but colloquially as "landlord and tenant cases." I include under that "umbrella" a miscellany of common law and statutory questions, which we often dispose of today by a denial of certiorari, or a summary affirmance or reversal, without opinion.

I have engaged in this interesting exercise several times in the past but recently took a few hours off to analyze the nature of the cases coming before the Court in the eight years of my tenure, as compared with other periods.

Two years ago President Ford created a committee to study the problems of the Federal courts. It was chaired by then Solicitor General Bork and included Attorney General Levi and Deputy Attorney General Tyler.

The conclusion of that report from these lawyers intimately familiar with the system is significant. I will say no more of it than to recite that conclusion:

"The Federal courts now face a crisis of overload, a crisis so serious that it threatens the capacity of the Federal system to function as it should. This is not a crisis for the courts alone. It is a crisis for litigants who seek justice, for claims of human rights, for the rule of law, and it is therefore a crisis for the nation."

While voices are raised from time to time complaining that the Federal courts are closing their doors, we in the system must be excused for noting the reality that since 1969 District Court civil filings have gone from 77,000 to 130,000, as I noted at the outset. The nature of this great increase is more important than the cold number. Claims under the Social Security Act have gone from less than five cases per district to more than 10,000 for the 94 districts. Habeas corpus and section 1983 cases by Federal and State prisoners have gone from 2,000 in 1960 to 19,000 in 1976. Civil Rights cases (not including Civil Rights claims of prisoners) increased 1,000 percent.

These changes in District Court cases are startling for the short-run, but if we look back 50 or 100 years they reflect, in a sense, the changes in our society.

The work of the Supreme Court reflects, of course, both in volume and character the work of other courts. Let me add just one more set of figures.

Analyzed in eight-year segments, and using signed-for-the-Court opinions as a measure of Supreme Court work, the figures are these:

In eight years from 1953 to 1960—average was 90 signed opinions
In eight years from 1961 to 1968—signed opinions averaged 100 per year
In eight years from 1968 to 1977—average of signed opinions was 122.

Filings in that eight years namely doubled.

If we were a growth stock, we would, perhaps, not be a spectacular investment, but we would surely be in the "blue chip" category on the basis of the steadiness of our growth, and all this without any significant plant expansion!

Just as the administration of criminal justice, school segregation, and equal process were overdue for examination in the late 1950's and 1960's, now other claimants press for remedies. That is as it should be for gradually our system

[3] That is not due to the long or short windedness of Justices but to the relative simplicity of many cases of that period.

either solves or brings problems under reasonable control and we must then move on to meet other demands. There is nothing new or remarkable about change in the nature of the cases coming into the courts. Fifty years ago state workmen's compensation laws removed many claims from the courts and made way for the great increase in automobile negligence cases. In time no-fault insurance legislation may remove much of the negligence litigation from the courts. Other examples will occur to you.

Courts are thought to be a stabilizing force in society, but they cannot be static instruments. They are tools, not ends in themselves. Their function is to respond to needs. As needs change, courts must change.

The work of the Supreme Court, as I suggested earlier, tends to reflect not only the kind of cases coming into other courts but also the changes in our society as a whole. Here is what I have culled—somewhat hastily—from the decided cases of the past eight years (without including all of the cases in the current term). These categories are cases on which full opinions were written by the Court:[4]

On rights of racial minorities (including 24 cases on Indian claims)	99
On rights of prisoners, probationers, and parolees	41
On right to counsel	15
On students' rights	10
On mental patients and mental institutions	5
On rights to welfare recipients	27
On women's rights	21
On rights of non-tenured employees	6
On rights of illegitimate children	11
On media rights under the First Amendment and statutes	25

The very fact of your presence here and the existence of the Institute attests your continuing concern about the problems of justice. In more than one-half century the Institute has seen that no matter what our progress may be, it never keeps up with new problems. Far from being discouraging, this is a sign of progress. When new problems constantly engage the attention of thoughtful lawyers, judges, and law teachers, it is evidence of a dynamic, not a static, society.

Unfortunately judges, like the advocates who bring the cases to the courts, are so busy trying to keep up with their daily work that they have very little time for scholarly reflection beyond the demands of the particular case at hand. Some scholars have already taken note of the changes I have mentioned in describing the categories of our current work. Perhaps their work and yours combined can prepare the system to be ready for its future tasks.

With respect to these categories I have described, we can leave it to scholars who take the long view of these matters to decide whether in any previous comparable period the Court has heard as many claims in these categories as the Court has heard in recent times.

What all this means, or what it portends for the future, I am not prepared to say. Perhaps Benjamin Cardozo said it best in his "Nature of the Judicial Process": "The greatest tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges idly by."

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REMARKS OF WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AMERICAN BAR ASSOCIATION MINOR DISPUTES RESOLUTION CONFERENCE, COLUMBIA UNIVERSITY, NEW YORK, NEW YORK, FRIDAY, MAY 27, 1977, 12:30 P.M.

As the discussions at this conference have shown, lawyers and judges, and social scientists and philosophers, have pondered for generations the problems arising from what we call minor, but vexing, disputes between private parties and those between citizens and government—usually local government. One year ago we sought again to probe unresolved problems in this area, on the occasion of the 70th anniversary of Roscoe Pound's classical analysis of popular dissatisfaction with the administration of justice.

This conference is a very important follow-up of the 1976 Pound Conference. President Justin Stanley and the American Bar Association deserve the thanks

[4] This does not include numerous cases under the Religion Clauses or private First Amendment claims such as the recent case of *Wooley* v. *Maynard*, decided this Term.

of multitudes of Americans who are involved in these minor but often painful disputes with their fellow human beings or with government, for which few adequate, cost-effective remedies are now available. I use the phrase "minor disputes" as you have in a sense as a term of art. Because we describe some problems and disputes as minor for statistical purposes does not mean they are unimportant to the individuals involved, or easy to resolve. In fact, thanks are due to dedicated judges in small claims courts, and to arbitration systems, which recognize that "minor disputes," if not disposed of in some reasonably acceptable manner, can create festering social sores and undermine confidence in society. From what I have been told of your deliberations of yesterday and this morning, I gather that some of our preconceptions may be shaken. That, of course, is the purpose of this gathering of a select group of thoughtful professionals, who are interested in "people problems." My criticism of legal education beginning when I tried to teach law long, long ago was that it was good on principles and not good about people. The law in its broadest sense is not an end in itself—it is a tool—a means to an end. And that end is justice as nearly as fallible humans can achieve it—for people and their problems. And we must not exalt the means at the expense of the ends. We in the law have been too much like the pathologists who can often tell more about what caused death than what would preserve life.

In common with most of you, I have participated in discussions of this kind for a long time. We are well aware that large lawsuits are not the major problem of American justice. They tend to take care of themselves—at great expense of course, especially in this day of high legal costs—and the litigants, whether satisfied or not, can at least vent their hostilities on each other. I do not minimize the potential contribution of some kinds of "large law suits" to improve the quality of life in our society, although I confess that the longer I live, the more I sense the futility of much of the gargantuansized litigation that is carried on. The thought will not go away, that there must be a better way to do some of these things. Apart from all other factors, judges are just not all that wise.

Perhaps some may disagree, but certainly there ought to be a clear consensus on the proposition that the complex procedures, refined and developed for certain types of more complex cases, are inappropriate and even counter-productive when applied to the resolution of the kinds of disputes which are the focus of our attention today.

What is beginning to emerge, through the fog, is that we lawyers and judges—aided and abetted by the inherently litigious nature of Americans—have created many of these problems.

It may be that even if we disciples of the law do not invent new problems, we have done far too little to solve them or channel them into simpler mechanisms that will product tolerable results.

If we are completely honest, we must at least consider whether we are not, in reality, somewhat like Pogo, the brainchild of that philosopher-humanist, Walt Kelly, who proclaimed "We have met the enemy, and he is us."

I do not suggest in fact the "enemy" we have met is the legal profession. But the "enemy" may be our willingness to assume that the more complex the process, the more refined and deliberate the procedure, the better the quality of justice which results. But this is not necessarily so. My submission is that we continue to engage in some ruthless self-examination and inquire whether our fascination with procedure, with legal tests—now often evolving three or four tiers deep—has not led to a smug assumption that conflicts can be solved only by law-trained people. It is possible that—because of our training—we have tended to cast all disputes into a legal framework that only legally trained professionals can cope with, and in traditional legal ways. If that is so—and I put it as a question—we are in a vicious cycle.

I do not suggest this has been the purpose or objective in the minds of lawyers, judges, and law professors, as we have developed and refined legal theory and procedures, but it may be the effect of our preoccupation with legal theory, orderliness and formalism.

As I pondered these matters in recent years, two experiences came into focus, one recent and one long past—one almost flippant and one serious.

One of my mother's many grandchildren at about age four suffered outbreaks of painful body rash. The family physician finally gave up and sent the patient to a renowned specialist in dermatology. For weeks the child was examined,

treated, given injections and X-rayed. All clothing and bedclothing was burned and replaced, as multiple medicines were employed. One day, the parents being occupied, the child was taken to the dermatologist by Grandmother. As usual, the child was disrobed, placed on the examining table where the first time she saw the condition. With some hesitation she said, "Doctor, if you will excuse me for saying so, this child isn't sick; he just should not eat eggs—he's allergic to them." The astonished specialist, having made no progress for weeks, was sensible enough to agree to act on Grandmother's diagnosis. The result of a no-egg diet was a complete recovery in a matter of days!

That experience, now more than thirty years past, came to my mind when the Chief of State of a developing but by no means poverty-stricken country visited the United States and I had occasion for some extended conversations with him about the problems of his country. He told me he had read that I had been working to make improvements in our system of justice and wanted to discuss what his country should do to modernize its judicial processes.

I hastened to tell him our progress was very slow and that at best some of our programs had begun to turn the tide somewhat. He asked me to explain what I meant and I responded that our system as a whole was a bit like a country that was trying to double its production of coal and iron while continuing to use 19th century methods and equipment. Not realizing the truth of what I said, he put my appraisal of progress to modesty and he went on to describe what he called the primitive system of justice in his country, especially dealing with small disputes in the rural areas. He said in his country, as in so many underdeveloped countries, each village had an informal body of respected elders to whom the villagers took their disputes. Their claims were resolved under something resembling our process of final arbitration—with no appeals and no review—and of course no lawyers, for they had none in rural areas. He said that their studies showed most disputes were disposed of with rough justice but that he wanted to modernize the system to make sure that true justice was done for the people of his country.

It had been suggested to him that a team of American legal experts might be enlisted to survey their problems and recommend a plan or system of courts and improved legal education, and he asked what I thought of the idea. I told him the story of the Grandmother and the dermatologist and said my honest answer to him—at least for the present—was to let well enough alone. I did not say, for fear he would think it foolish flattery, but I confess it occurred to me that a team of American legal experts, combined with social and political scientists, might well tour the towns and villages of his country. They might well, as social scientists have in studying primitive countries, learn lessons that would be useful in such conferences as this dealing with minor dispute resolution.

I do not want to be understood as endorsing Shakespeare's observation that to improve things, the first step is to "kill all the lawyers"—indeed I categorically reject that Shakespearean slander—but I must also reject the idea that we lawyers have all the answers. We do not. It is often pointed out that the United States has more practicing lawyers per 100,000 population than any society in the world—14 times the ratio of modern Japan, which is also a highly complex, highly developed society. Sometimes this is said to make a point favorable to our profession and sometimes to disparage it.

What some critics overlook is that we have a very complex social and economic system and, happily, we afford individuals more rights and provide more remedies than most other societies. To maintain that standard will always require a great many people—many of them lawyers, some of the new breed of paralegals, numerous decisionmakers, and then some other as yet unidentified.

I cannot escape a feeling that people with the kind of problems we are concerned about are more likely to go to a local neighborhood tribunal including not more than one lawyer surrounded by two non-lawyers, than a black-robed judge. Such people—the decisionmakers must be trained or natural—and practical—psychologists, with an abundance of the milk of human kindness and patience.

There is a notion abroad in our times—especially since the 60's and early 70's which I hope will pass—that traditional litigation—because it has been successful in some public areas—is the cure-all for every problem that besets us or annoys us. Litigation is indeed the cure for many problems and conflicts and is inescapable when new rights are evolving and new remedies being sought. And

our profession can take pride in the role of the law in improving the quality of life for the disadvantaged, in righting historic wrongs suffered by minorities, in assuring true freedom in fact to those for whom freedom was once only a promise. But the role of law, in terms of formal litigation, with the full panoply of time-consuming and expensive procedural niceties, can be overdone.

The consumer with $300 in controversy for car repairs, or a dispute on a defective roofing job, or a malfunctioning home appliance, prefers a reasonably satisfactory resolution to the protracted legal proceedings that are characteristic of courts. I suggest that most people will prefer an effective, common sense tribunal of non-lawyers, or a mix of two non-lawyers and one lawyer, rather than the traditional court system to resolve his modest but irritating claim.

The small claims courts which began early in the century have served a very useful function and many continue to do so. But you, who have taken the time from busy lives to attend this conference, need not be told that changing conditions have made some of those courts less than adequate as problem solvers.

My early reference to the informal, neighborhood-type mechanisms long used—and still used by both underdeveloped and some very advanced societies—points to what I am sure you have been considering. By whatever name we call it—arbitration, or mediation, or conciliation—or a combination of all three—centuries of human experience undergirds these informal kinds of procedures.

The labor movement, beginning in Europe more than a century ago, developed informal dispute resolution which today settles a vast array of difficult, tension-producing conflicts in industry and which helped make this country the great producer that it is. Great credit is due to the practical working men who devised the early grievance procedures employed by labor unions. The American Arbitration Association and the International Chamber of Commerce have demonstrated, on another level and on a larger scale, the value of arbitration methods, less formal and less rigid than traditional litigation. Countless variations and permutations have evolved to deal with lesser disputes than those great organizations are concerned with, the well-known Philadelphia plan being a prime example.

The complexities of our social structure today are placing unacceptable tension-producing burdens in two areas: first, the economics of law practice, with hourly rates beginning at $35 or more, make it unrealistic to have lawyers involved in minor disputes, unless they are subsidized by government. That, of course, is an increasing reality, but even with budgets running into the millions, it is doubtful that lawyers can be supplied to everyone. Even government-financed neighborhood law offices find it difficult to deliver legal services at much less than $15 to $20 an hour. More important, fully trained litigation lawyers are not needed to resolve some kinds of conflicts and, except for part of the decisionmaking process, they may be a handicap.

The second factor is that there are many conflicts that fall into today's classification as minor disputes, which no one is solving and which ought to be resolved if we are to avoid the frustrations, tensions, and hostilities that often flow from unresolved conflicts. We do not need to call on psychiatrists or clinical psychologists to tell us that a sense of injustice rankles and festers in the human breast and the dollar value of the conflict is not always the measure of tension and irritation produced. A landlord who delays unduly in repairing a defective radiator or refrigerator can produce unhappy chain reactions on children and adults. A defective roofing or siding job on the home, defective work on the family car or the television set sometimes can produce serious consequences comparable to those of a major illness.

Only the most effective small claims courts are dealing effectively with such claims. The volume of claims has gone beyond the capacity of many of those courts—as is true of all courts today. And when the injured party must make more than one trip to the court because he or she was not advised of the kind of evidence or witnesses needed, or when the injured party learns there is no way to enforce his legal victory, the tensions multiply and insult is added to the injury. Traditional courts or even specialized small claims courts cannot always cope realistically with such problems.

The recent experience with no-fault insurance is encouraging, even though those systems need time to develop. We must remember how long it has taken traditional legal systems to evolve—and how far they fall short, after generations or even centuries of experience.

Innovations toward solving the problems you are considering at this conference will take time, but the patterns of centuries of experience with informal and

formal arbitration strongly suggest that this is one key area to explore. Whether we look to the history of great institutions like the American Arbitration Association or the International Chamber of Commerce, or that of labor unions with grievances in an industrial plant, we can see their procedures, which are simple and informal when compared with traditional litigation, have made incalculable contributions to commerce and trade and labor peace—to society as a whole.

The 45 years of experience with the Jewish Conciliation Board, an extra-legal community court, here in New York, suggest that potential litigants are willing to submit disputes to laymen they trust, and that such informal tribunals can reduce conflicts and tensions in a community. Indeed, the past ten years proves there can be successful resolution of disputes without even resort to arbitration. The success of the Action Line and Hot-Lines throughout the country confirms this. I am told that an Action Line in Los Angeles has been receiving over 1,500 complaints each week. Not only do they assist in resolving specific disputes but they are also attempting to educate consumers to prevent many such disputes. Indeed, the sponsoring radio station (KNBC) trains consumers how best to initiate complaints. That station has been responsible for compelling manufacturers to change labels on nationally sold products and has helped draft new consumer statutes.[1]

The notion that most people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible. Even those who do not grasp the meaning of cost-effectiveness know the difference between total frustration and tolerable satisfaction. Overwhelmingly they will settle for a tolerable solution. Interdisciplinary-comparative research is bearing this out.

If there are any here who came looking for a perfect solution, I fear they are doomed to disappointment. There are few, if any, perfect solutions to human problems and conflicts and none I know of in the kinds of conflicts you are considering. I do not know what Judge Learned Hand said about arbitration and other informal means of resolving disputes, but I recall what he said about traditional litigation:

"I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." [2]

I do not know what Judge Hand would think about those who seem to regard litigation as one of the essences of life, and who scorn any solutions short of the traditional, but the harsh truth is that unless we devise substitutes for the courtroom processes—and do so quickly—we may be well on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated.

Lawyers and judges have made and are making great contributions to achieving a fair and humane society. Properly employed, with their experience and talents channeled, they can be the healers. Unrestrained, they can aggravate the problem. As with most experts and specialists, they are splendid servants but terrible masters. Their place in the resolution of minor disputes is more likely as fact-finders and decision-makers than as advocates.

James Marshall, a thoughtful student of legal systems, touched on what it is we are trying to grapple with in the closing quarter of the 20th century—and what you have come to this conference to study. He wrote: "Because law has not developed its own experimental discipline, it has the responsibility to test its own 'make believe' doctrine by whatever scientific methods are available and then adjust those doctrines—insofar as it can—to reality. If the law cannot achieve this within the traditions of the courtroom, then it would seem that substitute legal institutions should be provided that are better suited to reality. What is required, is social invention in the law based on findings of the social sciences."

I agree.

I commend the American Bar Association and this conference for being venturesome and imaginative in seeking new ways to reduce social irritations and tensions with minimum delay, complexity, and prohibitive expenses to those

[1] Earl Johnson, Valerie Kantor and Elizabeth Schwartz, *Outside the Courts*, p. 73.
[2] "Deficiencies of Trials to Reach the Heart of the Matter," Nov. 17, 1921, published in Lectures on Legal Topics, p. 105, line 3, by Association of the Bar of the City of New York.

who can least afford it. I hope we will see concrete experiments and accomplishments as your work proceeds.

APPENDIX 2

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STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS

(By William J. Brennan, Jr.*)

During the 1960's, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. In this Article, Mr. Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights. Finally, he discusses, and applauds, the implications of this new state court activism for the structure of American federalism.

Reaching the biblical summit of three score and ten seems to be the occasion—or the excuse—for looking back. Forty-eight years ago I entered law school and forty-four years ago was admitted to the New Jersey Bar. In those days of innocence, the preoccupation of the profession, bench and bar, was with questions usually answered by application of state common law principles or state statutes. Any necessity to consult federal law was at best episodic. But those were also the grim days of the Depression, and its cure was dramatically to change the face of American law. The year 1933 witnessed the birth of a plethora of new federal laws and new federal agencies developing and enforcing those laws; ones that were to affect profoundly the daily lives of every person in the nation.

In my days at law school, Felix Frankfurter had taught administrative law in terms of the operations of the Interstate Commerce Commission—because that was the only major federal regulatory agency then existing. But then came in rapid succession the National Labor Relations Board, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission and a host of others. In addition, laws such as the Fair Labor Standards Act, administered by the Labor Department, also began to require practitioners to master new, and federal, fields of law in order to serve their clients. And, of course, those laws and agencies did not disappear with the end of the Depression—rather a procession of still more federal agencies and federal laws has followed. Only recently, for example, Congress created the Environmental Protection Agency and the Equal Employment Opportunity Commission—new major sources of concern for today's clients keeping lawyers everywhere very federal law-minded.

In the beginning of this legal revolution, however, federal law was not a major concern of state judges. Judicial involvement with decisions of the new federal agencies was the business of federal courts. I have tried to recall how often in my years on the New Jersey courts from 1949 to 1956 issues of federal laws were relevant to cases tried before me as a trial judge in Paterson and Jersey City, or were addressed by me on the appellate division or in the supreme court. I can remember only three cases out of the hundreds with which I was involved over those years that turned on the resolution of a federal question, and in all three that question was statutory. Two were cases tried before me in Jersey City, one a railroad worker's suit under the Federal Employers Liability Act and the other a case that implicated the Immigration and Naturalization Act. Undoubtedly the reason they are still fresh in my memory is that I had frantically to dig up the federal statutes and federal cases that bore on their disposition because both presented federal questions of first impression in my experience. The third instance was a labor injunction case in which I first circulated

*Associate Justice, United States Supreme Court.

an opinion to my brethren on the supreme court sustaining a chancery injunction against peaceful picketing, only to have to withdraw the opinion and set aside the injunction when the United States Supreme Court held that federal law preempted state regulation of such picketing.

In recent years, however, another variety of federal law—that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty—has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the funadmental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment—that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. Although courts do not today substitute their personal economic beliefs for the judgments of our democratically elected legislatures[1] Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system—state courts no less than federal are and ought to be the guardians of our liberties.

But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

* * * * * * *

The decisions of the Supreme Court enforcing the protections of the fourteenth amendment generally fall into one of three categories. The first concerns enforcement of the federal guarantee of equal protection of the laws. While the best known, of course are *Brown* v. *Board of Education*[2] and *Baker* v. *Carr*,[3] perhaps even more the concern of state bench bar in terms of state court litigation are decisions invalidating state legislative classifications that impermissibly impinge on the exercise of fundamental rights, such as the rights to vote,[4] to travel interstate,[5] or to bear or beget a child.[6] Equally important are decisions that require exacting judicial scrutiny of classifications that operate to the peculiar disadvantage of politically powerless groups whose members have historically been subjected to purposeful discrimination—racial minorities[7] and aliens[8] are two examples.

The second category of decisions concerns the fourteenth amendment's guarantee against the deprivation of life, liberty or property where that deprivation is without due process of law. The root requirement of due process is that, except for some extraordinary situations, an individual be given an opportunity for a hearing before he is deprived of any significant "liberty" or "property" interest, Our decisions enforcing the guarantee of the due process clause have elaborated the essence of that "liberty" and "property" in light of conditions existing in contemporary society. For example, "property" has come to embrace such crucial expectations as a driver's license[9] and the statutory entitlement to minimal economic support, in the form of welfare, of those who by accident, birth or circum-

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[1] *Ferguson* v. *Skrupa*, 372 U.S. 720, 730 (1963).
[2] 347 U.S. 483 (1954) (invalidating state laws requiring public schools to be racially segregated).
[3] 369 U.S. 186 (1962) (invalidating state laws diluting individual voting rights by legislative malapportionments). See also *Reynolds* v. *Sims*, 377 U.S. 533 (1964).
[4] *Harper* v. *Virginia State Bd.*, 383 U.S. 663 (1966).
[5] *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).
[6] *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).
[7] *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954).
[8] *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971).
[9] *Bell* v. *Burson*, 402 U.S. 535 (1971).

stance find themselves without the means of subsistence.[10] The due process safeguard against arbitrary deprivation of these entitlements, as well as of more traditional forms of property, such as a workingman's wages[11] and his continued possession and use of goods purchased under conditional sales contracts,[12] has been recognized as mandating prior notice and the opportunity to be heard. At the same time, conceptions of "liberty" have come to recognize the undeniable proposition that prisoners and parolees retain some vestiges of human dignity, so that prison regulations and parole procedures must provide some form of notice and hearing prior to confinement in solitary[13] or the revocation of parole.[14] Moreover, the concepts of liberty and property have combined in recognizing that under modern conditions tenured public employees may not have their reasonable expectation of continued employment,[15] and school children their right to a public education,[16] revoked without notice and opportunity to be heard.

I suppose, however, that it is mostly the third category of decisions by the United States Supreme Court during the last twenty years—those enforcing the specific guarantees of the Bill of Rights against encroachment by state action—that has required the special consideration of state judges, particularly as those decisions affect the administration of the criminal justice system. After his retirement, Chief Justice Earl Warren was asked what he regarded to be the decision during his tenure that would have the greatest consequence for all Americans. His choice was *Baker v. Carr*, because he believed that if each of us has an equal vote, we are equally armed with the indispensable means to make our views felt. I feel at least as good a case can be made that the series of decisions binding the states to almost all of the restraints of the Bill of Rights will be even more significant in preserving and furthering the ideals we have fashioned for our society.

Before the fourteenth amendment was added to the Constitution, the Supreme Court held that the Bill of Rights did not restrict state, but only federal, action.[17] In the decades between 1868, when the fourteenth amendment was adopted, and 1897, the Court decided in case after case that the amendment did not apply various specific restraints in the Bill of Rights to state action.[18] The breakthrough came in 1897 when the prohibition against taking private property for public use without payment of just compensation was held embodied in the fourteenth amendment's proscription, "nor shall any state deprive any person of . . . property, without due process of law."[19] But extension of the rest of the specific restraints was slow in coming. It was 1925 before it was suggested that perhaps the restraints of the first amendment applied to state action.[20] Then in 1949 the fourth amendment's prohibition of unreasonable searches and seizures was extended,[21] but the extension was made virtually meaningless because the states were left free to decide for themselves whether any effective means of enforcing the guarantee was to be made available. It was not until 1961 that the Court applied the exclusionary rule to state proceedings.[22]

It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law. The eighth amendment's prohibition of cruel and unusual punishment was applied to state action in 1962,[23] and is the guarantee under which the death penalty as then

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[10] Goldberg v. Kelly, 397 U.S. 254 (1970).
[11] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).
[12] Fuentes v. Shevin, 407 U.S. 67 (1972).
[13] Wolff v. McDonnell, 418 U.S. 539 (1974).
[14] Morrissey v. Brewer, 408 U.S. 471 (1972).
[15] Perry v. Sindermann, 408 U.S. 593 (1972).
[16] Goss v. Lopez, 419 U.S. 556 (1975).
[17] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
[18] *See* O'Neil v. Vermont, 144 U.S. 323, 332 (1892); McElvaine v. Brush 142 U.S. 155, 158–59 (1891); *In re* Kemmler, 136 U.S. 436, 446 (1890); Presser v. Illinois, 116 U.S. 252, 263–68 (1886); Hurtado v. California, 110 U.S. 513 (1884); United States v. Cruikshank, 92 U.S. 542, 552–56 (1875); Walker v. Sauvinet, 92 U.S. 90 (1875).
[19] Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897).
[20] *Compare* Gitlow v. New York, 268 U.S. 652 (1925), *with* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).
[21] Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).
[22] Mapp v. Ohio, 367 U.S. 643 (1961).
[23] Robinson v. California, 370 U.S. 660 (1962).

administered was struck down in 1972.[24] The provision of the sixth amendment that in all prosecutions the accused shall have the assistance of counsel was applied in 1963, and in consequence counsel must be provided in every courtroom of every state of this land to secure the rights of those accused of crime.[25] In 1964, the fifth amendment privilege against compulsory self-incrimination was extended.[26] And after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v. Arizona*, requiring police to give warnings to a suspect before custodial interrogation.[27]

The year 1965 saw the extension of the sixth amendment right of an accused to be confronted by the witnesses against him,[28] in 1967 three more guarantees of the sixth amendment—the right to a speedy and public trial, the right to a trial by an impartial jury, and the right to have compulsory process for obtaining witnesses—were extended.[29] In 1969 the double jeopardy clause of the fifth amendment was applied.[30] Moreover, the decisions barring state-required prayers in public schools,[31] limiting the availability of state libel laws to public officials and public figures,[32] and confirming that a right of association is implicitly protected,[33] are significant restraints upon state action that resulted from the extension of the specifics of the first amendment.

These decisions over the past two decades gave full effect to the principle of *Boyd v. United States*,[34] the case Mr. Justice Brandeis hailed as "a case that will be remembered so long as civil liberty lives in the United States." [35] That principle, stated by Mr. Justice Bradley, was ". . . constitutional provisions for the security of person and property should be liberally construed . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [36]

The thread of this series of Bill of Rights holdings reflects a conclusion—arrived at only after a long series of decisions grappling with the pros and cons of the question—that there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure of government for a free society. For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

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Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections

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[24] Furman v. Georgia, 408 U.S. 238 (1972). *But see* Gregg v. Georgia, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas. 96 S. Ct. 2950 (1976).
[25] Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).
[26] Malloy v. Hogan, 378 U.S. 1 (1964).
[27] Miranda v. Arizona, 384 U.S. 436 (1966).
[28] Pointer v. Texas, 380 U.S. 400 (1965).
[29] Klopfer v. North Carolina, 386 U.S. 213 (1967); Parker v. Gladden, 385 U.S. 363 (1966); Washington v. Texas ,388 U.S. 14 (1967).
[30] Benton v. Maryland, 395 U.S. 784 (1969).
[31] School Dist. v. Schempp, 374 U.S. 203 (1963).
[32] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[33] NAACP v. Alabama ,377 U.S. 288 (1964).
[34] 116 U.S. 616 (1886).
[35] Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion).
[36] 116 U.S. at 635.

of their states' own bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

Under the equal protection clause, for example, the Court has found permissible laws that accord lesser protection to over half of the members of our society due to their susceptibility to the medical condition of pregnancy,[37] as well as laws that impose special burdens on those of our citizens who are of illegitimate birth.[38] The Court has also found uncompelling the claims of those barred from judicial forums due to their inability to pay access fees,[39] and has further handicapped the indigent by limiting their right to free trial transcripts when challenging the legality of their imprisonment.[40]

Under the due process clause, the Supreme Court has found no liberty interest in the reputation of an individual—never tried and never convicted—who is publicly branded as a criminal by the police without benefit of notice, let alone a hearing.[41] The Court has recently indicated that tenured public employees might not be entitled to any more process before deprivation of their employment than the government sees fit to give them.[42] It has approved the termination of payments to disabled individuals who are completely dependent upon those payments, prior to an oral hearing, a form of hearing statistically shown to result in a huge rate of reversals of preliminary administrative determinations.[43] And it has veered from its promise to recognize that prisoners, too, have liberty interests that cannot be ignored.[44]

The same trend is repeated in the category of the specific guarantees of the Bill of Rights. The Court has found the first amendment insufficiently flexible to guarantee access to essential public forums when in our evolving society those traditional forums are under private ownership in the form of suburban shopping centers,[45] and at the same time has found the amendment's prohibitions insufficient to invalidate a system of restrictions on motion picture theaters based upon the content of their presentations.[46] It has found that the warrant requirement plainly appearing on the face of the fourth amendment does not require the police to obtain a warrant before arrest, however easy it might have been to get an arrest warrant.[47] It has declined to read the fourth amendment to prohibit searches of an individual by police officers following a stop for a traffic violation, although there exists no probable cause to believe the individual has committed any other legal infraction.[48] The Court has held permissible police searches

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[37] Gelduldig v. Aiello, 417 U.S. 484 (1974); *cf.* General Electric Co. v. Gilbert 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976) (decided under Title VII).

[38] *Compare* Mathews v. Lucas, 96 S. Ct. 2755 (1976), *with* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (". . . imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."). Recent decisions have also given rise to some doubt as to the Court's continuing commitment to the eradication of racial discrimination in employment and education. *See* Washington v. Davis, 96 S. Ct. 2040 (1976); Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

[39] *Compare* Ortwein v. Schwab, 410 U.S. 656 (1973), *and* United States v. Kras, 409 U.S. 434 (1973), *with* Boddie v. Connecticut, 401 U.S. 371 (1971).

[40] United States v. MacCollom, 96 S. Ct. 2086 (1976).

[41] Paul v. Davis, 424 U.S. 693 (1976).

[42] Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 96 S. Ct. 2074 (1976).

[43] Mathews v. Eldridge, 424 U.S. 319 (1976).

[44] *Compare* Meachum v. Fano, 96 S. Ct. 2532 (1976) (finding no liberty interest implicated in the transfer of a prisoner to a maximum security facility), *with* Wolff v. McDonnell, 418 U.S. 539 (1974).

[45] Hudgens v. NLRB, 424 U.S. 507 (1976), *overruling* Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Lloyd Corp v. Tanner, 407 U.S. 551 (1972).

[46] *Compare* Young v. American Mini-Theatres, Inc., 96 S. Ct. 2440 (1976), *with* Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975).

[47] United States v. Watson, 423 U.S. 411 (1976). *See also* United States v. Santana, 96 S. Ct. 2406 (1976) (holding that in a *Watson*-like situation, police may pursue a suspect into his or her home).

[48] United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The Court has also declined to read the amendment to prohibit warrantless searches of the glove compartments of automobiles impounded for mere parking violations. South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

grounded upon consent regardless of whether the consent was a knowing and intelligent one,[49] and has found that none of us has a legitimate expectation of privacy in the contents of our bank records, thus permitting governmental seizure of those records without our knowledge or consent.[50] Even when the Court has found searches to violate fourth amendment rights, it has—on occasion—declared exceptions to the exclusionary rule and allowed the use of such evidence.[51]

Moreover, the Court has held, contrary to *Boyd v. United States*, that we may not interpose the privilege against self-incrimination to bar government attempts to obtain our personal papers, no matter how private the nature of their contents.[52] And the privilege, said the Court, is not violated when statements unconstitutionally obtained from an individual are used for purposes of impeaching his testimony,[53] or securing his indictment by a grand jury.[54]

The sixth amendment guarantee has fared no better. The guarantee of assistance of counsel has been held unavailable to an accused in custody when shuffled through pre-indictment identification procedures, no matter how essential counsel might be to the avoidance of prejudice to his rights at alter stages of the criminal process.[55] In addition, the Court has countenanced a state's placing significant burdens—in the form of a "two-tier" trial system—on the constitutional right to trial by jury in criminal cases.[56] And in the face of our requirement of proof of guilt beyond a reasonable doubt, the Court has upheld the permissibility of less than unanimous jury verdicts of guilty.[57]

Also, a series of decisions has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make.[58] At the same time, the *Younger* doctrine has been extended to allow state officials to block federal court protection of constitutional rights simply by answering a plaintiff's federal complaint with a state indictment.[59] And the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment.[60]

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities. The very life-blood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.

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Some state decisions have indeed suggested a connection between these recent decisions of the United States Supreme Court and the state court's reliance on the state's bill of rights. For example, the California Supreme Court, in holding that statements taken from suspects before first giving them *Miranda* warnings are inadmissible in California courts to impeach an accused who testifies in his own defense, stated: "We . . . declare that [the decision to the contrary of the United States Supreme Court [61]] is not persuasive authority in any state prosecu-

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[49] United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[50] United States v. Miller, 96 S. Ct. 1619 (1976).
[51] *E.g.*, United States v. Janis, 96 S. Ct. 3021 (1976).
[52] Andresen v. Maryland, 96 S. Ct. 2737 (1976); Fisher v. United States, 96 S. Ct. 1569 (1976).
[53] Harris v. New York, 401 U.S. 222 (1971).
[54] United States v. Calandra, 414 U.S. 338 (1974).
[55] *Compare* Kirby v. Illinois, 406 U.S. 682 (1972), *with* United States v. Wade, 388 U.S. 218 (1967).
[56] Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976) (approving trial de novo system).
[57] Apodaca v. Oregon, 406 U.S. 404 (1972).
[58] Rizzo v. Goode, 423 U.S. 362 (1976); Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976); Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974).
[59] Hicks v. Miranda, 422 U.S. 332 (1975).
[60] Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976).
[61] Harris v. New York, 401 U.S. 222 (1971).

tion in California. . . . We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution." [62]

Enlightenment comes also from the New Jersey Supreme Court. In 1973 the United States Supreme Court held that where the subject of a search was not in custody and the prosecution attempts to justify the search by showing the subject's consent, the prosecution need not prove that the subject knew he had a right to refuse to consent to the search.[63] The Court expressly rejected the contention that the validity of consent to a non-custodial search should be tested by a waiver standard requiring the state to demonstrate that the individual consented to the search knowing he did not have to, and that he intentionally relinquished or abandoned that right. In *State v. Johnson*,[64] Mr. Justice Sullivan writing for New Jersey's high court, first acknowledged that the United States Supreme Court decision was controlling on state courts in construing the fourth amendment and was therefore dispositive of the defendant's federal constitutional argument.[65] But Mr. Justice Sullivan went on to consider whether the identically phrased provision of the New Jersey Constitution, Art. I, para. 7, "should be interpreted to give the individual greater protection than is provided by" the federal provision.[66] Counsel had not made this argument either to the trial court or on appeal, but the supreme court, *sua sponte*, posed the issue and afforded counsel the opportunity for argument on the question. Mr. Justice Sullivan held for the court that, while Art. I, para 7, was *in haec verba* with the fourth amendment and until then had not been held to impose higher or different standards than the fourth amendment, "we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning." [67] That meaning, he went on to hold, was "that under Art. I, par. 7 of our State Constitution the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, i.e., where the state seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." [68]

Among other instances of state courts similarly rejecting United States Supreme Court decisions as unpersuasive, the Hawaii [69] and California [70] Supreme Courts have held that searches incident to lawful arrest are to be tested by a standard of reasonableness rather than automatically validated as incident to arrest; [71] the Michigan Supreme Court has held that a suspect is entitled to the assistance of counsel at any pretrial lineup or photographic identification procedure; [72] and the South Dakota [73] and Maine [74] Supreme Courts have held that there is a right to trial by jury even for petty offenses.[75]

Other examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.[76] As the Supreme Court of

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[62] People v. Disbrow, 16 Cal. 3d 101, 113, 114–15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976). The Hawaii and Pennsylvania Supreme Courts have taken similar positions. *See* State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975).

[63] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[64] 68 N.J. 349, 346 A.2d 66 (1975).

[65] *See* Oregon v. Hass, 420 U.S. 714, 719 (1975).

[66] 68 N.J. at 353, 346 A.2d at 67–68.

[67] *Id.* at 353 n.2, 346 A.2d at 68 n.2.

[68] *Id.* at 353–54, 346 A.2d at 68.

[69] State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

[70] People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

[71] *Compare* cases cited notes 69 and 70 *supra*, *with* United States v. Robinson, 414 U.S. 218 (1973).

[72] *Compare* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974) *with* United States v. Ash, 413 U.S. 300 (1973).

[73] Parham v. Municipal Court, 199 N.W.2d 501 (S.D. 1972).

[74] State v. Sklar, 317 A.2d 160 (Me. 1974). *See also* Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

[75] *Compare* cases cited notes 73 and 74 *supra*, *with* Baldwin v. New York, 399 U.S. 66 (1970), *and* Duncan v. Louisiana, 391 U.S. 145 (1968).

[76] For a listing of such examples, see the cases collected in the following articles: Falk, *The Supreme Court of California 1971–1972, Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 437–43 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 373 (1975); *Project Report, Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

Hawaii has observed, "while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law. . . ." [77] Some state courts seem apparently even to be anticipating contrary rulings by the United States Supreme Court and are therefore resting decisions solely on state law grounds. For example, the California Supreme Court held, as a matter of state constitutional law, that bank depositors have a sufficient expectation of privacy in their bank records to invalidate the voluntary disclosure of such records by a bank to the police without the knowledge or consent of the depositor; [78] thereafter the United States Supreme Court ruled that federal law was to the contrary.[79]

And of course state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.[80] This was precisely the circumstance of Mr. Justice Hall's now famous *Mt. Laurel* decision,[81] which was grounded on the New Jersey Constitution and on state law. The review sought in that case in the United States Supreme Court was, therefore, completely precluded.

This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.[82] And prior to the adoption of the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.[83] Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal

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[77] State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974).
[78] Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).
[79] United States v. Miller, 96 S. Ct. 1619 (1976).
[80] The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all over the decision despite the presence of federal issues. Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). One reason for the refusal to review such decisions, even where the state court also decides a federal question erroneously, was explained by Mr. Justice Jackson in Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945):

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

[81] Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (invalidating town's exclusive zoning ordinance), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).
[82] *See generally* Brennan, *The Bill of Rights and the States*, in THE GREAT RIGHTS (E. Cahn ed. 1963).
[83] The Court has made this point clear on a number of occasions. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) (". . . a State is free *as a member of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards"); Cooper v. California, 386 U.S. 58, 62 (1967).

constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

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Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts. Unfortunately, federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered.[84] Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated [85] and systmatic [86] violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism. Adopting the premise that state courts can be trusted to safeguard individual rights,[87] the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.

Moreover, it is not only state-granted rights that state courts can safeguard. If the Supreme Court insists on limiting the content of due process to the rights created by state law,[88] state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a "property" and "liberty" that even the federal courts must protect. Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.

We can confidently conjecture that James Madison, Father of the Bill of Rights, would have approved. We tend to forget that Madison proposed not ten, but, in the form the House sent them to the Senate, seventeen amendments. The House approved all seventeen including Number XIV—a number of prophetic of things to come with the adoption of Amendment XIV seventy-nine years later—for Number XIV would have imposed specific restraints on the states. Number XIV provided: "No State shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor the freedom of speech or of the press." [89] Madison, in a speech to the House in 1789, argued that these restrictions on the state power were "of equal, if not greater, importence than those already made" [90] in the body of the Constitution. There was, he said, more danger of those powers being abused by state governments than by the government of the United States. Indeed, he said, he "conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing these essential rights, it was equally necessary that they should be secured against the State governments." [91]

But Number XIV was rejected by the Senate, and Madison's aim was not accomplished until adoption of Amendment XIV seventy-nine years later. The reason that Madison placed such store in the effectiveness of the Bill of Rights was his belief that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." [92] His reference was, of course,

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[84] *See* Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976); Hicks v. Miranda, 422 U.S. 332 (1975).
[85] *See* Paul v. Davis, 424 U.S. 693 (1976); cases cited note 84 *supra*.
[86] *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).
[87] *See* Stone v. Powell, 96 S. Ct. 3037, 3051 n.35 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).
[88] *See* p. 496 and notes 41–42 *supra*.
[89] *See* E. DUMBAULD, THE BILL OF RIGHTS 215 (1957); Brennan, *supra* note 82, at 69–70.
[90] 1 ANNALS OF CONG. 440 (Gales & Seaton eds. 1789).
[91] *Id.* at 755. *See* Brennan, *supra* note 82, at 69–70.
[92] 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789). *See United States* v. *Calandra*, 414 U.S. 330, 356–57 (1974) (Brennan, J., dissenting).

to his proposed Bill including Number XIV, but we may be confident that he would welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model as proof of his conviction that independent tribunals of justice "will be naturally led to resist every encroachment upon rights expressly stipulated for. . . ." [93]

APPENDIX 3

TAXPAYER STANDING: SURVEY OF STATE LAWS

Taxpayer suits are a common vehicle on the state level for facilitating citizen involvement in government affairs and for increasing enforcement of state laws and the accountability of government officials. Presently, only one of the 50 states, New Mexico, has expressly prohibited taxpayer standing. *See Asplund* v. *Hannett*, 249 P. 1074 (1926). But even in New Mexico, more recent cases have begun to erode this total prohibition by allowing taxpayer suits to be maintained in certain specified circumstances. *See e.g., Zellers* v. *Hoff*, 236 P. 2d 949 (1951); *State ex rel. Castillo Corp.* v. *New Mexico State Tax Commission*, 79 N.M. 357 (1968). No cases or statutes were found addressing the issue in Maine, Nevada, New Jersey or Virginia, but in all other states, some type of taxpayer standing has been authorized. In most states taxpayer standing has been authorized by common law precedents. In many states, however, the legislatures have specifically authorized taxpayer suits by statute. In Arkansas, taxpayer standing is authorized by the State Constitution. Listed below are the authorities for taxpayer standing in each of the 49 states that provide for taxpayer suits.

I. COMMON LAW AUTHORIZATION FOR TAXPAYER STANDING

A. *Direct Grants:*

Alabama: Turnipseed v. *Blan*, 148 So. 116 (1933); *Hall* v. *Blan*, 148 So. 601 (1933).

Alaska: Reynolds v. *Wade*, 249 F. 2d 73 (9th Cir. 1957).

Arizona: Valley Bank & Trust Co. v. *Proctor*, 53 Pac. 2d 857 (1936).

Arkansas: Farrel v. *Oliver*, 226 S.W. 529 (1929); *Nelson* v. *Berry Petroleum Co.*, 413 S.W. 2d 46 (1967).

California: Ahlgren v. *California*, 25 Cal. Rpt. 887 (Court of Appeals, Third District 1962) (cited with approval in *Blair* v. *Rehess*, 96 Cal. Rpt. 42 at 49 (1971).

Colorado: Leckenby v. *Post Printing & Publishing Co.*, 176 P. 450 (1918); *Civil Serv. Emp.* v. *Love*, 448 P. 2d 624 (1968).

Delaware: Richardson v. *Blackburn*, 187 A. 2d 823 (1963); *Kottler* v. *McBride*, 283 A. 2d 855 (1971).

Florida: Crawford v. *Gilchrist*, 59 So. 963 (1912); *Department of Administration* v. *Horne*, 269 So. 2d 659 (1972).

Hawaii: Lucas v. *Amer. Haw. E & C Co.*, 16 Haw. 80 (1904); *Castle* v. *Secretary of the Territory*, 16 Haw. 769 (1905).

Idaho: Orr v. *State Board of Equalization*, 28 Pac. 416 (1891); *Dunn* v. *Sharp*, 35 Pac. 842 (1894).

Illinois: Fergus v. *Russell*, 270 Ill. 304 (1915); *Paepcke* v. *Public Bldg. Commission of Chicago*, 46 Ill. 2d 330 (1970).

Indiana: Ellingham v. *Dye*, 99 N.E. 1 (1912).

Iowa: Wertz v. *Shane*, 249 N.W. 661 (1933); *Iowa* v. *Timmons*, 105 N.W. 2d 209 (1960).

Kansas: Moore v. *Shanahan*, 486 P. 2d 506 (1971).

Louisiana: Borden v. *Louisiana*, 123 So. 655 (1929); *Woodward* v. *Reilly*, 152 So. 2d 41 (1963).

Maryland: Christmas v. *Warfield*, 66 A. 491 (1907); *Funk* v. *Mullan Contracting Co.*; 78 A. 2d 632 (1951); *Horace Mann League of U.S.* v. *Board of Public Works*, 220 A. 2d (1966).

Massachusetts: Sears v. *Treasurer and Receiver General*, 98 N.E. 2d 621 (1951); *Singleton* v. *Treasurer and Receiver General*, 165 N.E. 2d 899 (1960).

Minnesota: Lipinski v. *Gould*, 218 N.W. 123 (1928); *Regan* v. *Babcock*, 247 N.W. 12 (1933); *Rockne* v. *Olsen*, 254 N.W. 5 (1934).

Michigan: Carrier v. *State Administrative Board*, 196 N.W. 182 (1923).

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[93] 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).

Mississippi: Chance v. *Mississippi State Textbook Rating & Purchasing Board*, 200 So. 706 (1941).

Missouri: Castilo v. *State Highway Commission*, 279 S.W. 673 (1925); *Berghorn* v. *Reorganized School District No. 8*, 260 S.W. 2d 573 (1953).

Montana: Hill v. *Rae*, 158 P. 826 (1916); State ex rel. *Steen* v. *Murray*, 394 P.2d 761 (1964).

Nebraska: Fischer v. *Marsh*, 202 N.W. 422 (1925); *Rein* v. *Johnson*, 30 N.W. 2d 548 (1947), *cert. denied*, 335 U.S. 814 (1948).

New Hampshire: Conway v. *New Hampshire Water Resources Board*, 199 A. 82 (1938); *New Hampshire W.B. Ass'n* v. *New Hampshire S.L. Com'n*, 116 A.2d 885 (1955).

New York: Boryszewski v. *Brydges*, 37 N.Y. 2d 361 (1975).

North Carolina: Teer v. *Jordan*, 59 S.E. 2d 359 (1950); *Stanley* v. *Department of Conservation and Development*, 199 S.E. 2d 641 (1973); *Lewis* v. *White*, 216 S.E. 2d 134 (1975).

North Dakota Herr v. *Rudolf*, 25 N.W. 2d 916 (1947).

Ohio: Green v. *State Civil Service Commission*, 107 N.E. 531 (1914); *Horvitz* v. *Sours*, 58 N.E. 2d 405 (1943).

Oklahoma: Vette v. *Childers*, 228 P. 145 (1924).

Oregon: Sears v. *James*, 82 Pac. 14 (1905) (permits injunctive relief but expressly rejects recovery relief); *Evanhoff* v. *State Industrial Acc. Commission*, 154 P. 106 (1915); *Hanson* v. *Mosser*, 427 P. 2d 97 (1967).

Pennsylvania: Page v. *King*, 131 A. 707 (1926).

South Carolina: Gaston v. *State Highway Department of South Carolina*, 132 S.E. 680 (1926); *Crouch* v. *Benet*, 175 S.E. 2d 320 (1941).

South Dakota: Lien v. *Northwestern Engineering Co.*, 54 N.W. 2d 472 (1952).

Tennessee: Lynn v. *Polk*, 76 Tenn. 121 (1881).

Texas: Terrell v. *Middleton*, 187 S.W. 367 (Tex. Ct. Civ. App. 1916), *error refused* 191 S.W. 1138 (1917), *rehearing denied* 193 S.W. 139; *Calvert* v. *Hull*, 475 S.W. 2d 907 (1972).

Vermont: Clement v. *Graham*, 63 A. 146 (1906).

West Virginia: Campbell v. *Kelly*, 202 S.E. 2d 369 (1974).

Washington: State ex. rel. Lemon v. *Langle*, 273 P. 2d 464 (1954); *City of Tacoma* v. *O'Brien*, 534 P.2d 114 (1975).

Wisconsin: Democrat Printing Co. v. *Zimmerman*, 14 N.W. 2d 428 (1944).

Wyoming: Springs v. *Clark*, 14 P. 2d 669 (1932).

B. *Dictum Grants* (where favorable dicta but no cases expressly authorizing taxpayer standing could be found):

Georgia: Aiken v. *Armistead*, 198 S.E. 237 248 (1938).

Rhode Island: Sennott v. *Hawksley*, 241 A. 2d 286, 287 (1968).

Utah: Lyon v. *Bateman*, 228 P. 2d 819, 821 (1951).

C. *DeFacto Grants* (state courts which have not specifically ruled on the taxpayer standing issue, but which have reached the merits in suits brought by state taxpayers:

Connecticut: Delinks v. *McGowan*, 173 A. 2d 488 (1961).

Kentucky: Rawlings v. *Butter*, 290 S.W. 2d 801 (1956); *Perkins* v. *Sims*, 350 S.W. 2d 715 (1961); (also note that previously in *Stiglitz* v. *Schardin*, 40 S.W. 315 (1931) the Kentucky Court of Appeals expressly permitted plaintiffs suing as citizen, taxpayer and voter to question the validity of redistricting acts but the same court in a later decision. *Standard Printing Co.* v. *Miller*, 199 S.W. 2d 731, at 732 (1946) obscured the standing law by conceding ". . . without deciding . . ." that a taxpayer can seek a mandatory injunction requiring state officials to cancel a contract).

II. TAXPAYER STANDING STATUTES

Arizona: Ariz. Rev. Stat. § 35-213.

Hawaii: Haw. Rev. Stat. § 76-53(b); *see also Hall* v. *Kim*, 53 Haw. 215 (1971).

Illinois: Ill. Ann. Stat. ch. 102, § 11-16; *see also Lund* v. *Horner*, 375 Ill. 303 (1941).

Kansas: Kan Stat. § 60-907, *see also Seltman* v. *Board of County Commissioners of Rush County*, 512 P. 2d 334, 336 (1973).

Massachusetts: Mass. Gen. Laws. Ann. ch. 29, § 63.

Michigan: Revised Judicature Act § 600.2041(3).

New York: N.Y. State Fin. Law Art. 7-A.
North Dakota: N.D. Cent. Code § 32-33-02; *see also State ex rel. Walker* v. *Link*, 232 N.W. 2d 823 (1975) N.D. Cent. Code § 32-35-02; *see also Walker* v. *Omdahl*, 242 N.W. 2d 649 (1976).

III. CONSTITUTIONAL AUTHORIZATION FOR TAXPAYER STANDING

Arkansas: *Arkansas State Constitution, Art. 16, § 13:* "Any citizen of any county, city or town may institute suit on behalf of himself and all others interested to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." (*See, Nelson* v. *Berry Petroleum Company*, 413 S.W. 2d 46 (1967) which points out that this provision confers the right to challenge both direct and indirect exactions which comprehend invalid expenditure by any government official.

APPENDIX 4

(a)

FEDERAL ACCESS LEGISLATION: PROPOSALS INTRODUCED IN THE 95TH CONGRESS

(By Michael B. Trister)

The first part of this article, published in the April issue of the Clearinghouse Review, discussed a number of legislative proposals dealing with access to federal courts and administrative agencies, as well as a number of areas of importance to legal services programs in which no specific proposals had been made. The legislation discussed in the April article was for the most part introduced during the last session of Congress. This article will discuss legislative proposals relating to federal access which have emerged during the initial months of the new Administration and the 95th Congress.

I. JUSTICE DEPARTMENT INITIATIVES

Acting at the direction of Preident Gerald Ford, Attorney General Edward H. Levi in 1975 appointed within the Department of Justice a Committee on Revision of the Federal Judicial System. The Committee, which was made up of senior personnel within the Department and was chaired by Solicitor General Robert H. Bork, issued its report in January, 1977. Department of Justice Committee on Revision of the Federal Judicial System, *The Needs of the Federal Courts* (1977).

The Report finds a "crisis of overload" which is threatening to convert the federal courts "from deliberate institutions to processing, institutions, from a judiciary to a bureaucracy." To arrest this trend, the Report endorses a number of existing proposals to limit caseloads[1] and recommends several proposals which if adopted would have important consequences for legal services attorneys and their clients. The most important of these proposals are the creation of non-Article III tribunals to decide many cases which arise under various social welfare statutes, and a requirement that state prisoners be required to exhaust state administrative remedies before they are permitted to file suit under Section 1983 in federal court.

Non-Article III Tribunals. According to the Report, numerous cases presently brought in federal court do not require the special competence of federal judges and could be decided as fairly and more expeditiously by trained administrative judges. These cases involve "relatively unsophisticated, repititious factual issues" arising under statutes such as the Social Security Act, the Federal Employers Liability Act, the Consumer Products Safety Act, and the Truth-in-Lending Act. *Id.*

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[1] The Report endorses the earlier proposals, discussed in the April article, to increase the number of district and appellate judgeships, to repeal the Supreme Court's mandatory Appellate jurisdiction, and to eliminate diversity jurisdiction. It rejects as unnecessary the National Court of Appeals proposal made by the Hruska Commission. Finally, it recommends the creation of a Commission on the Judicial Appointment Process to make recommendations to improve the standards and procedures for selection of federal judges, and a permanent Council for Federal Courts, to study and make proposals to improve the functioning of the federal judicial system.

The Report recommends that a non-Article III "administrative court system" be estabilshed with its own trial and appellate levels.[2] Questions of constitutional or statutory interpretation could be referred to an Article III court for decision, and review of final legal determinations would be available by writ of certiorari in the Supreme Court.

Exhaustion of State Remedies. The Report also endorses the requirement of H.R. 12008, which was introduced at the Department's request during the last session of Congress, that relief should not be granted in cases brought under Section 1983 by prisoners and other incarcerated persons unless the plaintiff has exhausted "such plain, speedy, and efficient state administrative remedies as are available." As discussed in the previous article, this bill poses many difficulties for prisoners and other incarcerated persons, and it was opposed by prisoner, mental health and related groups.

Although the new administration at the Justice Department has not endorsed the specific recommendations of the Bork Committee, it has undertaken its own program to alleviate the congestion in the federal courts. In speech to a panel of the American Trial Lawyers Association on March 15, 1977, Attorney General Bell stated that he is determined to "develop a national policy for the delivery of justice at all levels." To this end, he has created a new Office for Improvements in the Administration of Justice, headed, by Assistant Attorney General Daniel J. Meador, which is developing a number of proposals to limit federal caseload. Amongst the ideas which are being considered by Meador's staff are limitations on diversity jurisdiction, eliminating priority of certain civil cases, revisions in the discovery rules to limit the cost and delay of litigation, modifications of the class action procedure, compulsory arbitration procedures to resolve Truth-in-Lending and other small claims, imposition of the British system of awarding attorneys fees to the prevailing party, expansion of the jurisdiction of the United States Magistrates, and the development of Neighborhood Justice Centers to provide an alernative forum for dispute resolution.[3]

Most of these Justice Department proposals are still in the development stage. Three are not. These include a repeal of existing statutory priorities for certain civil actions (which includes Freedom of Information Act cases), precluding plaintiffs from invoking diversity jurisdiction in any district court located in a state of which he is a citizen, and the proposal for expansion of the role of magistrates. In its current form, the proposal would give magistrates authority to enter final orders in three types of civil actions: cases brought under Section 205(g) of the Social Security Act, including those actions for black lung benefits that are handled by the Department of HEW;[4] government suits for civil penalties or forfeitures, if the government consents; and other jury or non-jury matters where the parties consent. Each district court would decide separately whether to refer any or all of these categories of cases to magistrates.

An aggrieved party could appeal a magistrate's decision by right to the district court, whose review would be limited "to determining whether the findings of the magistrate are clearly erroneous or his judgment is contrary to law." Review of the district court's ruling would be discretionary with the court of appeals and would be limited to questions of law decided by the district court. If the court of appeals declines to accept jurisdiction, there would be no opportunity for review by the Supreme Court.

The bill also empowers the Judicial Conference of the United States to promulgate procedures and establish standards to be used by the courts in selecting magistrates and in considering questions of removal or retention in office. Finally, the bill expands the magistrates' jurisdiction in federal misdemeanor cases.

The expanded role of magistrates in social security cases should be of great concern to legal services attorneys. Under the Supreme Court's decision in *Mathews* v. *Weber*, 423 U.S. 261 (1976), district courts are permitted to refer all social security cases to magistrates to review the administrative record and to

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[2] The proposed administrative court system would not specialize in one type of case, but would hear a variety of matters, thus allowing the judges "to maintain a broad perspective," and making it possible to attract judges of high caliber.

[3] Many of these proposals were first outlined by an American Bar Association Task Force which was convened to follow-up on recommendations made at the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice. See 70 F.R.D. 79 (1976). The Task Force was chaired by the present Attorney General and included the present Solicitor General as one of its members.

[4] Black lung cases are now processed by the Department of Labor and appealed, after administrative decision, directly to the courts of appeals.

make suggested findings and recommendations. This procedure has been adopted in a number of districts which have large numbers of social security and black lung case. The Justice Department proposal goes beyond the present system by allowing the magistrate to make final decisions and by seriously limiting appellate review.

The Justice Department contends that its proposals will remove a serious cause of federal court congestion. However, the Department's analysis is based only on the relatively high number of recent social security and black lung filings; the analysis does not take into account the relatively limited judicial time necessary to review social security cases when compared, for example, with the time spent on complex civil litigation in other areas. Also, new filings have been concentrated in a few districts located primarily in coal-producing areas which have large numbers of black-lung claims. These courts have effectively controlled their caseloads by adopting the procedure approved in *Mathews* v. *Weber*, *supra*. Furthermore, the number of black lung cases will decrease substantially as cases filed after July 1, 1974 are transferred to the Department of Labor with a direct appeal to the courts of appeals.

Another difficulty with the DOJ proposal is that it assumes that social security cases demand "primarily judicial determination of factual issues, only occasionaly presenting substantial questions of statutory or constitutional interpretation." In fact, social security cases rarely require judicial determination of facts, since they are tried on the administrative records, and the district court merely decides whether the agency's decision is supported by substantial evidence in that record. The district courts do, however, rule on numerous issues of law, or mixed questions of law and fact, including questions pertaining to the admissibility of evidence, the appropriateness of the agency's procedures, and the standards to be applied under the Act in particular cases. Delegation of this authority to the magistrates could result in less effective judicial supervision of the Social Security Administration and impede the development of a national body of precedent interpreting the Social Security Act.

Finally, the proposal is not likely to save district court time, since the courts will still have to review the record to determine whether the magistrate's decision is supported by substantial evidence. Thus, the bill merely requires a duplication of effort at the district court level rather than conserving judicial resources.

The proposal to refer social security cases to magistrates could also exaccerbate the already harmful effects of *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and its progeny, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Mathews* v. *Diaz*, 426 U.S. 67 (1976); *Mathews v. Lucas*, 427 U.S. 495 (1976); and *Califano* v. *Sanders*, 430 U.S. 99 (1977). In *Salfi* the Supreme Court held that beneficiaries seeking judicial review in federal district court on any claim arising under the OASDI program must because of Sections 205(g), 42 USC § 405(g) meet two prequisites: (1) that they present a claim of benefits to the Secretary, and (2) that they exhaust administrative remedies. In cases covered by *Salfi* there is no other jurisdictional base since Section 205(h), 42 USC § 405(h) precludes jurisdiction under 28 USC 1331. *Sanders* held there was no jurisdiction under the Administrative Procedure Act, 5 USC 3702.[5] If broadly interpreted *Salfi* may require exhaustion of administrative remedies in cases presenting a constitutional challenge to a statutory provision under the Social Security and medicare programs (and possibly under SSI)[6] or challenges to a regulation or practice of the Social Security Administration on either constitutional or statutory grounds.[7] As a result plaintiffs face two or more years in fruitless appeals before the SSA, even though the agency has no authority to rule on the legal

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[5] Jurisdiction may be possible in some cases under the mandamus statute, 28 U.S.C. § 1361.

[6] The Supreme Court has not yet determined whether the jurisdictional limits of section 205(h) apply to SSI claims. Section 1631(c)(3), 42 U.S.C. 1383(c)(3) providing for judicial review of SSI claims does not expressly incorporate 205(h) though HEW has argued and several courts have held that it does do so by implication. Sections 1869 and 1872, 42 U.S.C. §§ 1395ff and 1395ii of the medicare program expressly incorporate section 205(h).

[7] *Salfi* and subsequent cases have held that the exhaustion requirement may be waived by the Secretary (either by his admissions or actions) or may be ingnored when the challenge being litigated is collateral to the substantative claim and a denial of the challenge has the potential of causing irreparable injury (e.g., a challenge to termination procedures as in *Eldridge*).

questions presented or has made clear that it will not rule against its own regulations or interpretations.

Salfi also undermined the use of Social Security and medicare class actions brought under Rule 23 of the Federal Rules because of its holding that class members must each present claims to the Secretary and be denied and its implication that remedies must be separately exhausted even though the named plaintiff has demonstrated that exhaustion is fruitless.

To date, there have been no legislative proposals to overrule *Salfi*. If the Justice Department's proposal to send social security cases to Magistrates is accepted, individual social security claimants will not only be forced to waste time, energy and legal resources at the administrative level; they will now have to go through another layer of judicial review at the district court level, and they may be denied any review in the courts of appeals on legal issues of great complexity and importance.

The Magistrate's proposal was circulated to other federal agencies for comment during April. As the result of objections made by the Department of Health, Education and Welfare and by the Legal Services Corporation, the proposal was returned in late April to the Justice Department for further review and consideration. However, it is expected that a revised proposal will be submitted by the Administration.

II. CONGRESSIONAL INITIATIVES

A. Civil Rights Improvements Act—S. 35

The Civil Rights Improvements Act of 1977, which was introduced by Senators Mathias and Brooke on January 10, 1977, is intended to insure the continued vitality of 42 U.S.C. Section 1983 as the principal legal tool for vindicating federal civil rights and liberties. It does this by adding a new definitional subsection to section 1983 which attempts to remove most of the barriers created by the Supreme Court to the full exercize of federal jurisdiction in cases involving federal constitutional and statutory rights.

Definition of Person. The bill defines the term "person" to include any individual, State, municipality, or any agency or unit of government of such State or municipality.[8] The purpose of this amendment is to overrule the decisions in *Monroe* v. *Pape*, 365 U.S. 167 (1961), and *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), by making clear that municipalities, counties and states may be sued directly under section 1983 for either damages or injunctive relief.[9]

Unfortunately, the bill also includes a number of specific limitations on when governmental units may be held liable for damages or injunctive relief for the acts of their agents. Under section 2(c), governmental units such as cities, counties or states would not be liable for damages or injunctive relief under section 1983 unless:

> The officer of or employee of the governmental unit *directly* responsible for the conduct of the subordinate officer or employee who committed the violation either (a) "directed, authorized, or encouraged any action" by the subordinate which resulted in the violation; or (b) failed to act in any manner to remedy a pervasive pattern of unconstitutional or unlawful conduct engaged in by the subordinate, which in the absence of any remedial action was likely to continue or recur in the future; *or*
>
> the party seeking damages or an injunction establishes that one or more officers or employees of the governmental unit engaged in "grossly negligent conduct" in violation of the provisions of the act, but cannot identify the officer or employee or prove causation with regard to any officer or employee.

According to the bill's sponsors, these provisions are intended to overrule the more restrictive notions of governmental responsibility announced in *Rizzo* v. *Goode*, 423 U.S. 362 (1976), and to insure that plaintiffs will be able to recover in situations such as the Jackson State shooting case in which the plaintiffs

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[8] As introduced, the bill does not define the term "state" to include the District of Columbia, thus leaving intact the decision in *District of Columbia* v. *Carter*, 409 U.S. 418 (1973).

[9] The bill further defines the term "civil action" as it is used in section 1983 to mean "any action at law, suit in equity, or other proper proceedings for redress." By expressly including states within the scope of the statute and by allowing suits for damages against states, the bill apparently would abrogate the Eleventh Amendment protection presently afforded to the states, although the language on this power is less than clear.

could not demonstrate which police officers had fired the fatal shots, although it was clear that some officer was responsible. *Burton* v. *Waller*, 502 F. 2d 1261 (5th Cir. 1974.) However, the language of the bill may go beyond *Rizzo*, particularly in cases for damages, which were not in issue in *Rizzo* and for which common-law tort principle may be more lenient than the rules set forth in the bill. Furthermore, it is not clear why the liability of governmental units in damage cases should not extend to all unconstitutional or illegal actions by its officers and employees, regardless of the responsibility of superior officers or the agency itself.

Prosecutorial Liability. Section 2(d) of S. 35 would overrule the Supreme Court's holding in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), that prosecutors are absolutely immune from liability for damages in suits brought under section 1983. However, the bill takes the very narrow approach, suggested by Justice White's concurring opinion in *Imbler*, of holding prosecutors liable only where they "fail to disclose to the defendant in any criminal proceeding, upon the request of the defendant or his counsel, all material evidence which the prosecutor knows or reasonably should know is exculpatory to the defendant."

This proposal raises a number of problems. First, it is not clear why prosecutors should continue to enjoy absolute immunity from damages in cases other than where they have failed to disclose exculpatory evidence to a defendant. For example, why shouldn't prosecutors also be liable for the knowing use of false testimony or for failing to disclose exculpatory evidence where no defense request is necessary under current case law?

Second, the bill leaves intact, and therefore approves by implication, the granting of absolute immunity in section 1983 cases to judges and legislators, and the granting of qualified immunity to other executive officers. Since the bill opens up the immunity question, it should consider whether state judges and legislators should be immune from damages where they have acted maliciously or in plain disregard of clearly established constitutional rights; it should also question whether any immunity is justified for executive officers, such as jailers, at least for injuries resulting from their ministerial actions. *CF. Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir 1976.)

Finally, section 2(d) applies to actions against prosecutors for injunctive relief as well as for damages. It thus suggests that the Court's decisions granting absolute immunity to some defendants in section 1983 damage actions are also applicable in actions for injunctive relief. In fact, the availability of immunity in injunctive cases is not well settled, and the bill should not suggest that it is. *See e.g., Littleton* v. *Berbling*, 468 F.2d 389 (7th Cir. 1972) *rev'd on other grounds sub nom O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

Abstention. Section (e)(1) of the bill abolishes the doctrine of abstention in all cases brought under section 1983: No Court of the United States shall refuse temporarily to hear any civil action brought under the provisions of this section on the ground that such action raises, in addition to any question of Federal constitutional or statutory law, a question of State law which has not been previously decided by the highest court of such State or which, if decided by a State court, could render unnecessary a decision by such court of the United States on such question of Federal constitutional or statutory law.[10]

Although this language is broad enough to eliminate abstention in all cases brought under section 1983, it may possibly be attacked as unnecessarily broad, especially in light of the increasing pressure to reduce federal caseloads. A different approach might be for Congress to allow federal courts to abstain in a carefully defined category of cases but to limit the time during which the state courts may act and to provide that the costs of the State proceeding may be allowable as costs in the federal action.

Exhaustion of State Remedies. In order to prevent a judicial reversal or narrowing of the decision in *Monroe* v. *Pape*, *supra*, section (e)(2) of S. 35 provides that "no court of the United States shall dismiss any civil action brought under the provisions of this section on the ground that the party bringing such action failed to exhaust the remedies available in the courts of any State." There is no explanation as to why the bill fails to deal with the question of administrative remedies, although there is a strong possibility of judicial retrenchment in that area as well, and Congressional failure to act could be interpreted as approval of an administrative exhaustion requirements.

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[10] The bill assumes that the abstention doctrine applies in cases involving purely federal statutory claim. That issue is not settled.

Comity. S. 35 deals with the problems raised by *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny by barring the federal courts from hearing any action under section 1983 where there is a pending criminal[11] proceeding against the plaintiff in the civil action, "or against any person with whom such party's interest are closely intertwined," which arises out of the same fact situation as the civil action and in which all claims in the civil action may be presented and resolved. The bill then creates an exception to this rule where "extraordinary circumstances exist" including where it can be shown that the criminal action was brought "in bad faith for the purposes of harassment, or that the criminal statute which is the basis of such criminal proceeding is unconstitutional on its face and that the enforcement of such statute is likely to deter the exercise of rights protected under the first amendment." Finally, the bill overrules the decision in *Hicks* v. *Miranda*, 422 U.S. 322 (1975), by providing that an action shall not be dismissed under the comity doctrine where the criminal action was commenced after the complaint in the civil action was filed.

In the forum in which this section is drafted may create a number of problems. By legislatively adopting a blanket rule against enjoining state criminal proceedings and then attempting to define the limited exceptions to that rule, the bill risks the possibility that it will overlook important exceptions which might become clear in the future. Furthermore, the bill makes it mandatory for a court to refuse jurisdiction unless one of the specific exceptions applies, instead of leaving the decision to the discretion of the court, as is presently the law.

Res Judicata. S. 35 attempts to deal with the judicially unresolved questions of what affect prior state proceedings should be given in civil actions brought under section 1983. The bill provides that no federal court may refuse to hear a case brought under section 1983 on the ground that the action only raises issues previously decided in a civil or criminal proceeding in a state or local court to which the plaintiff in the 1973 action was also a party. However, the bill further states that the federal court shall not grant the following types of relief in that action: (a) the invalidation or setting aside of any conviction; (b) the modification or setting aside of any order by the state or local court with respect to damages; (c) the modification or setting aside of any order by the state or local court "with respect to an injunction related to conduct determined in such civil or criminal proceeding not be protected under the provisions of this section 1983."

Protection of Reputation. Finally, S. 35 attempts to overrule the Supreme Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), by stating that "the right to enjoy one's reputation is a right secured by the due process clause of the section 1 of the Fourteenth Amendment of the Constitution.

Although S. 35 includes a number of drafting and substantive problems, it also is the first comprehensive effort to deal with the limitations on section 1983 actions which have been erected by the Supreme Court in recent years. It offers a useful point of departure for further proposal and deserves careful consideration by legal services attorneys. The bill has been assigned to the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, which has not scheduled hearings on it. Parallel legislation was introduced in the House of Representatives. (H.R. 4514). The Department of Justice has not taken a public position on the bill.

B. Civil Rights of Institutionalized Persons

H.R. 2439, introduced by Representative Kastenmeier on January 26, 1977, gives standing to the Attorney General to file suit in the name of the United States to enforce the federal constitutional and statutory rights of any person confined in an institution. The term "institution" includes any jail, prison or other correctional facility or treatment center for juveniles; any mental hospital; any institution or treatment facility for mentally retarded persons; any facility for the chronically physically ill or handicapped; and any nursing home.

The bill also establishes a private right of action on behalf of institutionalized persons against "every person, including a unit of government," responsible for depriving them of their federal rights. This right exists independently of section 1983 and, in this limited area, would overcome some of the definitional problems

[11] By restricting the comity doctrine to cases in which state criminal proceedings are sought to be enjoined, the bill presents the extension of *Younger* to the civil area. *See Huffman v. Pursue, Ltd.*, 420 U.S. 593 (1975); *Juidice* v. *Vail*, 430 U.S. 327 (1977).

under that statute which were created by *Monroe* v. *Pape* and *City of Kenosha* v. *Bruno*.

H.R. 2439 does not include any requirement that institutionalized persons who bring suit to improve the conditions of their confinement must first exhaust available state administrative remedies. Similar legislation introduced in the last session of Congress contained an exhaustion requirement, and there may still be an effort to add exhaustion language to H.R. 2439 when it is taken up in committee. Hearings were held in H.R. 2439 in the House during late April and early May, and the committee is expected to act soon thereafter.

C. Consumer Actions

Proposed amendments to the Federal Trade Commission Act, introduced as S. 1288 and H.R. 3816, include a new section pertaining to private consumer actions which could be of importance to legal services attorneys. If adopted, the proposal could also serve as a model for broader reforms of the class action.

Under the amendments, any person, partnership or corporation injured by a violation of any rule under the Act respecting unfair or deceptive acts or practices or any final cease and desist order issued by the Federal Trade Commission may file suit in either federal court or state court. Federal courts are given jurisdiction over such actions if the amount in controversy exceeds $25,000 in the aggregate exclusive of interest and costs. The courts are authorized to provide any relief necessary to redress the injury to the plaintiffs, including the rescission or reformation of contracts, the refund of money or the return of property, the payment of damages, and public notification of the violation. Injunctive relief is also available after notice to the FTC. The House version of the bill prohibits the award of exemplary or punitive damages.

The bill also supersedes the notice requirements of Rule 23 of the Federal Rules of Civil Procedure by requiring notice of the commencement of any action to be given to the members of any class through publication in the media, posting at any location which is likely to be frequented by members of the class, or through individual notice to each classmember that can be identified through reasonable effort. The court may also provide that individual notice may be given to a sample of the classmembers, if the sample may reasonably be expected to represent any material conflict or divergence of views among the classmembers or to any subclass. The bill provides that in determining which method of notice to use, the court shall take into account the interests of the classmembers in being informed, the costs of notice, the financial and other resources of the parties, and whether a significant percentage of the members would be likely to desire to exclude themselves or to participate in the action. The costs of any general notice shall be born by the plaintiff unless the court determines that justice requires the defendant to pay all or parts of the costs. The costs of any individual notice to the class or to a sample of the class must be born by the defendant.[12]

The bill also provides that plaintiffs who prevail in any action under this statute may recover reasonable attorneys fees.

Hearings have already been held on this legislation, and the bills are expected to be reported by the full committees in the House and Senate by May 15.

D. Judicial Resources

An omnibus bill creating 107 new federal district judgeships and 25 new appellate judgeships has been introduced in both Houses of Congress with the support of the Administration On April 21, 1977, the Senate Judiciary Committee approved a slightly expanded version of this bill (111 district judges; 35 appellate judges), but added an amendment splitting the Court of Appeals for the Fifth Circuit into two new circuits. The Committee took no action on pending proposals to split the Court of Appeals for the Ninth Circuit. The House Judiciary Committee held hearings on the omnibus bill during March and is expected to take formal action prior to May 15.

In a related area, on February 14, 1977, President Carter signed Executive Order 11972 which creates the United States Circuit Judge Nominating Commis-

[12] Similar legislation dealing with class actions in the environmental area has been introduced. (H.R. 1092)

sion to recommend persons to be nominated as U.S. Circuit Judges. 42 Fed. Reg. 9659. The Commission is composed of thirteen panels—two each for the Fifth and Ninth Circuits and one for each of the other circuits.

Upon the request of the President, the panels will recommend the five persons they deem best qualified to fill circuit court vacancies, taking into account criteria specified in the Order. These criteria include a candidate's reputation for integrity and good character, and whether he or she has demonstrated "outstanding legal ability and commitment to equal justice under law."

The Order does not deal directly with the need for more minorities and women on the federal bench, although the panels are directed to consider whether a candidate "would help to meet a perceived need of the court of appeals on which the vacancy exists." The President is not bound to select a nominee from the panel's list of recommendations.

The panels will consist of no more than eleven members each. They are supposed to include members of both sexes, minority groups and an equal number of non-lawyers. Also, the panels will include at least one member who is a resident of each state served by the panel. The members of the panels are expected to be appointed in May.

E. Lobbying Disclosure

During the last session of Congress, the House and Senate passed different bills designed to improve the Federal Regulations of Lobbying Act, by strengthening its enforcement, coverage and penalty provisions. However, approval of a final bill was blocked by parliamentary maneuvers in the Senate.

Efforts to enact lobbying legislation have been renewed in the 95th Congress and, if they are successful, they could have a major impact on the activities of some legal services programs. At least eight different bills have already been introduced in the House, and bills are expected to be introduced in the Senate in the near future.

Although they differ in their details, each of the proposals requires organizations that engage in lobbying in excess of certain threshold levels to register with a federal agency, probably the General Accounting Office, and to file quarterly reports listing their contributors and describing their lobbying activities during the covered period. For example, under H.R. 1180, which is identical to last year's House passed bill, any organization that (1) spends more than $1250 on lobbying in any quarter, or (2) employs at least one person who spends 20 percent of his or her time lobbying activities would have to register and file reports. The Senate passed bill in 1976 included a threshold of twelve or more contracts, lobbying as well as financial thresholds.

Much concern has been raised about these proposals because of their potential for inhibiting lobbying activities by public interest groups. Thus, to the extent that the reporting requirements demand careful recordkeeping or force organizations to disclose their activities and their contributions, they may inhibit organizations from engaging in lobbying and related political activity. This is especially true for small organizations, which may avoid any lobbying activity in order not to have to mantain the necessary records.

Moreover, under some of the proposals, including last years House bill and a draft bill slated to be introduced by Senator Ribicoff, lobbying is defined to include communications with members of the Federal executive branch above a specified rank, usually defined as federal employees at the GS–15 or above. Organizations could not avoid the reporting and disclosure requirements, as they have been able to do in the past, simply by confining their federal level activities to administrative lobbying.

Hearings on the lobbying were held during April before the House Subcommittee on Administrative Law and Government Relations, which may attempt to report a bill in time for floor consideration this summer. No hearings have been held in the Senate, but the staff of the Senate Governmental Affairs Committee has prepared a bill which expected to be introduced in May with hearings this summer.

F. Miscellaneous Legislation

The public Participation in Government Proceedings Act, which was discussed at length in the April articles and the May Research Institute column has been reintroduced by Senators Kennedy and Mathias (S. 270) and by Representatives Rodino and Koch (H.R. 3361). The bill provides attorney fees and litigation costs:

to the prevailing party in actions against federal agencies and officers, and it provides financial support for citizens to participate in federal agency proceedings. The bill has been endorsed by the Department of Justice and by the American Bar Association, but is opposed by the Office of the Administrator of the United States Courts and by a number of industry groups. Hearings have been held on the bill before the Senate Judiciary Committee and the House Judiciary Subcommittee on Administrative Law. Under the Congressional Budget Act, the bills must clear both committees by May 15 if funding is to be available during fiscal 1978.

Senator Nelson has reintroduced a somewhat revised bill to improve the federal habeas corpus statute. (S. 1314.) There has been no activity on this bill in the Senate. However, Representative Kastenmeier has introduced the same bill on the House side (H.R. 5631), and there is some possibility that it will be considered along with other federal access legislation when the subcommittee holds hearings this summer.

There have been no legislative proposals in the standing area. A number of outside organizations, including the Public Citizen litigation group and the American Civil Liberties Union have been preparing bills to expand the scope of standing in federal cases, but to date neither proposal has been introduced in the Congress.

The Civil Rights Amendments Act of 1977, H.R. 3504, which has been introduced by Representatives Edwards and Drinan, would establish an Equal Opportunity Loan Fund and a Fair Housing Loan Fund to provide financial support for private actions to enforce titles VII and VIII of the Civil Rights Act of 1964. The Funds would be administered by the Department of the Treasury. The Funds would be authorized to make loans to any "aggrieved individual" who has alleged a violation of title VII or title VIII. The loans and interest would be repayable out of any costs allowed in the civil action and if no costs are allowed, or if they are insufficient to repay the loan, the uncompensated amount of the loan and interest would be cancelled. Each of the Funds would be limited to an aggregate of $1 million in outstanding loans at any time. H.R. 3504 also makes a number of important substantive and administrative changes in titles VII and VIII which may be of interest to legal services attorneys. Hearings have been scheduled before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee during the middle of May.

In the area of administrative reform, Representative Flowers and others have reintroduced the Administrative Rule Making Reform Act in substantially the same form as passed the House Judiciary Committee in 1976 (H.R. 116). As discussed in the first part of this article, the bill makes a number of improvements in the informal rulemaking procedures required by section 4 of the Administrative Procedure Act and also creates a new procedure for Congressional veto of rulemaking. No schedule has been set for consideration of these bills in the House Judiciary Committee, and parallel legislation has not been introduced in the Senate. A number of bills have also been introduced to provide judicial review of decisions of the Veterans Administration (H.R. 4898, 5380).

Finally, both Houses of Congress are working on proposals for an Agency for Consumer Advocacy, which will represent the interest of consumers in administrative proceedings before other agencies (S. 1261, H.R. 6118). On April 6, 1977, President Carter announced his support for the ACA, and hearings were begun in April with both Houses. Floor consideration is expected in June. There is some concern that passage of this Act will undermine efforts to pass the Public Participation in Government Proceedings Act—the Kennedy-Mathias bill. Conservatives may suggest, as Senator Allen did in the Judiciary Committee consideration of the Kennedy-Mathias, that there is no need for such private enforcement incentives and the Agency for Consumer Advocacy should first be given a chance to work.

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Legislative Proposals To Improve Access to Federal Courts and Administrative Agencies

(By Michael B. Trister)

INTRODUCTION

During the 1960's and the early 1970's, the federal courts were the forum of choice for poor and minority persons seeking to protect their federal rights.

Recently, however, access to the federal courts has been blocked by two parallel forces. First, greatly increased caseloads at all levels of the federal court system have seriously taxed judicial resources, making it difficult to obtain a full hearing without unacceptable delay. Moreover, heavy caseloads have forced the federal courts to adopt mechanisms for disposing of cases which do not afford parties the full attention of the courts and often do not result in carefully reasoned decisions.

Second, under the leadership of Chief Justice Burger, the Supreme Court has erected a number of procedural barriers to gaining access to the federal courts. The Court's rulings have been motivated at least partially by its concern for the heavy caseloads of the lower federal courts; but its opinions also demonstrate a fundamental hostility both to the underlying federal rights being asserted and to the notion that the federal courts should be the paramount vindicators of federal constitutional and statutory rights.[1]

The 1960's and early 1970's also saw the development of new mechanisms for providing citizen access to the federal administrative agencies. During this period, federal legislation greatly opened agency decision-making to public scrutiny, and a number of judicial decisions expanded citizens' rights to participate as full parties in agency proceedings. As a practical matter, however, access to administrative justice has been limited by the large resources which are necessary to monitor agency decision-making and to participate in a complex and protracted agency proceedings. Furthermore, the agency procedures themselves often do not adequately protect the public.

Future efforts to improve citizen access to judicial and administrative justice must be directed at the United States Congress. The Supreme Court has demonstrated that it is not willing to exercise leadership in this area, although it has recognized Congress's power to do so. Furthermore, many of the problems, such as those posed by heavy caseloads or by the lack of resources to support citizen participation in administrative proceedings, are only susceptible to legislative solutions.

This paper surveys a number of recent legislative proposals to improve access to federal judicial and administrative justice which should be of interest and concern to legal services attorneys and their clients.[2] Part I of the paper describes proposals to repeal or modify statutory and doctrinal barriers which often block the exercize of federal jurisdiction over cases to enforce federal constitutional and statutory rights. Part II describes legislation to remove financial barriers to judicial justice, primarily legislation granting attorney's fees in civil rights and public interest cases. Part III discusses a number of current proposals made in response to the increased federal court caseload. Although the proposals discussed in Part III are not restricted to the kinds of cases brought by legal services programs, they could have a major impact on the availability of a federal forum in such cases as well as the conditions under which legal services attorneys practice. Finally, Part IV addresses proposals to improve the ability of citizens to influence federal administrative decision-making.

I. LEGISLATION ELIMINATING DOCTRINAL AND STATUTORY LIMITATIONS ON THE EXERCISE OF FEDERAL JURISDICTION

A. Amount in controversy

28 U.S.C. § 1331 grants original jurisdiction to the United States District Courts over all civil actions arising under the Constitution, laws, or treaties of the United States where the amount in controversy, exclusive of interest and costs, exceeds $10,000. The purpose of the amount in controversy requirement

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[1] The Burger Court decisions limiting access to the Federal courts are discussed in Society of American Law Teachers, *Statement of the Board of Governors: Supreme Court Denial of Citizens Access to Federal Courts to Challenge Unconstitutional or Other Unlawful Actions: The Record of the Burger Court* (1976). *See also Hearing on the Causes of Popular Dissatisfaction with the Administration of Justice Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 94th Cong., 2d Sess. (1976).

[2] The proposals discussed deal with reform of the federal judicial and administrative machinery; they do not include proposals to improve the state and local courts and agencies, although that area is of fundamental importance to legal services attorneys and clients. In addition, the proposals relate only to federal civil jurisdiction. The proposed overhaul of the Federal Criminal Code is therefore beyond the scope of the paper, although it too is of great importance to the poor.

in federal question cases is to insure that federal courts do not "fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong., 2d Sess. 3103 (1958). However, the requirement often excludes cases involving important federal constitutional and statutory rights.

Difficulties in meeting the amount in controversy requirement have arisen as the result of two restrictive doctrines adopted by the federal courts. First, relying on dictum of Mr. Justice Stone in *Hague* v. *C.I.O.*, 307 U.S. 496 (1939),[3] many courts have held that federal rights or benefits that cannot be valued precisely in dollar terms do not satisfy minimum amount in controversy even though the rights or benefits at stake may be "invaluable" to the plaintiff.[4] *See e.g.*, *Hanna* v. *Drobnik*, 514 F.2d 393 (6th Cir. 1975) (illegal search under building inspection ordinance); *Winningham* v. *H.U.D.*, 512 F.2d 617 (5th Cir. 1975) (denial of federal rent subsidy); *Randall* v. *Goldmark*, 495 F.2d 356 (1st Cir. 1974) (reduction in welfare payments); *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir. 1970) (right to distribute leaflets on a military base); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964) (illegal FBI surveillance); *Yahr* v. *Resor*, 339 F. Supp 964 (E.D.N.C. 1972) (right to hold anti-war meeting on military base); *Post* v. *Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971) (closing of campus radio station in violation of first amendment). *See also* Wright, *The Federal Courts* § 34 (1970 *ed.*).

Second, the Supreme Court has held that cases involving claims by separate plaintiffs of less than $10,000 each may not be brought under 28 U.S.C. § 1331 even though the total of all the claims in issue in the same case far exceeds $10,000. *Snyder* v. *Harris*, 394 U.S. 332 (1969). Thus, many cases involving substantial federal issues are excluded from the federal courts because no single plaintiff has a separate claim worth more than $10,000.

Until recently, the amount in controversy requirement was a particular problem in cases brought against the federal government. Unless the district court found jurisdiction under 28 U.S.C. § 1361 or under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, for which the case law was mixed, plaintiffs ordinarily were forced to establish jurisdiction under 28 U.S.C. § 1331 by showing that the amount in controversy exceeded $10,000. Public Law 94–574 (October 27, 1976), however, repealed the amount in controversy requirement in any action under 28 U.S.C. § 1331 "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." The legislative history of this statute makes clear that its intent is to eliminate the amount in controversy requirement in all cases against the federal government, and the statutory language appears to accomplish this broad purpose.

After Public Law 94–574, there are three areas in which the amount in controversy requirement will continue to plague legal service attorneys. First, there are a small number of constitutional cases against states and local governments which do not fit within the scope of 42 U.S.C. § 1983 and which therefore cannot be brought under 28 U.S.C. § 1343, which has no amount in controversy requirement.[5] Second, there are a large number of cases involving federal statutory claims against state and local officials in which the substantive statute does not provide for judicial review at the behest of injured citizens. Under *Hagans* v. *Lavine*, 415 U.S. 528 (1974), federal jurisdiction may be obtained over these

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[3] In *Hague*, the Supreme Court held that jurisdiction existed under 28 U.S.C. § 1343(3) over a suit to enjoin city ordinances which restricted the plaintiffs' right to meet and to distribute literature. In his concurring opinion, Justice Stone stated that such rights could not satisfy the jurisdiction amount requirement of Section 1331:

> There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite.

307 U.S. at 529.

[4] Other courts have taken the opposite approach, holding that rights or benefits which are invaluable are inherently worth more than $10,000. *See e.g.*, *Spock* v. *David*, 469 F. 2d 1047 (3d Cir. 1972) (right to campaign on military base); *CCCO-Western Region* v. *Fellows*, 359 F. Supp. 644 (N.D. California 1972) (right to distribute leaflets); *Marquez* v. *Hardin*, 339 F. Supp. 1364 (N.D. Cal. 1969) (right to a free lunch); *Cortright* v. *Resor*, 325 F. Supp. 797 (S.D.NY. 1971) (exercise of first amendment rights).

[5] These cases include actions in which the defendant agencies are not "persons" within the meaning of section 1983 under the Supreme Court's restrictive interpretation of that statute in *Monroe* v. *Pape*, 365 U.S. 167 (1961), and *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973); and actions alleging unconstitutional actions by officials of the District of Columbia. *See District of Columbia* v. *Carter*, 409 U.S. 418 (1973). Although these claims generally may be brought directly under the constitution, *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), jurisdiction must be established under 28 U.S.C. § 1331.

statutory claims if there is a parallel constitutional claim against the same defendants. If there is no such constitutional claim, or if the court rules that the asserted constitutional claim is not substantial, it may not be possible in some courts to obtain jurisdiction over the statutory claims without meeting the amount in controversy requirement.[6] Third, jurisdiction over many federal claims against private defendants, particularly in the consumer and environmental areas, must be based on 28 U.S.C. § 1331.

As originally introduced in the Senate, S. 800, which became Public Law 94–574, eliminated the amount in controversy requirement for all federal question cases, regardless of whether the defendant was a private party, a state official or agency, or the federal government. The bill was narrowed to apply only to federal defendants after some committee members argued that tht broader provision might unduly increase the caseload of the federal courts. S. Rep. No. 94–996, 94th Cong., 2d Sess. 14 (1976). The Department of Justice supported the repeal of the amount in controversy requirement for federal defendants, but it too opposed the broader proposal because "we do not know the volume and the character of cases which this further extension would add to federal court dockets." *Id.* at 28.

The Senate Report carefully left room for future consideration of a broader amendment: "The Committee has concluded not that a broader elimination of the requirement is in appropriate or would result in any added workload for Federal courts, but simply that it was unnecessary to achieve the purposes of the bill." *id.* at 14. However, future legislative proposals will have to respond to the caseload problems raised by the Department of Justice and the Senate Committee last year.

B. Soverign immunity and the eleventh amendment

Public Law 95–574 also eliminated the soverign immunity defense in most cases brought against the federal government. The statute does not apply, however, to actions to obtain money damages, and it does not affect the defenses available to the states under the Eleventh Amendment.

Public Law 94–574 eliminates the need to respond to the government's often frivolous soverign immunity arguments in cases involving only injunctive relief. The bill's failure to waive federal soverign immunity inactions for money damages, however, may create problems in cases seeking injunctive remedies which are in the nature of damages, such as backpay or retroactive payments.

The Senate Report is not clear regarding the meaning of the term "money damages." The Report states that the purpose of the bill is to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." S. Rep. No. 94–996, 94th Cong., 2d Sess. 8 (1967). Also, the Report explains the retention of sovereign immunity in damage actions as being necessary to protect the restrictions on damage actions which are contained in the Federal Tort Claims Act, the Tucker Act, and other similar statutes.[7] *Id.* at 4, 10. It can therefore be argued that the exception for "money damages" should apply only to those cases in which the relief sought is otherwise available against the government under another federal statute. If this interpretation is not accepted by the courts, however, then the sovereign immunity defense may continue to be a problem in cases seeking equitable relief which is similar to damages, and further corrective legislation may be desirable.

The statute's failure to deal with the Eleventh Amendment is understandable in light of the complicated and far-reaching issues involved in that area. The

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[6] The Courts of Appeals for the Fourth and Fifth Circuits have ruled that jurisdiction over these claims exists under 28 U.S.C. § 1341(3) or (4), which do not require proof of a minimum amount in controversy. *Blue* v. *Craig*, 505 F. 2d 830 (4th Cir. 1974); *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The Court of Appeals for the Second Circuit has rejected this argument, *McCall* v. *Shapiro*, 416 F. 2d 246 (2d Cir. 1969); *Almenares* v. *Wyman*, 453 F. 2d 1075 (2d Cir. 1971); and the issue is unsettled in other courts. *See e.g.*, *Randall* v. *Goldmark*, 495 F. 2d 356 (1st Cir. 1974). The Supreme Court has avoided the issue when it was squarely presented in several recent cases.

[7] The Report lists the following types of cases in which the sovereign immunity defense was thought to have had undesirable results: "cases concerning agricultural regulations, governmental employment, tax investigations, postal rate matters, administration of labor legislation control of subversive activities, food and drug regulation." S. Rep. No. 9.–996, *Supra* at 8. Since these cases often involve backpay or retroactive money payments, it can be argued that the Committee did not intend to exclude such relief from the scope of the statute.

Supreme Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), however, makes this issue of paramount importance to legal services clients and attorneys.

By holding that federal courts are barred by the Eleventh Amendment from ordering retroactive payment of welfare benefits that are illegally withheld. *Edelman* removed any incentive for state welfare agencies to comply voluntarily with federal statutory and constitutional requirements. The impact of the case extends to cases involving many other types of state administered public benefit programs, including medicaid, unemployment compensation, supplemental security income and general assistance. Moreover, the Eleventh Amendment may also be held to prevent effective relief in cases brought to improve conditions within prisons, mental hospitals and other state institutions. Orders in these cases often require states to expend large amounts of money to make structural and programmatic improvements that might be thought to interfere with traditional state prerogaives. *Edelman's* acceptance of prospective injunctive relief against the state welfare agency may well be distinguishable from such orders; and since the Supreme Court has yet to rule on any case requiring broad relief in an institutional case, this issue cannot be regarded as settled.

Before any effort is made to obtain remedial legislation in the Eleventh Amendment area, a number of doctrinal and tactical issues must be considered. For example, Congress' power to abrogate the states' immunity is not clear. The Supreme Court ruled last term that Congress has power under section 5 of the Fourteenth Amendment to abrogate state immunity under the Eleventh Amendment. *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666 (1976); but the extent of Congressional authority to abrogate the Eleventh Amendment by exercising its power under the commerce and general welfare clauses of the Constitution also is not settled, compare: *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), with *Employees of the Missouri Department of Public Health and Welfare* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973). Moreover, the Supreme Court last term ruled that Congressional action under the commerce clause may not interfere with some state activites. *National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976).

The tactical problems raised by Eleventh Amendment remedial legislation are also important. When Congress has previously abrogated state immunity, it has done so as part of specific substantive legislation, and the effect on the Eleventh Amendment has been limited to actions brought under those statutes. If this approach is followed in the future, however, it will be virtually impossible to obtain legislation in a number of critical areas, such as welfare, medicaid, and unemployment compensation, because the committees, especially in the Senate, with jurisdiction over these areas will almost certainly be hostile.[8] It would be far preferable therefore for reform legislation to apply to a broad range of federal rights; but the open-ended nature of such a bill might create additional doctrinal problems.

C. Abstention, comity and exhaustion of State remedies

Cases challenging unconstitutional or illegal actions by state and local agencies are increasingly faced with three judge-made barriers to the exercise of federal jurisdiction. The first of these doctrines, abstention, has traditionally been applied where a challenged state statute is sufficiently unclear that resolution of the ambiguity by the state courts might avoid or substantially modify the constitutional question presented to the federal court. *See e.g.*, *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959); *Bellotti* v. *Baird*, 96 S. Ct. 2857 (1976). The federal court retains jurisdiction over the case, but no action is taken while the state courts decide the state law questions. Recently, however, the Supreme Court has begun to apply the abstention doctrine in cases which do not involve a direct challenge to an ambiguous state statute. Instead, it has been applied to the much larger category of cases in whcih alternative state law claims exist which

[8] In 1974, Senator Taft introduced a bill (S. 3937) which required states to waive their immunity under the Eleventh Amendment in cases brought to enforce the requirements of the Social Security Act as a condition of receiving federal assistance under that Act. The bill was referred to the Senate Finance Committee, but no action was ever taken. A more narrow provision, which required the states to waive their immunity only in cases brought by certain medicaid providers, was enacted by Public Law 94-182 (December 31, 1975). However, the states complained to the Finance Committee that the statute would cost them large amounts of money, and within a few months the provision was repealed. Public Law 94-552 (October 18, 1976).

might make decision of the federal question unnecessary: *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *Harris County Comm'rs Court* v. *Moore*, 419 U.S. 88 (1975); *Boehning* v. *Indiana State Employee's Assn.*, 423 U.S. 6 (1975).[9]

The doctrine of comity bars the federal district courts from hearing cases in which the relief sought would interfere with pending state criminal proceedings. In *Huffman* v. *Pursue Ltd.*, 420 U.S. 592 (1975), the Supreme Court held that the doctrine also applies to pending state civil proceedings, such as nuisance abatement actions, which are initiated by the state and are related to the state's criminal laws. Furthermore, *Huffman* held that the plaintiff's failure to appeal the decision in the state civil matter to the state supreme court permanently precluded the plaintiff from raising its federal constitutional claims in federal court. The case thus strongly suggests that plaintiffs must raise all of the federal claims in the state courts when a state proceeding is pending, with the possibility that the state court's determination of these federal issues might be *res judicata* in any subsequent federal proceeding.

If *Huffman* is extended to cover all state civil or administrative proceedings, as appears likely, it could bar a large number of federal actions that have been brought by legal services attorneys in federal courts. Actions challenging the standards applied in state dependency and neglect cases could be barred if the state adjudication has already begun, as is often the case. Similarly, actions challenging state civil commitment standards or procedures may also run afoul of the comity doctrine if the commitment proceeding has already begun. *Cf. Lessard* v. *Schmidt*, 413 F. Supp. 1318 (E.D. Wisc. 1976). Actions to enjoin state garnishment and other civil prejudgment procedures which often injure the poor may also be barred. *See Finley* v. *Hernandez*, 405 F. Supp. 757 (N.D. Ill. 1976), *prob. jur. noted*, 44 U.S.L.W. 3702 (U.S. June 7, 1976) (No. 75–1407).[10]

The third judicially created barrier, the doctrine of exhaustion of administrative remedies, has traditionally not been applied in cases brought under 42 U.S.C. § 1983. *See McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Damico* v. *California*, 389 U.S. 416 (1967). However, the Supreme Court may be getting ready to require that plaintiffs exhaust available state administrative remedies at least in some types of cases. *See Gibson* v. *Berryhill*, 411 U.S. 564 (1973; *Burrell* v. *McCray*, 98 S. Ct. 2640 (1976).[11]

There has been no legislative response to the problems created by the expanded use of the doctrines of abstention and comity. However, two identical bills (H.R. 12008 and H.R. 12230) were introduced in 1976 by Representatives Railsback and Rodino which required exhaustion of state administrative remedies in actions brought under 42 U.S.C. § 1983 by persons who are involuntarily confined in any state institution, including prisons, jails, mental hospitals, institutions for the mentally retarded and nursing homes. Under these bills, exhaustion would not be required if the state remedies are not "plain, spedy and efficient" or if there are "circumstances rendering the administrative remedy inffective to protect the [plaintiff's] rights." However, this language would not do much to protect plaintiff's in light of the increasing impatience of the federal courts with prisoner and related cases. In addition, the bills did not state whether plaintiffs would have to seek judicial review of administrative proceedings in state court and, if so, whether the state court's determination of any federal constitutional claims would be *res judicata* in subsequent federal actions involving the same claims.

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[9] In *Boehning*, the plaintiff had been dismissed from her job with the Indiana State Highway Commission without a pretermination hearing. She brought suit under section 1983 for damages and injunctive relief on the ground that her procedural due process rights had been violated. The district court abstained, and the Supreme Court affirmed in a brief *per curiam* decision holding that abstention was proper because the Indiana Administrative Adjudication Act might "fairly be read" to give the plaintiff a hearing under state law.

[10] In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), the Supreme Court held that an action to enjoin a Connecticut sheriff from enforcing a prejudgment garnishment statute was not barred by principals of comity. However, *Lynch* was decided before *Huffman*. Moreover, Justice White, Burger and Blackmun dissented on this point, and Justices Powell and Rhenquist did not participate in the decision.

[11] In *Burrell* v. *McCray*, the plaintiffs were three state prisoners who alleged numerous violations of their constitutional rights. The Court of Appeals for the Fourth Circuit sitting *en banc* felt itself bound by McNeese and held that exhaustion of internal prison remedies was not required. 516 F. 2d 357 (1975). The Supreme Court granted *certiorari* to decide this issue. 423 U.S. 923 (1975). However, after full briefing and oral argument the Court dismissed the writ as improvidently granted. Four Justices (Stevens, White, Brennan and Marshall) dissented from the dismissal and indicated that they would have affirmed the court of appeals. However, there apparently was no fifth vote for affirmance.

H.R. 12008 and H.R. 12230 also contained authority for the Attorney General to bring suits to enforce the constitutional rights of confined persons, an authority which has been questioned under present law by some courts.[12] Prisoner and mental retardation advocates, who support this authority, have been working with congressional staff to insure that when the bills are reintroduced in the 95th Congress they do not contain the exhaustion requirement. It is possible, of course, that the exhaustion requirement could be added in committee or on the floor.

D. Standing to sue

From 1968 to 1972, the Supreme Court adopted a liberal view of standing which greatly expanded the kinds of injuries which could be protected by litigation in the federal courts. *See e.g., Flast* v. *Cohen*, 382 U.S. 83 (1968); *Association of Data Processing Service Organizations*, v. *Camp*, 397 U.S. 150 (1970); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Since 1972, however, the court has made the standing requirement into a serious obstacle to the litigation of federal claims by aggrieved persons.[13] At the same time the court has made it clear that the so-called prudential elements of standing may be eliminated by Congress, and that the constitutional requirement of injury-in-fact may be satisfied by the deprivation of a stautory right or entitlement, even where the plaintiff would not have standing in the absence of the statute. *Warth* v. *Seldin*, 422 U.S. 490, 514 (1975); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972).

There has been only one attempt to draft legislation which would create standing to sue in a broad category of cases. Under S. 3296, which was introduced by Senator Kennedy in 1976, the Administrative Procedure Act would be amended to provide that any "interested person" may bring suit to challenge any Federal agency action. Interested persons include any citizen or resident of the United States; any domestic partnership, corporation, association or other organization whose rights may be affected by, or whose organizational purposes relate to, the agency action; and any state or subdivision thereof asserting its own rights or the rights of its citizens or residents. In addition, under the bill, 28 U.S.C. § 1340 would be amended to provide that any taxpayer shall be considered to have an interest in insuring that funds from the Treasury are not expended for unlawful purposes and may maintain an action which seeks to prevent, terminate, or recover an expenditure of funds from the Treasury on the ground that the expenditure is in violation of a law of the United States.[14]

During hearings held in May, 1976, the Department of Justice strongly opposed S. 3296 on the grounds that the bill is not necessary and that it would open the federal courts to a flood of frivolous lawsuits against the federal government. Although it has not been shown that the standing doctrine actually deters frivolous actions, instead of presenting a technical barrier to many substantial claims, the argument that S. 3296 is too broad has caused potential supporters to look for a more narrowly drawn standing proposal. However, no alternative has been proposed which would sufficiently expand standing to challenge federal agency action.

S. 3296 did not deal with the problem of standing in cases brought against state and local officials. Where cases are brought to enforce federal statutory requirements, Congress would seem to have the power to authorize suits by any interested person. In constitutional cases, however, Congressional power to create standing is more difficult to rationalize. Rather than proposing a comprehensive bill in this area, it might therefore be better to deal with standing only

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[12] An earlier version of the bill (H.R. 2323) introduced by Representative Kastenmeier and twenty-one other liberal members only contained the authority for the Attorney General. Apparently, the exhaustion requirement was added in the Railsback and Rodino bills at the request of the Justice Department.

[13] These decisions include *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Laird* v. *Tatum*, 408 U.S. 1 (1972); *Linda R.* v. *Richard O.*, 410 U.S. 614 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 96 S. Ct. 1917 (1976).

[14] Persons who were parties to or who otherwise participated in an agency proceeding would be entitled to immediate judicial review of any agency action resulting from that proceeding. Otherwise, interested persons would not be entitled to seek judicial review until sixty days after they had notified the agency of the alleged illegality. Notice would not be required if it would be "futile" or if "prior court action is necessary in order to obtain meaningful judicial review of the agency action complained of." Similar notice requirements would apply to taxpayer suits.

in those areas where the doctrine has created special difficulty. To date no review of the cases has been undertaken to identify these areas and to propose specific remedial legislation.

E. Scope of section 1983

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, prohibits the denial of any rights, privileges or immunities secured by the Constitution and laws of the United States by any "person" acting under color of state law. The Supreme Court has narrowed the scope of section 1983 by holding that local government units are not "persons" who can be sued under the statute, *Monroe* v. *Pope*, 365 U.S. 167 (1961); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). During the 1975 Term, the court extended the effect of these rulings by holding that federal courts may not decide state law damage claims against municipalities even where there is a claim under section 1983 against municipal officers arising out of the same events. *Aldinger v. Howard*, 96 S.Ct. 2413 (1976).

Monroe and its progeny seriously undercut the usefulness of damage actions to deter the violation of constiutional rights by allowing local governmental agencies to escape responsibility for the acts of their officials. Agencies thus have no incentive to exercise care in selecting police officers and other officials or to supervise and train their employees to respect citizens' constitutional rights.

Until recently, *Monroe's* impact on actions for injunctive relief was slight because the same relief could be obtained against the named officials of the offending local agency. A recent *en banc* decision of the Court of Appeals for the Fifth Circuit suggests, however, that injunctive relief may not be available under section 1983 at least where the injunction will run against the city's treasury. *Muzquiz* v. *City of San Antonio*, 528 F.2d 499 (5th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3057 (U.S. May 27, 1976) (No. 75–1723). Furthermore, in *Rizzo* v. *Goods*, 96 S. Cit. 598 (1976), the Supreme Court held that injunctive relief is not available under section 1983 against city officials who were not directly responsible for the challenged conduct. If these decisions are given their full scope, section 1983 may be drastically curtailed as the principal source of claims to redress illegal official conduct.

With the exception of one very narrow bill,[15] there have been no legislative proposals in this area.

F. Official immunity

Over the past decade, the Supreme Court has severly limited the availability of money damages against state and local officials who are sued in their individual capacities for alleged violation of constitutional rights. The court has held that judges. *Pierson* v. *Ray*, 386 U.S. 547 (1967), legislators, *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), and prosecutors performing judicially related functions, *Imbler* v. *Pachtman*, 96 S. Ct. 984 (1976), are absolutely immune from suit for damages under 42 U.S.C. § 1983 even though they have acted with malice in violating the plaintiff's constitutional rights. The court has further held that executive officers are immune from suits for damages if they acted with a reasonably held good faith belief that their action was lawful. *Pierson* v. *Ray*, *supra* at 555 (police officers); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (Governor, president of the state university, members and officers of the National Guard); *Wood* v. *Strickland*, 420 U.S. 308 (1975) (school board members).

Except in the most aggregious cases, these decisions remove the threat of damages as a deterrent to unconstitutional behavior by local officials. The rational. for the decisions is that if public officials must defend against numerous lawsuits by citizens who are not happy with their decisions, they will be inhibited in carrying out their duties or they will become unwilling to serve altogether. These arguments are not persuasive, however, where public officials are defended in court by publicly supported counsel and where they are indemnified for any damages which they are ordered to pay.

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[15] H.R. 2323, which was introduced by Rep. Kastenmeier on January 29, 1975, provided: Every person including a unit of government, who, under color of law, causes any inmate to be deprived of any rights, privileges, or immunities secured by the Constitution and laws of the United States shall be liable to the inmate in an action for redress, including an application for a permanent or temporary injunction, restraining order, or other order for preventing relief.

By defining "person" to include a unit of government, the bill avoids the decisions in *Monroe* and *Bruno*. However, the bill was limited to cases brought on behalf of persons confined in a state or local correctional facility or jail.

The elimination of official immunity would not be important if governmental units were liable for damages under section 1983 for the unconstitutional acts of their officials. (See Part I(E), *supra.*) Even if section 1983 were amended to cover governmental units, however, state agencies might still be immune from actions for damages under the Eleventh Amendment. One possible legislative solution would be to condition official immunity for individual state official on the states' waiver of their immunity under the Eleventh Amendment. Under this proposal, if a state elected not to waive its immunity, its officials would not be entitled to assert their own immunity when they are sued in heir individual capacities. To date no federal legislation has been proposed which deals with this area.

G. Class actions

Legislative proposals to reform the class action device have focused on two problem areas created by recent decisions of the Supreme Court. The first area involves the Court's refusal to allow the members of a class to aggregate their claims in order to reach the amount in controversy necessary for federal jurisdiction under 28 U.S.C. § 1331. The second area concerns the notice requirements imposed on a plaintiff who brings a class action under subdivision (b)(3) of Rule 23 of the Federal Rules of Civil Procedure.

1. *Aggregation, In Synder* v. *Harris*, 394 U.S. 332 (1969), the Supreme Court held that unless the claims of a class are common and undivided the individual claims of the classmembers may not be aggregated to determine whether the amount in controversy requirement has been met. In *Zahn* v. *International Paper Co.*, 411 U.S. 291 (1973), the Court held that each member of a proposed class must satisfy the amount in controversy requirement independently. The effect of these two cases has been to bar many suits involving substantial federal rights, especially in the area of consumer fraud.

H.R. 673, the Consumer Class Action Act, which was introduced in 1975 by Representative Murphy, dealt with the aggregation problem by repealing the amount in controversy requirement in any civil suit to redress "an act in defraud of consumers which affect commerce."[16] A different solution was proposed in H.R. 2078, the Consumer Class Action Act of 1975, which raised the amount in controversy requirement for class actions to remedy unfair consumer practices to $25,000, but permitted aggregation of all claims, except claims of less than $10.[17]

2. *Notice.* In *Eisen* v. *Carlisle and Jacqueline*, 417 U.S. 156 (1974), the Supreme Court held that notice of the commencement of a class action must be given to each identifiable member of a class even though the cost of such notice is prohibitive. The Court further ruled that the cost of giving notice may not be assigned to the defendant or apportioned between the plaintiff and the defendant, even where the district court has found that the plaintiff is likely to succeed on the merits. *Eisen* was decided under Rule 23(c)(2) of the Federal Rules of Civil Procedure, which applies only to class actions brought under Rule 23(b)(3) and not to class actions brought under Rule 23(b)(1) or (b)(2). Nevertheless, *Eisen* has had a significant negative effect, particularly in the consumer area.

H.R. 2078 would have overruled *Eisen* by providing that: Reasonable notice of the commencement of a class action brought under this Act shall be given to the members of the class in such manner as the court directs. In determining the method of notice, the court shall consider both the interest of the represented members in knowing of the pendence of the suit and their interest in having the action go forward and their claims presented to the court without receiving actual notice of the suit.

Furthermore, under the bill, the district court could order the defendant to bear all or part of the cost of notice; and where the cost of the notice, the resources of the parties and the stake of the classmembers make individual notice inappropriate, the court could order that notice be given other than by individual

[16] An act in defraud of consumers is defined as any unfair or deceptive act or practice which is unlawful within the meaning of section 5(a)(1) of the Federal Trade Commission Act or any act which gives rise to a civil action by a consumer under state statutory or decisional law for the benefit of consumers.

[17] An unfair consumer practice is defined as any material statement which has the capacity, tendency or effect of misleading or deceiving consumers, the use or threat of physical force or the undue harassment or coercion of consumers, the wrongful failure to return deposits or advance payments for goods not delivered or services not rendered, or any other action prohibited by the Commission as intended to constitute a basis of civil liability.

notice to each classmember. As with the aggregation provision, the notice rules contained in H.R. 2078 apply only to consumer class actions. H.R. 673 did not deal with the notice problem at all.

Both of the consumer class action bills were referred to the House Committee on Interstate and Foreign Commerce, which took no action on them during the last session. It is expected that similar legislation will be introduced in the 95th Congress. In addition, Representative Koch is preparing legislation which is patterned on the consumer bills but is broader in scope. A preliminary draft of the Koch proposal would amend sections 1331 (federal question) and 1332 (diversity jurisdiction) of the Judicial Code to provide that in determining the amount in controversy "the district courts shall aggregate the claims of all members of the class bringing the action." The Koch draft would also create a new section 1657 of the Judicial Code which provides that reasonable notice of the commencement of *all* class actions must be given to the classmembers, but that the method of notice as well as which party must pay shall be within the discretion of the district court.

By going beyond consumer class actions, the Koch proposal reaches a number of important categories of cases which are not aided by the consumer bills. Moreover, because it is drafted as an amendment to the Judicial Code, the bill will be sent to the House Judiciary Committee, where it may receive a more sympathetic hearing than the consumer bills received in the last session. On the other hand, the Koch draft still retains the amount in controversy requirement, and it will therefore have no impact on federal question cases involving constitutional and statutory rights which cannot be evaluated in monetary terms. (See Part I (A), *supra*.) Another major defect, which may be deleted before the bill is introduced, is that the notice requirements apply to all class actions, not just to those brought under Rule 23(b)(3). To this extent, the bill creates obligations which are not required under present law. Finally, by allowing aggregation in diversity cases, the Koch draft expands federal jurisdiction in the one area in which federal involvement is least justified.

H. Habeas Corpus

The Burger Court has often made clear its desire to restrict the power of federal courts to review state criminal proceedings under the federal *habeas corpus* statute. During the 1975 Term, it took the first major steps in this direction. In *Francis* v. *Henderson*, 96 S. Ct. 1708 (1976), the Court held that a state prisoner who failed to make a timely challenge to the racial composition of the grand jury that indicted him could not raise that claim in his federal *habeas corpus* hearing. In *Stone* v. *Powell*, 96 S. Ct. 3037 (1976), the Court held that a state prisoner may not be granted federal habeas relief on the ground that illegally seized evidence was used against him at trial if he received a full and fair opportunity to litigate that issue before the state court.

On October 1, 1976, Senator Gaylord Nelson introduced legislation, S. 3886, to reverse the decisions in *Francis* and *Stone* and to return to the standards announced in *Fay* v. *Noia*, 372 U.S. 391 (1963). The bill would amend 28 U.S.C. § 2241, *et seq.*, to provide (1) that a federal *habeas corpus* petition may be brought despite a procedural default in the state court, unless the petitioner has bypassed state procedures; (2) that federal prisoners may petition under section 2255 without regard to prior procedural defaults, unless a deliberate by-pass was involved; and (3) that any constitutional claim which could be considered on direct review may also be asserted in a petition for *habeas corpus*.

S. 3886 was introduced too late in the session for any action to be taken. The bill will probably be reintroduced by Senators Nelson and Mathias early in the 95th Congress.

II. LEGISLATION PROVIDING FINANCIAL SUPPORT FOR PUBLIC INTEREST LITIGATION

A. Attorney's fees

During 1976, Congress took an important step toward providing financial support for public interest litigation.[18] Under the Civil Rights Attorney's Fee Awards

[18] The provision of federally financed legal assistance to the indigent through the Legal Services Corporation and its predecessor agency was the first major step towards removing financial barriers to access to justice in the civil area. Federal funds for legal services are also available through a number of other special purpose programs, such as Title XX of the Social Security Act, the Older Americans Act, Model Cities, CETA, general revenue sharing, Action, and LEAA. Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* 262–266 (1976). Continuation and expansion of these programs is vital.

Act of 1976, Pub. L. 94–559 (October 19, 1976), courts may allow reasonable attorney's fees to the prevailing party in any action brought to enforce 42 U.S.C. sections 1981, 1982, 1983, 1985 and 1986,[19] Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964.[20] The Act was modeled after the attorney's fees provisions of Titles II and VII of the Civil Rights Act of 1964 as well as a number of other civil rights laws, and the legislative history makes clear that Congress intends the liberal standards developed by the courts under these statutes to apply to the new Act. S. Rep. No. 94–1011, 94th Cong., 2d Sess. 4 (1976); H.R. Rep. No 94–1558, 94th Cong. 2d Sess. 6–7 (1976). Under these standards, successful plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," *Newman* v. *Piggy Park Enterprises, Inc.* 390 U.S. 400, 402 (1968); *see also Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973); but prevailing defendants should not recover fees unless the case was vexatious, frivolous, or brought for harassment purposes. *See Carrion* v. *Yeshiva University*, 535 F. 2d 722 (2d Cir. 1976); *Wright* v. *Stone Container Corporation*, 524 F. 2d 1058 (8th Cir. 1975); *United States Steel Corporation* v. *United States*, 519 F. 2d 359 (3d Cir. 1975).

If the Civil Rights Attorney's Fees Act is to benefit legal services programs, it is essential both that courts not refuse to make awards merely because legal services clients have no obligations to pay their attorneys and that the courts value the services provided by legal services attorneys comparably to services rendered by private counsel. This has generally been the approach under the other civil rights statutes. *See e.g., Miller* v. *Amusement Enterprises, Inc.*, 426 F. 2d 534 (5th Cir. 1970).

The Committee Reports state that attorney's fees are to be available under the Act against governmental as well as private defendants. S. Rep. No. 94–1011, *supra* at 5; H.R. Rep. No. 94–1558, *supra* at 7. However, there may be a number of instances in which fees will not be available under the Act against governmental units or officials. First, certain local agencies do not fit within 42 U.S.C. § 1983. (See Part I (E), *supra*). Fees therefore may not be available even where relief is obtained. Second, if the Supreme Court ultimately holds that actions to enforce federal statutory rights do not fall under section 1983 or, alternatively, that Congress may not exercise its authority under the Fourteenth Amendment to abrogate the states' immunity in these cases, fees may not be available in a large number of important cases brought by legal services attorneys.[21] *See Stanton* v. *Bond*, 97 S. Ct. 50 (1976) (fee award in action to enforce federal medicaid requirements remanded for reconsideration in light of Pub. L. 94–559.) Third, fees probably may not be awarded under the Act against the United States or one of

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[19] Sections 1981 and 1982 derive from section 1 of the Civil Rights Act of 1866. Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. It has been construed by the Supreme Court of the United States to bar racially discriminatory admissions policies by private non-sectarian schools, *Runyan* v. *McCrary*, 96 S. Ct. 2586 (1976), and private racially discriminatory employment practices. *McDonald* v. *Santa Fe Train Transportation Co.*, 96 S. Ct. 2574 (1976); *Johnson* v. *Railway Agency*, 421 U.S. 454 (1975). *See also Tillman* v. *Wheaton-Haven Recreation Assn., Inc.* 410 U.S. 431 (1973) (section 1981 may reach racially discriminatory guest policies by private swimming club.) The lower federal courts have construed section 1981 to prohibit discrimination in contracts for admission to privately-owned recreational facilities, *Olzman* v. *Lake Hills Swim Club, Inc.*, 495 F. 2d 1333 (2d Cir. 1974), in contracts for medical care, *United States* v. *Medical Society*, 298 F. Supp. 145 (D.S.C. 1969), and in contracts for insurance, *Sims* v. *Order of United Comm. Travelers*, 343 F. Supp. 112 (D. Mass. 1972). Section 1982 prohibits private racial discrimination in the sale or rental of real or personal property. *Jones* v. *Alfred H. Meyer Co.*, 393 U.S. 409 (1968).

Section 1983 prohibits the denial under color of state law of any rights, privileges or immunities secured by the Constitution and laws of the United States. It is the principal source of federal claims for damages and injunctive relief against state and local officials. Section 1985 prohibits private conspiracies to violate civil rights. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). Section 1986 creates a claim for damages for the knowing failure or refusal to prevent a conspiracy which violates section 1985.

[20] Title IX, 20 U.S.C. § 1681, prohibits discrimination on the basis of sex in federally assisted educational programs or activities. Title VI, 42 U.S.C. § 2000d, prohibits discrimination on the bases of race and national origin in all federally assisted programs and activities. Title VI has been held to give rise to a private right of action, *Lau* v. *Nichols*, 414 U.S. 563 (1974); but it is not yet clear whether Title IX may be enforced privately. See *Cannon* v. *University of Chicago*, F. 2d (7th Cir. 1976), *petition for rehearing en banc granted.*

[21] Congress made it clear that it was acting under section 5 of the Fourteenth Amendment in making state defendants liable for attorney's fees. S. Rep. No. 94–1011, *supra* at 5; H.R. Rep. No. 94–1558, *supra* at 7 n. 14; 122 Cong. Rec. S. 17052–53 (daily ed. Sept. 27, 1976); 122 Cong. Rec. H12160 (daily ed. October 1, 1976). This should be sufficient to override the states' immunity under the Eleventh Amendment at least in cases involving constitutional claims. *Fitzpatrick* v. *Bitzer*, 96 S. Ct. 2666 (1976).

its agencies or officials, although the language of the Act is broad enough to reach such cases.[22]

Even if the Civil Rights Attorney's Fees Act is construed to include cases brought against the federal government, which is not likely, the Act will still not reach most cases brought by legal services attorneys against federal agencies, since they do not arise under one of the civil rights laws covered under the Act. The general rule against awarding attorneys' fees against the United States will therefore continue to apply. 28 U.S.C. § 2412. During the last session of Congress, Senator Kennedy introduced a bill, S. 2715, under which attorney's fees and other litigation expenses, including expert fees, could be awarded against the United States in any civil action or other proceeding for judicial review of agency action brought under the Administrative Procedure Act.[23] To be eligible under S. 2715, a claimant would have to meet three conditions: First, the claimant must receive the relief sought in substantial measure, either by order of the Court or by voluntary action of the agency. Second, the court must find that the action "served an important public purpose." Third, the economic interest of the claimant must be small in comparison to the costs of effective participation *or* the claimant must demonstrate to the court that he or she does not have sufficient resources available to participate effectively in the action in he absence of an award.

The third test for eligibility under S. 2715 raises a number of questions. The Committee Report issued when the bill was approved by the Senate Judiciary Committee states that the "economic interest" test is intended ot prevent utilization of the provisions of this Act by groups whose members may stand to gain significant economic benefits through participation in a particular proceeding." S. Rep. No. 94–863, 94th Cong., 2d Sess. 20 (1976). However, the report also states that the provision is not intended to preclude a group or organization from receiving a fee "simply because a few of its members may have some economic interest in a proceeding, particularly if that interest cannot be said to have motivated those members' involvement in that group or organization." *Id.* at 21. It is thus not clear whether a welfare rights organization or tenant's organization which successfully sues the federal government would be barred by the "economic interest" test because its members benefit substantially from the result.

The second prong of th third test is regarded as an alternative to the economic test, but it is equally vague. The Report states: To determine whether a person seeking an award of fees and costs under this Act does not have sufficient resources available to participate effectively in a proceeding in the absence of such an award, [the court] should look to such objective indicators as the size of the person's advocacy budget and the number of other proceedings or actions in which it is involved. It is not intended that a person must deplete its resources in order to qualify for an award under this Act.

Id. at 20. Elsewhere, the Report states that courts should consider whether the persons may utilize business tax deductions to offset their litigation expenses and whether it is likely that the claimant would seek to participate whether or not compensation was available. *Id.* at 20. The Report does not discuss whether a group or individual who is represented by a legal services program without charge is regarded as having sufficient resources without resort to fees available under the Act. In the absence of explicit legislative history to the contrary, however, the courts could very possible conclude that the bill was not intended to reach cases brought by legal services programs.

S. 2715 was reported by the full Judiciary Committee on May 13, 1976. It was never brought up for a vote on the floor, however, because of the threat of a filibuster by the bill's opponents. The Administrative Practices Subcommittee of the Senate Judiciary Committee will hold hearings on a new bill very early in the 95th Congress. An identical bill (H.R. 13901) was introduced in the House during the last session but it was never acted upon in committee. Representatives Koch and Rodino intend to reintroduce the bill this year, and it is likely that hearings will be held on it during 1977.

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B. Litigation costs

28 U.S.C. § 1915 provides that any federal court may authorize the prosecution or defense of any civil action or appeal without prepayment of fees and costs or security if the party can demonstrate that he or she is unable to pay the costs or give security. Although the actual practice varies a great deal, at the trial level the statute has been interpreted to cover only the filing fee, marshal's fees, and the cost of printing the transcript if an appeal is taken. The statute does not cover the costs of discovery, the costs of printing the trial transcript for any purpose other than appeal, such as to prepare findings of fact and conclusions of law, the costs of notice, or witness fees. In addition, there is considerable variance among the federal courts in the standards used to determine indigence. No legislation has been proposed to amend section 1915 to deal with these difficulties.

III. LEGISLATION RELATING TO THE FEDERAL CASELOAD PROBLEM

A. Reorganization of the fifth and ninth circuits

Acting at the request of the Judicial Conference of the United States and the Federal Judicial Center, Congress in 1972 Created the Commission on Revision of the Federal Court Appellate System, the so-called Hruska Commission, to look into the problem of increasing caseloads in the federal appellate courts. Pub. L. 92-489 (October 13, 1972). The members of the Commission included Roger Cramton, Emmanuel Celler, Judge J. Edward Lumbard, Bernard Segal and Herbert Wechsler. On December 18, 1973, the Commission recommended to Congress that the Courts of Appeals for the Fifth and Ninth Circuits be realigned to create new Eleventh and Twelfth Circuits.[24] Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations For Change* (1973) reprinted at 62 F.R.D. 223.

Bills embodying the Commission's recommendations were not acted upon in the 93rd Congress. During the 94th Congress, two bills were reported by the Senate Committee on the Judiciary, but neither was brought to a vote on the floor. Parallel legislation was introduced in the House of Representatives, but no committee action was taken.

The Senate Judiciary Committee rejected the Hruska Commission's recommendation to create two new circuits because it believed that the Commission's approach would soon result in a large number of circuits with only one or two states. S. Rep. No. 94-513, 94th Cong., 2d Sess. 10-11 (1976); S. Rep. No. 94-1227, 94th Cong., 2d Sess. 20-21 (1976). Instead, the Committee retained the present jurisdiction of both circuits, but created two separate divisions within each circuit.[25] Under S. 2752, the Court of Appeals for the Fifth Circuit would be split into an Eastern Division, serving Florida, Georgia, Alabama, Mississippi and the Canal Zone, and a Western Division, serving Louisiana and Texas. Under S. 729, the Ninth Circuit would be divided into a Northern Division, serving Alaska, the Eastern and Northern Districts of California, Hawaii, Idaho, Montana, Oregon, Washington and Guam, and a Southern Division, serving Arizona, the Central and Southern Districts of California, and Nevada. Additional judgeships would be created for each division to bring the total in the Fifth Circuit to 23 and the total in the Ninth Circuit to 20. Active judges sitting on these courts would be assigned to the division in which they resided at the time of their appointment. The divisions would take effect for all future cases and for pending cases in which oral argument has not been heard or the case has not been submitted for decision.

Among the many technical changes required by these bills, the most important concerns *en banc* proceedings. In the Fifth Circuit, cases could be heard by the division *or* the court sitting *en banc* by the vote of a majority of the active mem-

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[24] The Commmission recommended that there be a new Fifth Circuit consisting of Florida, Georgia and Alabama; a new Eleventh Circuit consisting of Mississippi, Louisiana, Texas and the Canal Zone; a new Ninth Circuit consisting of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California; and a new Twelfth Circuit consisting of the Southern and Central Districts of California, Arizona and Neveda. 62 F.R.D. at 232, 235.

[25] The approach taken by Congress in dealing with the Fifth and Ninth Circuits is likely to become the model for dealing with other circuits in the future. The Second, Third and Sixth Circuits may also be candidates for division if their caseloads continue to increase at their current rates.

bers of the division or the court. The bill leaves open, apparently for local rule, whether a case must be heard first by the judges of a division before it could be heard by the entire court, or whether an *en banc* hearing before the division would preclude *en banc* consideration before the full court.

In the Ninth Circuit, the problem would be dealt with somewhat differently, in order to accommodate the special problems created by the division of California into two divisions. A case heard by a panel (three judges) of a division could be reviewed by the full division or by the full court sitting *en banc*. In addition, a joint *en banc* panel, consisting of the four most senior judges in regular active service in each division plus the senior chief judge sitting *ex officio*, could be convened by petition of a party or by certification of a division of the circuit. The joint *en banc* panel would have jurisdiction over three types of cases: (1) any decision by a division which is in conflict with a decision by the other division which affects the validity, construction or application of any statute or administrative order, rule or regulation, state or federal, which affects personal or property rights in the same state; (2) any decision by a division or a panel involving as a question of first impression or of primary importance a determination of the validity, construction or application of any statute or administrative order, rule or regulation, where it is shown that a prompt review is necessary to avoid uncertainty and to promote uniform application of law within a single state or within the several states of the circuit; and (3) by writ of certiorari, any decision by a district court or by a panel of a division of the circuit where it is shown that there is a substantial ground for difference of opinion and that an immediate decision will materially advance the interests of justice.

Pressure for splitting the Fifth and Ninth Circuits is the result of the tremendous increase in the caseload of both circuits. From 1961 to 1975, the number of appeals docketed in the Fifth Circuit rose from 630 to 3,292, while the number of judges only increased from 7 to 15; S. Rep. No. 94–513, *supra* at 5; similarly, from 1953 to 1975, the number of appeals docketed in the Ninth Circuit rose from 450 to 2,731, while the number of judges only increased from 7 to 13. S. Rep. No. 94–1227, *supra* at 13. As a result, there have been unconscionable delays in the disposition of cases—according to the Committee Reports, in 1974, the average time from the filing of the notice of appeals to the decision of the court in cases decided after oral argument or submission on briefs was 449 days in the Ninth Circuit, S. Rep. No. 94–1227, *supra* at 14; if the case was decided by a signed opinion, rather than by a *per curiam* or memorandum order, the average time was 565 days, *Id.* The court encourages counsel to file supplemental briefs prior to oral argument in order to address any new caselaw since the original briefs were filed. *Id.*

Both the Fifth and Ninth Circuits have adopted a number of procedural devices to try to control their dockets and to reduce delay. The Fifth Circuit screens all cases to determine which may be decided without argument, which may be decided with argument limited to 15 minutes per side, and which will be allowed the normal 30 minutes per side. S. Rep. No. 94–513, *supra* at 6. As a result of this process, oral argument has been allowed in less than one-third of the appeals in that circuit. *Id*, at 7. Furthermore, under its Rule 21, the Fifth Circuit may decide cases without opinion by a simple order of affirmance (not reversal). In 1972, 26.6 percent of the appeals which were terminated by some form of written opinion were decided under Rule 21. *Id.* The Ninth Circuit has dealt with the problem by assigning district judges to sit on most of its cases. As a result, in 1973, judges other than circuit judges wrote 27 percent of the signed majority opinions in that circuit. S. Rept. No. 94–1227, *supra* at 14.

Noone appears to question that the Fifth and Ninth Circuits need additional judges to cope with their caseload. There is strong disagreement, however, over whether increasing the number of judges must also be accompanied by a restructuring of the courts and, if so, how that restructuring should take place.

In its Report on S. 2752, the majority of the Senate Judiciary Committee argued that merely increasing the number of judges on the Fifth Circuit would not in fact reduce the judges' workload because of the increased logistical and coordination problems and because a judge on an expanded circuit would have to review the decisions of 24 rather than 14 other judges in order to stay abreast of decisions in the circuit. S. Rep. No. 94–513, *supra* at 7–8. In addition, they argued, more *en banc* hearings would become necessary, with even more practical difficulties because of the larger number of judges who would have to sit. *Id.* at 8.

Senators Hart, Kennedy, Bayh, Tunney and Abourezk filed a minority report from S. 2752 in which they argued that the caseload problems in the Fifth Circuit are not unique and that other devices, including *certiorari* jurisdiction, should be considered rather than splitting the Fifth Circuit into two divisions. S. Rep. No. 94–513, *supra* at 27–28. Furthermore, the problems associated with more than 15 judges, they argued, could be resolved by adopting the recommendation of the Hruska Commission that *en banc* panels be limited by statute to nine judges. *Id.* at 28–29. Their major objection, however, was that the so-called federalizing function of the appellate courts would be reduced by the creation of divisions with as few as two states in them. This function is especially important in the area of civil rights where the "proposed division, by reducing the scope of this regional influence, may narrow the perspective of the circuit's legal opinions, perhaps adversely affecting civil rights litigation where a balanced concern for national justice and equality are of supreme importance," and in the area of energy, where "isolating the major oil and gas producing states in one division could deprive that division of the points of view of judges coming from non-producing states which depend upon the producing states as energy sources." *Id.* at 31.

Opposition to S. 729 centered around the proposal to split California between two divisions. Some people have proposed instead a "Northwest Circuit" consisting of Alaska, Washington, Oregon, Idaho and Montana. However, the Committee rejected this approach because such a circuit would have a caseload of only 475 cases, sufficient under current standards for only three or four judges, and it would still leave a caseload of 2,220 cases for California, Arizona, Nevada, Hawaii and Guam, requiring 13 or more judges. S. Rep. No. 94–1227, *supra* at 15.

The California State Bar Association, the Bar Association of San Francisco and the President of the Los Angeles Bar Association all opposed splitting California into two circuits or divisions. *Id.* In response to this opposition, Senators Tunney and Cranston introduced an amendment containing the so-called Califoria Plan under which the jurisdiction of the Ninth Circuit would remain as it is; the number of judges would be increased from 13 to 20; and *en banc* proceedings would be limited to nine judges. *Id.* at 45. The Committee rejected this proposal largely because of its view that 15 judges is the maximum that should sit on an appellate court and because it does not want a panel of nine, which could be split by a 5–4 vote, to decide the law of the circuit, *Id.* at 17–20.

Legislation similar to S. 729 and S. 2752 is expected to be introduced in the 95th Congress.

B. Additional Federal judgeships

Another possible response to expanding caseloads is to increase the number of federal judges.[26] Bills creating seven additional appellate judgeships (S. 286) and forty-five additional district judgeships (S. 287) were passed by the Senate on October 2, 1975 and April 1, 1976 respectively. Legislation creating thirteen new appellate judgeships (H.R. 4422) and fifty-two new district judgeships (H.R. 4421) was not acted upon in the House Judiciary Committee in time to allow a vote on the floor.[27]

The bills introduced in the last session were based largely on the 1972 and 1974 recommendations of the Judicial Conference of the United States. S. Rep. No. 94–387, 94th Cong., 1st Sess. 5 (1975); S. Rep. No. 94–404, 94th Cong., 1st Sess. 3 (1975). In September 1976, the Conference increased its recommendation for new district judgeships to 106, *Report of the Proceedings of the Judicial Conference of the United States* 37–39 (1976), and it is expected to recommend soon a large increase in the number of federal appellate judgeships.

The appointment of 75–100 new federal judges offers a major opportunity to shape the character of the federal bench for many years to come. In the past, legal services attorneys, along with their counterparts in the civil rights, labor, consumer and public interest bars, have had little role in the selection of federal judges, except in opposing a few extremely unqualified nominees. In the future, mechanisms need to be developed by which legal services representatives can join with other citizen representatives to play an affirmative role in the judicial

[26] In addition, there are presently sixteen vacancies at the district court level and three vacancies at the court of appeals level.

[27] S. 387 was reported by the House Judiciary Committee on September 28, 1976 with amendments increasing the additional district judgeships to 49 and postponing the bill's effective date to January 21, 1977.

selection process. Rather than merely attempting to veto unacceptable candidates, the legal services community and its allies should recommend the names of qualified attorneys to fill the vacant positions, taking into account the need for more minority and women federal judges and the need for judges whose legal experience is likely to make them sympathetic to the needs of the poor.

C. Supreme Court jurisdiction

In 1971, Chief Justice Burger appointed a study group under the auspices of the Federal Judicial Center to study the Supreme Court's caseload. The study group was chaired by Professor Paul Freund and included a number of other law professors and practitioners, but no judges. In its report, filed in December of 1972, the study group found that the large number of filings in the Supreme Court had brought the Court's docket to the "saturation point" and that its ability to prepare well-reasoned decisions would be impaired unless steps were taken to reduce its caseload, particularly the large number of *certiorari* petitions filed each year. The study group made a number of specific recommendations for reducing the Court's caseload: establishment of a National Court of Appeals to screen *certiorari* petitions before they reach the Supreme Court; repeal of three judge district courts; repeal of the Court's mandatory appellate jurisdiction; and creation of a non-judicial agency to review prisoner petitions seeking post-conviction relief or involving complaints of mistreatment in prison. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court* (1972), reprinted at 57 F.R.D. 573.

Under the Study Group's proposal, the National Court of Appeals (NCA) would consist of seven members, selected for three-year terms on a rotating basis from among the active judges of the courts of appeals. The NCA would screen all petitions for *certiorari* and all appeals, if that mode of review were retained, and would refer a small number (about 450 cases a year) of the more important cases for Supreme Court consideration. The Supreme Court would retain authority to reject or accept these cases or to remand them for consideration by the NCA itself. In addition, the NCA could keep certain cases in which a conflict existed among the circuits for its own consideration. A decision by the NCA refusing to refer a case to the Supreme Court or declining to review the case directly would be final.

The Study Group's proposal for a National Court of Appeals was opposed by a number of present and former Justices of the Supreme Court,[28] as well as other commentators,[29] on the grounds that it exaggerated the Supreme Court's caseload problems and unnecessarily impaired the Court's ability to control its own docket. After considering the issue in depth, the Commission on the Revision of Federal Court Appellate System (the Hruska Commission) recommended in 1975 that a National Court of Appeals be established, but in a greatly modified form.

The Commission focused its inquiry on whether the need for definitive declaration of the national law was being met under the current system of appellate review. It concluded that it was not, largely because of the Supreme Court's inability to give plenary consideration to a sufficient number of the cases on its docket. It recommended the creation of a National Court of Appeals[30] to increase

[28] *See e.g.*, Goldberg, *One Supreme Court*, The New Republic, February 10, 1973 at 14–16; Statement of Former Chief Justice Warren, 59 A.B.A.J. 724 (1973); Statement of Mr. Justice Brennan, 59 A.B.A.J. 835 (1973); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473 (1973).

[29] *E.g.*, Black, *The National Court of Appeals: An Unwise Proposal*, 83 Yale L.J. 883 (1974); Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. Rev. 842 (1973).

[30] The Commission proposed that the judges of the NCA be appointed for permanent terms by the President with the advice and consent of the Senate. It rejected the Study Group's proposal to select the members from among the judges of the courts of appeals because a court so composed would lack stability and continuity and because it believed that the judges of the NCA ought not be in the position of reviewing the decisions of colleagues on a court to which they would return, 67 F.D.R. at 194–195.

the capacity of the federal appelate system to render definitive statemens of national law in more cases. Rather than allowing the NCA to control the docket of the Supreme Court, which was the principal objection to the Study Group's proposal, the Hruska Commission proposed that the NCA only have jurisdiction over cases referred to it by the Supreme Court and certain cases transferred to

it by a court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals.[31]

The National Court of Appeals could decline to accept any case transferred to it, and it could deny review of any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case. The Supreme Court would be required to direct that the NCA decide all cases subject to review by appeal. There would be no judicial review of actions granting or denying transfer, or of actions by the NCA accepting or rejecting a case. NCA decisions would be reviewable by writ of *certiorari* to the Supreme Court.

Bills modeled after the Hruska Commission's NCA proposal were introduced in the House (H.R. 11218) and Senate (S. 2762) during the 94th Congress. In May 1976, the Senate Judiciary Committee held extensive hearings on the bills, but the Committee took no formal action. No hearings were held in the House. It is expected the proposal for a National Court of Appeals will be reintroduced in the next Congress and that both committees may take action early in the session.

The study Group's recommendation to eliminate three judge courts was substantially adopted by Congress in Public Law 94–381 (August 12, 1976). No action has been taken on the Group's recommendation to repeal the Supreme Court's appellate jurisdiction, although there has been almost no opposition to that portion of the report.[32]

The Court's recent position regarding the binding nature of summary orders disposing of cases within its mandatory appellate jurisdiction has increased the need for corrective legislation in this area. In order to avoid giving full consideration to cases within its appellate docket, the Court often disposes of them by dismissing for want of a substantial federal question or by summarily affirming the decision below. Both types of decisions are regarded as decisions on the merits, *Hicks* v. *Miranda*, U.S. 332, 334 (1975), and are therefore binding on the lower federal courts and the state courts until the Supreme Court itself indicates to the contrary. *Id.* 344–345 *Doe* v. *Hodgson*, 478 F.2d. 537, 539 (2d Cir. 1973); *Port Authority Bondholder Protective Committee v. Port of New York Authority*, 387 F.2d 259, 262 n. 3 (2d Cir. 1967).

The problems caused by the Supreme Court's approach to summary dispositions have been discussed recently by Mr. Justice Brennan, dissenting from the denial of *certiorari* in *Colorado Springs Amusements, Ltd.* v. *Rizzo*, 96 S. Ct. 3228 (1976). First, the Court's summary disposition definitively may decide novel and complex constitutional questions without the aid of oral argument or full briefs. Moreover, it precludes further consideration of these issues by the lower courts, so that, if the Court ever gives full consideration to the issue, it will not have the benefit of the thinking of other courts and it will not have a full record in the future cases. Second, in order to determine what the Supreme Court actually decided, the lower courts must look at the jurisdictional statements and other papers filed in the Supreme Court. Even then, it may be difficult to discover the actual basis for the Court's disposition, leading to unnecessary reliance on the decisions.

Repeal of the three judge district court removes one major area in which the Supreme Court has used summary dispositions to avoid hearing all of the cases on its appellate docket. The problem could be further alleviated by repealing the Court's mandatory jurisdiction over cases arising in the state courts, and it is likely that legislation to achieve this result will be considered soon.

D. United States magistrates

The Federal Magistrates Act, 28 U.S.C. § 631 *et seq.*, was passed in 1968 to assist district judges to cope with their increasing caseload.[33] Under the original

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[31] Cases could be transferred by these lower courts if an immediate decision by the NCA would be in the public interest and (1) the case turns on a rule of federal law and the courts have reached inconsistent conclusions with respect to the rule; (2) the case turns on a rule of federal law applicable to a recurring factual situation and showing is made that the advantages of a prompt and definitive determination of that rule outweigh any potential disadvantages; or (3) the case turns on a rule of federal law previously announced by the National Court of Appeals, if there is a substantial question about the proper interpretation or application of that rule.

[32] The Report of the Hruska Commission did not discuss this issue, but its proposal for a National Court of Appeals assumes that the Supreme Court would continue to have mandatory appellate jurisdiction.

[33] As of June 30, 1976, there were 482 magistrate positions authorized by the Judicial Conference, including 150 full-time positions. Administrative Office of the United States Courts, *1976 Annual Report of the Director* 30.

language of the Act, in addition to certain enumerated duties, magistrates were authorized to perform "such other duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b), amended Pub. L. 94–577 (October 21, 1976). Decisions by the Supreme Court of the United States and by several courts of appeals, however, narrowed the permissible functions of the magistrates. Consequently, Congress amended the Act in 1976 to clarify and expand the functions that may be assigned to magistrates by the district courts.

Under 28 U.S.C. § 636(b)(1)(A), as amended by Public Law 94–577 (October 21, 1976), a district judge[34] may designate a magistrate "to hear and determine any pretrial matter pending before the court," except for a number of so-called dispositive motions. The magistrate may enter an order finally deciding the matter, subject only to the right of the district court to set the order aside if it is "clearly erroneous or contrary to law."

In civil cases, the so-called dispositive motions which are excluded from the magistrate's plenary authority include motions for injunctive relief, motions for judgement on the pleadings or for summary judgement, motions to dismiss for failure to state a claim upon which relief can be granted, and motions to involuntarily dismiss an action for failure to comply with an order of the court. Magistrates may conduct hearings, including evidentiary hearings, on these motions; but they may not enter final orders. Instead, they must submit proposed findings of fact and recommendations for disposition to the district judge, who must make a "de novo determination"[35] of any finding or recommendation to which objection is made by the parties. One of the purposes of this provision to overrule the decision in *T.P.O.* v. *McMillan*, 460 F. 2d 348 (7th Cir. 1972), which held that a magistrate could not hear a motion to dismiss or for summary judgment. even where an appeal to the judge was available, H.R. Rep. No. 94–1609, 94th Cong., 2d Sess. 11 (1976).

Under section 636(b)(1)(B), as amended, magistrates may also conduct hearings, take evidence and make recommendations to the court regarding applications for post-trial relief in criminal cases and "prisoner petitions challenging conditions of confinement." The provision allowing magistrates to hear evidence in *habeas corpus* cases is intended to overrule the contrary decision of the Supreme Court of the United States in *Wingo* v. *Wedding*, 418 U.S. 461 (1974). S. Rep. 94–625, 94th Cong., 2d Sess. 9 (1976); H.R. Rep. No. 94–1609, supra at 11 (1976).

Even prior to Public Law 94–577, the Federal Magistrates Act had had a significant impact in two areas of concern to legal services programs—cases seeking to review the denial of benefits by the Social Security Administration, and petitions for post-conviction relief in criminal cases.

Acting under their authority in the original Act, a number of district courts have adopted local rules automatically assigning all cases involving claims under the Social Security Act for medicare, social security insurance, and black lung benefits to magistrates for preliminary review of the administrative record, oral argument and the preparation of a recommended decision as to whether the administrative decision is supported by substantial evidence. The courts of appeals had split over whether these blanket rules were permissible under the original Act; but in *Mathews* v. *Weber*, 423 U.S. 261 (1976), the Supreme Court approved their use, and Congress expressly approved of this result when it enacted Public Law 94–577. S. Rep. No. 94–625, *supra*, at 9; H.R. Rep. No. 1609, *supra* at 11.

Magistrates reviewed 1480 social security cases during fiscal year 1976. Administrative Office of the United States Courts, *1976 Annual Report of the Director* at I–76. This represented 14.3 percent of the 10,355 social security matters filed in the district courts during 1976. Id. at I–15. Moreover, in light of *Weber*, it is likely that even more district courts will adopt the practice of routinely assigning social security claims to magistrates for initial review. It is not clear,

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[34] The requirement in the original Act that assignments could be made only by local rule adopted by a majority of the judges of the district has been repealed.

[35] According to the legislative history: [T]he use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findinks of the stances, however, it may be necessary for the judge to modify or reject the findings of the magistrate for further proceedings. H.R. Rep. 94–1609, 94th Cong., 2d Sess. 3 (1976).

however, whether this practice improves the quality of review on social security cases.

A second area of concern to legal services clients is *habeas corpus* petitions and section 1983 cases challenging conditions of confinement. Despite *Wingo*, magistrates dealt with 8,231 prisoner petitions during fiscal year 1976, a slight decline from 1975. *Id.* at 8. If the magistrates' authority to hear evidence granted by Public Law 94–577 is found to be constitutional, an issue which *Wingo* did not reach, then the magistrates' role in determining prisoner petitions will become even more pivotal in the future. Again, it is not known whether this practice improves the likelihood that defendants will receive a full hearing on their claims.

IV. LEGISLATION RELATING TO ADMINISTRATIVE JUSTICE

A. Informal rulemaking

As the beneficiaries of numerous federal programs, legal services clients have an enormous stake in the actions of many federal agencies, particularly the non-regulatory grant-making agencies. Rulemaking by these agencies is governed by the informal notice and comment procedures required by section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and not by the formal (on-the-record) procedures required of the regulatory agencies. In general, section 4 does not adequately protect the interests of the public or insure that agencies make reasoned decisions based on all of the relevant and available information. Consequently, in a number of recent statutes Congress has modified the informal rulemaking requirements to make them more stringent for the proceedings of certain agencies. *See* Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 242–244 (1974). However, the grant-making agencies that are important to legal services clients are not covered by these statutes.

H.R. 12048, the Administrative Rulemaking Reform Act of 1976, which was introduced by Representative Flowers, would have revised section 4 of the APA to make it more effective in a number of important ways. First, the bill would have repealed the present rulemaking exception for matters relating to "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). A number of agencies covered by the present exception, including the Departments of Health, Education and Welfare and Agriculture, have voluntarily brought themselves under the informal rulemaking procedures of the APA. However, repeal of the exception is necessary to insure that these agencies do not take advantage of the exception in the future and to reach other agencies that have not elected to follow the notice and comment procedures.

Second, H.R. 12048 would have added a number of requirements regarding the notice that must be given under section 4 prior to the promulgation of a rule. These new requirements include a statement of the projected effective date of the rule, a statement of the purpose of the rule, "a description of the subjects with which the rulemaking will deal and major issues it will raise," and "a list of the technical, theoretical and empirical studies, if any, on which the agency intends to rely in the rulemaking proceeding and a statement of where this material may be inspected or copies thereof may be obtained." The Committee Report states that the last requirement is intended to insure that "the public will be aware of important advice received from experts, and of the critical experimental and methodological techniques on which the agency intends to rely. Thus the agency should not rely on any research methods or data not presented to interested parties for comment and criticism." H.R. Rep. 94–1014, 94th Cong., 2d Sess. 21 (1976).

Third, H.R. 12048 would have repealed the present rulemaking exception for interpretive rules and general statements of policy, 5 U.S.C. § 553(b)(A), and the so-called good cause exception. 5 U.S.C. § 553(b)(B). Instead, an agency could by-pass the notice and comment procedures only if it finds that they are unnecessary "due to the routine nature or the insignificant impact of the proposed rule" or where emergency rules are issued. If an agency finds that an exception is necessary, it must state its reasons when it issues the rule.

Fourth, the bill would have required that the public be given a minimum of 45 days to comment on a proposed rule. It further provided that when an agency determines "that there is a significant controversy over a factual issue the resolution of which will materially affect the substance of the rule, the agency shall utilize a procedure for resolution of that issue which will permit different points of view to be adequately presented, will provide for agency objectivity in such

resolution, and will not unduly delay the rulemaking." The bill also required that agencies maintain a file for each rulemaking proceeding which must include *inter alia* "all relevant material which the agency by law is required to retain on file in connection with the rulemaking.

Fifth. H.R. 12048 would have required that when an agency promulgates a rule it must give a concise statement of the purpose of the rule and its legal authority, and it must place a statement in the rulemaking file "setting forth the primary considerations interposed by persons outside the agency in opposition to the rule as adopted, together with brief explanations of the reasons for rejecting those considerations."

Sixth, and perhaps most importantly, the bill amended present section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, to provide that a court may set aside an agency rule adopted pursuant to section 4 as amended if it is "unwarranted by material in the rulemaking file."

H.R. 12048 was reported by the House Judiciary Committee on April 6, 1976. An attempt was made to bring the bill up for a vote near the end of the session, but a procedural motion requiring a ⅔ vote was defeated. 122 Cong. Rec. H10719 (daily ed., Sept. 21, 1976). Opposite to the bill centered on other provisions which provided a congressional veto over all agency rules (See Part IV(B), *supra*) and not on the amendments to section 4. The Senate Administrative Practices Subcommittee is considering informal rulemaking amendments for introduction in the 95th Congress.

B. Congressional veto of rulemaking

Section 4 of H.R. 12048 created a mechanism for Congressional review and disapproval of all administrative rules. Under the proposal, a copy of each rule filed by an agency for publication in the Federal Register would have to be submitted to the standing committee having oversight and legislative responsibility over the agency. A rule would not take effect if within 90 days both Houses of Congress adopt a concurrent Resolution disapproving the regulation or if within 60 days one House adopts a resolution disapproving the rule and the other House does not *disapprove* the resolution (*i.e.*, approve the rule) within 30 more days. If within 60 days after referral of the rule, no committee of either House has reported a resolution or been discharged from further consideration of a resolution disapproving the rule, and neither House has adopted a resolution, the rule would go into effect immediately. If within 60 days after referral, a committee has reported or been discharged from further consideration, or if either House has adopted a resolution, then the rule may not take effect prior to 90 days after its referral to Congress, unless it is disapproved sooner.

An agency could not promulgate a new rule or an emergency rule identical to one disapproved by Congress "unless a statute is adopted affecting the agency's powers with respect to the subject matter of the rule." If an agency proposes a new rule "dealing with the same subject matter as a disapproved rule," the agency must comply with the procedures of the Act.

The bill also authorizes either House of Congress to pass a resolution directing an agency to reconsider an existing rule or a proposed rule. If such a resolution is adopted by either House within 90 days after referral of a proposed rule, it may not take effect and the agency must reconsider the rule and within 60 days after the resolution either withdraw it or repromulgate it pursuant to the review procedures of the Act. Within 180 days after adoption of a reconsideration resolution regarding a rule that is in effect, the agency must repromulgate the rule in accordance with the Act or else it will lapse. If the rule is repromulgated, then it may remain in effect during the period of Congressional review.

The bill provides that "congressional inaction or rejection of a resolution of disapproval or of a resolution for reconsideration shall not be deemed an expression of approval of such rule," when the rule is considered by a court.

The congressional veto proposal was strongly opposed by many members of Congress and by outside organizations, particularly Congress Watch and the AFL–CIO. Opponents claimed that it would lead to an impossible workload for the Congress and divert the committees from true oversight activities, that it was very likely unconstitutional, that it would delay the effective date of regulations and often make the effective date uncertain, and that it would give corporate lobbyists a second chance to defeat policies which they do not like.

C. Access to Government information

In the past five years, Congress has passed a large number of far-reaching statutes designed to increase public access to information about the workings of federal agencies. These laws include the Freedom of Information Act, 5 U.S.C. § 552, the Federal Advisory Committee Act, 5 U.S.C., App. I, the Privacy Act, 5 U.S.C. § 552a, and the Government in the Sunshine Act, Pub. L. 94–409 (Sept. 13, 1976).

Congress has demonstrated a willingness to review the effectiveness of these laws on a regular basis and to make changes in them where necessary. This has been especially true where the courts have interpreted the law to deny access by the public. Thus, in 1976, Congress amended the Federal Advisory Committee Act to make clear that the public could not be excluded from advisory committee meetings merely because their discussions were related to internal decision-making, as had been suggested by some courts, and it amended the third exemption to the Freedom of Information Act to overrule the Supreme Court's decision in *Federal Aviation Administration* v. *Robertson*, 422 U.S. 255 (1975). Pub. L. 94–409, § 5(b)–(c).

D. Attorney's fees

A major barrier to citizen influence in agency decision-making is the high cost of participation in the complex and often protracted agency proceedings. To remedy this, a number of recent federal statutes have provided federal funds to support citizen representation in agency proceedings. For example, the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701–93, created an Office of Public Counsel within the Interstate Commerce Commission with authority to retain outside counsel to represent communities threatened with loss of rail service. The 1975 amendments to the Federal Trade Commission Act, 15 U.S.C. §§ 2301, *et seq.* authorized the Commission to provide compensation including attorney's and expert witness fees to citizens and citizen groups for participation in trade regulation rulemaking proceedings. Five Hundred Thousand Dollars ($500,000) was appropriated to implement this program during fiscal year 1976. Grants were made to a number of public interest organizations to participate in specific rulemaking proceedings before the agency, including the Center for Auto Safety, the National Council of Senior Citizens, and the Consumers Union. Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* 273 (1976).[36]

S. 2715, which is discussed in Part II(A), *supra*, also would have provided express authority to all federal agencies to award attorney's fees, expert's fees and other costs to public participants in certain agency proceedings. Under the bill, compensation would be available in "rulemaking" ratemaking and licensing proceedings," and in adjudicatory proceedings which involve "issues which relate directly to health, safety, civil rights, the environment, and the economic well-being of consumers in the marketplace." According to the Senate Report, the purpose of limiting coverage to certain types of adjudicatory proceedings was to insure that compensation would not be available in proceedings which are concerned with purely private interests, such as most adjudications before the Social Security Administration or the Veterans' Administration. S. Rep. No. 94–863, 94th Cong., 2d Sess. 18 (1976).

The Committee Report states that compensation is to be available for informal as well as formal agency proceedings. *Id.* at 17. Furthermore, "proceeding" is defined as "any agency process including rulemaking, ratemaking, or any other agency process in which by statute, regulation, or agency practice public participation is authorized." Although the language of the bill is confusing, it seems broad enough to include the numerous policy decisions which are not accomplished through rulemaking or adjudications.

In order to be eligible for an award under S. 2715, an applicant must represent an interest, the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding.

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[36] It has also been held that federal agencies have the power, even without express statutory authorization, to compensate intervenors who cannot otherwise afford to participate in agency proceedings. *See Greene City Planning Board* v. *F.P.C.*, 45 U.S.L.W. 2319 (2d Cir. December 3, 1976) *Also*, Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 Harv L. Rev. 1815, 1827–1830 (1975). Petitions have been filed with a number of federal regulatory agencies on behalf of citizen groups requesting that the agencies establish programs to compensate public interest intervenors.

In addition, the applicant must satisfy the same economic criteria which must be met for the judicial award of fees in suits brought against the federal government. (See Part II(A), *supra*).

Under the bill, payment of fees and costs would be made within 90 days after the date of the final decision or order disposing of the matters involved in the proceeding, except that an agency would be authorized to make advance payments or periodic payments to applicants whose ability to participate effectively in the proceeding would be impaired if they did not receive compensation prior to its conclusion. The bill also specified that attorney's fees and other costs should be compensated at the prevailing market rates for the kind and quality of the services rendered. Finally, the Committee Report states that fees should be paid without regard to whether the services were provided at less than normal rates or for no fees at all. *Id.* at 23–24.

S. 2715 contains a number of provisions to insure that agencies actually provide compensation to eligible applicants. First, within ninety days after the date of enactment each agency must propose regulations to carry out the provisions of the Act. Second, agencies must make a written determination, giving reasons, of each application for an award prior to the commencement of any proceeding, unless the determination cannot practically be made at that time. Third, applicants may seek judicial review of any final agency denying an award, granting an award which is insufficient to enable the applicant to participate effectively in the proceeding, or reimbursing an award which is insufficient to compensate adequately for such participation.[37]

As noted above, legislation identical to S. 2715 is expected to be introduced in both the Senate and House early in the 95th Congress.

E. Alternative forms of public representation

The proposals previously discussed in this Part would improve direct access to the administrative process for clients and their advocates. To this extent they are the most relevant to legal services attorneys and clients, who depend upon their own advocacy efforts to influence government decision-making. A number of legislative proposals should be mentioned briefly which do not improve direct access to the agencies but instead create new governmental mechanisms to represent citizen interests.

The major recent proposal of this type is for an Agency for Consumer Advocacy (ACA) to represent the interests of consumers before federal agencies and in the courts. The ACA would be an independent agency within the Executive Branch. It would be authorized to participate in agency proceedings on behalf of consumers and to seek judicial review of agency actions that may affect consumer interests. However, the ACA could not initiate actions on behalf of consumers, such as class actions.

In 1976, bills to enact a Consumer Advocacy Agency passed both the House (H.R. 7575) and the Senate (S. 200) with strong support from consumer and public interest organizations. A threatened filibuster, however, prevented final passage. A major effort will be made in the 95th Congress to enact some form of consumer protection agency, and the likelihood of success has been improved by the apparent support for the proposal by the new administration.

A similar proposal is for the establishment of consumer representatives or ombudsmen within specific agencies or departments. During the 94th Congress, bills were introduced to establish citizen advocates for a member of federal agencies and programs including the Federal Bureau of Prisons and the Federal Board of Parole (H.R. 700), the Department of Health, Education and Welfare's home health service and nursing home programs (H.R. 4775 and H.R. 7300), and the Smaller Communities Administration (H.R. 3133).[38]

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[37] The bill grants jurisdiction over such actions "in the appropriate court of the United States having jurisdiction of an appeal from the proceeding in which such person participated or sought to participate." It is not clear what court has jurisdiction in cases involving agency proceedings for which no statutory appeal exists.

[38] These proposals are discussed in detail in Cunningham, Rolsman, Rich, Beatley and Barry, *Improving Access to Courts and Public Agencies to Protect Citizen Interests* 20–24 (1976).

V. RECOMMENDATIONS AND CONCLUSION

The legislative proposals discussed in this paper offer numerous opportunities for further activity within many different segments of the legal services community. For example, during the paper's preparation, a number of persons suggested the need for a manual on federal practice and procedure for legal services attorneys. Unlike conventional hornbooks and treaties, the manual would focus on the special problems which arise in legal services and other public interest cases, and it would include model pleadings, briefs and tactical analysis. The manual would be up-dated regularly to reflect new caselaw and new legislation.

Other persons suggested the need for a newsletter to inform legal services attorneys and clients about pending legislative developments in this area. In many instances, the legal services community could be helpful in drafting and supporting legislative proposals on access issues, but generally they have not been made aware of pending legislation early enough in the legislative process.

A number of the specific areas discussed in the paper require further research and analysis before proposals can be developed which will serve the needs of the poor. For example, not enough has been done to develop legislative approaches to the problem of standing, particularly in suits against state and local officials, or to develop the case for broad remedial legislation to overrule *Edelman v. Jordan*. The area of informal rulemaking by grant-making agencies has not been adequately explored, although positive suggestions for improving the process would receive careful attention in Congress. Also, there needs to be careful empirical research to assess the impact of the expanded jurisdiction of U.S. Magistrates in social security and other cases.

Finally, it is hoped that this paper will provide the necessary background for the development within the legal services community of an advocacy program to make the federal jurisdiction and administrative system better able to serve the needs of the poor.[39] At present, no agency or project within the legal services community has responsibility for working on access to justice issues. Instead, the issues are dealt with, if at all, on an *ad hoc* basis by individual persons or projects whose other activties take priority. Whether repsonsibility for the area should lie within the Legal Services Corporation, or in an outside grantee, or with the outside support organizations, needs to be debated and resolved.

Access to federal courts and agencies is but one part of the question of access to justice generally. Drastic improvements are needed in our state and local court systems and in the administrative procedures of state and local administrative agencies, which generally lag far behind the federal agencies in their procedures for protecting the interests of citizens. Furthermore, alternative dispute resolving mechanisms need to be developed to relieve the burden on our courts at all levels without reducing the quality of justice received. Research and advocacy on the issues discussed in this paper will hopefully be the starting point for further analysis and advocacy concerning these boarder issues.

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[39] Efforts to amend the Judicial Code and the Administrative Procedure Act usually involve the Judicial and Administrative Conferences of the United States, the various bar associations, and a number of prominent law professors, acting in their personal capacities. However, these groups and individuals too often do not appreciate the importance of the federal courts in protecting federal constitutional and statutory rights. Recently, consumer, environmental and civil liberties organizations have been active in drafting and supporting procedural reforms, but their activities have been fragmented and do not focus on the interests of the poor.

APPENDIX 5

(*a*)

American Bar Association

REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE

August, 1976

This report was submitted to the Board of Governors of the American Bar Association in August, 1976. The Board authorized distribution to the various sections of the American Bar Association and to other interested groups, and placed the recommendations of the Task Force on the agenda of its forthcoming meeting.

This report, and the continued interest in the Pound Conference, have generated a number of valuable suggestions. These will be reviewed by the Task Force and a supplemental report is to be issued later this fall.

Griffin B. Bell
Chairman

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THE TASK FORCE

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Introduction

The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held recently in Saint Paul in commemoration of Dean Pound's classic address,[1] was designed for "long-range planning," to look ahead to the time when there will be "260 million [Americans], with social, economic and political forces that will generate incalculable problems and conflicts to be resolved."[2] Inevitably, the "vexing problems" of today,[3] exacerbated by a litigation explosion of unprecedented dimension, were also discussed. The Conference generated a large number of proposals for reform and, in addition, identified a significant number

1. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* address delivered at the 1906 Annual Meeting of the American Bar Association in Saint Paul, Minnesota, printed in 29 A.B.A. Reports 395 (1906), reprinted, 35 F.R.D. 273 (1964). The Conference was jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association.

2. Burger, 1976 Annual Report on the State of The Judiciary, Supreme Court Reporter, vol 96, no. 9, pp. 3, 8 (1976). The purpose of the Conference was also described by Chief Justice Burger in the key-note address, Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83 (1976).

3. Burger, 1976 Annual Report, *supra* note 2, at 3.

of issues considered worthy of further study and exploration.[4]

This Task Force was appointed by President Walsh to assure that the ideas presented at the Pound Conference would be carefully considered by those organizations or agencies best able to evaluate and implement them.

The subjects discussed at Saint Paul were many and varied. The Conference heard an eloquent and vigorous reaffirmation of *The Priority of Human Rights in Court Reform.*[5] It heard the hope expressed that "the weak, the poor, the powerless" would be among the beneficiaries of whatever change the Conference generated.[6] The recommendations presented were intended to achieve the delivery of justice to all; none presented at Saint Paul, no recommendation presented in this report, is intended to detract from that goal.

The specific proposals presented would significantly affect both civil litigation and criminal prosecutions, in state as well as in federal courts. They would place increased emphasis on avoiding controversy and would create new forums for dispute resolution, providing alternatives both to jury and non-jury trials. Obviously, no single governmental agency has the authority to implement so wide a range of recommendations. Nor can any one organization or academic institution be expected to research all of the questions identified as worthy of study.

Some recommendations should be referred now to an official body able to effect change; some require evaluation and refinement before being referred. Other suggestions, however, need substantial study and analysis before specific, practicable recommendations will emerge. We believe these should be routed to other forums where they can be properly considered and developed. In the report which follows we have attempted to identify those in each category and to suggest appropriate next steps as regards each proposal.

4. The major addresses delivered at the Conference are reprinted in 70 F.R.D. 79 (1976).

5. Higginbotham, *The Priority of Human Rights in Court Reform,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 134 (1976).

6. Burger, keynote address, *supra* note 2, at 96.

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The subjects discussed at Saint Paul were many and varied. The Conference heard an eloquent and vigorous reaffirmation of *The Priority of Human Rights in Court Reform.*[5] It heard the hope expressed that "the weak, the poor, the powerless" would be among the beneficiaries of whatever change the Conference generated.[6] The recommendations presented were intended to achieve the delivery of justice to all; none presented at Saint Paul, no recommendation presented in this report, is intended to detract from that goal.

The specific proposals presented would significantly affect both civil litigation and criminal prosecutions, in state as well as in federal courts. They would place increased emphasis on avoiding controversy and would create new forums for dispute resolution, providing alternatives both to jury and non-jury trials. Obviously, no single governmental agency has the authority to implement so wide a range of recommendations. Nor can any one organization or academic institution be expected to research all of the questions identified as worthy of study.

Some recommendations should be referred now to an official body able to effect change; some require evaluation and refinement before being referred. Other suggestions, however, need substantial study and analysis before specific, practicable recommendations will emerge. We believe these should be routed to other forums where they can be properly considered and developed. In the report which follows we have attempted to identify those in each category and to suggest appropriate next steps as regards each proposal.

4. The major addresses delivered at the Conference are reprinted in 70 F.R.D. 79 (1976).

5. Higginbotham, *The Priority of Human Rights in Court Reform,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 134 (1976).

6. Burger, keynote address, *supra* note 2, at 96.

INTRODUCTION

Lawyers have a special responsibility, imposed by the Code of Professional Responsibility, to "assist in improving the legal system."[7] But lawyers are not the only ones with important contributions to make and we have not hesitated to recommend that others be involved in the process of shaping solutions to present problems. We have not attempted to deal with all of the questions which ultimately must be answered, nor have we attempted to choose between diverse points of view on many issues expressed at the Conference. Obedient to our mandate, we have attempted to recommend "what specific action the Association should take to see that answers are ultimately forthcoming."

It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all.

The ultimate goal, it is worth reiterating, is the fullest measure of justice for all. That goal cannot be achieved without change, but as the Chief Justice reminded us in his keynote address "change is a fundamental law of life."[8] What is important, he added, "is that lawyers fulfill their historic function," and help assure "orderly evolution."[9]

This report is intended to further that process, and to suggest a program for action by the American Bar Association designed to contribute significantly to the improvement of the administration of justice in this country.

7. Canon 8
8. Burger, keynote address, *supra* note 2, at 96.
9. *Id.*

Summary of Recommendations

The ultimate goal of our efforts is to achieve the fullest measure of justice for all. To that end we make the following recommendations:

I. NEW MECHANISMS FOR THE DELIVERY OF JUSTICE

A. *Neighborhood Justice Centers*

1. We recommend that the American Bar Association, in cooperation with local courts and state and local bar associations, invite the development of models of Neighborhood Justice Centers, suitable for implementation as pilot projects. Such facilities would be designed to make available a variety of methods of processing disputes, including arbitration, mediation, referral to small claims courts as well as referral to courts of general jurisdiction. (See pages 9–11)

2. We recommend that the American Bar Association undertake to stimulate research and experimentation designed to develop criteria by which to identify disputes most likely to profit from mediation, fact-finding and other alternative mechanisms of dispute processing. (See pages 11–12)

3. We recommend that the American Bar Association undertake to stimulate research and experimentation designed to en-

courage resolution of disputes without resort to governmental agencies, particularly in the area of consumer complaints. (See pages 11–12)

B. *Small Claims Courts*

4. Mindful of the potential inherent in the revitalization and expanded use of small claims courts and of the forthcoming Conference on Minor Dispute Resolution being planned by the American Bar Association, we recommend that state and local bar associations be involved in the Conference and in programs for the implementation of recommendations which may result from the Conference. In that connection, we invite consideration of a pattern of experimentation, evaluation and widespread adoption of those programs which prove successful. (See page 12)

C. *Arbitration*

5(a). We recommend that the Judicial Administration Division consider the potential utility of programs of compulsory arbitration with a right of appeal de novo, tailored to local needs and circumstances, with a view to the development of a program for the federal courts.

5(b). We further recommend that the Judicial Administration Division, in cooperation with state and local bar associations and the National Center for State Courts, seek more widespread adoption of such programs in state courts.

5(c). We recommend that the American Bar Association invite the Conference of Chief Justices, a co-sponsor of the Pound Conference, to consider a program of encouraging the development of proposals for compulsory arbitration, tailored to local needs and circumstances and to promote the implementation of such programs. (See pages 12–15)

6. We recommend that the American Bar Association, in cooperation with the American Arbitration Association, undertake a program designed to increase the use of commercial arbitration in cases of repetitive litigation among members of the same industry, particularly where the expertise of arbitrators would be helpful. We further recommend that such a program should be con-

cerned with developing criteria for the identification of additional categories of agreements appropriate for commercial arbitration. (See pages 15–16)

D. *Administrative Agencies; "Sunset Laws"*

7. We recommend that the Section on Administrative Law consider the feasibility and desirability of increased use of the administrative process as an alternative to resort to the courts. (See page 16)

8. We recommend that the American Bar Association, acting through the Section on Administrative Law, establish a special commission composed of lawyers and non-lawyers, to study the "sunset laws," statutes which provide for automatic termination of administrative agencies after a specified term of years unless the legislature act affirmatively to continue their existence. We further recommend that such study be undertaken with a view to making legislative recommendations. (See pages 16–17)

9. We recommend that the Section on Administrative Law review all instances of multiple appeals as of right from administrative determinations with a view to proposing remedial legislation. (See pages 17–18)

II. ELIMINATING THE NEED FOR JUDICIAL ACTION

A. *Changes in the Substantive Law*

10. We recommend that the Conference of Chief Justices be invited to consider whether decriminalization of "victimless" crimes such as public drunkenness should be referred to appropriate state agencies for study and possible action. We further recommend that state and local bar associations should be invited to consider and evaluate proposals in this area. (See page 19)

11. We recommend that the Conference of Chief Justices be invited to consider proposals to limit the right of recovery in cases of professional malpractice with a view to referring them to appropriate state agencies for evaluation and possible action. (See pages 19–20)

12. We recommend that the American Bar Association, acting through the appropriate sections, monitor experience with no-fault statutes. (See page 20)

B. *Elimination of the Use of Courts in Non-Adversarial Proceedings*

13. The use of courts in non-adversarial proceedings is an unwise allocation of scarce resources. With respect to some such matters—e.g., approving changes of name, incorporating membership corporations and making appointments to semi-public office—the problem may be relatively simple and amenable to solution. With respect to other matters—e.g., uncontested divorce, child custody and adoptions—the issues are frequently subtle and complex. We recommend that the subject be referred to the Conference of Chief Justices for such further reference as they deem appropriate; and we further recommend that the attention of state and local bar associations and the interested sections of the American Bar Association be invited to this problem. (See pages 20–21)

III. CRIMINAL PROCEDURE

14. Mindful of the leadership of the American Bar Association and the Section of Criminal Justice in developing Standards for Criminal Justice and in seeking their implementation in every state, and mindful of recent changes in the law governing illegally obtained evidence, we recommend that the Section of Criminal Justice give a high priority to the development of effective deterrents to illegal search and seizure by law enforcement officers; and we further recommend that the National Conference of State Trial Judges be invited to contribute to the solution of this pressing problem. (See pages 22–26)

IV. CIVIL PROCEDURE

A. *Correcting Abuses in the Use of Discovery*

15(a). The Section on Litigation, in coordination with the Judicial Administration Division, should accord a high priority

to the problem of abuses in the use of pretrial procedures with a view to appropriate action by state and federal courts. The National Conference of State Trial Judges should be invited to join in a common effort to provide a solution for this problem. (See pages 27–28)

15(b). Early identification of issues in complex litigation can serve to reduce the cost of discovery and to expedite disposition of the case. We recommend that the Section on Litigation consider the utility of such early identification of issues and how best to assure its use in appropriate cases. (See pages 27–28)

B. *The Use of Sanctions*

16. We recommend that procedural rules provide for sanctions for the willful filing of baseless or otherwise improper pleadings which contribute to delay and to increased expense of litigation. We further recommend that the Section on Litigation study the problem of enforcement and make recommendations appropriate for state and federal courts. (See pages 29–30)

17. We recommend that the Section on Litigation consider the possibility of creative use of sanctions, such as the taxing of costs, to serve as a useful deterrent to needless extension of litigation. We further recommend the Michigan mediation system as worthy of study in this context. (See page 30)

C. *Class Actions*

18(a). We recommend that all concerned sections accord a high priority to evaluation of existing rules and statutes relating to class actions for the purpose of assessing current proposals for change, both state and federal, and for the further purpose of initiating recommendations for change. Such consideration should encompass not only the procedures governing class actions, but where the availability of a class action has substantive implications, it should include the substantive law as well. (See pages 30–34)

18(b). We further recommend that particular consideration be given to the desirability of (1) substituting an "opt-in" procedure for the present "opt-out" procedure in actions brought

under Federal Rule 23(b)(3), or their state equivalents; and (2) providing for greater judicial control over attorney's fees in class actions. (See pages 30–34)

D. *The Jury*

19. We recommend that the American Bar Association invite the American Bar Foundation, the Institute of Judicial Administration, the Federal Judicial Center or other appropriate organization to undertake a thorough study of the proper scope of the right to jury trial in civil cases and to make recommendations concerning any changes in present practice which may be desirable. Such study should include consideration of the recent extension of the right to jury trial as the result of the merger of law and equity, re-examination of the doctrines governing right to jury trial where new causes of action are created by statute and the use of the jury in complex litigation. (See pages 34–36)

20. We recommend that the ABA Standards Relating to Trial Courts be referred to the Conference of Chief Justices and to the Judicial Conference of the United States with a view to improving present procedures relating to jury selection and jury utilization. (See pages 36–37)

21. We recommend that the Section on Litigation consider new techniques, or the desirability of more widespread use of existing techniques, to assure better communication of instructions to the jury. (See pages 36–37)

E. *Special Problems of Federal Jurisdiction*

22. We recommend that the Conference of Chief Justices and state and local bar associations be invited to study the contemporary utility of diversity jurisdiction with a view to endorsement of current proposals for its curtailment or elimination. (See pages 37–38)

23. We recommend that the Judicial Administration Division and the Committee on Coordination of Judicial Improvements study current proposals for elimination of three-judge courts

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and direct appeals, with reasonable exceptions, with a view to vigorous and effective support of legislation which would achieve this end. (See page 38)

V. ASSURING THE AVAILABILITY OF LEGAL SERVICES

24. We recommend that the American Bar Association continue its efforts to assure the availability of legal services to all and, to this end, that it maintain a close liaison with the Congress to assist in the development of specific recommendations and to aid in expediting their implementation. We further recommend that the ABA continue to work with state and local bar associations in this area. (See pages 39–41)

VI. JUDGES

25. We recognize that specific provisions designed to assure judges of superior quality in adequate numbers have been included in the ABA Standards on Court Organization and that there exists a special committee charged with seeking implementation of those standards. The development of a mechanism designed to assure periodic legislative consideration of the need for new judgeships would go far to alleviate a recurring problem in judicial administration. Specific proposals intended to achieve this end have been made. We recommend that these proposals be considered by the Judicial Administration Division, the Conference of Chief Justices and the Judicial Conference of the United States. (See pages 42–43)

VII. COLLECTION AND EVALUATION OF DATA

26. We recommend that the American Bar Association seek the creation of a Federal office for the collection of data relevant to judicial administration and to dispute resolution generally. Such an office would collect data, both state and federal, civil and criminal, and would be authorized to undertake special studies relevant to the administration of justice. It would work in close cooper-

ation with the National Center for State Courts, the Federal Judicial Center and other groups. We recommend that ABA approval be conditional on approval by the Conference of Chief Justices. (See pages 44–45)

I.
New Mechanisms for the Delivery of Justice

A. NEIGHBORHOOD JUSTICE CENTERS

1. *The Varieties of Dispute Processing*[1]

A trial in a court of record is one way of resolving disputes. It is neither cheap nor speedy and society has long sought for alternative ways to resolve disputes that do not really require full-blown trials. Arbitration and administrative adjudication are familiar mechanisms; small claims courts provide a less formal, less costly and more expeditious means of providing claimants with a day in court. Other alternatives include mediation, conciliation, fact-finding and negotiation. The use of ombudsmen should also be mentioned and, in addition, there are various mechanisms of dispute avoidance, institutionalized effort to prevent potential grievances from ripening into claims which will have to be adjudicated or otherwise resolved.[2]

1. The title is taken from Sander, *Varieties of Dispute Processing,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 111 (1976).

2. Professor Sander has pointed out that possible reforms aimed at reducing the number of disputes include changes in the substantive law, such as decriminalization of some activities or the adoption of no-fault provisions, where appropriate; reducing court discretion by statute in certain areas, such as in the division of marital property; and greater emphasis on "preventive law." Sander, *supra* note 1, at 112.

It was urged at Saint Paul that alternative methods of dealing with disputes, if properly developed and made widely available in realistic fashion, offered great promise of meeting the needs of claimants and, in the process, providing relief to the courts so that they might be available for litigants with claims which only courts can adjudicate.

If some disputes are first to be subjected to mediation or fact-finding, while others are to be sent to arbitration and still others to courts of record, it becomes necessary to employ some method of "routing" claimants to the appropriate forum. One model, described at the Saint Paul Conference, provided for a screening clerk located in a Dispute Resolution Center. Such a center might offer a variety of services. In addition to a trial court of general jurisdiction, it might house a Malpractice Screening Panel, an Ombudsman, a mediation service and other facilities as well.[3]

2. *Designing Pilot Projects*

We believe these proposals offer sufficient promise of significant improvement in the delivery of justice to warrant the development, on an experimental basis, of Neighborhood Justice Centers designed to make available a variety of methods of dispute processing.

We do not here intend to describe a specific model; indeed, what is appropriate for one locality may not be suitable for another. As will be developed below, we recommend that the American Bar Association undertake to stimulate the development of practicable models, with a view to implementing one or more pilot projects. Some detail, however, is needed to describe the nature of the facility which we envision. What follows is intended solely for that purpose.

A Neighborhood Justice Center would be manned by paralegals, with perhaps one young lawyer for technical advice. It might well be designed to include the services of a mediator. Such a facility could be expected to prove effective in disposing of some civil disputes and perhaps some criminal matters. It might be help-

3. *Id.* at 131.

ful in avoiding litigation of "family disputes," for example. Where the dispute was not resolved rapidly at the Neighborhood Center, persons aggrieved could be referred to a small claims court, to arbitration, or to the court of general jurisdiction.

We recommend that the American Bar Association invite the development of specific models of Neighborhood Justice Centers, one or more of which would then be funded as pilot projects. Such pilot projects would, of course, be valuable in themselves in providing for effective and efficient delivery of justice. Of greater significance, they could be evaluated, refined and modified and where warranted replicated in other communities.

Our primary purpose is to stimulate experimentation, evaluation and widespread emulation of successful programs.

We urge, as a first step, that the American Bar Association take the initiative and invite the active participation of local courts and local and state bar associations in developing proposals for evaluation. Such submissions would, of course, contain specific proposals for the funding of pilot projects, which funding might be by local resources, by existing federal agencies, or by interested foundations. Successful pilot projects begin with thoughtful and creative design. Inevitably, such planning takes time; it is important that the process begin, and that it begin as soon as possible.

3. *Research and Development*

At Saint Paul there was some emphasis on the need for the development of criteria by which we could more readily identify those types of disputes most likely to profit from mediation, fact-finding or other alternative mechanisms of dispute processing. We recognize the potential value of research designed for this purpose. Nothing in our earlier proposal concerning Neighborhood Justice Centers is intended to minimize the need. On the contrary, the program detailed above should serve to stimulate such research, particularly since the evaluation of success or failure is of the essence in any experimental program.

There are various non-governmental as well as governmental programs which should be considered. In Sweden, Public Com-

plaints Boards, although their recommendations are not binding, appear to have had a beneficent influence.[4] Non-governmental programs by civic organizations or by industrial associations may also contribute significantly to avoiding disputes, or to their prompt resolution should they arise.

Pilot projects designed to resolve disputes fairly and efficiently without recourse to government should be encouraged. They need not await the results of long-term study. Particularly in the field of consumer complaints, any serious program designed to resolve disputes and to deliver justice without resort to the courts or to other instrumentalities of government should also be encouraged.

We recommend that the ABA undertake to stimulate research in this area, including experimentation.

B. SMALL CLAIMS COURTS

Revitalization and expanded use of small claims courts offers substantial promise of assuring the delivery of justice to all citizens in a manner which is both speedy and efficient. The American Bar Association is currently planning a Conference on Minor Dispute Resolution, to take place in May, 1977. Empirical research designed to provide needed factual information has already been undertaken.

We recommend that state and local bar associations be involved both in the Conference and in programs for the implementation of recommendations for change which may result.

Again, we recommend a pattern of experimentation, evaluation and widespread adoption of those programs which prove successful.

C. ARBITRATION

1. *Compulsory Arbitration*

Experience has already supplied a substantial body of information pointing to the utility of a procedure under which certain types

4. *Id.* at 119.

of cases are submitted to compulsory arbitration before three members of the Bar, with a right of appeal de novo.[5] Such provisions are in effect in Pennsylvania,[6] Ohio,[7] and New York[8] and in some cases apply to virtually all law suits involving claims for money damages up to $10,000.

The reports on the operation of a number of these rules are highly favorable. These programs provide far speedier adjudication than the courts; procedures are more informal and less expensive. Moreover, the diversion of appropriate claims into the arbitration process relieves the pressure on the court system to the benefit of all litigants.[9]

5. The right of appeal is conditioned upon payment of a non-recoverable sum as costs, providing a deterrent. The threshold question, of course, is whether this results in the denial of the right to trial by jury. That right has been held to be satisfied by the right of appeal de novo, *Application of Smith,* 381 Pa. 223, 112 A. 2d 625 (1955), which states at 381 Pa. 230-231, 112 A. 2d at 629, "The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable." (emphasis in original).

6. *Pa. Stat. Ann.* tit. 5 §21 et seq. (1963).

7. In Ohio a Rule of the Supreme Court authorized the trial court of any county to establish a mandatory arbitration rule. The favorable experience with mandatory arbitration in Hamilton County (Cincinnati) and Cuyahoga County (Cleveland) is discussed at some length by Chief Justice C. William O'Neill in an address delivered before the Fifth Circuit Judicial Conference in Houston, Texas, May 26, 1976.

8. 22 N. Y. Codes, Rules, and Regulations, Part 28 (1974).

9. Prof. Maurice Rosenberg and Myra Schubin, Esq., writing in 1961, observed that the adoption of compulsory arbitration of claims [up to $2000] in the Municipal Court of Philadelphia had impressive results: "In one sweep the major part of the court's civil jurisdiction was diverted to arbitration panels; in less than two years delay fell sharply from between twenty-four and thirty months to between three and five months." Rosenberg and Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448, 458 (1961). *See also* O'Neill, *supra* note 3, at 9 discussing the Ohio experience, together with accompanying data.

Adoption of compulsory arbitration procedures in federal courts could prove beneficial.[10] The Judicial Conference of the United States, acting through the appropriate committees, may wish to consider a national rule. If the Judicial Conference chooses not to promulgate a rule applicable nationally, the possibility of adopting local rules in the various circuits or in metropolitan districts deserves consideration. We recommend that the Judicial Administration Division seek adoption of an appropriate federal program.

We also recommend that the Judicial Administration Division encourage state courts to explore the potential utility of arbitration procedures. State and local bar associations should be involved in the effort.

We recommend that the Conference of Chief Justices consider the potential advantages of encouraging the development of proposals for compulsory arbitration, tailored to local needs and circumstances.[11] We recognize that the National Center for State Courts can perform significant service by the dissemination of information presently available, design of specific proposals, and evaluation of the data generated by the adoption of the program in any given court. We therefore recommend that the Judicial Administration Division maintain continued close contact with the National Center to assure a coordinated effort.

It is important to recognize that the success of a program of compulsory arbitration depends on the degree of legislative support for the program in the form of funds with which to operate the system and from which to compensate the arbitrators. Compared to the cost of court trials the cost per case is small indeed. Lawyers provide facilities for the conduct of the hearings at no cost to the state and the rate of compensation for the arbitrators is typically

10. Compulsory arbitration procedures may prove beneficial to federal courts in relieving them of relatively small claims which arise under federal statutes such as The Truth-In-Lending Act.

11. The provisions of existing compulsory arbitration statutes are by no means identical. Details of the programs provided by these statutes may vary widely with respect to such features as the size of the claims diverted into arbitration and the availability of particular procedures.

very modest. Indeed, the success of compulsory arbitration is due in no small measure to the willingness of the members of the bar to participate in the program as a public service.

In the aggregate, however, the funds required are not de minimis, particularly when provision must be made for processing literally thousands of cases annually in a single county. Accordingly, we recognize the need for an effective program to inform legislators of the value of arbitration programs and the need to provide adequate fiscal support. Here, once again, the active participation of state and local bar associations can be of significance and their active participation should be encouraged.

2. *Increased use of commercial arbitration by contractual provision.*

Whenever contracting parties agree in advance in a contract for arbitration of any disputes which may later arise, the probability of resort to a law suit is reduced. Although such provisions are not uncommon,[12] courts continue to be obliged to litigate large numbers of cases which might more profitably be arbitrated.

Repetitive litigation among members of the same industry, such as disputes among insurance companies, might more frequently be resolved by arbitration to the benefit of all concerned.[13] By developing a pattern including an agreement to arbitrate in specified categories of cases, much could be achieved.[14]

Such categories would include areas in which there is a substantial volume of repetitive litigation, in which the primary impact of the disposition of disputes will be felt within a particular industry, in which the expertise of arbitrators knowledgeable about the customs and practices of the particular industry would be helpful, and, normally, in which the relationship of the parties depends on a written contract. Specifically, contractual provisions for arbitration

12. Sander, *supra* note 1, at 116.

13. *See, e.g.,* Security Mutual Casualty Ins. Co. v. Century Casualty Co., 531 F. 2d 974 (10th Cir. 1976).

14. Of course, a great deal has already been accomplished to this end. *See,* Coulson, *Arbitration—Positive Experiments in Modern Justice,* 50 Judicature No. 4 (Dec. 1966).

may profitably be adopted with respect to disputes between franchisors and franchisees, and between contractors and sub-contractors in the construction industry, in addition to disputes among insurance carriers previously mentioned.

We recommend a program of education which would invite the attention of all concerned to the advantages of non-judicial dispute resolution. The ABA should take the initiative in developing and implementing such a program on a national level.

In this connection, it is significant that the American Arbitration Association and the American Bar Association have been cooperating on a number of projects. A joint effort in this area would be appropriate. Such an effort should not be limited to education and persuasion. It is also desirable to identify other categories of agreements appropriate for arbitration. In addition, it may be desirable to recommend revision of court rules or statutory provisions concerning the effect of arbitration and the bases of appeal from awards.

In short, we recommend a continuing cooperative program of study, of monitoring the operation of the program, and of education designed to assure widespread implementation and use.

D. ADMINISTRATIVE AGENCIES; "SUNSET LAWS"

It was suggested at Saint Paul that increased resort to administrative agencies might serve to relieve the courts of disputes which they are currently obligated to resolve. We recommend that the Section on Administrative Law consider the feasibility and desirability of this suggestion. Any specific proposals will, of course, require careful analysis. Moreover, basic changes in procedure of the type here proposed frequently have substantive implications. For this reason specific recommendations should, in accordance with usual practice, be made in coordination with all interested sections.

There is another side of the coin. Proliferation of administrative agencies with no thought given to eliminating those which no longer perform a useful function is wasteful, imposing burdens on

affected citizens without commensurate benefit to society. Repeal of legislation creating such boards and agencies is rare, for it requires the exercise of initiative by some interested party. It has long been suggested that agencies be required to justify their continued existence from time to time.[15] The so-called "sunset laws," which provide for the automatic termination of administrative agencies after a specified period of time, unless the legislature acts affirmatively to continue them, are intended to force such justification and evaluation. Colorado has provided a model which deserves consideration in other jurisdictions.[16] The subject is one which should command the attention of the Section on Administrative Law, but it is also one which is of interest to members of other professions, to the business community and to consumers. It is one concerning which non-lawyers have much to contribute. For this reason we recommend that the American Bar Association establish a special commission, composed of lawyers and non-lawyers, to study the "sunset laws" and related plans with a view to making legislative recommendations.

Present provisions for judicial review of administrative determinations offer the possibility of improvement, at least in some instances. The usual pattern presently prevailing in the federal system provides for a single appeal as of right.[17] Under some statutes, however, two appeals as of right are allowed, to the District Court and thereafter to the Court of Appeals. The Social Security Act has

15. As Chief Justice Burger observed in his keynote address: "My colleagues, Justices Black and Douglas—not in jest but in complete seriousness—said many years ago that new regulatory agencies and new government programs should be dismantled after a fixed period—ten years or so—and not reinstated unless a compelling need were shown." Burger, *Agenda for 2000 A.D.—A Need For Systematic Anticipation,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83, 89 (1976).

16. *Colo. Rev. Stat. Ann.* § 24-34-104, effective July 1, 1976. This bill was introduced in the Colorado House of Representatives as H.R. 1088.

17. See generally, Currie and Goodman, *Judicial Review of Agency Action: The Quest for an Optimum Forum,* 75 COLUM. L. REV. 1 (1975).

been cited as one example of unnecessary proliferation of appeals.[18] Fashioning specific remedies requires careful consideration of the volume of litigation, reversal rates and the nature of the questions presented at the various levels of appeal.[19] The right of every claimant to a day in court, with adequate representation to make it meaningful, would, of course, still be assured.

We recommend that the Section on Administrative Law review all instances of multiple appeals as of right with a view to assessing their justifiability in each situation and to proposing remedial legislation where necessary.

18. *Id.* at 23 et seq.

The Longshoremen's and Harbor Workers' Compensation Act previously provided for two tiers of review, but was amended to provide for appeal directly to the Courts of Appeals (33 U.S.C. § 921 (Supp. II, 1972)). See Currie and Goodman, *supra* note 17 at 36-37.

19. See generally, Currie and Goodman, *supra* note 17.

II
Eliminating the Need for Judical Action

A. CHANGES IN THE SUBSTANTIVE LAW

1. *Decriminalization*

The desirability of decriminalization of what are frequently termed "victimless" crimes such as public drunkenness has been vigorously supported and equally vigorously opposed. We recommend that the Conference of Chief Justices be invited to consider whether the subject should be referred to appropriate state agencies for study and possible action. In addition, state and local bar associations should be invited to consider and evaluate proposals in this area. It should be noted that it is not necessary to accord like treatment to social problems as diverse as drunkenness and prostitution, although both are frequently lumped under the rubric of "victimless crime."

2. *Professional Malpractice*

A number of statutes relating to medical malpractice have recently been enacted; most are procedural in nature. Proposals which would limit the right of recovery in medical malpractice, and in professional malpractice generally, have been urged as appropriate next steps. These are matters which are primarily for the states and we therefore recommend that the Conference of Chief Justices be invited to consider whether this subject, too, should be

referred to appropriate state agencies for study and possible action. If the ABA is to make any recommendation in this area, the matter should first be considered by interested sections.

3. *No-Fault Provisions as an Alternative to Actions Based on Negligence.*

The history of ABA concern with no-fault proposals, and ABA support of state no-fault statutes, is familiar. It is appropriate that the subject remain on the agenda of the Association and that the ABA monitor experiences with no-fault provisions where they have been adopted. The potential for major benefits from the no-fault approach is too significant for the ABA to fail to remain concerned with this subject.

4. *Simplification*

Simplified laws and simplified procedures serve to reduce costs and thus serve the public interest. Needless complexity in the substantive law serves to invite litigation; procedures which are needlessly complex are wasteful.

In the effort to simplify, however, we must be mindful not to eliminate the rights and procedures granted to the less powerful and less affluent members of our society in order to assure them equal justice.

The law governing transmission of property at death has long been singled out as an example of needless complexity. We note, however, that substantial progress has been made in many states, thanks in large measure to the Uniform Probate Code. In general, it may be observed, the work of the Commissioners on Uniform State Laws has been an important influence.

These are matters best considered by the individual sections in the course of their continuing concern for improvement of the law.

B. ELIMINATION OF THE USE OF COURTS IN NON-ADVERSARIAL PROCEEDINGS

Judicial resources are never available in overabundance and they should be reserved for the resolution of controversies and the vindication of rights. Much time is consumed in some courts as a result of judicial involvement in uncontested probate, uncontested divorce, incorporating membership corporations, approving changes of name and, in some cases, making appointments to semi-public offices. It is certainly an appropriate judicial function to assure that absent interests are in fact represented when important rights might otherwise be lost, but courts should not be quick to assume that conflicts exist when in fact there are none. Thus, there is much to commend the proposal that the courts be freed from the obligation to act in situations inappropriate for judicial action, limiting judicial involvement to cases in which a controversy between adversaries has developed.

The issues are frequently subtle and complex. It may, or it may not, be desirable to develop new procedures for approval of child custody and adoptions where these are not contested. Again, the work of the Commisisoners on Uniform State Laws can be helpful.

We recommend that the matter be referred to the Conference of Chief Justices for such further reference as they may deem appropriate. We further recommend that the attention of state and local bar associations, and of the interested sections of the ABA, be invited to this problem.

III
Criminal Procedure

The public expects the criminal justice system—referred to in some countries as a social defense system—to be effective in reducing crime and affording protection to the community and to be fair in the process. Our system of criminal justice, however, is not viewed as effective. Crime and the fear of crime have become two of the society's most deeply disturbing problems. There is profound dissatisfaction with the operation of the criminal law,[1] both on the part of those who consider judicial processes too slow and the judges too lenient and on the part of those who consider sentences too harsh, our correctional institutions ineffective and the system, generally, one which oppresses the poor and is manipulated by the rich.[2] Understandably, much of the Pound Conference was devoted to the criminal justice system.

1. Rubin, *How Can We Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of the Criminal Law.* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 176, 178 (1976). *See also,* National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts,* 1 (1973), [hereinafter National Advisory Commission *Report*] where it is observed, "While all components of the [criminal justice] system have been criticized, it is becoming apparent that, as the Nation's crime-consciousness grows, the role of the ocurts in crime control is becoming the center of controversy."

2. *See* Rubin, *supra* note 1.

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Recommendations for change concerned virtually every phase of the system from arrest through appeal. They varied in nature and purpose, reflecting in some instances opposing points of view. The abbreviated roster of proposals which follows serves to illustrate the range of concerns expressed at Saint Paul and the willingness of at least some of the participants to experiment with procedures fundamentally at variance with present practice.

Elimination of the professional bondsman was urged as an important step in bail reform.[3] Control of prosecutorial discretion was considered desirable, perhaps by the development of standards which would serve as a guide in individual cases.[4] Effective pre-trial discovery was urged and the desirability of an omnibus procedure considered.[5]

Trial procedures came under scrutiny; understandably, it was urged that we develop procedures which are prompt and fair and which consider the interests of victims, jurors and witnesses while yet safeguarding individual rights.[6] Assuring competence of counsel was accorded a high priority.[7]

3. Rubin, *supra* note 1, at 183. *See also* National Advisory Commission *Report, supra* note 1, Standard 4.6.

4. A related issue, the desirability of plea bargaining, provoked controversy. Compare the discussion in Rubin, *supra* note 1, at 183-186 with Schaefer, *Is the Adversary System Working In Optimal Fashion? Id.* at 159, 174-175.

5. Rubin, *supra* note 1 at 188; *see also* National Advisory Commission *Report, supra* note 1, Standard 4.9 and commentary thereto.

6. *See* Higginbotham, *The Priority of Human Rights in Court Reform,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 134, 151-154; Rubin, *supra* note 1, 178, 193. *See also* Burger, *Agenda For 2000 A.D.—A Need for Systematic Anticipation, id.* at 83, 92: "Inordinate delay in criminal trials and our propensity for multiple trials and appeals shock lawyers, judges and social scientists of other countries."

7. Rubin, *supra* note 1, at 188; *see also* National Advisory Commission *Report, supra* note 1, Standards 12.15 and 13.16 and accompanying Commentary, advocating specialized training for prosecutors, defenders and their assistants with a view toward assuring maximum effectiveness of counsel in criminal trials.

Reform of sentencing practices was a subject which received some emphasis, with particular concern for the need to reduce disparity in sentencing.[8] To that end proposals were discussed recommending that sentencing guidelines be established and that judges be required to assign reasons for the sentences which they impose.[9]

The need to improve our correctional institutions was stressed; the creation of in-prison procedures to deal with prisoner complaints was urged as a means of achieving internal prison reforms and reducing the workload of courts.

Present patterns of post-conviction remedies, involving repetitive collateral attacks and multiple appeals, were severely criticized.[10] Specific proposals included provision for a single post-conviction hearing,[11] speedier review and the imposition of a requirement of a colorable claim of innocence as a prerequisite to collateral attack.[12]

More fundamental changes, with potential impact on an entire range of present procedures, were urged. The exclusionary rule was attacked and its efficacy as a deterrent to illegal activity by police officers challenged.[13] The *Miranda* rule was also criticized, with a proposal for in-custody interrogation before a judicial officer offered

8. *See* Schaefer, *supra* note 4, at 173-174; Rubin, *supra* note 1, at 193-196; National Advisory Commission *Report, supra* note 1, at 109.

9. Rubin, *supra* note 1, at 195; *see also* Schaefer, *supra* note 4, at 173-174. Appellate review of sentencing was also considered, with Rubin noting, "Although a majority of judges oppose appellate review, the United States is the only democratic nation that does not have it." Rubin, *supra,* at 195; *see also* Schaefer, *supra,* at 173.

10. Rubin, *supra* note 1, at 196-197. Schaefer, *supra* note 4, at 170-171. It was also suggested that the problem was one that "must be solved by the courts themselves." Walsh, *Improvements in the Judicial System: A Summary and Overview, id.* at 223, 227.

11. Rubin, *supra* note 1, at 198.

12. Schaefer, *supra* note 4, at 171, *citing,* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

13. Schaefer, *supra* note 4, at 171.

as an alternative.[14] It bears emphasis that the proponents of these changes were not suggesting that illegal activity by law enforcement officials should be condoned. On the contrary, they called for increased effort to discover alternative deterrents to illegality that would prove more effective than the challenged procedures in achieving their basic purpose as well as less obstructive in the enforcement of the criminal law.[15]

These, then, were some of the major proposals presented at Saint Paul—innovative, creative and in many respects controversial.

The American Bar Association has, of course, been actively involved in attempting to improve the administration of criminal justice in recent years. The ABA-sponsored studies may, with justification, be termed monumental. The ABA Standards for Criminal Justice were the result of a decade of intensive effort[16] and the Section of Criminal Justice has mounted a nationwide program seeking their implementation in every state.[17] Certainly the continuation of these efforts must remain of primary concern.

This is an area of the law, however, which is hardly static; change comes quickly and is far-reaching in impact. Thus, in a Supreme Court opinion announced earlier this month the scope of

14. Schaefer, *supra* note 4, at 166. In his discussion of this proposal, *id.* at 166-170, Justice Schaefer notes that Dean Pound had advocated a "legal mode of interrogation of suspects taken into custody" as early as 1907. *Id.* at 166 *quoting* Proceedings, Am. Pol. Sci. Ass'n. (1907), reprinted in Roscoe Pound and Criminal Justice 100 (S. Glueck, Ed. 1965).

15. Schaefer, *supra* note 4, at 172.

16. Erickson, The ABA Standards for Criminal Justice, App.-3, reprinted from Criminal Defense Techniques (Cipes & Bernstein eds. Release No. 10, July 1975) (distributed by ABA Section of Criminal Justice.)

The National Advisory Commission on Standards and Goals for Criminal Justice, funded by LEAA, meanwhile produced six volumes of standards and goals, which were in substantial agreement with the ABA Standards in those areas covered by both. The House of Delegates also endorsed these standards and goals to the extent not inconsistent with the ABA Standards.

17. *Id.* App. A-4-8.

federal collateral attack on state convictions was sharply curtailed,[18] and on the same day the Court took occasion to question the deterrent effect of the exclusionary rule.[19] Again, there is no suggestion that illegal practices be condoned; the concern is for procedures which protect the interests of society while assuring fairness to defendants. These developments require, therefore, that the quest for other practicable, effective deterrents to illegal search and seizures by law enforcement officers be accorded a high priority. Accordingly, we recommend that the matter be referred to the Section of Criminal Justice, confident that vigorous efforts by that Section will assure continued ABA leadership in this field.

The National Conference of State Trial Judges has an obvious interest in, and its members possess rich experience relevant to these issues. We recommend that they, too, be invited to contribute to the solution of these pressing problems.

18. Stone v. Powell, 44 U.S.L.W. 5313 (U.S. July 6, 1976), holding "that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 44 U.S.L.W. 5317.

19. United States v. Janis, 44 U.S.L.W. 5303, 5308-5310, text at notes 19-29 and authorities cited (U.S. July 6, 1976).

IV.
Civil Procedure

A. CORRECTING ABUSES IN THE USE OF DISCOVERY

Substantial criticism has been leveled at the operation of the rules of discovery.[1] It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit.

Much of the criticism has focused on the role of the trial judge. It has been urged that the fair and orderly operation of the rules should be a prime and personal responsibility of the trial judge. It has been further suggested that abuse cannot be eliminated unless the judge insists on defining the issues before extensive discovery is permitted.[2] Others have urged that, in the federal system at least,

1. Rifkind, *Are We Asking Too Much of Our Courts?* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 96, 107 (1976); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?, id.* at 199, 202-204.

Expressing concern regarding complaints that pretrial procedures are abused, the Chief Justice commented that he had asked the appropriate committees of the Judicial Conference of the United States to conduct hearings, "on any proposals the legal profession considers appropriate." Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation, id.* at 83, 96.

2. Kirkham, *supra* note 1 at 204, Rifkind, *supra* note 1 at 107. Judge Rifkind also added, "I believe it is fair to say that currently the power for

magistrates should monitor the process and be admonished not to allow unrestricted and expensive discovery unrelated to the actual needs of the litigants.

Certainly, abuse of the processes of discovery on any widespread scale must be a matter of prime concern. Fashioning appropriate remedies, remedies which will neither impose undue burdens on the courts nor prove unfair to litigants with genuine need for extensive discovery, is, however, a complex task. Empirical data concerning the types of cases in which abuse is most likely to occur, the nature and extent of the abuse, and the utility of remedies which have been tried may prove helpful.[3] Happily, the Section on Litigation already has the subject under study. The National Conference of State Trial Judges and the Judicial Administration Division may be expected to provide additional perspectives which would aid in developing practicable and equitable solutions. A common effort by these three bodies would have many advantages. It would assure the active participation of those best able to contribute to prompt and effective resolution of these difficult questions. Accordingly, we recommend that consideration be given to such a joint program.

At the least, the Section on Litigation, in coordination with the Judicial Administration Division, should accord a high priority to the problem of abuses in the use of pretrial procedures and report its findings and recommendations with a view to appropriate action by state and federal courts.

the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the Fourth Amendment."

3. The value of empirical research in considering amendments to the Federal Rules of Civil Procedure has been recognized by the Advisory Committee in the past. *See, A Field Study of Discovery Practice,* Advisory Committee's Explanatory Statement concerning Amendments of the Discovery Rules accompanying the 1970 Amendments to F.R.C.P., 26-37.

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B. THE USE OF SANCTIONS

Imposition of sanctions in the course of civil litigation is a familiar penalty which may be imposed for failure to comply with judicial orders,[4] willful violation of an obligation imposed by procedural rules,[5] or even in some circumstances for failure to respond to a request to admit.[6] Such sanctions may run the gamut from an order to pay reasonable expenses, including attorney's fees, incurred by an adversary in proving a single fact[7] to punishment for contempt in the extreme case.[8]

Reasonable sanctions imposed to assure compliance with reasonable procedures are appropriate and necessary to prevent abuses.[9] It is right to insist that an attorney's signature on a pleading certifies that to the best of his knowledge there is good ground to support its averments and that it is not interposed for delay.[10] Where inadequate and improper pleadings give evidence of contributing to delay and increased expense of litigation,[11] it is desirable to assure that procedural rules specifically provide that an attorney's signature carries with it such a certification and that sanctions may be imposed for willful violation. Moreover, it is important that judges enforce the rules. We recommend that the Section on Litigation study the problem of enforcement and make recommendations appropriate for state and federal courts.

4. *See, e.g.,* FED. R. CIV. P. 37(b)(1).

5. *See, e.g.,* FED. R. CIV. P. 11.

6. FED. R. CIV. P. 37(c).

7. *Id.* Attorney's fees, of course, have varied purposes. They are often intended to make a party whole. They are included in many statutes to serve as an incentive to bringing suit.

8. FED. R. CIV. P. 37(b)(2)(d).

9. Sanctions must, of course, be determined pursuant to law and in accordance with established procedures. *See* Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L. Ed. 2d 734 ,1962).

10. FED. R. CIV. P. 11.

11. Commenting on the extent of abuse of liberalized pleading requirements, Judge Rifkind observed: "Many actions are instituted on the basis of a hope that discovery will reveal a claim." Rifkind, *supra* note 1, at 107.

The taxing of costs can be, and in some places has been used far more creatively. The risk of being taxed with the expenses incurred by an opposing party has been considered a useful deterrent to needless extension of litigation. Similarly, it has been used to avoid resort to trial where trial is unnecessary. What has been termed the Michigan mediation system, for example, has proved [illegible] in reducing the number of unnecessary trials.[12] Under the terms of the governing provisions, cases in which liability is realistically not in issue can be referred for evaluation to an impartial panel. The findings of the panel are not binding, but, if rejected by a litigant who then fails to achieve a substantially more favorable result at trial, they subject the litigant to the imposition of the costs of litigation. It is important to emphasize that these mechanisms are designed to apply equally to all parties to a lawsuit.

In our view, such creative use of sanctions offers a significant potential for increased efficiency to the benefit of the litigants immediately involved and to the ultimate benefit of all who depend on the availability of an efficient judicial system. We recommend that the Section on Litigation evaluate programs designed to this end, and encourage experimentation and implementation of those programs which have proved successful.

C. CLASS ACTIONS

Class actions have been in use for well over a hundred years and have proved themselves a valuable tool. A little more than a dozen years ago the Federal Rules governing class actions were changed substantially, use of the class action became far more widespread, its impact on litigants far more significant, and the governing rules and doctrine highly controversial. It is certainly true that few procedural devices have been the subject of more widespread criticism

12. For a description of The Michigan Mediation System in Wayne County, Michigan, and for an evaluation of its operation, *see* Miller, *Mediation in Michigan* 56 Judicature 290 (1973). The Mediation System was established by Michigan General Court Rules and Wayne County Circuit Court Rules, *id.* at 290, and periodic statistical reports are prepared.

and more sustained attack—and equally spirited defense. The dissatisfaction, however, does not encompass all kinds of class actions; it focuses on litigation under Federal Rule of Civil Procedure 23 (b) (3) and its state counterparts, which permit suits on the part of persons whose only connection is that one or more common issues characterize their position in relation to an adverse party.

The sheer magnitude of many of these suits, in some instances involving literally hundreds of thousands of claimants and an equally imposing number of documents, has been said by some critics to result in litigation so complex as to be beyond the power of judicial tribunals to adjudicate on any rational basis.[13] The use of the jury in such cases has been condemned with particular vigor, resulting in judicial speculation as to whether jury trial should be denied even when requested by both sides.[14]

There are those, however, who vigorously resist any attempt to contract the sweep and scope of class actions. The Supreme Court's holding in *Eisen* concerning notice to the individual members of the class drew substantial fire for unduly restricting the utility of the Federal Rule.[15] By the same token, the Court's holdings relating to jurisdictional amount in 23 (b) (3) class actions has been condemned in language which reflects the intensity of feeling which these problems of practice and procedure evoke.[16]

The unseemly picture of the lawyer frequently as the real party

13. Kirkham, *supra* note 1 at 203.

14. Parsons, J. in Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., N.D. Ill., Case No. 71-C-1243 (May, 1976) (Transcript of decision rendered orally).

15. Schuck and Cohen, *The Consumer Class Action: An Endangered Species,* 12 SAN DIEGO L. REV. 39 (1974) Comment, *Class Actions and the Need for Legislative Reappraisal,* 50 NOTRE DAME LAW. 285 (1974); Comment, *The Federal Courts Take a New Look at Class Actions,* 27 BAYLOR L. REV. 751 (1975).

16. "*Snyder* was a disappointment and *Zahn* a tragedy to those who view class actions as a powerful weapon on behalf of the average citizen." Coiner, *Class Actions: Aggregation of Claims for Federal Jurisdiction* 4 MEMPH. STATE U.L. REV. 427, 447 quoted in Wright and Miller, Federal Practice and Procedure, Civil § 1756 (Supp. 1975).

in interest, representing vast numbers of plaintiffs no one of whom has substantial interest in the recovery, has been a cause of concern.[17] The size of counsel fees in such litigation led one panelist at Saint Paul to characterize litigation as a new "growth industry."[18]

More importantly, the order of magnitude of the potential liability in many treble damage cases and other 23 (b) (3) actions and the sheer expense of defending, have been said to coerce settlements unrelated to the merits of the claim, thus resulting in what has been called a "de facto" deprivation of defendants' "constitutional right to a trial."[19]

A number of specific proposals for change were considered in some detail at the Pound Conference. Elimination both of claims which are de minimis and of cases "too big for adjudication,"—either because of too many parties, too many witnesses, or an excessive diversity of issues—was suggested. The major problems could be solved, it was urged, by a requirement that members of a class who desire to litigate take some affirmative step to "opt in," replacing the current practice under which they are considered litigants if they fail to "opt-out."[20]

17. American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure,* 20-21 (1972).

The potential conflict of interest between the attorney and the members of the class has also become the subject of study. See Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. Legal Studies 47, 56-61 (1975).

18. Kirkham, *supra* note 1 at 204.

19. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 9 (1971).

20. American College of Trial Lawyers, *supra* note 16 at 2-3, also contains such a proposal.

See also Miller v. Mackey International, Inc., 515 F.2d 241 (5th Cir. 1975). Counsel had sought court approval of a fee in excess of $130,000; the District Court awarded only $20,500, and counsel appealed. The Court of Appeals reversed. Bell, J., concurring specially, appeared to invite consideration of the need for special counsel to represent members of the class

It would be wrong to leave the impression that the debate over class actions is limited to the federal forum. On the contrary, developments in the law applied in federal courts have served to heighten interest in state provisions. Recently enacted statutes in New York[21] and in California[22] depart significantly from the federal pattern, as does the Fifth Tentative Draft of a Uniform Class Actions Act presently before the Commissioners on Uniform State Laws.

The impact of the class action on producers and consumers alike[23] and the diversity of viewpoints concerning the nature of the problems and the preferred solutions, make it clear that the subject must remain of primary concern. Moreover, substantive considerations of major significance are involved. The 1974 amendment to the Truth in Lending Act limits recovery in a class action under that statute to $100,000 or one percent of the net worth of the

against "their counsel" on the issue of fees. Noting that "lawyers representing one client having a claim valued at $587," ended up with "an estimated 1,500 to 2,000 clients unknown to counsel having claims approximating $700,000," he added: "These unknown clients have no counsel other than the counsel here and thus the fees are being awarded in a non-adversary context. They had no representation in the district court and they have none here." *Id.* at 244.

Examining the problem in terms of root causes, Judge Bell called for a "better system," one which "would be in the form of an opt-in provision in the class action rule so that only those persons would be in the law suit who choose to remain in and thus allow counsel to represent them. This would enable a return to the tradition of the legal profession where clients affirmatively employ counsel." Finally, Judge Bell suggests that "pending amendment of the rule, an opt-in procedure should be used in the discretion of the district court if it is substantially related to the management of a class action." Rule 23(b) (3) (D), "coupled with the inherent powers of the court to manage litigation, will be sufficient in some cases to allow a class action to be maintained only on an opt-in procedure." *Id.*

21. N.Y. C.P.L.R. § 901 *et. seq.* (McKinney Supp. 1976).

22. Cal. Civ. Code § § 1780, 1781 (West 1973).

23. Kirkham, *supra* at 204, referring to class actions, observed that they are "adding billions of dollars to the cost of producing consumer goods and services."

creditor, whichever is less,[24] a formula which amply illustrates that, once again, the substantive law may be developing in the interstices of procedure.

We have already noted the active interest of the Commissioners on Uniform State Laws in this area; there is reason to believe that the appropriate committees of the Judicial Conference of the United States will consider whether changes in the Federal Rule are desirable. We note, as particularly worthy of study, the possibility of an added measure of judicial control over attorney fees in class actions,[25] and the substitution of "opt-in" provisions for the present "opt-out" rule.[26] Further, we urge all concerned sections of the ABA to accord a high priority to class actions with a view to assessing proposals put forth by others and, of equal importance, with a view to initiating recommendations for change both with respect to procedures and to the substantive law.

D. THE JURY

1. *The Right to Jury Trial*

Trial by jury has long been the subject of debate, "attracting at once the most extravagant praise and the harshest criticism."[27] It is

24. 15 U.S.C.A. § 1640(a) (Supp. 1976), amending 15 U.S.C.A. § 1640 (1974).

25. The courts have already evidenced sensitivity to the problems raised by large fee awards in class actions. Flatly characterizing the fees awarded in the settlement of a class action as "excessive," the Second Circuit commented: "For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir., 1974).

See also the concurring opinion of Bell, J., in Miller v. Mackey International, Inc., discussed note 20 *supra.*

26. At least one member of the Task Force opposes substitution of the opt-in provision.

27. Kalven, *The Dignity of the Civil Jury,* 50 VA. L. REV. 1055, 1056 (1964).

significant, as the Commentary to the ABA Standards Relating to Trial Procedures observes, that "American trial court procedure remains unique in the breadth of the jury trial guaranty it affords and the generality with which juries are used."[28] The use of juries in civil cases was the subject of trenchant criticism at Saint Paul, where it was described as the cause of much of the current dissatisfaction with the adversary system.[29] Of course, there were many who reaffirmed their commitment to the civil jury and those who expressed the view that the issue "must be addressed with all the cautions that we exercise in dealing with that which has been regarded as a fundamental part of our system."[30]

Whatever the division of opinion concerning the desirability of reducing or eliminating the scope of the right to jury trial in civil cases, there would seem to be rather widespread agreement that the right should not be extended. The fact, is, however, that there has been a substantial extension of the right to jury trial in the federal system over the past few decades.[31] The reasons for the expansion,

28. ABA Commission on Standards of Judicial Administration, *Standards Relating to Trial Courts,* Commentary to § 2.10 (1975), approved by the House of Delegates 1976.

29. Schaefer, *Is the Adversary System Working in Optimal Fashion?* in National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 159, 160 (1976).

30. Walsh, *Improvements in the Judicial System: A Summary and Overview,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 223, 228. (1976). For a thoughtful discussion of the considerations raised by the proposal to eliminate juries in civil cases, see *id.* at 227-228.

31. *See, e.g.,* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making,* 70 NW. L. REV. 486, 501 (1975): "the 'bottom line' in using the rational approach has invariably been extension of the right to jury trial to cases where historically there would have been no such right." *See also* F. James, Civil Procedure 377 (1965): "the Court makes it clear that the constitutional right to a jury attaches to those areas wrested from 'the scope of equity' by 'expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules.' The present Court, which heavily favors the jury trial, will no doubt use this flexibility always to expand jury trial."

rooted in the Supreme Court's view of the implications of the merger of law and equity, need not be detailed here. The subject clearly appears ripe for reexamination.[32] It may also be appropriate to reexamine the application of doctrines governing right to jury trial in the cases of new causes of action created by statutes of a type unknown to the common law.[33]

It should be noted that complaints with respect to the civil jury have been focused particularly on cases which are complex and difficult.[34] Long ago, equity felt free to assert jurisdiction in such cases and thus preclude jury trial; accounting in equity is a familiar example. This subject, too, is ripe for reexamination.

We recommend that the American Bar Foundation, the Institute of Judicial Administration, the Federal Judicial Center, or some other appropriate organization, be invited to undertake a thorough study of the proper scope of the right to jury trial in civil cases and to make recommendations concerning any changes in present practices which may be desirable.

2. *Jury Trial Procedures*

The procedures presently employed in jury trials can be improved substantially. As the Chief Justice observed in his keynote address in Saint Paul, there is reason to doubt "whether the jury selection process, which is provided as a means to insure fair, impartial jurors, should be used as a means to select a favorable jury." [35] It is hardly in the public interest to afford the parties on either side the opportunity to select a jury biased in their favor. The ABA Standards Relating to Trial Courts include recommended

32. *See* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); Redish, *supra* note 5.

33. *See, e.g., Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Comm'n.*, 519 F.2d 1200 (3d Cir. 1975), *cert. granted*, 96 S. Ct. 1458 (1976), discussed in Schaefer *supra* note 2 at 164.

34. *See* text at note 3, *supra*.

35. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83, 92 (1976).

procedures designed to achieve both efficiency and impartiality.[36] They deserve implementation.

Frequently too little attention is paid to the price in needless discomfort and boredom and sheer indignity that thoughtless practices exact from citizens called for jury duty. It is familiar knowledge that too many jurors react negatively to the whole system of justice as a result of their own experiences. Various proposals relating to efficient utilization of jurors deserve consideration. Continued experimentation is certainly to be commended.

We recommend that the ABA Standards Relating to Trial Courts be referred to the Conference of Chief Justices and to the Judicial Conference of the United States with a view to correcting abuses in this area wherever such abuses exist. Aside from amenities, attitudes and sheer waste, the actual functioning of juries can be improved.

Increased use of interrogatories and special verdicts, and better communication of instructions to the jury, perhaps by use of a videotaped charge, are two further examples of suggested improvements in the use of juries. Other examples may also be suggested. We recommend that the Section on Litigation consider suggested new techniques, or more widespread use of existing techniques, with a view to appropriate recommendations.

E. SPECIAL PROBLEMS OF FEDERAL JURISDICTION

Elimination of diversity jurisdiction, or at least denying such jurisdiction at the option of a citizen of a forum state, has long been espoused.[37] The high quality of justice dispensed in state

36. Section 2.12.

37. Noting that the subject of diversity jurisdiction "is one to which I have addressed myself on a number of prior occasions, particularly in reports to the American Bar Association annual meeting," the Chief Justice called for abolition of diversity jurisdiction with the statement that "in the 20th century such cases have no more place in the federal courts than the trial of a contested overtime parking ticket!" Letter of the Chief Justice to Senator Roman L. Hruska, Chairman, Commission on Revision of the Federal Court Appellate System, May 29, 1975, 67 F.R.D. 195, 397-398 (1956).

courts makes resort to removal to the federal courts unnecessary; moreover, today parochialism is hardly the problem it once was, if it can be said to be a problem at all. The change would have little impact on the total volume of litigation in state systems, but would provide significant relief to the federal courts.[38] We recommend that the Conference of Chief Justices and state and local bar associations be invited to consider this improvement with a view to endorsement. Such endorsement, we are confident, would go far toward assuring favorable action by the Congress.

Legislation passed by the Senate and pending in the House would eliminate three-judge courts and direct appeals, with reasonable exceptions.[39] The ABA, acting through the Judicial Administration Division and through the Committee on Coordination of Judicial Improvements, should actively support the legislation and seek to have it enacted into law.

38. *Id.* at 397, *citing* the 1969 Study of the American Law Institute.

39. S. 537, 94th Cong., was passed by the Senate on June 20, 1975. H.R. 6150 is pending in Committee.

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V.
Assuring the Availability of Legal Services

Neighborhood Justice Centers, described earlier in this report, are designed to make it easier for all citizens to obtain just resolution of their grievances. The availability of mediation and arbitration will serve the same end. In some cases simplified procedures will make it possible for the citizen adequately to prosecute his own claim or to establish his own defense; this has long been a stated goal of small claims courts. Moreover, the forthcoming Conference on the Resolution of Minor Disputes may be expected to deal with appropriate ways and means for the realization of that goal. Nonetheless, it must be recognized that in many cases substantial claims will be referred to courts of general jurisdiction with a realistic possibility that plenary trial will be necessary. In such cases a litigant not represented by counsel is, realistically speaking, deprived of his day in court. Adequate legal representation must be viewed as a prerequisite to the delivery of justice.

In a very fundamental sense, the issue forces us to examine the precise nature of the commitment of our society, and especially of our profession, towards those who cannot afford to retain their own counsel. We have gone far to protect the indigent criminal defendant; a genuine sensitivity to the need to provide representation in civil matters involving status, such as divorce and custody, is also

apparent.[1] In many cases the contingent fee assures adequate representation for the indigent. The full range of the need, however, has not yet been met. We recognize and applaud the advances already made towards ensuring access to the judicial system for all; it is important, however, that we maintain a continuing awareness of the need for further progress and a continuing commitment to find and implement the means by which to achieve it.

Canon 2 of the Code of Professional Responsibility has particular relevance in this context. It provides that "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

On a national level, Congress has already evidenced concern with these problems;[2] the Legal Services Corporation has also shown interest in state and federal programs designed to assure the availability of legal services to all.[3] This is an area in which the concern of state and local bar associations can be particularly productive and efforts should be made to stimulate interest and initiative at the local level.

The American Bar Association has taken significant steps in the effort to assure delivery of justice to all.[4] We recommend that the

1. *See, e.g.,* Commentary to American Bar Association Commission on Standards of Judicial Administration, *Standards Relating to Trial Courts,* Standard 2.20 (1976).

2. *See, e.g.,* May 19, 1976 Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, the most recent in a series on these issues.

3. *See* Thomas Ehrlich, *Causes of Popular Dissatisfaction with the Administration of Justice: The Perspective of the Poor,* Statement before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, May 19, 1976.

4. The ABA Consortium on Legal Services and the Public includes the following constituent committees: Standing Committee on Lawyer Referral Service, Standing Committee on Legal Aid and Indigent Defendants, Standing Committee on Legal Assistance for Servicemen, Special Committee on the Delivery of Legal Services, Standing Committee on Specialization, Special Committee on Prepaid Legal Services, Special Committee on Public Interest Practice, Special Committee to Survey Legal Needs.

American Bar Association continue in the forefront of this effort, and particularly that it maintain a close liaison with the Congress to assist in the development of specific recommendations and to aid in expediting their implementation. We recommend further that the American Bar Association invite the attention of state and local bar associations to the potential for service in this area.

VI.
Judges

Assuring judges of superior quality in adequate numbers has long been a concern of the Association. A number of specific recommendations presented at Saint Paul are embodied in the Standards on Court Organization, which have already been approved by the House of Delegates. These emphasize prompt filling of vacancies,[1] merit selection[2] and adequate provision for the tenure[3] and discipline[4] of judges. The importance of a program of continuing education for judges[5] also deserves inclusion in any program concerned with judicial quality.

In the effort to move from precept to practice, the ABA has established a special committee, chaired by Judge Winslow Christian to seek implementation of these standards.[6] Accordingly, we recommend that the above proposals be referred to that committee for action.

1. American Bar Association Commission on Standards of Judicial Administration, *Standards Relating to Court Organization* (1974). Standard 1.21(b) (ii).
2. Standard 1.21(a).
3. Standard 1.21(b) (iii).
4. Standard 1.22.
5. Standard 1.25.
6. The Committee to Implement the Standards Relating to Court Organization. The jurisdiction of the committee, however, may soon be broadened.

An additional proposal, presented at Saint Paul and not included in the Standards, is the development of a mechanism designed to assure periodic legislative consideration of the need for new judgeships. Such a mechanism would regularly supply the legislature with data concerning workloads and population, including both past experience and future projections, a formula by means of which to utilize the data in determining the number of judgeships warranted for each court, and a self-imposed legislative requirement that the legislature vote on new judgeships within a specified time after the submission of such data.

We recommend that this proposal be considered by the Judicial Administration Division, the Conference of Chief Justices and by the Judicial Conference of the United States.

VII.
Collection and Evaluation of Data

There was repeated emphasis at the Pound Conference on the paucity of data available for an adequate understanding of the reasons for the critical problems of judicial administration and for informed consideration of the alternatives to judicial resolution of disputes.[1] Are disputes not brought to court resolved in some other manner? If so, how? Are there social and psychological costs involved in not pressing disputes? If so, what are they? Further, it was suggested that we do not know, and we need to learn, the relative speed and cost of different methods of dispute resolution.[2] Certainly, it is difficult to judge the desirability of increased resort to alternatives without such information.

We need to learn more of the operation of the Bail Reform Act and the Criminal Justice Act.[3] We have no reliable data, it was

1. Sander, *Varieties of Dispute Processing,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 111, 133 (1976).

2. *Id.*

3. Commenting on these two acts, the Chief Justice said, "Each of these acts was one that most informed people would call 'good' legislation. Now, a decade and more of actual experience shows that the interaction of these two improvements created vexing problems not anticipated." Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 83, 90 (1976).

urged, on the number of crimes committed in this country, on arrests and dispositions.[4] For efficient operation, the entire system of the administration of justice must be thoroughly coordinated and adequately funded. This is difficult, if not impossible, without adequate data, current and reliable.

This is an area concerning which the Task Force considers it appropriate to make its recommendation directly to the Board of Governors with a view to the earliest possible implementation.

In our judgment, creation of a Federal Office for the collection of data, both state and federal, civil and criminal, would be desirable. Such an office might be established as an adjunct of the Administrative Office of the United States Courts. It would collect state data reported to it on a voluntary basis and would be authorized to undertake special studies relevant to the administration of justice. This Office would work in close cooperation with the National Center for State Courts, and the Federal Judicial Center, and with other groups. Indeed, we note that certain state data, relating to wiretaps, is today reported to the Administrative Office of the United States Courts.

ABA approval should be made conditional on approval by the Conference of Chief Justices.

In the long range, it may become appropriate to transfer some or all of the functions of this office to the National Institute of Justice, should one be established. Certainly, nothing in this proposal is intended to preclude, or to militate against the establishment of such an Institute. However, the need for data is too pressing, and the opportunity for creating a simple, efficient mechanism for meeting that need too obvious, to postpone action now until a National Institute is in fact created.

4. Rubin, *How Can We Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of Criminal Law,* National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. 70 F.R.D. 176, 180-181 (1976).

Supplemental Report of Pound Conference Follow-Up Task Force

RECOMMENDATIONS

1. We recommend that the Board of Governors take special action designed to assure funding of experimental Neighborhood Justice Centers in the immediate future. This recommendation is made in view of interest in this concept which has been generated by the Pound Conference and ABA reports, and the funding opportunities which have recently arisen.

2. We recommend that the Division on Judicial Administration be invited to study the desirability of expanded use of magistrates within the Federal judicial system. We further recommend that the Division on Judicial Administration, in coordination with the Federal Juditcial Center, develop legislative proposals designed for this purpose.

3. We recommend that the American Bar Association endorse, in principle, funding by the Congress of a program for the collection of data relevant to judicial administration, both state and federal, civil and criminal. This recommendation is a modification of Recommendation 26 (Pp. 7–8; 44–45) of the August, 1976 Report of this Task Force.

DISCUSSION

This Task Force was appointed last spring by President Walsh to assure that the ideas presented at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, more commonly referred to as the Pound Conference, would be carefully considered by those organization or agencies best able to evaluate and implement them.

Pursuant to that mandate, the Task Force reported to the Board of Governors in August, presenting 26 recommendations. In view of the interest in the ideas considered by the Task Force, the Task Force undertook to prepare a supplemental report.

We are pleased to report that the recommendation endorsing the abolition of three-judge courts (pages 6–7, 38) has been enacted by the Congress and was signed into law August 12, 1976 (P.L. 94–381).

There have been other developments. The papers presented in St. Paul last April have already been cited in a number of judicial opinions. See, e.g., *Stone* v. *Powell*, 96 S.Ct. 3037, 3050 n.28 (1976); *Franchise Realty Interstate Corp.* v. *San Fransisco Local Joint Executive Board of Culinary Workers* (9th Cir., No. 73–2727, Sept. 17, 1976, concurring opinion of Markey, C. J.). The Young Lawyers Section devoted a full day in Atlanta to the Pound Conference and committees of that Section are actively developing an action program. A special ABA Task Force on the Resolution of Minor Disputes, under the chairmanship of Talbot (Sandy) Dalemberte, commenced work last summer; and the American College of Trial Lawyers appointed a prestigious special committee to consider the implementation of proposals generated by the Pound Conference, which committee is already at work.

Meanwhile, the National Conference of Commissioners on Uniform State Laws has approved a Uniform Class Actions Act and the United States Senate evidenced continued interest in consumer courts by passing *S. 2069*, which would fund experimentation in this area by the states.

We do not attempt in this supplemental report to catalogue all developments relevant to the ideas propounded at the Pound Conference or to the recommendations included in our earlier report. Courts and legislatures will continue to grapple with these issues precisely because they are significant today and are likely to become more significant tomorrow. The use of sanctions in civil litigation to deter willful conduct which contributes to delay and to increased expense of litigation provides one example. The importance of the subject is underscored by recent judicial developments. Only last month, the United States Court of Appeals for the Fifth Circuit affirmed the action of the trial court in striking defendant's answer and counterclaim, and entering judgment for plaintiff, as a sanction for delay in making discovery. The Court of Appeals, while noting that it was not called upon "to say whether we would have chosen a more moderate sanction," (*Emerick* v. *Fenick Industries*, 539 F. 2d 1379, 1381 (5th Cir. 1976)), found no abuse of discretion. In reaching this conclusion, the court relied on *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 96 S. Ct. 27778 (1976), decided by the United States Supreme Court at the end of June.

In our earlier report, we recommended that the Section on Litigation make recommendations on this subject "appropriate for state and federal courts." We adhere to our earlier recommendations on this subject (numbers 16–17, pp. 5, 29–30), and find no need formally to renew them. In this case, as with other recommendations calling for study and evaluation, we are confident that future developments will be duly considered in the normal course.

A final example may be noted. Last month, the Congress enacted and the President signed into law, P.L. 94–559, providing for attorney's fees in civil rights litigation. The new statute is relevant to assuring the availability of legal service to all (see recommendation number 24, pp. 7, 39–41), but it does not yet preclude the need for further action.

Other recent developments are noted below in connection with the discussion of specific recommendations.

NEIGHBORHOOD JUSTICE CENTERS

The recommendations of this Task Force for the creation of Neighborhood Justice Centers (pp. 1–2, 9–12) have generated prompt and favorable response. An article in the August 29, 1976 issue of the *Nashville Tennessean* reports on the development of one such program by Judge A. A. Birch, noting the parallel to the ideas presented by Chief Justice Burger and by our earlier report.

Three metropolitan counties in Florida now have pilot programs "designed to offer an alternative to the usual criminal court procedures for persons who may be involved in certain county and municipal ordinance violations, misdemeanors or minor felonies." Chief Justice Ben F. Overton of the Supreme Court of Florida describes them as follows:

> Citizens Dispute Settlement Programs. These programs are designed to resolve citizen disputes that could but would not necessarily result in a criminal charge. The parties may be relatives, neighbors, co-employees, or be involved in some other relationships. Types of charges that generally arise and are considered in this program are assault and battery, threats, malicious destruction of property, complaints about dogs or other animals, improper telephone calls, and petit larceny.
>
> Also included are certain domestic felonies, and landlord and tenant disputes. Three metropolitan counties in our state now have operating pilot programs. Hopefully, this type of program will relieve the criminal justice system of certain minor offenses.

The concept of the Neighborhood Justice Center is commanding attention outside of legal circles. It is noteworthy that the School of Social Work of Bryn Mawr College has expressed interest in the development of a pilot program.

Opportunities for funding have arisen and, to take advantage of this interest and these opportunities, we recommend special action by the Board of Governors, consistent with our prior recommendations (numbers 1–3, at page 1–2, 9–12).

In this connection, the funding mechanism used in connection with the Legal Clinic experimental program may serve as a model.

MAGISTRATES IN THE FEDERAL SYSTEM

Various proposals for wider and more effective utilization of Federal magistrates have been put forth in recent months. There are a wide range of matters, both civil and criminal, which might appropriately be left to a magistrate, rather than to a District Judge. In many, perhaps in all such instances, the decision of the magistrate would be final absent specific, timely objection by one of the parties to the litigation.

Chief Judge Harry Phillips of the Sixth Circuit, in a letter to Mr. Justice Rehnquist dated August 12, 1976, provides a rich range of examples. Commenting on Judge Phillips' proposal, Judge Bell suggests a Magistrates Division in the District Courts.

The Congress, by enacting Public Law 94–577 in the last days of its most recent session, has expanded the jurisdiction of the Magistrates. Further expression of that jurisdiction, and the creation of a Magistrates Division within the United States District Courts, is deserving of further study. In the first instance, the subject is one appropriate for the Division on Judicial Administration. We note, however, that the Federal Judicial Center is particularly suited to provide assistance in the development of specific proposals and we recommend a

coordinated effort between the Division on Judicial Administration and the Center.

DATA COLLECTION

In our earlier report, we pointed to the need for an appropriate office for the collection of data relevant to judicial administration and to dispute resolution generally. We urged that such an office be empowered to collect data, both state and federal, civil and criminal, and that it should be authorized "to undertake special studies relevant to the administration of justice." (See pp. 7–8, 44–45).

Our earlier report sought creation of a Federal office for this purpose. In that report we recognized the need for close cooperation with the National Center for State Courts, the Federal Judicial Center and other groups.

Our present recommendation is a modification of our prior proposal. We adhere to the basic idea that such an office be funded by the Congress. We do not, however, in our present recommendation attempt to specify whether a new office is necessary or desirable, nor whether it should be state or Federal.

Funding by the Congress, in our view, is the essential ingredient. It is essential if we are to meet the pressing need for adequate information necessary to evaluate and to improve our many judicial systems.

CONTINUED EXISTENCE OF THE FOLLOW-UP TASK FORCE

It is the view of the Task Force that with this report we have completed the assignment with which we were charged. We have not been asked to monitor, let alone to assure, implementation of the ideas presented at the Pound Conference. Ours has been a far more modest task, that of assuring that the ideas presented in St. Paul were referred to those organizations or agencies best able to evaluate and implement them. This is entirely appropriate for the range of recommendations which have been generated as a result of the Pound Conference is too wide, and the significance of the proposals too far-reaching, for implementation to be left to this, or any similar Task Force. The concerns expressed in St. Paul and the specific recommendations generated will inevitably occupy an important place on the agenda of the ABA for some time to come.

The Board of Governnors has asked that we remain available on a stand-by basis, until the forthcoming mid-winter meeting of the Association. This we will be pleased to do. In the absence of any further charge or mandate, we will consider our assignment completed and the Task Force disbanded as of that date.

Respectfully submitted.

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(b)

UNITED STATES DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE,
Washington, D.C., May 9, 1977.

A PROGRAM FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

A two-year program to be pursued by the Office for Improvements in the Administration of Justice is outlined in the attached pages. The first page presents a summary statement of the goals of the program. Following that is a more detailed outline of the steps through which those goals will be pursued. This program draws upon a wide range of reports and studies which have appeared in recent years.

This is a beginning agenda. To an extent it is tentative and flexible, and it may be revised from time to time. Limited resources make it unlikely that every measure indicated will be fully pursued. On the other hand, new items are likely to be added as fresh insights emerge. Goals, however, will remain fundamentally the same.

Some of the projects will be carried out entirely by OIAJ staff; others will be headed by OIAJ staff working which persons from elsewhere in the Department or with expert assistance from outside the Department. Some projects may be developed primarily by outsiders under the anticipated Federal Justice Research Program, administered by this Office.

Liaison will be maintained with professional groups, congressional staffs, interested individuals and citizen organizations, other government agencies, and research entities. Continuing advice will be sought from these sources, and their assistance will be drawn upon in developing proposals. Collaborative efforts will be pursued where appropriate to the end that measures to improve the administration of justice will be soundly conceived and will have broad support. This is an action agenda. All measures proposed are aimed at concerte steps to achieve the stated goals.

Some subjects recognized as important and in need of attention are not included on this agenda because other offices or organizations have special mandates and competence to address them. These include, for example, the delivery of legal services, grand jury reform, antitrust enforcement procedure, and reorganization of the Department of Justice.

For further information contact:

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A Two-Year Program for Improvements in the Administration of Justice

Summary Statement of Goals

Goal I. Assure access to effective justice for all citizens through:
- A. Non-judicial dispute settlement procedures.
- B. More effective courts.
- C. More effective procedures in civil litigation.

Goal II. Reduce the impact of crime on citizens and the courts through:
- A. Substantive reforms in Federal law.
- B. Procedural reforms in criminal cases.

Goal III. Reduce impediments to justice unnecessarily resulting from separation of powers and federalism by:
- A. Coordination of the three branches of the Federal Government to plan for and improve the judicial system.
- B. Exploration of means of coordinating Federal, State and local efforts to improve justice.
- C. Reallocation of Federal and State authority.

Goal IV. Increase and improve research in the administration of justice through:
- A. The Federal justice research program.
- B. A central, effective statistical agency for criminal and civil justice.
- C. Development of proposals for new means of organizating and funding nationwide justice research.

A Two-Year Program for Improvements in the Administration of Justice

Goal I. Assure access to effective justice for all citizens:
- A. Non-judicial Dispute Settlement Procedures:
  - *1. Plan and establish Neighborhood Justice Centers.
  - *2. Develop proposals for increased use of arbitration.
  - 3. Devise administrative remedies for victims of law enforcement excesses.
  - 4. Assist in developing proposals for Federal role in automobile no-fault.
  - *5. Develop alternatives to class actions as remedies for mass wrongs.
- B. More Effective Courts:

1. Federal justice personnel:
   *a. Perfect procedures and monitor performance of the new judicial nominating panels for the U.S. Courts of Appeals.
   b. Encourage and study the use of judicial nominating panels at the District Court level.
   c. Assist in developing proposals for disability and tenure commissions for Federal judges.
   d. Develop proposals for improving the selection and training of Federal magistrates.
2. Better designed court structures:
   *a. Increase jurisdiction and evaluate effectiveness of the Federal magistrate system.
   *b. Develop judicial impact assessment of new legislation, in conjunction with the Office of Legislative Affairs.
   c. Develop proposals for rationalizing and increasing the appellate capacity of the federal judiciary.
3. Federal government representation in court:
   a. Improve coordination and management of government litigation below the Supreme Court.
   *b. Structure prosecutorial discretion.
   c. Develop plans for case management and professionalization in U.S. Attorneys' Offices.
4. Citizen participation in the courts:
   *a. Improve compensation and treatment of jurors and witnesses.
   b. Assist in reassessing the role and composition of juries in civil cases.
   c. Assist in developing proposals to help participants with language problems.

C. More Effective Procedures in Civil Litigation:
1. Trial procedures:
   *a. Improve class action procedures.
   *b. Develop proposals for more equitable allocation of attorneys' fees and court costs.
   *c. Revise pretrial procedures, especially discovery, to reduce expenses and delay and to increase fairness.
   d. Assist in developing legislation governing standing to sue in federal courts.
   e. Make *voir dire* jury selection procedures fairer and more effective.
   f. Revise procedures to deal with current trends toward strong court role in case management.
2. Appellate Procedures:
   *a. Devise and evaluate experiments in subject matter panel assignments.
   *b. Develop proposals to alter the economic incidents of civil appeals—costs, interest rates, attorneys' fees—for more equitable allocation and to discourage groundless appeals.
   c. Devise and experiment with innovations in the presentation and decision of appeals.
   d. Revise procedures to deal with new judicial role in case management and the increased use of professional assistance.

Goal II. Reduce the impact of crime on citizens and the courts

A. Substantive reforms in federal law:
   *1. Assist in revising the Federal Criminal Code.
   *2. Assist in developing legislation on handgun control.
   3. Simplify and consolidate criminal sanctions in regulatory laws.
   *4. Develop plans to improve prison conditions.
   *5. Propose federal and state programs for compensation for victims of crime.

B. Procedural reforms in criminal cases:
   1. Develop means other than the exclusionary rule for deterring illegal law enforcement activity and of providing redress for persons harmed by such activity.
   2. Develop proposals for a fair and effective system of review in criminal cases.

* 3. Develop sentencing guidelines and procedures, including relation of parole to sentencing.
4. Improve procedures for detention and release before trial and pending appeal.
5. Develop proposals for ameliorating the adverse impact of the Speedy Trial Act.
6. Commence long-range, fundamental reexamination of American criminal procedure.

C. Administrative coordination—develop policies to focus criminal law efforts within and without the Justice Department.

Goal III. Reduce impediments to justice unnecessarily resulting from separation of powers and federalism:

* A. Coordination of the three branches of the federal government to plan for and improve the judicial system—devise plan for a Federal Justice Council to include representatives from all three branches.
* B. Exploration of means of coordinating federal, state, and local efforts to improve justice—consider National Justice Council with mixed federal and state representation to develop and implement national policy on justice.
C. Reallocation of federal and state authority:
* 1. Move portions of federal diversity jurisdiction to the state courts.
2. Develop policies for allocating primary responsibility for prosecuting conduct which is an offense under both state and federal laws.
3. Develop proposals for improved federal judicial review of state convictions.

Goal IV. Increase and improve research in the administration of justice:

* A. Direct the newly created Federal Justice Research Program.
* B. Assist in devising final plans for a central, effective statistical agency for criminal and civil justice.
* C. Assist in developing proposals for new means of organizing and funding nationwide justice research.

(c)

[From the Washington Post, Monday, June 13, 1977]

U.S. To Fund Neighborhood Justice Center Tests in Three Cities

(By John M. Goshko)

The Justice Department is launching an experimental program to give the public a speedy and inexpensive way to resolve minor disputes through neighborhood justice centers that would serve as alternatives to the courts.

The centers would attempt, through mediation, to settle the sort of conflicts—domestic spats, claims by customers against merchants, arguments between landords and tenants—that clog the dockets of the lower courts in American cities.

The centers and their services would be available to anyone willing to submit a dispute to mediation. But Justice Department officials believe they will be especially helpful to poor people who are denied access to justice because of the lack of money, education and time.

"We're trying to devise new means to alleviate the difficulty of many Americans in finding answers to small grieviences," explains Deputy Assistant Attorney General Paul Nejelski. "For many, litigation in the courts just isn't a practical answer. It's too costly and too time-consuming for the man of limited means who feels he's paid $25 for a pair of boots that aren't any good.

"At the same time," Nejelski adds, "many of the traditional institutions that used to provide a framework for settling such disputes, such as the family and church, are losing their efficacy. Others like the justice of the peace, the policeman on the beat and the precinct captain are fading from the American scene."

As part of its research for substitutes, the Justice Department hopes to have three neighborhood centers, funded with federal money but under local control, in operation by the fall.

Although the plans are still tentative, department officials say it seems fairly certain that one will be in Los Angeles and one in Atlanta. The third is expected to be in the Midwest.

* Indicates project already commenced or assigned priority.

The experimental centers will be evaluated closely over a 15-to-18-month period, and department officials are hopeful that the experiment will spur cities all over the country to set up their own neighborhood centers.

To assist such efforts, the department has plans for a "national resources center" that would serve as a clearinghouse for information and technical assistance for local governments wanting to try the idea.

The impetus for this program comes from Attorney General Griffin B. Bell, who has established as one of his main priorities a drive to provide better access to justice without putting an unbearable strain on the resources of the federal, state and local courts.

To direct this campaign, Bell has set up an Office for Improvements in the Administration of Justice under Assistant Attorney General Daniel J. Meador, a former law professor at the University of Virginia. Meador's office already is involved in several initiatives to speed the process of justice, including plans for arbitration of certain cases in the federal courts, and recently introduced legislation to broaden the jurisdiction of federal magistrates.

Of all the plans, though, Bell is known to regard the neighborhood justice centers as potentially the most important. He has said that he wants the program to demonstrate how the federal government can play "a leadership role" in assisting the states and cities to improve the quality of justice.

To this end, he directed that the experiment be financed by federal funds through the Law Enforcement Assistance Administration. Department officials estimate the cost at $150,000 each for the three prototype centers and an additional $300,000 to $350,000 for evaluation of their operations.

The planning has been done primarily by Nejelski, one of Meador's deputies, and by John Beal, a department attorney. Both say that a great deal of trial and error will be necessary to learn how the centers can operate most efficiently.

Each center will have an administrator, who may or may not be a lawyer, some paralegal assistants and a cadre of mediators, recruited, if possible from the neighborhood served by the center and given special training.

"We hope to recruit from retired persons, housewives and others who know the people of the neighborhood and their problems." Nejelski says. "If, for example, you have a dispute involving a family who are Black Muslims, it would be important to have a mediator who is also a Muslim or at least familiar with their traditions and sensibilities."

Establishment and control over the centers will be accomplished in a variety of ways. In Los Angeles, the department is working through the local bar association, while the projected Atlanta center probably will be tied to the local courts. Each center also will have a citizen's advisory board representing the ethnic, economic and social composition of its neighborhood.

They will be geared to handle cases referred by public and private agencies and what Nejelski calls "walk-ins form the street." A primary task of each administrator, he adds, will be to ensure that the people of the neighborhood are aware of the center's services and be encouraged to put their trust in it.

Nejelski notes that the centers are certain to encounter some cases that they cannot handle, either because one of the disputants will not agree to mediation or because they involve issues that require the intervention of a lawyer. In such instances, he says, the centers will assist the parties to a dispute in going to court or seeking some other legal remedy.

Both Nejelski and Beal point out that these general guidelines still leave a lot of unanswered questions. They range from whether chain stores and municipal agencies, which might be parties to a dispute, will cooperate in submitting to mediation to the type and premises and working hours that would be most appropriate for the centers.

"That might sound trivial," Nejelski says, "but there are real problems in whether people might find a storefront location less intimidating than a public building. If you schedule mediation sessions at night when people aren't tied up at work, will they be afraid to come because of a high crime incidence in the streets?

"These are all things where we're still groping for answers, and that's why we're starting in a small way with only three centers. We hope their experience will tell us what's good and what's bad and which way we should go in the future."

APPENDIX 6

(*a*)

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., May 24, 1977.

MEMORANDUM

Ninety-fifth Congress Bills To Amend 28 U.S.C. § 142 (S. 653, H.R. 2677, H.R. 2770, H.R. 3727)

PURPOSE OF THE BILLS

It is the purpose of the proposed bills to amend Title 28 of the United States Code to provide accommodations for judges of the United States courts of appeals at place other than those where regular terms of court are authorized by law to be held, *if* (1) such accommodations have been approved as necessary by the judicial council for the appropriate circuit, *and* (2) space is available without cost to the government.

Such an amendment would deter the proliferation of additional statutorily designated places for holding *district* court, eliminate one factor now contributing to inefficient utilization of judicial resources, and alleviate an inconvenience for *circuit court judges* which the Congress never intended to impose upon them when it last amended section 142 of Title 28 in 1962.[1]

BACKGROUND

At present all United States courts of appeals sit in "principle" locations, and several occassionally sit in one or more "additional" locations within their circuits, for the purpose of hearing oral arguments. In most instances, both the "principle" and "additional" locations have been statutorily designated by the Congress, in 28 U.S.C. § 48, as places at which "terms or sessions of courts of appeals shall be held annually." In certain instances, however, "terms or sessions" may be held, again in accordance with 28 U.S.C. § 48, "at such other places within the respective circuits as may be designated by rule of the court." In very rare instances, under yet another provision of 28 U.S.C. § 48, which states that: "Each court of appeals may hold special terms at any place within its circuit," oral arguments may be heard at a location which is *not* designated by *either* statute or court rule. Such "special terms" are usually held as a courtesy or convenience for local or state governments.

Today there are 97 "active" circuit judges and 43 "senior" circuit judges who comprise the "pool" from which panels of three judges are drawn to sit. Occasionally a district court judge, in either active or senior status, is invited to sit with two circuit judges on such a panel.

When circuit judges are not sitting on such panels, or en banc, however, they work "in chambers" in quarters located in the communities in which they actually reside. In fact, although "non-resident offices" are available for circuit judges at the "principle" places where courts of appeals sit for purposes of oral argument, full facilities and accommodations for a circuit court judge and his staff have for years been provided *only* at the location where the judge normally perfoms his "in chambers" work. Because most circuit court judges normally perform their "in chambers" work in the communities in which they reside, their facilities and accommodations at such locations have been traditionally referred to as "resident chambers."

When "the Judicial Code" was "recodified" in 1948, section 142 of Title 28, United States Code, was enacted as follows:

> § 142. Accommodations at places for holding court.
>
> Court shall be held only at places where Federal quarters and accommodations are furnished without cost to the United States.[2]

In 1962, however, that section was amended by adding to the language cited, *supra*, the following sentence: "The foregoing restrictions shall not, however, preclude the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, from providing such court quarters and accommodations as the Administrator determines can appropriately

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[1] Act of Oct. 9, 1962, Pub. L. No. 87–764, 76 Stat. 762.
[2] Pub. L. No. 773, 80th Cong., 2d Sess., ch. 646 (June 25, 1948), 62 Stat. 808.

be made available *at places where regular terms of court are authorized by law to be held*, but only if such court quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.[3]

In explaining the purpose of that 1962 amendment the House Judiciary Committee noted that the 1948 language, standing alone: . . . has the effect of precluding the use of Federal funds for the purpose of providing facilities *for the U.S. district courts* by new construction, remodeling of existing Federal buildings, or otherwise, at locations where court facilities have not previously been provided in Federal buildings. Consequently, it has been necessary to obtain a waiver of the provisions of section 142 by specific legislative action in each instance to permit the provision of court facilities at such locations.[4]

Citing recent legislation creating additional federal judgeships and the resulting need for "improved and additional court space," the Committee noted that: Enactment of this legislation would eliminate the delays now caused by the necessity for obtaining special legislation with respect to those locations where section 142 applies, and permit discontinuance of the undesirable practice of securing such individual waivers, and would permit the provision and development of more satisfactory court facilities, with improved operation of the courts.[5]

In essence, the original 1948 legislation, designed to limit the number of places where *district* court "shall be held" to those locations where quarters and accommodations *then existed*, was amended to both (1) accommodate a growing court system and (2) eliminate the "undesirable practice" of the judiciary having to seek "specific legislative action in each instance" to overcome "the effect of precluding the use of Federal funds for the purpose of providing facilities *for the U.S. district courts.*"

That legislative history would appear to justify the conclusion that 28 U.S.C. § 142 is a provision applicable to *district courts only*. Given the section's placement in Chapter 5 of Title 28, that chapter which is clearly designed to statutorily govern organization of the district courts, and the legislative history discussed *supra*, a sound argument might be made that Congress at no time intended section 142 to be applied to *circuit courts*, which are organized under Chapter 3 of Title 28.

In 1948 and 1962, the practice which now is followed by providing circuit court judges with "resident chambers" in their home communities prevailed nationwide. Had that practice been a matter of concern to Congress, appropriate language could have been added to section 48 of chapter 3 of Title 28, that section which governs places where circuit court "shall be held." [6] The absence of such language would seem to justify a finding that section 142 should *not* be deemed applicable to the establishment of "resident chambers" for courts of appeals judges. That finding is impeded, however, by a provision in the 1948 recodification legislation, which states that: No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . . in which any section is placed, nor by reason of the catchlines used in such title.[7]

Thus, today, if a community in which a circuit court judge resides is not a place "where regular terms of court are authorized by law to be held," either under chapter 3 *or* chapter 5 of Title 28, section 142 precludes the Administrative Office of the U.S. Courts from providing that judge with "resident chambers" in his home community, even if federal facilities exist and are available at no additional cost to the government. This situation has been in existence since 1962, and not surprisingly, the solution has been very much like the "undesirable practice" the 1962 amendment was designed to eliminate. The solution has been "specific legislative action in each instance" to authorize the subject community as a place where *district* court "shall be held." Since 1962, sixteen different public laws have been enacted to "designate twenty-one additional communities as "places where court shall be held." [8]

On March 13, 1973, Senator Marlow Cook of Kentucky introduced S. 1175, 93d Cong., 1st Sess., a bill "To amend section 142, United States Code, relating to the furnishing of accommodations to judges of the courts of appeals of the United States." As introduced, S. 1175 would have added the following sentence to section 142:

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[3] Note 1, *supra* (emphasis added).
[4] H.R. Rep. No. 2340, 87th Cong. 2d Sess. 2 (1962) (emphasis added).
[5] Id.
[6] See text *supra*, at 1–2
[7] See Pub. L. No. 773, 80th Cong., 2d Sess., § 33 (June 25, 1948), 62 Stat. 991.
[8] See the "Legislative History" notes following section 142 in 28 U.S.C. (1970 ed.).

The limitations and restrictions contained in this section shall not be applicable to the furnishing of accommodations to judges of the courts of appeals at places where Federal facilities are available and the judicial council of the circuit approves.

The bill was formally referred to the Senate's Subcommittee on Improvements in Judicial Machinery, and transmitted to the Judicial Conference of the United States for its views. The Conference, acting upon the recommendation of its Committee on Court Administration, approved S. 1175 at its April 1973 session.[9] Following receipt of those Conference views, the Senate subcommittee took no further action on S. 1175 during the 93d Congress.

In September of 1975 the Judicial Conference therefore "reendorsed" its approval of S. 1175, 93d Congress, and instructed the Director of the Administrative Office of the U.S. Courts to "transmit such legislative proposal to the 94th Congress." [10] Several bills embodying the Judicial Conference's proposal were thereafter introduced: H.R. 10574, 94th Cong., 2d Sess., by Congressman Carter and Mazzoli of Kentucky; H.R. 12182, 94th Cong., 2d Sess., by Congressmen Brooks and Poage of Texas; and S. 2749, 94th Cong., 2d Sess., by Senators Huddleston and Ford of Kentucky. Beyond referral to subcommittee, no action was taken on S. 2749 during the 94th Congress. The House bills, however, were referred to Congressman Kastenmeier's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, and one day of hearings was held on May 20, 1976. Appearing on behalf of the Judicial Conference, William E. Foley, Deputy Director of the Administrative Office of the U.S. Courts, fully supported the amendment of section 142 of Title 28, United States Code.[11] Unfortunately, the press of business before the subcommittee prevented favorable action prior to the adjournment of the 94th Congress.

THE PRESENTLY PENDING BILLS

Now, in this 95th Congress, Senator Huddleston of Kentucky has introduced S. 653, 95th Cong., 1st Sess., a bill which would accomplish the same objective as S. 1175, 93d Cong., 1st Sess. and S. 2749, 94th Cong., 2d Sess., by again adding an additional sentence to section 142. In this 95th Congress bill, however, Senator Huddleston has revised the language previously introduced.[12] S. 653 would add the following language to section 142: Notwithstanding the second sentence of this section, the Administrator of General Services may provide, in accordance with this section, such quarters and accommodations to judges of the courts of appeals at any place where Federal quarters and accommodations are available, if the judicial council of the appropriate circuit approves.

In addition, three similar bills have been introduced in the House: H.R. 2677, 95th Cong., 1st Sess., introduced by Congressmen Carter and Mazzoli; H.R. 2770, 95th Cong., 1st Sess., introduced by Mr. Brooks and Mr. Poage of Texas; and H.R. 3727, 95th Cong., 1st Sess., introduced by Congressman Breckinridge of Kentucky. H.R. 2677 and H.R. 2770 are identical to S. 1175, 93d Congress [13] and contain language approved by the Judicial Conference. H.R. 3727 is identical to S. 653. The Conference, having approved the common objective of all four bills, expresses no preference for either of the two proposed approaches to clarifying section 142. Either version will permit the provision of necessary facilities and accommodations *after* approval by the appropriate circuit council and *without* additional cost to the government. In addition to alleviating an inconvenience for those courts of appeals judges who happen to reside in communities which are not designated "places where court shall be held," this correction of section 142 will prevent otherwise undesirable "specific legislative action in each instance," which results in the proliferation of designated locations for the holding of terms or sessions of *district* court. In the final analysis, a circuit court judge must be provided with a "resident chambers" at some location. Under section 142 as it is now

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[9] See "Annual Report of the Proceedings of the Judicial Conference of the United States, April 5–6, 1973," at 4.

[10] See "Annual Report of the Proceedings of the Judicial Conference of the United States, September 25-26, 1975," at 49.

[11] Hearings on H.R. 10574, H.R. 8472 and S. 14, and S. 12 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) (unprinted hearings).

[12] See text at note 9, *supra*.

[13] *Id.*

drawn, unless "specific legislative action' is taken to "designate" his home community, the "resident chambers' must be located at the *nearest* "designated place," necessitating travel to and from the facility regularly. Given the fact that the cost of "resident chambers" will be incurred in either case, amending section 142 would not only *not* result in additional expenditures for such "resident chambers," it would save expenditures for unnecessary compensable travel costs. [Same bill as H.R. 2677, introduced by Mr. Carter (for himself and Mr. Mazzoli]

[H.R. 2770, 95th Cong., 1st sess.]

A BILL To amend section 142 of title 28, United States Code, relating to the furnishing of accommodations to judges of the courts of appeals of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 142 of title 28, United States Code, is amended by adding the following sentence at the end thereof: "The limitations and restrictions contained in this section shall not be applicable to the furnishing of accommodations to judges of the courts of appeals at places where Federal facilities are available and the judicial council of the circuit approves.".

[H.R. 3727, 95th Cong., 1st sess.]

A BILL To amend section 142 of title 28, United States Code, relating to the furnishing of accommodations to judges of the courts of appeals of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 142 of title 28, United States Code, is amended by adding at the end thereof the following new sentence: "Notwithstanding the second sentence of this section, the Administrator of General Services may provide, in accordance with this section, such quarters and accommodations to judges of the courts of appeals at any place where Federal quarters and accommodations are available, if the judicial council of the appropriate circuit approves.".

DEPARTMENT OF JUSTICE,
Washington, D.C., July 20, 1977.

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your requests for the views of the Department of Justice on H.R. 2770 and H.R. 3727, two bills "To amend section 142 of title 28, United States Code, relating to the furnishing of accommodations to judges of the courts of apepals of the United States."

28 U.S.C. 142 provides that court shall be held only where Federal quarters and accommodations are available or where suitable quarters and accommodations are furnished without cost to the United States; however, the section also permits the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, to provide court quarters and accommodations at places where regular terms of court are authorized to be held, if such quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit. H.R. 2770 would make inapplicable the restrictions and limitations of 28 U.S.C. 142 "to the furnishing of accommodations to judges of the courts of appeals at places where Federal facilities are available and the judicial council of the circuit approves." Similarly, H.R. 3727 would amend section 142 to allow the GSA Administrator to provide "such quarters and accommodations to judges of the courts of appeals at any place where Federal quarters and accommodations are available, if the judicial council of the appropriate circuit approves."

The Department of Justice supports the common objective of these bills, but expresses no preference for either of the two proposed approaches to clarifying section 142. Either version will permit the provision of necessary facilities and accommodations. The Department recommends enactment of either bill.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

(b)

JUNE 30, 1977.

Hon. M. CALDWELL BUTLER,
Cannon House Office Building, Washington, D.C.

DEAR CONGRESSMAN BUTLER: During hearings held before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice yesterday, you requested that we provide copies of materials documenting the Judicial Conference's consideration and approval of the Judicial Tenure Act, now pending in the House as H.R. 1850 and in the Senate as S. 1423. I am accordingly enclosing a copy of the views presented to the full Judicial Conference in March of 1975 by Judge Ainsworth's Court Administration Committee. Those views resulted in the Conference approving, *in principle*, S. 4153, 94th Cong., predecessor legislation to both currently pending bills, without approving specific provisions in S. 4153, and five suggestions for future Congressional study pertaining to the provisions of S. 4153. You will find the official reoprt of the Conference action at pages 4 through 5 of the enclosed "Report of the Proceedings of the Judicial Conference of the United States, March 6–7, 1975."

To date the Conference's approval, *in principle*, of the Judicial Tenure Act, has been expressed to Chairman Rodino in correspondence dated May 11, 1977; it has not, however, been provided to the Senate Judiciary Committee during this Congress because it has not been requested (perhaps because it is already on file there from the 94th Cong.).

If my office may provide you with further information concerning this matter, please have a member of your staff telephone me at 382-1615.

Sincerely,

WILLIAM JAMES WELLER,
Legislative Liaison Officer.

Enclosure.

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MARCH 6–7, 1975

The Judicial Conference of the United States convened on March 6, 1975, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. 331. The following members of the Conference were present:

District of Columbia Circuit:

Chief Judge David L. Bazelon*
Chief Judge George L. Hart, Jr., District of Columbia

First Circuit:

Chief Judge Frank M. Coffin
Chief Judge Andrew A. Caffrey, District of Massachusetts

Second Circuit:

Chief Judge Irving R. Kaufmann**

Chief Judge Jacob Mishler, Eastern District of New York

Third Circuit:

Chief Judge Collins J. Seitz
Chief Judge Michael H. Sheridan

Fourth Circuit:

Chief Judge Clement F. Haynsworth, Jr.
Judge Charles E. Simons, Jr., District of South Carolina

Fifth Circuit:

Chief Judge John R. Brown
Chief Judge Alexander A. Lawrence, Southern District of Georgia

Sixth Circuit:

Chief Judge Harry Phillips
Judge Robert L. Taylor, Eastern District of Tennessee

*On designation of the Chief Justice, Judge J. Skelly Wright attended the Conference in place of Chief Judge David L. Bazelon.

**On designation of the Chief Justice, Judge Wilfred Feinberg attended the Conference in place of Chief Judge Irving R. Kaufman.

Seventh Circuit:

Chief Judge Thomas E. Fairchild
Judge James E. Doyle, Western District of Wisconsin

COURT ADMINISTRATION

The report of the Committee on Court Administration was presented by the Chairman, Judge Robert A. Ainsworth, Jr.

JUDICIAL DISABILITY

The Conference considered the recommendations of the Committee relating to S. 4153, 93rd Congress, a bill referred by the Senate Judiciary Committee for comment. The proposed bill provides for the establishment of a Council on Judicial Tenure to be composed of 14 judges elected for three-year terms. The Council is charged with the duty to receive and investigate complaints against a justice or judge of the United States and to determine whether the complaint alleges grounds which would warrant removal, censure or involuntary retirement. The bill provides for investigation, hearing and appeal to the Judicial Conference and, ultimately, to the Supreme Court. After consideration of this legislation and prior bills of a similar import which have been considered by the Conference over a period of years, the Conference agreed that, with the suggestions expressed in paragraphs 1–5, it would approve in principle the legislation proposed by S. 4153, without approving the specific provisions of the bill. The suggestions expressed by the Conference are:

1. That any reference to Justices of the Supreme Court be eliminated inasmuch as sufficient means exist through the impeachment process and further that it would be inappropriate for judges of the inferior courts to pass judgment on the action of a Justice of the Supreme Court. Moreover, the Judicial Conference has no jurisdiction over the Supreme Court;
2. That neither a judge nor a Justice of the United States may be removed from office except by the impeachment process;
3. That following a hearing before a commission of the type proposed in S. 4153, following review by the Judicial Conference of the United States and further review by the Supreme Court of the United States, mandatory or involuntary retirement of a judge for physical or mental disability (including habitual intemperance) may be ordered, with the judge so charged being relieved of his judicial duties;
4. That a judge similarly may be mandatorily (or involuntarily) retired for serious misconduct and he may be relieved of any further judicial duties; and
5. That the censure of a judge following a hearing before such a commission with review and appeal may be imposed as a less severe sentence than mandatory or involuntary retirement.

REPORT OF THE COMMITTEE ON COURT ADMINISTRATION

(To the Chief Justice of the United States, Chairman; and Members of the Judicial Conference of the United States)

Your Committee on Court Administration met at Marco Island, Florida, on February 3 and 4, 1975. All members of the committe were present. The Chief Justice and his Administrative Assistant, Mark W. Cannon, attended most of the sessions of the committee as did the Director of the Federal Judicial Center, Judge Walter E. Hoffman; the Director of the Administrative Office, Rowland F. Kirks; and the Deputy Director, William E. Foley.

* * * * * * *

III

JUDICIAL DISABILITY

Your committee has received for comment S. 4153, 93d Congress, a copy of which is attached hereto as Exhibit A. This bill is captioned as a bill to establish a council on judicial tenure in the judicial branch of the government, to establish a procedure in addition to impeachment for the retirement of disabled Justices

and judges of the United States, and the removal of Justices and judges whose conduct is or has been inconsistent with the good behavior required by article III, section 1 of the Constitution.

BACKGROUND

Legislation of this nature has been proposed periodically since 1937 when a bill was introduced by Senator Hatton W. Sumners, then chairman of the House Judiciary Committee. The bill was endorsed by the American Bar Association. Again, in the period between 1965 and 1970 there was much agitation for legislation of this nature and Senator Tydings of Maryland, then chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, introduced similar legislation.

At the March 1966 session of the Conference this committee submitted alternative proposals which came to be known as Plans A and B, to provide for a Commission on Judicial Disability charged with the duty of receiving and considering complaints of misconduct on the part of a judge.

Provision was made for hearing, the right to offer testimony and confront witnesses and, in the event of a finding of guilt, the matter was reviewed by the Judicial Conference which was vested with wide discretionary power. If the Conference concurred in the finding of guilt, Plan A provided only as a punishment or sanction that the Conference advise the Congress and the Attorney General of its findings. Plan B, on the other hand, provided that the judge concerned might be ordered involuntarily retired. The Conference directed that these two plans be circulated to all federal judges and be considered by the circuit conferences. Subsequent bills of similar import were later referred to the Conference for study by the Tydings subcommittee. The Conference has never taken final actions to approve or disapprove any of these proposals.

RECOMMENDATION

Your committee and its Subcommittee on Judicial Improvements have considered these several legislative proposals and the current bill, S. 4153, and on the basis of extensive discussion recommend:

1. That the Conference endorse the principle of the legislation proposed by S. 4153 but not the specific provisions of that bill;

2. That any reference to Justices of the Supreme Court be eliminated inasmuch as sufficient means exist through the impeachment process and further that it would be inappropriate for judges of the inferior courts to pass judgment on the action of a Justice of the Supreme Court;

3. That neither a judge or a Justice of the United States may be removed from office except by the impeachment process;

4. That following a hearing before a commission of the type proposed in S. 4153, following review by the Judicial Conference of the United States and further review by the Supreme Court of the United States, mandatory or involuntary retirement of a judge for physical or mental disability (including habitual intemperance) constitutionally may be ordered, with the judge so charged being relieved of his judicial duties;

5. That a judge similarly my be mandatorily (or involuntarily) retired for serious misconduct and he may constitutionally be relieved of any further judicial duties; and

6. That the censure of a judge following a hearing before such a commission with review and appeal may be imposed as a less severe sentence than mandatory or involuntary retirement.

APPENDIX 7

(a)

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THE MYTH OF PARITY

Burt Neuborne *

Recent Supreme Court decisions have assumed that federal and state trial courts are equally competent forums for the enforcement of federal constitutional rights. Criticizing this assumption, Professor Neuborne traces federalism arguments advanced during the past two centuries by litigators seeking to have their constitutional claims adjudicated in federal court. Professor Neuborne then examines a number of institutional differences between state and federal trial courts that account for the continued preference of constitutional litigators for a federal trial forum.

IN *Stone v. Powell*,[1] Justice Powell responded to the assertion that federal habeas corpus review of state exclusionary rule determinations was essential to the vigorous enforcement of the fourth amendment by rejecting any notion that federal judges are institutionally more receptive to federal constitutional norms than are their state counterparts.[2] Rather, Justice Powell appeared to assume that state and federal courts are functionally interchangeable forums likely to provide equivalent protection for federal constitutional rights. If it existed, this assumed parity between state and federal courts, which characterizes much of the current Court's approach to problems of federal jurisdiction,[3] would render the process of allocating judicial business between state and federal forums an outcome-neutral exercise unrelated to the merits.

Unfortunately, I fear that the parity which Justice Powell celebrated in *Stone* exists only in his understandable wish that it were so. I suggest that the assumption of parity is, at best, a dangerous myth, fostering forum allocation decisions which channel constitutional adjudication under the illusion that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts. At worst, it provides a pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be

* Professor of Law, New York University. A.B., Cornell, 1961; LL.B., Harvard, 1964. The author served as staff counsel to the New York Civil Liberties Union in 1967–1972, and as Assistant Legal Director of the American Civil Liberties Union in 1972–1974. He is currently a member of the board of directors of the NYCLU and a volunteer litigator for the ACLU.

The author dedicates this piece to Judge Orrin G. Judd, whose qualities of mind and heart made it a joy to practice before him. He transformed litigation into a search for justice and his courtroom into a palace of inspiration.

[1] 428 U.S. 465 (1976).

[2] *Id.* at 493–94 n.35.

[3] *See, e.g.*, Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

receptive to vigorous enforcement of federal constitutional doctrine. As a result, I view forum allocation decisions like *Stone* not as outcome-neutral allocations of judicial business but as indirect decisions on the merits, which weaken disfavored federal constitutional rights by remitting their enforcement to less receptive state forums.

The attempt by lawyers to utilize an ostensibly outcome-neutral federalism analysis to influence indirectly the merits of constitutional litigation is hardly new. During the past century, litigators have consistently advanced ostensibly outcome-neutral federalism arguments, assertedly unrelated to the merits, to channel constitutional adjudication into forums calculated to advance the substantive interests of their clients. Although the political persuasion and economic status of the constitutional litigants have varied with the changing nature of the rights invoked, one factor has remained constant: interests and groups seeking expansive definition and vigorous application of federal constitutional rights have sought a federal judicial forum while their opponents, attempting to narrow federal rights and weaken their implementation, have emphasized the facially neutral federalism concerns which argue in favor of state judicial enforcement of federal constitutional rights.

In the first Part of this Article, I will briefly sketch the interaction among federalism arguments, forum allocation, and the enforcement of substantive federal rights during the last century. In addition, I will attempt to show that a similar interplay occurred earlier in the nineteenth century. Having presented the historical pattern, I will suggest an institutional explanation of the long-standing preference for federal courts exhibited by persons seeking to enforce federal constitutional rights. By combining the historical pattern with an institutional explanation, I hope to cast doubt on the propriety of deciding contemporary forum allocation issues under a mistaken assumption of parity.

I. Historical Considerations

In 1886, the Supreme Court accepted Roscoe Conkling's contention that business corporations were "persons" within the meaning of the due process clause of the fourteenth amendment.[4] In a series of decisions in the late nineteenth and early twentieth centuries, the Court infused the due process clause with substantive content, thus providing business corporations with a potent

[4] *See* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886). *See also* Richmond, F. & P.R.R. v. Richmond, 96 U.S. 521 (1878); Chicago, B. & Q.R.R. v. Iowa, 94 U.S. 155 (1877).

defense against state regulatory initiatives.[5] Once the substantive federal right was enunciated the forum allocation struggle was soon under way. Lawyers for the business corporations, invoking the newly granted general federal question jurisdiction,[6] sought to utilize federal trial courts as the primary forums for the enforcement of fourteenth amendment rights, while lawyers representing state regulatory agencies sought to channel the litigation into state courts.

In a succession of cases in the late nineteenth and early twentieth centuries corporate plaintiffs challenging the constitutionality of state regulatory activities were met with arguments that the existence of adequate state remedies,[7] an asserted lack of the requisite "state action" where the challenged state activity might also have violated state law,[8] and the concept of sovereign immunity embodied in the eleventh amendment[9] precluded an immediate hearing in federal court. The Supreme Court consistently resolved those federalism issues in favor of immediate access to federal district court. Thus, in *Smyth v. Ames*,[10] the Court rejected Nebraska's argument that the federal district court should refrain from enjoining a ratemaking scheme because the state system provided for state judicial determinations of the reasonableness of the rates set. Similarly, in *Home Telephone & Telegraph Co. v. City of Los Angeles*,[11] the Court rebuffed a more sophisticated attempt to compel a corporate plaintiff to exhaust available state remedies by finding that the conduct of state officers could be deemed state action for the purposes of the fourteenth amendment even though it may have been a violation of the state con-

[5] *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897) (fourteenth amendment due process clause protects "liberty of contract"); Reagan v. Farmers Loan & Trust Co., 154 U.S. 362 (1893) (due process clause subjects state economic regulatory legislation to "reasonableness" test).

[6] General federal question jurisdiction was first conferred in 1875. *See* Act of March 3, 1875, ch. 137, 18 Stat. 470 (present version at 28 U.S.C. § 1331 (1970)).

[7] *See* Smyth v. Ames, 169 U.S. 466 (1898).

[8] *See* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

[9] *See Ex parte* Young, 209 U.S. 123 (1908).

[10] 169 U.S. 466 (1898).

[11] 227 U.S. 278 (1913). Plaintiff's substantive due process challenge to the constitutionality of Los Angeles' rate schedule was met with the argument that since the California Constitution contained an identically worded due process clause, the Los Angeles rate schedule, if unreasonable, might violate the state as well as the Federal Constitution. The defendants argued that since the local rate schedule was in violation of the state constitution, it could not constitute state action required for a violation of the federal due process clause. Accordingly, they argued that plaintiffs were obliged to litigate the state constitutional question in state court; resort to federal court would be appropriate only if the state court upheld the Los Angeles schedule.

stitution.[12] Finally, in *Ex parte Young*,[13] the Court upheld a federal court's issuance of an injunction prohibiting the Attorney General of Minnesota from enforcing a state regulatory scheme despite the defendant's claim that such federal court action was barred by the eleventh amendment.[14]

The juxtaposition of *Home Telephone* and *Young* indicates the extent to which concern for the underlying substantive rights at stake may have prompted the Court's forum allocation decisions. In *Young*, the Court ruled that where the action of a state officer is alleged to be void under the *Federal* Constitution, the officer ceases to act for the state for purposes of eleventh amendment analysis,[15] but in *Home Telephone*, the Court found that the actions of a state officer in violation of the *state* constitution remained state action under the fourteenth amendment.[16] While the different interests embodied in the eleventh and fourteenth amendments may mean that both *Young* and *Home Telephone* are correct interpretations of the respective constitutional provisions involved, when taken together the outcomes look strikingly inconsistent. The ease with which the Court ignored the apparent paradox belies the notion that outcome-neutral considerations were the primary factor underlying the Court's federalism decisions during the era of substantive due process.

Although the principal subject matter of constitutional cases raising federalism questions has shifted since the early twentieth century from economic regulation to individual liberties, the nexus between a lawyer's position with respect to the merits of the federal right claimed and his view of the asserted right to a federal forum remains strong. Lawyers seeking to enforce the Bill of Rights against the states have sought to use the lower federal courts as the primary implementing forum. Lawyers representing state and local officials have raised the familiar arguments that the federal courts lack jurisdiction to hear the civil rights claim,[17] that plaintiffs are required first to seek relief from

[12] *Id.* at 288. Justice White, writing for the Court, rejected the notion that governmental activity ceases to be "state action" because it may violate the state constitution.

[13] 209 U.S. 123 (1908).

[14] *Id.* at 159–63. Justice Peckham reasoned that since the eleventh amendment conferred immunity only on the actions of a state, and since states were not authorized to act in violation of the Federal Constitution, actions of a state official which violated the Federal Constitution could not be deemed the actions of the state but merely the ultra vires acts of an erring individual.

[15] *See id.*

[16] *See* 227 U.S. at 288.

[17] *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Hague v. CIO, 307 U.S. 496 (1939).

state courts,[18] and that the eleventh amendment may preclude federal courts from awarding the relief sought.[19]

As in the era of substantive due process, an assumption of a lack of parity implicitly underlies the arguments of the lawyers seeking both to enforce and to avoid the new and broader vision of the Bill of Rights. Moreover, until recently, the Court continued to resolve the federalism issues raised by the cases under precisely that assumption. In *Hague v. CIO*,[20] the Court secured a federal forum for plaintiffs seeking injunctive relief to enforce the first amendment against local officials.[21] Justice Stone, in his influential concurrence, sought to free civil rights litigants from the jurisdictional amount requirement of the federal question statute by carving out a dichotomy between "personal" rights, governed by the federal civil rights jurisdictional statute, and "property" rights, covered by the general federal question provision.[22] Justice Stone's efforts manifest a conscious and laudable attempt to insure vigorous application of first amendment rights by channeling first amendment cases through the federal courts. Similarly, the Court in *Monroe v. Pape*[23] rejected a reading of

[18] *See, e.g.*, Lane v. Wilson, 307 U.S. 268 (1939); *cf.* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (abstention by federal court to enable state court to resolve questions of unclear state law).

[19] *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[20] 307 U.S. 496 (1939).

[21] Plaintiffs in *Hague* alleged that local officials were engaged in concerted action to prevent union organizers from speaking in Jersey City. While plaintiffs' claim clearly satisfied the "arising under" requirement of federal question jurisdiction, serious doubt existed concerning the satisfaction of the jurisdictional amount. Plaintiffs argued that 28 U.S.C. § 1343(3) (1970) provided an alternative jurisdictional base without the requirement of a jurisdictional amount.

[22] 307 U.S. at 518, 531–32. Justice Stone's attempt to forge a distinction between personal and property rights for federal jurisdictional purposes was rejected in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), when the Court ruled that 28 U.S.C. § 1343(3) (1970) provided a jurisdictional base for all constitutional claims against state officials without regard to the jurisdictional amount requirement of 28 U.S.C. § 1331(a) (1970).

[23] 365 U.S. 167, 183 (1961). Similar questions concerning whether plaintiffs would be compelled to present their claims to a state court before final determination in a federal court would be available arose in Lane v. Wilson, 307 U.S. 268 (1939), and Railroad Comm'n v. Pullman, 312 U.S. 496 (1941). In *Lane*, defendants argued that available state judicial remedies should be exhausted prior to federal judicial review of Oklahoma's grandfather clause. 307 U.S. at 274. Oklahoma's claim in *Lane* was virtually identical to Nebraska's position in *Smyth v. Ames*, *see* 169 U.S. at 478.

Similarly, the decision in *Pullman* to abstain so that the state court might resolve unclear questions of state law may be seen, in part, as reflecting a notion that the issue of whether the challenged state act was, in fact, authorized by state law should be decided by state courts. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1250–74 [hereinafter cited as *Develop-*

section 1983 [24] which would have required civil rights litigants to exhaust state judicial remedies before being able to seek relief in federal district court.

Hague and *Monroe*, with their thinly disguised assumptions of nonparity between state and federal courts, are paradigmatic twentieth-century forum allocation decisions in the tradition of *Young* and *Home Telephone*. *Stone v. Powell*, with its explicit assertion that parity does exist, may presage a significant shift in the pattern of forum allocation decisions.[25] Since plausible doctrinal and policy arguments generally exist on both sides of any serious federalism dispute, the Court's assumption of parity may well tip the decisional balance toward resolving the dispute in favor of state courts. After a brief examination of nineteenth-century federalism issues, I hope to demonstrate the continued existence of the institutional factors which led the lawyers and judges alike in *Smyth v. Ames*, *Home Telephone*, *Young*, *Hague*, and *Monroe* to act as though parity did not exist.

The two major nineteenth-century issues implicating federalism concerns in the enforcement of constitutional rights involved polar concepts of slavery and freedom. The fugitive slave laws,[26] designed to enforce the rights of slaveowners under the fugitive slave clause of the Constitution,[27] were an early grant of jurisdic-

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ments]. In *Monroe*, defendants argued that acts of local officials clearly violative of state law could not be deemed to have been taken "under color of law" within the meaning of 42 U.S.C. § 1983 (1970). I have discussed the role of *Lane* and *Monroe* and the anomalous position of *Pullman* in establishing the modern non-exhaustion model of federal judicial review in Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545, 556–60 (1977).

[24] 42 U.S.C. § 1983 (1970).

[25] *See also* Juidice v. Vail, 97 S. Ct. 1211 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

[26] *See* Act of Sept. 18, 1850, ch. 10, 9 Stat. 462; Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

[27] U.S. CONST. art. IV, § 2, cl. 3. The text of the fugitive slave clause states:

> No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered upon claim of the party to whom such service may be due.

The fugitive slave clause was one of a number of measures adopted at the Philadelphia Convention in 1787 in order to induce the Southern states to adopt the Constitution. *See generally* T. MORRIS, FREE MEN ALL 16 (1974); S. LYND, *The Compromise of 1787*, in CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION (1967).

Southern concern over the status of escaped slaves had been aroused by the pre-Revolutionary English decision in Sommersett's Case, 20 Howell's State Trials 1, 98 Eng. Rep. 499 (K.B. 1772). The case was popularly perceived as establishing a conflicts-of-law rule which tested the right of a master to his slave which he had brought to "free" territory by the law of the forum in which the claim was ad-

tion to the lower federal courts to enforce constitutional rights. Following the demise of slavery, the second major delegation of constitutional enforcement responsibility to the federal courts was the attempt by the Reconstruction Congresses to use the federal judiciary as a primary implementing mechanism for the rights conferred by the post-Civil War amendments.[28] The responses of nineteenth-century lawyers and judges to the federalism issues posed by the fugitive slave laws and the Reconstruction program roughly parallel the responses of the corporate and civil rights bar to the federalism questions which arose during the twentieth century. Moreover, as in most of the twentieth century, the federalism issues of the fugitive slave era were resolved in favor of federal definition, implementation, and enforcement of rights which had been created by the Supreme Court, or with which the Court was in sympathy. In the Reconstruction era, however, a Court which harbored serious reservations about the substantive wisdom of the rights involved determined the federalism questions in favor of state protection.

During the fugitive slave era, antislavery lawyers adopted a forceful states' rights stance. Asserting that the plenary powers of the states could be curtailed only by explicit constitutional limitation or by a grant of exclusive enforcement authority to Congress, they argued that state legislatures and state courts retained considerable responsibility for evolving mechanisms for enforcing the fugitive slave clause — mechanisms which the antislavery bar hoped would be less effective in protecting the rights of slaveholders than the summary procedures contained in the 1793 Act.[29] Abolitionist strategy, therefore, initially centered on

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vanced rather than the law of the master's residence. Moreover, while Lord Mansfield was careful to distinguish between a slave brought voluntarily into a "free" jurisdiction and a slave escaping to a "free" jurisdiction, the popular perception of his decision was not so limited, and after *Sommersett's Case* it was argued that an escaped slave became free as soon as he set foot on free soil. *See also* Forbes v. Cochrane, 107 Eng. Rep. 450 (K.B. 1824) (*Sommersett's Case* read to apply to escaped slaves); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836) (applying *Sommersett's Case* to a slave brought to free territory as a "sojourner" rather than as a domiciliary).

[28] *See generally Developments, supra* note 23, at 1147–53.

[29] The Fugitive Slave Act of 1793 authorized a slaveholder or his agent to bring an alleged fugitive before any federal judge or state magistrate for a summary determination of whether the black owed him service. If so, the owner could obtain a certificate enabling him to remove the fugitive from the state in which he was caught to the owner's home state where the fugitive's status could be determined according to local law by a local court. The Act, however, was quite vague both in defining the rights of claimants and fugitives in these "rendition" proceedings and in establishing whether other remedies, especially self-help, might be used. *See* R. COVER, JUSTICE ACCUSED 161 (1975). Among the questions left unresolved by the 1793 Act were who would bear the burden of persuasion,

requiring persons seeking to enforce rights under the fugitive slave clause to use judicial forums and state-defined procedures, as opposed to self-help.[30] The slaveowners countered by arguing the primacy of federal power to enforce federal constitutional rights, claiming alternatively that federal legislative authority to enforce the fugitive slave clause was exclusive, or that, if concurrent authority remained with state legislatures and courts, it could only benefit and not burden the rights of slaveholders.[31] The slaveholders' position prevailed in *Prigg v. Pennsylvania*,[32] where the Supreme Court invalidated a Pennsylvania statute which had required slaveholders to use judicial remedies and had forbidden them from resorting to self-help to recover fugitive slaves. Although the Justices were divided over whether federal legislative authority to enforce the fugitive slave clause was exclusive,[33] they were unanimous in concluding that state legislation impairing the right to recapture fugitive slaves was unconstitutional.[34]

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the claimant or the fugitive, as to the determination of the fugitive's legal status; whether the fugitive had the right to present evidence; and whether a jury trial would be available. *See id.* at 162–63. The availability of a jury trial had enormous practical significance on fugitive slave litigation throughout this period. *See id.* at 191.

[30] *See* T. MORRIS, *supra* note 27, at 219–22.

[31] *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 626 (opinion of Taney, C.J.); *id.* at 636 (opinion of Wayne, J.); *id.* at 650 (opinion of Daniel, J.) (1842).

[32] 41 U.S. (16 Pet.) 539 (1842).

[33] Justice Story, whose opinion for the Court was joined by Justices Catron and McKinley, and Justices Wayne and McLean in additional separate opinions all concluded that federal authority to legislate for the enforcement of the fugitive slave clause was exclusive. *Id.* at 622–23, 637, 661. Chief Justice Taney and Justices Thompson and Daniel, in separate opinions, found that the states possessed the power to legislate concurrently with the federal government so long as they "intended, in good faith, to protect the owner in the exercise of his rights of property." *Id.* at 627, 635, 652.

[34] Among the Justices writing opinions that the Pennsylvania antikidnapping statute was invalid in the light of Congress' exclusive power to establish procedures for the adjudication of claims to fugitives were two Northerners sympathetic to the antislavery cause, Justices Story and McLean. In a sense, both appear to have been compelled to reach a result which they considered morally indefensible because of the affirmative vindication of the rights of the slaveholders clearly found in the Constitution, which they read in the light of mid-nineteenth-century legal positivism and strong contemporary notions of the limited role of the judiciary to apply "the law, and not conscience." *See* R. COVER, *supra* note 29, at 119–20; T. MORRIS, *supra* note 27, at 103. *See also* Miller v. McQuerry, 17 F. Cas. 332, 339 (C.C.D. Ohio 1853) (No. 9,583); Vaughn v. Williams, 28 F. Cas. 1215, 1216 (C.C.D. Ind. 1845) (No. 16,903). However, each included language in his opinion with the apparent intent of undercutting the effect of the fugitive slave law. Justice Story believed that by giving Congress exclusive power in the field he had enhanced the prospects for an eventual repeal of the fugitive slave law. *See* T. MORRIS, *supra* note 27, at 103. Further, he twice intimated in his opinion that since the fugitive slave clause was directed

In reaction to *Prigg*, several Northern states sought to close their courts to persons seeking to enforce rights under the fugitive slave clause.[35] Given the scarcity and inaccessibility of the federal judges empowered by the 1793 Act to enforce the clause, this attempted withdrawal of state jurisdiction would have rendered self-help the only practicably available remedy for a slaveowner. The slaveowners successfully turned to Congress for assistance. The Fugitive Slave Act of 1850[36] created a new corps of federal judicial officials empowered to hear claims under the fugitive slave clause.[37] The abolitionists promptly attacked the newly created federal forum by seeking to pit state courts against federal slave rendition commissioners through the use of state habeas corpus writs to disrupt federal rendition proceedings.[38] In *Ableman v. Booth*,[39] the Supreme Court invalidated the strategy,

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only at the federal government, state officials could not be compelled, as they were under the Act of 1793, to participate in the enforcement of the law. 41 U.S. at 621–22. Justice McLean differed from Justice Story on this point because he believed that Congress could legitimately impose an obligation on state officers, but their disagreement mattered little because Justice McLean found that a state could resist, and that no means were available to coerce a fulfillment of duties. If a state refused to cooperate, the federal government would be compelled to "rely upon its own agency in giving effect to the laws." *Id.* at 666. Moreover, Justice McLean, unlike the other members of the Court, denied that the fugitive slave clause validated self-help which threatened a breach of the peace. *Id.* at 668.

[35] *See* T. MORRIS, *supra* note 27, at 114 (Massachusetts Personal Liberty Law of 1843); *id.* at 118 (Pennsylvania Personal Liberty Law of 1847). *But see id.* at 119–23 (New York rejected similar action).

[36] Act of Sept. 18, 1850, ch. 10, 9 Stat. 362.

[37] *See id.* The 1850 Act denied the alleged fugitive the right to testify before the federal commissioner hearing his case. Moreover, the commissioner was to receive a ten dollar fee if he issued a certificate of removal, but only a five dollar fee if he denied the certificate.

[38] *See, e.g., Ex parte* Sifford, 22 F. Cas. 105 (C.C.S.D. Ohio 1857) (No. 12,848); *Ex parte* Robinson (*Robinson II*), 20 F. Cas. 965 (C.C.S.D. Ohio 1856) (No. 11,834); *Ex parte* Robinson (*Robinson I*), 20 F. Cas. 969 (C.C.S.D. Ohio 1855) (No. 11,835). *See generally* T. MORRIS, *supra* note 27, at 186–201.

[39] 62 U.S. (21 How.) 506 (1859). The *Booth* litigation is indicative of the fractious relations between federal and state courts which the fugitive slave controversy aroused. Booth and Rycraft were arrested in 1854 as aiders and abettors under the 1850 Act when they helped free a fugitive who had been apprehended by a federal marshal. They obtained discharge on a writ of habeas corpus from the Wisconsin Supreme Court. *In re* Booth, 3 Wis. 157 (1854), *rev'd*, 62 U.S. (21 How.) 506 (1859). When the United States sought review in the United States Supreme Court, the clerk of the Wisconsin court, upon instructions from the state judges, refused to make any return to the writ of error issued by the Federal Supreme Court. The high Court then held that such a refusal could not prevent the exercise of its appellate jurisdiction, and issued a direct order to the clerk to make a return. United States v. Booth, 59 U.S. (18 How.) 476 (1855). The return was never made, and the Supreme Court proceeded to hear the case upon a certified copy of the record provided by the United States

which may be viewed as an attempt to impose a primitive exhaustion requirement on persons invoking a federal forum to enforce federal constitutional rights.[40] *Ableman* thus completed the process begun in *Prigg* of affirming the primacy of federal institutions in detailing the procedural and substantive components of the rights established by the fugitive slave clause.

The federalism positions adopted by the parties in the Reconstruction era were also shaped by assumptions about their impact on the substantive rights of blacks. But during Reconstruction these positions were reversed. The Republicans, the spiritual and political descendants of the abolitionists who, in the fugitive slave context, had urged states' rights positions, championed the most expansive notions of federal power; the Democrats, including many former opponents of the abolitionists, embraced views reflecting broad sympathy for the independent position of the states in a federal system.[41] While the Republicans prevailed initially in Congress, the Supreme Court, reflecting the increasing Northern indifference to blacks, eventually eviscerated the role of federal institutions in protecting the rights theoretically secured to the freedmen.[42]

Although the parallel between nineteenth- and twentieth-

Attorney General. United States v. Booth, 62 U.S. (21 How.) 506, 511–12 (1859).

[40] By securing a state forum to hear the habeas request, the fugitive could give testimony which could then be used to establish certain facts by documents in the proceeding before the commissioner. Further, in the state court proceeding the alleged fugitive could obtain other protections, such as the appointment of a guardian ad litem. Moreover, the existence of a record compiled in a state court hearing which would lead a state court to conclude that the alleged fugitive was not in fact a fugitive from service might make the commissioner less likely to grant the requested removal certificate. Finally, the state court proceedings could prolong the entire matter to the point where a rescue might be made, a purchase negotiated, or a witness found to help the fugitive's case.

[41] *See generally* H. HYMAN, A MORE PERFECT UNION 433–542 (1975); J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 579–80, 683 (1969); K. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 135–43 (1965).

[42] Even before the Reconstruction process had been concluded, the Supreme Court began to interpret the Reconstruction amendments to restrict the range of interests protected and the type of conduct prohibited. In The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), the Court distinguished the "privileges and immunities" of national citizenship from those of state citizenship and limited the fourteenth amendment to the former, much narrower category. *Id.* at 79–80. *See also* United States v. Cruikshank, 92 U.S. 542 (1876) (right to assemble to petition for redress of grievances not a component of national citizenship unless the petition directed at the national government). The "state action" doctrine similarly restricted the scope of the protection afforded by the changes in the Constitution by precluding federal vindication of the rights of the freedmen against private interference. *See, e.g.*, James v. Bowman, 190 U.S. 127 (1903); Baldwin v. Frank, 120 U.S. 687 (1887); The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882).

century federalism strategies is intriguing, one significant element differentiates the position of twentieth-century lawyers from their predecessors. During the twentieth century, federalism disputes have focused on the allocation of business between state and federal judicial forums. In the nineteenth century, however, more turned on the federalism arguments than on the choice of forum. Often, the procedures and even the substantive law applicable to a given federal norm were affected by a decision as to whether state or federal institutions were to be given primary responsibility for defining and implementing federal rights.[43] Moreover, whatever the hopes of the nineteenth-century lawyers seeking to advance the status of blacks, their target forum proved far less sympathetic than the lawyers had hoped. Despite the energy which abolitionist and Republican lawyers lavished on their federalism positions in the hopes of improving their chances on the merits, state courts during the fugitive slave era and federal courts during Reconstruction were ultimately unsympathetic to the claims of blacks.[44]

While distinctions thus exist between nineteenth- and twentieth-century federalism issues, lawyers and judges in each century advanced federalism arguments with an eye to their effect on the merits. And despite Justice Powell's protestations to the contrary in *Stone*, I believe that the choice between federal and state courts as constitutional enforcement forums continues to exert an effect on the nature of the resulting federal right.

II. Parity: Contemporary Institutional Considerations

As a civil liberties lawyer for the past ten years, I have pursued a litigation strategy premised on two assumptions. First, persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state,

[43] Thus, in the fugitive slave era, the federalism issues decided in *Prigg* and *Abelman* determined whether alleged fugitives would enjoy a jury trial and be allowed to testify in their own defense and also effected a state-federal forum allocation. *See* notes 30, 40 *supra*. In the Reconstruction era the *Civil Rights Cases* determined the existence or nonexistence of substantive norms. *See* note 42 *supra*.

[44] On the willingness of Northern state courts to enforce the fugitive slave clause, see generally R. Cover, *supra* note 29. The failure of the federal judiciary as a forum for the enforcement of the constitutional rights conferred by the Reconstruction is exemplified by Giles v. Harris, 189 U.S. 475 (1903), where the Court rejected a challenge to Alabama's voter registration system. Although the Court acknowledged that the scheme might constitute a fraudulent denial of fifteenth amendment rights, it refused to issue an injunction ordering the plaintiffs' names to be placed on the voter lists. *See generally Developments, supra* note 23, at 1156–61.

trial court. Second, to a somewhat lesser degree, federal district courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims.[45] I know of no empirical studies that prove (or undermine) those assumptions.[46] Yet, they frequently shape the forum selection strategy in constitutional cases today as they have in the past.

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[45] This Part focuses on factors supporting my first premise — that federal district courts are superior to state trial courts as forums for constitutional enforcement. For reasons to be discussed shortly, pp. 1118–19 *infra*, the comparison between federal district and state trial courts is the critical one in most constitutional cases. In some situations, however — in habeas corpus and in a relatively few non-habeas situations where neither speedy relief nor factfinding are critical — a comparison between state appellate and federal district courts may be appropriate.

When comparing federal district and state appellate courts, the comparative advantage which exists at the trial level is substantially diminished. If a competence gap exists at all, it is very slight and may, indeed, favor state appellate judges. Moreover, the sense of elan and mission characterizing federal judges is also present among many state appellate courts.

Two factors exist, however, that continue to incline me toward a federal trial forum. First, appellate court ability to review findings of fact and issues of credibility is limited. The Supreme Court's increasing emphasis on intent and motive in constitutional adjudication, *see* note 53 *infra*, renders the integrity of the factfinding process all the more critical. Second, because of the selection processes, most state appellate courts are exposed to majoritarian pressures to nearly the same extent as are state trial courts. The same three methods used to select state trial judges, *see* pp. 1127–28 & notes 81–82 *infra*, predominate in the selection of appellate judges. *See* S. ESCOVITZ, JUDICIAL SELECTION AND TENURE 17–42 (1975). Only Rhode Island, New Hampshire, Massachusetts, and New Jersey grant life tenure to supreme court justices, the latter's being conditioned on reappointment after one seven-year term. All other states require reelection at intervals from 2 to 15 years. *See id.*

While the evidence is far from conclusive, it is from among those appellate courts which closely approximate the independence enjoyed by the federal courts that one finds the state courts which have been most vigorous in protecting individual rights. For example: New Jersey (appointment for a seven-year term, followed by reappointment with life tenure): Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (prohibiting exclusionary zoning), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (requiring equalization of school financing), *cert. denied*, 414 U.S. 976 (1973); Massachusetts (appointment for life): Commonwealth v. O'Neal, 339 N.E.2d 676 (Mass. 1975) (striking down death penalty for rape); California (12-year term): Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (requiring equalization of school financing), *reaff'd on state constitutional grounds*, 557 P.2d 929, 135 Cal. Rptr. 345 (Cal. 1976).

[46] No comparative study of the relative performance of state and federal courts in the enforcement of constitutional rights appears to exist. However, the impact of state hostility to Supreme Court mandates has been noted. *See, e.g.*, Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260 (1972); Schneider, *State Court Evasions of United States Supreme Court Mandates: A Reconsidera-*

The Supreme Court, however, presently seems bent on resolving forum allocation decisions by assuming that no factors exist which render federal district courts more effective than state trial or appellate courts for the enforcement of federal constitutional rights.[47] I hope to challenge the Court's present assumptions, and to support my own, by focusing on institutional characteristics relevant to assessing the relative competence of state and federal courts as constitutional enforcement mechanisms.

Admittedly, since forum allocation choices implicate concerns for federalism, judicial economy, and the federal courts' caseload, it is not suprising that there has been an increasing tendency to channel constitutional challenges to state action into the state courts. And, of course, even if federal district courts were conceded a comparative advantage in constitutional enforcement, those concerns might militate in favor of routing certain constitutional cases into state forums. However, by uncritically assuming parity, the Supreme Court has avoided the difficult, but critical, issue of whether concerns for federalism, efficiency, and

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tion of Evidence, 7 VAL. U.L. REV. 191 (1973). *See generally* Balustein & Ferguson, *Avoidance, Evasion and Delay*, in THE IMPACT OF SUPREME COURT DECISIONS 96 (T. Becker ed. 1969); Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963); Schmidhauser, *The Tensions of Federalism: The Case of Judge Peters*, in CONSTITUTIONAL LAW IN IN THE POLITICAL PROCESS 36 (J. Schmidhauser ed. 1963). Specific attempts to measure state court response to Supreme Court decisions broadening constitutional rights include Manwaring, *The Impact of* Mapp v. Ohio, in THE SUPREME COURT AS POLICY MAKER 24 (D. Everson ed. 1968); Vines, *Southern State Supreme Courts and Race-Relations*, 18 WEST. POL. Q. 5 (1965); Wasby, *Public Law, Politics and the Local Courts: Obscene Literature in Portland*, 14 J. PUB. L. 105 (1965); Note, Gideon, Escobedo, Miranda: *Begrudging Acceptance of the United States Supreme Court's Mandates in Florida*, 21 U. FLA. L. REV. 346 (1969). *See generally* H. JACOB, JUSTICE IN AMERICA 218 (2d ed. 1972). Expression of state judicial hostility to Supreme Court decisions broadening individual rights has not been unknown. *See, e.g.*, State v. Phillips, 540 P.2d 936, 938–39 (Utah 1975); *1958 Report of the National Conference of State Chief Justices*, in CONSTITUTIONAL LAW IN THE POLITICAL PROCESS 32 (J. Schmidhauser ed. 1963) (signed by 36 chief justices).

Unfortunately, little scholarly attention has been paid to the state trial benches. The only serious study is K. DOLBEARE, TRIAL COURTS IN URBAN POLITICS (1967). A substantial literature exists, however, on the functioning of the federal district courts. *See, e.g.*, J. PELTASON, FIFTY-EIGHT LONELY MEN (1961); R. RICHARDSON & K. VINES, THE POLITICS OF FEDERAL COURTS (1970); Douglas, *Federal Courts and the Democratic System*, 21 ALA. L. REV. 179 (1969); Wisdom, *The Friction Making, Exacerbating Political Role of Federal Courts*, 21 Sw. L.J. 411 (1967).

[47] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 493 & n.35 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 928, 931 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592, 606 (1975). *See generally Developments, supra* note 23, at 1282–87; *see also* Preiser v. Rodriguez, 411 U.S. 475, 491–92 (1973).

caseload outweigh the importance of having constitutional claims heard by the more sympathetic and competent forum.[48]

A. An Institutional Comparison: Some Preliminary Observations

The first step in assessing the relative institutional capacity of state and federal courts to enforce constitutional doctrine requires agreement on which state forum should be compared with the federal district courts to determine whether a comparative advantage exists. Generally, when the parity issue is discussed, it is in the context of a comparison that tends to measure the federal district courts against state appellate courts.[49] While such a comparison makes sense in the context of habeas corpus, where the petitioner first will have pursued his federal claims unsuccessfully through the state court system,[50] it is inappropriate in most constitutional cases. Even if one concedes parity between state appellate and federal district courts,[51] corrective state appellate work does not adequately substitute for

[48] The Supreme Court's forum allocation decisions in recent years have tended to reflect logical extensions of the *Younger* doctrine and traditional concerns for efficiency and finality. *See, e.g.*, Juidice v. Vail, 97 S. Ct. 1211 (1977); Stone v. Powell, 428 U.S. 465 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Hicks v. Miranda, 422 U.S. 332 (1975). Having avoided the difficult, but necessary, task of candidly comparing the relative efficacy of state and federal forums, the Court appears to be drifting towards a de facto requirement that civil rights plaintiffs exhaust state judicial remedies before invoking federal jurisdiction. *See Developments*, *supra* note 33, at 1267–70. Moreover, having relegated cases initially to state courts, the Supreme Court has begun to employ preclusion techniques which may bar all access to the federal district courts. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). I have attempted to describe this process in Neuborne, *supra* note 23 at 568.

The Warren Court's major forum allocation decisions appear based on precisely the opposite assumption — that potentially outcome-determinative distinctions exist between state and federal courts which justify a broad choice of forum for constitutional claims. *See, e.g.*, Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Fay v. Noia, 372 U.S. 391, 416, 421–22 (1963); Monroe v. Pape, 365 U.S. 167, 174, 176 (1961). *See also* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964). Regrettably, the Warren Court made no greater attempt to justify its assumption that parity does not exist, than has the current Court made to justify its contrary assumptions. Since one's assumptions about parity may dictate the result in most forum allocation decisions, in-depth Supreme Court scrutiny of the relative capacity of state and federal courts as constitutional enforcement mechanisms is long overdue.

[49] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 493 & n.35 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592, 607–11 (1975); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 507–14 (1963).

[50] *See* 28 U.S.C. § 2254(b), (c) (1970).

[51] While the issue is much closer, I am unprepared to concede such parity. *See* note 45 *supra*.

vigorous constitutional protection at the trial level. The expense, delay, and uncertainty which inhere in any appellate process render ultimate success after appeal far less valuable than speedy, accurate resolution below. Especially in the context of first amendment rights, by their nature fragile, the possibility of a lengthy, problematic appeal in order to reverse an adverse criminal or civil judgment may deter many individuals from effectively exercising their rights.[52] Moreover, in many constitutional cases, the factfinding process plays a critical role in resolution of the controversy.[53] These two factors combine to render the trial forum often the most critical stage, and thus the appropriate institutional comparison should be between federal district courts and their state trial counterparts.[54]

A second preparatory step is to dispel the notion that acknowledging a comparative advantage to federal courts need imply that state trial judges violate their oaths by consciously refusing to enforce federal rights. We are not faced today with widespread state judicial refusal to enforce clear federal rights.[55] When the mandates of the Federal Constitution are clear, most state judges respect the supremacy clause and enforce them. Constitutional litigation is, however, rarely about clear law. The disputes which propel parties raising constitutional questions into court frequently pit strong legal and moral claims against each other and resolution of those competing "legitimate" claims is the real stuff of constitutional litigation. Thus, one need not intimate that state trial judges act in bad faith. Our comparison need only suggest that given the institutional differences between the two

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[52] *See* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trials*, 113 U. PA. L. REV. 793, 798–99 (1965).

[53] *See* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 416–17 (1964). The Supreme Court's growing reliance on motivation and intent in constitutional adjudication, *see, e.g.*, Mt. Healthy Bd. of Educ. v. Doyle, 97 S. Ct. 568, 574–76 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977); Washington v. Davis, 426 U.S. 229 (1976), puts increasing pressure on the factfinding phase.

[54] Failure to perceive the trial court's importance in constitutional litigation stems in part from the prevalence of an "upper court myth" which pictures the final appellate level as the most important aspect of the American judicial process. While the appellate opinion is the more glamorous aspect of constitutional adjudication, it takes a trial court to translate the abstract norms of an appellate decision into reality. *See generally* J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 222–24 (1950).

[55] The widespread breakdown of Southern justice which motivated enactment of the Civil Rights Act of 1871, *see Developments*, *supra* note 23, at 1153–56, and similar breakdowns during the height of the civil rights movement which provoked calls for significant expansions of federal jurisdiction, *see, e.g.*, Amsterdam, *supra* note 52, at 793–805, do not exist today.

benches, state trial judges are less likely to resolve arguable issues in favor of protecting federal constitutional rights than are their federal brethren.

As a final preparatory step, another notion — that federal district judges, when called upon to enforce the fourteenth amendment against local officials, resemble an alien, occupying army dispatched from Washington to rule over a conquered province — must be dispelled. Federal judges are chosen from the geographical area they serve.[56] Generally, they are appointed with the consent and often at the behest of a senator representing the state in which they will sit,[57] frequently after local officials and citizen groups have had the opportunity to make their views on the nominee known.[58] To characterize federal judges as carpetbaggers, unaware of, and insensitive to, local concerns is thus inaccurate and serves to deflect attention from the relative efficacy of state and federal forums in enforcing constitutional norms.

Concentrating, therefore, on an institutional comparison at the trial level, disclaiming any intent to cast aspersions on the good faith of state judges, and recognizing that both state and federal trial judges have roots in the communities they serve, three sets of reasons support a preference for a federal trial forum. First, the level of technical competence which the federal district court is likely to bring to the legal issues involved generally will be superior to that of a given state trial forum. Stated bluntly, in my experience, federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts. Second, there are several factors, unrelated to technical competence — which, lacking a better term, I call a court's psychological set — that render it more likely that an individual with a constitutional claim will succeed in federal district court than in a state trial court. Finally, the federal judiciary's insulation from majoritarian

[56] A 1963 survey revealed that 51.3% of all federal district judges were born in the district in which they sit, while 56.1% attended law school in the district. Moreover, 89% had held government positions in the states encompassing their districts before appointment. Vine, *Federal District Judges and Race Relation Cases in the South*, 26 J. POL. 337, 351–55 (1964). Federal district judges are required to live in their districts. 28 U.S.C. § 134(b) (1970).

[57] *See generally* H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 32–33 (1972).

[58] *See, e.g.*, N.Y. Times, Jan. 19, 1977, at A1, col. 4, D17, col. 6 (describing the operation of advisory committee, comprised of legal practitioners and scholars, established to counsel Senator Daniel P. Moynihan on the appointment of federal judges and prosecutors in New York).

pressures makes federal court structurally preferable to state trial court as a forum in which to challenge powerful local interests.[59]

B. Technical Competence

Merely because federal judges feel constrained by legitimate considerations of comity from explicitly recognizing that a competence gap exists between the state and federal courts, that gap does not become any less real. It stems in part from the relative capacities of the judges themselves and, in part, from institutional factors unrelated to personal ability.

Because it is relatively small, the federal trial bench maintains a level of competence in its pool of potential appointees which dwarfs the competence of the vastly larger pool from which state trial judges are selected. There are about twice as many trial judges in California as in the entire federal system.[60] As in any bureaucracy, it is far easier to maintain a high level of quality when appointing a relatively small number of officials than when staffing a huge department. Additionally, there is a substantial disparity between state and federal judicial compensation[61] which allows the federal bench to attract a higher

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[59] Concededly, there are state trial judges of genuine distinction who outshine federal district judges of limited capacity. And state judges can and occasionally do outperform federal judges in protecting individual rights. *See, e.g.*, cases cited note 45 *supra*; Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). If, as I believe, federal courts are more responsive than state courts to Supreme Court commands, *see* pp. 1124–25 *infra*, contraction of federal constitutional rights by the Supreme Court will be reflected quickly at the district court level. If so, civil liberties lawyers may be forced to turn increasingly to state courts in hopes of protecting individual rights under state constitutions.

Where federal rights remain viable, however, enforcement by the federal district courts remains the most effective implementation device. The recent state court decisions strongly solicitious of constitutional rights remain the exception and take place at the appellate level. No noticeable upsurge in solicitude for constitutional rights has been reported at the state trial level. Forum allocation decisions should, however, be made to comport with the rule rather than the occasional exception.

[60] Currently, the federal trial bench consists of 399 authorized judgeships. In addition, 109 senior district judges continue to render service at the trial level. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 2 (1976) [hereinafter cited as U.S. ANNUAL REPORT]. In California, there are 503 superior court judges, 406 municipal court judges, and at least 199 justices of the peace. JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 98, 125, 133 (1976) [hereinafter cited as CALIFORNIA ANNUAL REPORT].

[61] After a recent pay raise, federal district judges now earn $54,500 a year for life, 35 CONG. Q. WEEKLY REP. 268, 334 (1977), while the average state trial court judge receives $33,823 per year. NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES IN THE STATE COURT SYSTEMS 4 (1976).

level of legal talent than state trial courts can hope to obtain.

The selection processes utilized to staff the respective judicial posts also incline toward a federal bench of higher professional distinction. While the federal selection process is not without flaws,[62] it does focus substantially on the professional competence of the nominee.[63] The selection processes for state trial courts are generally less concerned with gradations of professional competence once a minimum level has been attained.[64] Neither elections nor an appointment process based largely on political patronage is calculated to make refined judgments on technical competence.[65]

The competence gap does not stem solely from the differences in the native ability of the judges. While it is often overlooked, the caliber of judicial clerks exerts a substantial impact on the quality of judicial output.[66] Federal clerks at both the trial and appellate levels are chosen from among the most promising recent law school graduates for one- to two-year terms. State trial clerks, on the other hand, when available at all, tend to be either career bureaucrats or patronage employees and may lack both the ability and dedication of their federal counterparts. Moreover, while the caseload burden of the federal courts is substantial, it pales when compared to the caseload of most state trial courts of general jurisdiction.[67] Thus, even if state and federal judges

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[62] *See* H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS (1972); J. GROSSMAN, LAWYERS AND JUDGES (1965).

[63] *See, e.g., Hearing on the Nomination of Francis X. Morrisey to be United States District Judge for the District of Massachusetts Before a Subcomm. of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); Chase, *The Johnson Administration — Judicial Appointments — 1963–1966*, 52 MINN. L. REV. 965, 980–86 (1968).

[64] Jacob & Vines, *The Role of the Judiciary in American State Politics*, in JUDICIAL DECISION MAKING 245 (G. Schubert ed. 1963).

[65] Dissatisfaction has been frequently voiced with the selection processes used to staff state judiciaries. *See, e.g.*, A. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 48–49 (1956); Brownell, *Too Many Judges Are Political Hacks*, in JUDICIAL SELECTION AND TENURE 47 (G. Winters ed. 1967); Utter, *Selection and Retention — A Judge's Perspective*, 48 WASH. L. REV. 839, 846 (1973); Note, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267 (1976). *See generally* S. ESCOVITZ, *supra* note 45.

[66] Discussion of the impact of clerking patterns on judicial performance has been sparse, impressionistic, and unsatisfactory. Perhaps the most useful collection of materials appearing to date is *Judicial Clerkships*, 26 VAND. L. REV. 1123 (1973).

[67] One useful way of comparing the relative caseloads of state and federal trial courts is again to contrast the California and federal systems. In fiscal year 1976, approximately 170,000 civil and criminal cases were commenced in the United States district courts. U.S. ANNUAL REPORT, *supra* note 60, at 5, I–12 (table C–2). During the same period in the California superior courts, where

were of equal native ability, the advantages enjoyed by federal judges would probably result in a higher level of performance. When those institutional advantages are combined with the differential in native ability, the competence gap becomes pronounced.

It is fair to ask why a civil liberties lawyer is particularly concerned about the relative competence of the possible forums. Even if a competence differential exists, would not an allegedly less competent state judge be as likely to err in favor of the lawyer's position as against it? Apart from esthetics, the answer is twofold. First, since constitutional decisions serve to guide third persons seeking to conform to constitutional norms, the clarity and persuasiveness of judicial opinions in constitutional cases assume great importance. A randomly correct decision by an inarticulate court, while welcome, is of far less value to the general protection of constitutional rights than the same decision by a court which can produce an eloquent and technically precise opinion to guide similarly situated persons.[88]

Second, a technically less competent judge is not as likely to err on the side of the constitutional claimant as against him. Constitutional litigation generally involves an assault on an existing state of law or facts which enjoys the imprimatur of democratic decisionmaking, with the party asserting a constitutional claim bearing a substantial burden of explaining why the status quo should be changed.[89] Since judicial failure to comprehend his claim renders it impossible to satisfy that heavy burden, the constitutional claimant will be generally disadvantaged in a forum of limited technical capacity.

More specifically, for the past two decades constitutional litigators have sought to implement principles inherent in a series of expansive constitutional interpretations by the Warren Court.

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the number of judges is about the same as that in the entire federal system, *see* note 60 *supra*, total filings were approximately 601,000. CALIFORNIA ANNUAL REPORT, *supra* note 60, at 98.

[88] Assume, for example, that union organizers, seeking to inform migrant workers of their rights, are charged by a local farmer with criminal trespass for conduct which they claim is protected by the first amendment. *See, e.g.*, Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975). An acquittal in a justice of the peace court would be of little value to the organizers at the next migrant stop and of no help to similarly situated organizers. An articulate opinion by a technically competent trial court, while not necessarily binding at the next stop, would be of substantial assistance.

[89] Because of the countermajoritarian character of his claim, a constitutional plaintiff will face a greater inertial burden than a plaintiff in a nonconstitutional case. At the trial level, this burden — the presumption of constitutionality generally afforded government action — becomes stronger as trial judges, mindful of their position in the judicial hierarchy, often feel constrained to leave the overturning of governmental decisions to the appellate courts.

Much of that effort has involved explaining to skeptical lower court judges why those decisions have altered much of the law they remember from law school. Our success has depended not only on our skill as advocates, but also on the technical proficiency of the trial court.

Clearly, if the Supreme Court retrenches from those expansive decisions, superior technical competence at the trial level may be as troublesome to future civil liberties lawyers seeking to enforce eroded precedents as it is currently attractive to those seeking to enforce viable ones. A possible future preference for a mistake-prone tribunal as an antidote to a less libertarian Supreme Court, of course, hardly constitutes a serious forum allocation argument. However, it does emphasize that technical competence is not synonomous with victory for a constitutional plaintiff. Yet, despite gloomy predictions,[70] the current Court does not appear to be engaged in a wholesale reversal of the Warren Court's legacy. Thus, while trial level competence may be a future adversary of expansive constitutional enforcement, it remains a current ally.[71]

C. Psychological Set

Even if state and federal forums were of equal technical competence, a series of psychological and attitudinal characteristics renders federal district judges more likely to enforce constitutional rights vigorously. First, although intangible, an elite tradition animates the federal judiciary, instilling elan and a sense of mission in federal judges and exerting, as Judge Friendly has noted,[72] a palpable influence on the quality of the judicial product. As heirs of a tradition of constitutional enforcement, federal judges feel subtle, yet nonetheless real pressures to uphold that tradition. State trial judges, on the other hand, generally seem to lack a comparable sense of tradition or institutional mission.

Second, federal judges often display an enhanced sense of bureaucratic receptivity to the pronouncements of the Supreme Court. State judges, of course, almost always recognize that they too are bound not to disregard the Supreme Court's interpretation of the Federal Constitution. Their bureaucratic relationship with the Supreme Court is, however, more attenuated than that of a district court judge. Although the effects of this difference are difficult to isolate with certainty, in my experience federal

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[70] *See, e.g.*, Brennan, *supra* note 59, at 495, 498.

[71] Of course, apart from the impact of competence on the outcome of constitutional cases, a strong argument exists for delegating constitutional decisionmaking to the most competent available forum because of its intrinsic importance.

[72] H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 28–29 (1973).

judges appear to recognize an affirmative obligation to carry out and even anticipate the direction of the Supreme Court. Many state judges, on the other hand, appear to acknowledge only an obligation not to disobey clearly established law.[73] While this distinction is subtle, in the doubtful case it can exert a discernible impact on the trial level outcome. Since civil liberties lawyers frequently are engaged in urging judges to recognize Supreme Court precedent, which, while not clearly dispositive, implies judgment for the constitutional plaintiff, the forum's recognition of an institutional duty to anticipate the as yet unexpressed views of the Supreme Court is critical.[74]

Third, in seeking a federal forum, civil liberties lawyers hope to benefit from what can be described as an "ivory tower syndrome." The scope of federal jurisdiction, even taking account of that over federal crimes and habeas corpus, is such that federal judges are insulated from the more cynicism-breeding dimensions of constitutional law. State trial judges, conversely, especially at the criminal, family, and lower civil court levels, are steadily confronted by distasteful and troubling fact patterns which can sorely test abstract constitutional doctrine and foster a jaded attitude toward constitutional rights. The fourth amendment's exclusionary rule, for example, will command greater allegiance from a judge who has not been repeatedly exposed to the reality of the social harms inflicted by some felons whom the rule requires to be freed. Similarly, the right to hold a political demonstration or a union organizing rally will seem more obvious to a judge who need not face the disorderly conduct arrests which may arise from them. Distance from the pressures and emotions generated by the application of constitutional doctrine is conducive to a generous reading and vigorous enforcement of constitutional rights. For state trial courts, which ordinarily must be responsible both for law enforcement and the day to day implementation of constitutional rights, no such distance is possible.[75] Federal trial judges, on the other hand, because of the limited nature of their jurisdiction, enjoy a degree of distance enhancing

[73] *See generally* note 46 *supra*.

[74] As with competency, the bureaucratic obedience factor assumes that the Supreme Court pronouncement in question is supportive of constitutional rights. If the Court's decisions justify a tendency to anticipate decisions adverse to constitutional rights, civil liberties lawyers may be forced to seek state forums where state judges may feel freer to enforce a given federal right until explicitly instructed by the Supreme Court to cease and would remain free to enforce the right as a matter of state constitutional law. However, such a strategy is one of necessity, not of choice. *See generally* note 59 *supra*.

[75] *See* Bator, *supra* note 49, at 510; Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

the likelihood that they will liberally and assiduously perform their function of enunciating constitutional norms.

Finally, the differences in the backgrounds of the state and federal trial judges make it more likely that a federal judge will possess certain class-based predilections favorable to constitutional enforcement than will his state court counterpart. The federal bench is an elite, prestigious body, drawn primarily from a successful, homogeneous socioeducational class[76] — a class strongly imbued with the philosophical values of Locke and Mill (which the Bill of Rights in large measure tracks). As such, when a plaintiff asserts a constitutional claim against a state official whose socioeducational background does not include obeisance to that libertarian tradition, a federal judge generally will protect the threatened constitutional value.[77]

This is not to say that judges consciously shape rulings in constitutional cases according to the defendant's social class. Rather, I suggest only that if the defendant and the judge are of the same socioeducational class, a judge will tend to trust that the defendant shares his values and thus will not feel compelled to enforce them vigorously. If the defendant deviates from the judge's class, however, no assumption of shared values will exist — and indeed a suspicion of contrary values may exist — leading to stronger enforcement of the judge's values in the guise of constitutional adjudication.[78]

Most of the constitutional rights which civil liberties lawyers seek to protect fit snugly within nineteenth-century liberal

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[76] For a composite picture of the federal trial bench, see J. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION (1965); D. JACKSON, JUDGES 247–76 (1974); J. PELTASON, *supra* note 46; Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959).

[77] *See generally* Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966); Haines, *General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96 (1922).

[78] One example of judicial class bias at work is the formulation of executive immunity in Barr v. Matteo, 360 U.S. 564 (1959). Immunity was confined to persons whose high status in the government virtually assured membership in the same social and educational elite to which the judge belonged. Defendants occupying a less exalted status in government (and in the social order) were refused immunity and remitted to a good faith defense. *See generally Developments, supra* note 23, at 1209–17. The orthodox explanation for confining immunity to department heads is their greater need for freedom of action. However, when one compares police commissioners with patrolmen, it is unclear why the commissioner should be immunized, but not the patrolman who must make more difficult decisions with less time for reflection. Freezing immunity at a high level is explicable more readily, I submit, as an expression of trust for members of one's class and mistrust for outsiders.

thought. And since a class disparity between federal trial judges and the individual targets of constitutional enforcement is more likely than one between state trial judges and constitutional defendants, this class phenomenon will assist the constitutional plaintiff more often in the federal courts.[79]

D. Insulation from Majoritarian Pressures

Constitutional adjudication inherently involves persuading a judicial forum to counter the will of the majority as expressed through its representatives. To the extent that the forum is itself subject to the political pressures which shaped the judgment it is asked to review, its capacity to provide sustained enforcement of countermajoritarian constitutional norms will be diminished. When one compares the institutional structure of the federal trial bench with state court structures, the functional superiority of federal courts as checks on majoritarian excess is pronounced.

Federal district judges, appointed for life and removable only by impeachment, are as insulated from majoritarian pressures as is functionally possible, precisely to insure their ability to enforce the Constitution without fear of reprisal.[80] State trial judges, on the other hand, generally are elected for a fixed term,[81] rendering

[79] I concede the inherent difficulty of proving the validity of these psychological factors. Indeed, in many cases I suspect they may not operate. However, many of us who routinely practice constitutional law in both the state and federal systems think that we perceive them at work in a sufficiently large proportion of our cases to require their consideration in our forum selection strategy.

[80] The independence of the federal judiciary has been properly celebrated. *See, e.g.*, Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 667 (1969) ("Without their independence, the federal judges will have lost all that separates them from total subordination to the political processes from which they ought to be aloof.").

[81] Three general methods for selecting state trial judges are currently in use: appointment; election, either partisan or nonpartisan; and initial appointment followed by retention election. *See* S. ESCOVITZ, *supra* note 45, at 11–12. In four states, Massachusetts, Rhode Island, New Hampshire, and New Jersey, trial judges are appointed with life tenure; in the last, such tenure is conditioned upon reappointment after completion of one seven-year term. *See id.* at 27, 31, 36. In four other states, trial judges are appointed for terms of four to twelve years followed by consideration for reappointment. *Id.* at 20, 22, 26. In the other 42 states and the District of Columbia, trial judges are either appointed or elected subject to retention election at intervals of from one to fourteen years. *Id.* at 17–42. *See* Note, *supra* note 65. Thus, only in four states do trial judges possess insulation from majoritarian political pressures comparable to that enjoyed by federal trial judges. For an example of the impact which such insulation, or the lack thereof, can have upon the judiciary, compare the fates of two judges, one state and one federal, who were involved in similar school desegregation cases, as described in Maroney, *"Averting the Flood": Henry J. Friendly and the Jurisdiction of the Federal Courts* (pt. 1), 27 SYRACUSE L. REV. 1071, 1128–29 (1976).

them vulnerable to majoritarian pressure when deciding constitutional cases.[82] Thus, when arguable grounds supporting the majoritarian position exist, state trial judges are far more likely to embrace them than are federal judges.[83] This insulation factor, I suggest, explains the historical preference for federal enforcement of controversial constitutional norms. While the level of hostility towards any given constitutional decision varies from locality to locality, from issue to issue, and over time, constitutional adjudication still frequently involves issues which raise strong political passions. Insulation from political pressures may not be necessary in all constitutional cases; yet, where such pressures are strong, insulated judicial forums are necessary if constitutional rights are to remain viable.

E. Some Costs of the Federal Forum Preference

Opting for a federal forum in constitutional cases admittedly entails some costs. First, an insulated federal judge may be less sensitive to the social milieu into which his decisions must fit and thus less successful in shaping decisions and remedies to the reality of that milieu. That danger, however, is minimized by the fact that "insulated" federal judges are typically drawn from, and well acquainted with, the locality in which they sit.[84] Even so, the decisions of a politically insulated federal judge may encounter greater public resistance than the same decisions rendered by a politically accountable state judge. Clearly, to the extent that constitutional norms are enforced by a forum sensitive to the majority will, the chances of public acceptance are enhanced. Conversely, by entrusting constitutional adjudication to federal trial forums perceived as free from majoritarian influence, a measure of public acceptance is lost. That loss, however, seems necessary to insure the existence of a forum capable of protecting individual rights in the face of local political dissatisfaction.

Second, by urging a broad option to invoke federal jurisdiction in constitutional cases, civil rights lawyers exacerbate an

[82] The impact of political concerns on judicial behavior is discussed in Jacob, *Judicial Insulation — Elections, Direct Participation and Public Attention to the Courts in Wisconsin*, 1966 WIS. L. REV. 801; Ladinsky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128.

[83] The insulation which a federal forum provided out-of-state litigants against local pressures was, of course, the initial justification for diversity jurisdiction. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492–93 (1928). While the local pressures operating on a diversity suit have all but disappeared, the nature of constitutional adjudication, involving as it does a challenge to a majoritarian position, continues to suffer from the danger of local pressure, especially at the trial level.

[84] *See* p. 1110 *supra*.

already difficult caseload burden in the federal courts. One factor rendering federal courts desirable is their superior technical competence. Yet a failure to remedy the overburdening of the federal trial courts threatens precisely that capacity for excellence. While the caseload problem cannot be dismissed, several responses do exist. Although its small size is important in maintaining both a high level of professional ability and an elite sense of institutional mission, the current federal bench could be substantially enlarged without compromising either attribute.[85] More fundamentally, the major justification for a system of lower federal courts is the protection of federal rights. Before that basic function is curtailed, substantial savings of federal judicial time could and should be effected by eliminating archaic heads of federal jurisdiction which lack contemporary social purpose.[86] Moreover, barring a given case from the federal courts does not mean its disappearance. Rather, it likely will reappear on an already overcrowded state court docket. Limiting access to the federal courts, therefore, does not really solve the problem of overburdened judges. The burden is merely shifted to institutions which are often even less able to cope with the caseload.[87]

Third, by assuming state court inferiority and by seeking to funnel important constitutional cases into federal trial courts, civil liberties lawyers may be engaged in self-fulfilling prophecy which helps perpetuate the second-class status and performance of state trial courts. Clearly, if significant constitutional cases were forced into state courts more frequently, state judges would acquire greater expertise and sensitivity in the area and would probably develop an enhanced sense of institutional responsibility for the enforcement of constitutional rights. Moreover, over time the competence gap might diminish, since such a regime would likely engender pressure from the bar and the public for upgrading the quality and the prestige of state trial benches. That, of course, would be all to the good. Channeling more cases into the state courts, however, would have no impact on their vulnerability to majoritarian pressures. Indeed, it would be likely to increase (and certainly cannot decrease) the extent to which state trial judges are exposed to such pressures. And even if state courts

[85] Recent congressional efforts to increase the number of federal judges bespeak a perception that some increase in the size of the federal bench will not seriously undermine its quality and should, if successful, appreciably ease federal caseload burdens. *See* [1977] U.S. CODE CONG. & AD. NEWS at xiv.

[86] As numerous eminent commentators have suggested, Jones Act, FELA, and diversity cases, among others, could be better handled in forums other than the federal courts. *See, e.g.*, H. FRIENDLY, *supra* note 72, at 129–33; Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 (1976); Haynsworth, Book Review, 87 HARV. L. REV. 1082, 1085, 1088–91 (1974).

[87] *See* note 67 *supra*.

could be upgraded by a force feeding of constitutional cases, such an avenue of judicial reform may well require the sacrifice of several waves of litigants in the hope of achieving subsequent improvements. Where constitutional rights are at stake, that is, to my mind, too great a risk to run in order to improve the state courts.[88]

III. Conclusion

One of the current Court's most vigorous proponents for channelling constitutional challenges against state officials into the state courts has been Justice Rehnquist.[89] Professor David Shapiro, recently assessing Justice Rehnquist's performance on the Court, has suggested that his opinions have been guided by three basic principles:

> (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
>
> (2) Conflicts between state and federal authority, . . . should, whenever possible, be resolved in favor of the states; and
>
> (3) Questions of the exercise of federal jurisdiction, . . . should, whenever possible, be resolved against such exercise.[90]

As Professor Shapiro noted, these principles "often overlap and reinforce each other."[91] I suggest that not only do they

[88] If the force feeding technique for state court improvement is to be tried, it would be safer, and probably more effective, to attempt it first by abolishing diversity jurisdiction rather than by closing the federal courts to constitutional cases. Presently, much of the complex personal injury and commercial litigation arising under state law is routed into the federal courts by the corporate bar desirous of obtaining the technical advantages which federal trial courts are perceived to enjoy over their state counterparts. This continues, despite the fact that most commentators believe that the major justification for diversity jurisdiction — the need to safeguard out-of-state litigants against local bias — no longer is a significant concern. *See, e.g.*, H. Friendly, *supra* note 72, at 146-47; Haynsworth, *supra* note 86, at 1089. Since improvement of state judicial systems will require not only pressure on the state judges themselves, but also on state political branches to increase the level of compensation and resources available for state judiciaries and to change judicial selection processes, it is important that those pressures come from politically powerful groups. While the civil rights bar is not without some clout, its political strength in any given state pales beside that which the beneficiaries of diversity jurisdiction — the corporate bar and its generally well-heeled clients — could muster for reform if given the incentive to do so.

[89] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

[90] Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293, 294 (1976).

[91] *Id.*

"often overlap"; they are, in fact, integrally related by the perception that state judicial forums are less likely to operate as strong countermajoritarian power centers than are federal district courts. Were one to reformulate Professor Shapiro's first proposition more charitably, it might read:

> In a democracy, actions bearing the imprimatur of democratic decisionmaking should be overturned by courts only when absolutely necessary; all doubts should be resolved in favor of upholding a collective societal judgment.

If the views of Justice Rehnquist and those of a current majority of his brethren reflect not merely a preference for government at the expense of the individual, but rather a principled theory of deference to majoritarian decisionmaking,[92] the Court's increasing preference for state court adjudication and its distrust of federal jurisdiction are explicable as the logical forum allocation corollaries to its major substantive premise. As subsidiary propositions they rest, I suggest, on an understanding that the only judicial forums in our system capable of enforcing countermajoritarian checks in a sustained, effective manner are the federal courts and that, to the extent that constitutional cases can be shifted from federal to state trial courts, the capacity of individuals to mount successful challenges to collective decisions will be substantially diminished. It is the recognition of that fact and its troubling ramifications for the viability of constitutional rights — and not an uncritical assumption of parity — which should be the critical factor in current federal-state forum allocation decisions.

[92] Justice Rehnquist has articulated such a view in Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976).

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THE PROCEDURAL ASSAULT ON THE WARREN LEGACY: A STUDY IN REPEAL BY INDIRECTION

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I. INTRODUCTION

Despite the passing of the Warren Court, its legacy of precedent remains intact. While the current Court's disagreement with Warren precedents has occasionally been explicit,[1] resulting in the overruling or severe limitation of a given decision,[2] the current Court has more often attacked Warren Court precedents indirectly by dismantling the structure of bench and bar necessary to implement them. Since the practical significance of the Warren legacy depends on the continued interplay between a vigorous civil rights-civil liberties bar and a federal judiciary sensitive to constitutional values, the spate of Supreme Court decisions in recent years threatening that interplay has made it increasingly difficult to transform Warren constitutional theory into practical reality. By limiting access to the federal courts and by weakening the public interest bar, the current Court is successfully undermining the institutional structure which made the Warren era possible and which keeps its surviving precedential legacy viable.

If, as I suggest, the substantive significance of a constitutional precedent depends upon the existence of a bar capable of enforcing it and a bench disposed to implement it, the Burger Court's procedural decisions have dramatically weakened the substantive significance of the body of surviving Warren precedent.

II. THE CORPORATE BAR AS HISTORICAL ANTECEDENT

1882 and 1898 were watershed years in American constitutional history. In 1882, in *San Mateo County v. Southern Pacific*

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† This paper is dedicated to my friend, Marvin M. Karpatkin, whose death in 1975 deprived the civil liberties bar of its most passionate and tireless voice. We continue to miss him deeply.

1. *See, e.g.*, Washington v. Davis, 423 U.S. 820 (1976); City of Richmond v. United States, 422 U.S. 358 (1976).

2. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974); Harris v. New York, 401 U.S. 222 (1971).

Railroad,[3] Roscoe Conkling argued before the Supreme Court that corporations were persons within the meaning of the due process clause and, thereby, enlisted the not inconsiderable battalions of the corporate bar in the service of the fourteenth amendment.[4] In 1898, in *Smyth v. Ames*,[5] the corporate bar persuaded the Supreme Court that the lower federal courts were the appropriate forums for the initial enforcement of the newly minted constitutional right to substantive due process.[6] By linking a powerful and able cadre of lawyers with an institutionally receptive judicial forum, *San Mateo* and *Smyth* touched off a doctrinal explosion—the era of economic substantive due process.[7]

It is currently fashionable to look back with horror at the bad old days of substantive due process. Certainly, it is not easy to admire decisions like *Lochner v. New York*[8] and *Adkins v. Children's Hospital*[9] and the vision of uncontrolled judicial power which made them possible.[10] Whatever one may think of the merits of the substantive due process cases, however, much of our modern conception of the judiciary's role in enforcing constitutional limitations on governmental power,[11] and all of our current

3. 116 U.S. 138 (1885).

4. Although Conkling's argument was initially launched in 1882 when *San Mateo* was initially argued before the Court, it was not explicitly accepted by the Supreme Court until Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886). A printed copy of Conkling's argument has been preserved in the Hopkins Railroad Collection of Stanford University, entitled *San Mateo Case, Arguments and Decision*. The classic refutation of the Conkling position is Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1937).

5. 169 U.S. 466 (1898).

6. *Id.* at 516. Although the corporate bar's struggle for access to the lower federal courts was tentatively won in *Smyth*, the jurisdictional struggle continued in the celebrated cases of *Ex parte* Young, 209 U.S. 123 (1908), and Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), resulting in total victory for corporate access to the lower federal courts to enforce substantive due process.

7. Graham, *supra* note 4, at 372.

8. 198 U.S. 45 (1905) (statutory limit on maximum number of hours of employment invalidated as a violation of freedom of contract).

9. 261 U.S. 525 (1923) (striking down a federal minimum wage law for women).

10. A summary of the laws invalidated by the federal judiciary during the era of substantive due process is set forth in THE CONSTITUTION OF THE UNITED STATES 1431-85 (Gov't Printing Office 1964).

11. Meyer v. Nebraska, 262 U.S. 390 (1923), for example, a classic substantive due process case, is the forerunner of much of the evolving law of the right to individual privacy. *See* Warren, *The New Liberty Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1925). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925). Nor is it merely chance that the first stirring of genuine judicial concern for first amendment values coincided with the apogee of substantive due process. This development can be traced through the following cases: Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United

conception of the role of the lower federal courts as a forum of first resort for the protection of federal constitutional rights,[12] is traceable to the romance between corporate lawyers and the federal courts made possible by Roscoe Conkling's coup.

During the era of substantive due process, the corporate bar, without access to the federal courts, would more likely than not have been far less successful in state courts which were increasingly sympathetic to state legislative attempts to regulate the economy.[13] Conversely, the federal bench, whatever its predisposition, would have been less able to enunciate constitutional doctrine in the absence of the steady stream of fact patterns and legal analyses supplied by a vigorous and talented corporate bar.

Thus, the era of substantive due process provides a classic example of two principal factors which must coalesce as a prerequisite to sustained judicial activism: (1) a vigorous and well trained bar, capable of subjecting courts to constant intellectual pressure and (2) an institutionally receptive bench capable of enunciating and implementing constitutional doctrine in the face of popular dissatisfaction.

In the early years of the twentieth century, neither an organized bar nor an effective judicial forum existed in the civil rights-civil liberties area. Obvious economic constraints rendered the availability of counsel in civil rights-civil liberties cases an accidental phenomenon. Most criminal cases were disposed of in the absence of counsel. Affirmative civil litigation was the exclusive province of unpaid, volunteer counsel. Much is owed to legal pioneers like Clarence Darrow, Osmond Fraenkel, Charles Hous-

States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372-78 (1927) (Brandeis, J., concurring); Fiske v. Kansas, 274 U.S. 380 (1927). Fiske, an Industrial Workers of the World organizer convicted of violating the Kansas Criminal Syndicalism Act, was the first defendant to assert successfully a free speech defense in the Supreme Court. Not surprisingly, the Court analyzed Fiske's arguments as a substantive due process problem. *Id.* at 387.

12. The current model of the role of the federal district courts as protectors of federal constitutional rights against state encroachment stems from the successful efforts of the corporate bar to enforce substantive due process rights in federal district court. *See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Silver v. Louisville & N.R.R., 213 U.S. 175 (1909); *Ex parte* Young, 209 U.S. 123 (1908).

13. Consider, for example, the litigation strategy of the Attorney General of Minnesota in *Ex parte* Young, 209 U.S. 123 (1908), and the Los Angeles City Attorney in Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), which sought to funnel substantive due process challenges into state rather than federal courts. *See also* Barney v. City of New York, 193 U.S. 430 (1904), where such litigation strategy was successful.

tor, William Hastie, Arthur Garfield Hays, and, most recently, Marvin Karpatkin, whose volunteer efforts secured rights for thousands of powerless persons. Reliance on volunteer counsel, however, had its obvious limitations. Availability was sporadic, and apart from the few dedicated giants, quality was uneven. More important, a volunteer civil rights and civil liberties bar, lacking an economic base, was unable to generate a substantial volume of litigation and thus was unable to exert sustained intellectual pressure on the judiciary. Since legal doctrine grows incrementally, the absence of a sustained volume of cases was a critical handicap in the development of civil rights doctrine.[14]

Moreover, prior to the Second World War, primary responsibility for the initial judicial enforcement of constitutional values in the civil rights and civil liberties area rested with state courts, staffed by judges traditionally less responsive to politically unpopular federal constitutional norms than their federal counterparts. The predictable consequence of a virtually nonexistent public interest bar[15] and a skeptical judicial forum was the extremely slow growth of constitutional doctrine. By 1960, however, two dramatic changes had occurred on the American legal landscape.

First, a full-time, professionalized, public interest bar had emerged.[16] The recognition of the right to appointed counsel in criminal proceedings, culminating in *Gideon v. Wainwright*,[17] and the increasing complexity of criminal practice caused by the reform decisions of the Warren Court resulted in the emergence of a body of sophisticated, publicly supported lawyers who eschewed traditional careers in favor of an ideologically moti-

14. Contrary to popular assumption, advances in constitutional doctrine rarely, if ever, spring from an isolated case. Rather, they are the cumulative result of numerous prior cases impinging on a given court. There should be a special award for the last lawyer to advance a newly emerging argument unsuccessfully, for without the cases which have gone before, the ultimate doctrinal breakthrough would rarely, if ever, occur.

15. As used in this article, the concept of public interest bar includes an ideologically oriented practice in which attorneys seek to advance certain values which they deem particularly important. Generally, their fees are substantially lower than the prevailing rate for legal services.

16. J. CASPER, LAWYERS BEFORE THE WARREN COURT 109-14 (1972).

17. 372 U.S. 335 (1963). The right to appointed counsel in criminal cases may be traced through Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in state proceedings whenever imprisonment possible); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in state felony cases); Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel in all federal criminal prosecutions); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel in capital cases).

vated commitment to public interest law. Moreover, the legal and emotional climate of the Warren years stimulated young lawyers to attempt full-time careers as public interest lawyers seeking to implement the Warren vision of the law as an engine of social reform.[18] The newly emergent public interest bar confronted the judiciary with a barrage of fact patterns and legal analyses which, for the first time, subjected judges to sustained intellectual pressure comparable to the pressure maintained by the corporate bar in support of its constituency.

Second, in response to the efforts of the public interest bar, the Supreme Court shifted the locus of decisionmaking in the area of personal constitutional rights from state courts to federal district courts. The demise in *Monroe v. Pape*[19] of Justice Frankfurter's insistence that state judicial remedies be exhausted prior to filing a federal civil rights complaint[20] and the recognition in *Fay v. Noia*[21] of the primacy of lower federal courts in the enforcement of federal constitutional doctrine, provided access for the public bar to an institutionally receptive judicial forum uniquely suited to the implementation of politically unpopular federal constitutional norms.

Thus, by 1963 the configuration of bench and bar which had coalesced in 1900 to bring about the era of substantive due process had emerged once again, this time in the area of civil liberties. The result was a second doctrinal explosion which completely altered the face of constitutional law in America.

The era of substantive due process ended with its ultimate rejection on the merits by the New Deal Supreme Court. Apparently, no such fate awaits the Warren era. Instead, the current Court is embarked upon a more subtle course of repeal by indirection by undermining the configuration of bench and bar which is a precondition to effective enforcement of the Warren precedents. First, the Supreme Court has severely restricted access to the federal district courts by aggrieved individuals; second, the Court has limited the ability of a district court to provide effective

18. Obviously, lawyers embarking on a public interest law career owe an enormous debt to the pioneering efforts of the full-time legal staff of the NAACP and the volunteer legal resources of the ACLU, which provided both an organizational model and a benchmark of quality.

19. 365 U.S. 167 (1961).

20. For the development of Justice Frankfurter's views, see Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting); Snowden v. Hughes, 321 U.S. 1, 13 (1943) (Frankfurter, J., concurring); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941); Lane v. Wilson, 307 U.S. 268 (1939).

21. 372 U.S. 391 (1963).

remedies; and, third, the Court has struck a blow at the continued existence of a vigorous public bar by denying federal courts the power to award attorneys' fees in many cases.

III. Restrictions on Access to the Federal Courts

Attorneys seeking to protect federal constitutional rights against state encroachment are generally in agreement that federal courts provide the most effective forum for obtaining such relief.[22] Thus, whether the plaintiff was a slaveholder seeking judicial enforcement of article IV, section 2 (the fugitive slave clause) in 1842,[23] a freedman seeking enforcement of the fifteenth amendment in 1903,[24] a corporation seeking enforcement of substantive due process in 1908,[25] or a modern protestor seeking to enforce the first amendment in 1974 or in 1939,[26] he has sought immediate access to the lower federal courts in the belief that the lower federal courts would provide the most effective forum in which to enforce a provision of the Constitution of the United States against state or local encroachment. An extended explanation for the heightened sensitivity of the federal courts to federal constitutional doctrine lies beyond the scope of this article.[27] It

22. Such a sweeping generalization is, of course, subject to qualification when applied to given courts and issues. Thus, for example, civil rights litigators in California have long viewed the California Supreme Court as a sympathetic forum, while the track record of the Court of Appeals for the Ninth Circuit has been less than encouraging. Similarly, state courts, construing their own constitutions, may find substantive rights not present in the Supreme Court's reading of the Constitution. *Compare* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971), *and* Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976), *with* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). Under such circumstances, resort to state court is obviously preferable. In the majority of situations, however, the generalization represents the considered judgment of the civil rights bar. For a discussion of the use of state courts as a primary forum for the protection of constitutional rights, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

23. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). *See also* Abelman v. Booth, 62 U.S. (21 How.) 506 (1859); Jones v. Van Zandt, 13 Fed. Cas. 1047 (C.C.D. Ohio 1843) (No. 7,502).

24. *See* Giles v. Harris, 189 U.S. 475 (1903).

25. *See, e.g.*, *Ex parte* Young, 209 U.S. 123 (1908).

26. *See* Steffel v. Thompson, 415 U.S. 452 (1974); Hague v. CIO, 307 U.S. 496 (1939).

27. The comparative advantage in constitutional enforcement exhibited by the federal trial bench over their state trial counterparts is attributable, in large part, to two elements present in constitutional adjudication. First, constitutional doctrine is likely to be extremely complex and difficult to apply. Second, a decision in favor of a constitutional claim will often force a court into a confrontation posture with a democratically chosen branch of the state government. Such confrontations often will find a court forced to appear to espouse a politically unpopular position. Given the institutional makeup of the state and federal trial benches, it should come as no surprise that federal trial courts struggle with such problems far more effectively than do their state brethren. For a discussion of the relative efficacy of state and federal trial courts as constitutional enforcement mechanisms, see Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. (forthcoming 1977).

has been historically true, nevertheless, and it remains the fixed belief of most experienced civil rights lawyers, that ready access to a federal forum is of critical importance to the vigorous enforcement of federal constitutional rights. It is that ready access which has been the particular target of the current Supreme Court.

A. *Standing and Causation-in-Fact*

Until the 1972 Term of the Supreme Court, a majority endorsed a view of standing which posed little or no obstacle to the effective litigation of constitutional cases in the federal district courts.[28] Standing was perceived as a convenient functional device to insure that litigants before the court were sufficiently motivated by self-interest to assure a vigorous adversary presentation of the issues.[29] Beginning with *Sierra Club v. Morton*[30] and

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At the outset, it should be noted that the institutional comparison should not be between federal trial courts and state appellate courts, since corrective state appellate work, even if available, is no substitute for effective implementation of constitutional rights at the trial level. Thus, the appropriate point of comparison is between federal district judges and their counterparts on the state trial bench. When such a comparison is made, the advantages of the federal bench become apparent.

First, the federal trial judge is appointed for life and is free from majoritarian pressures in carrying out his functions. Many state trial judges, on the other hand, are elected, forcing judges to decide politically charged issues in a constitutional case against the background of potential majoritarian reprisal. Moreover, even those state trial judges who are appointed, ordinarily do not serve for life and are the appointive products of a local political structure with a strong institutional receptivity to perceived majoritarian wishes.

Second, the federal bench, because it is relatively small, maintains a level of competence in its appointee pool which, quite simply, dwarfs the competence level of the state pool. There are more judges in Southern California than in the entire federal system. As in any bureaucracy, it is easier to maintain quality levels when appointing a small number of officials than when staffing an enormous department.

Third, the elite tradition of the federal courts, although intangible, creates an elan and sense of responsibility and collegiality which Chief Judge Friendly has correctly identified as exerting a palpable influence on the quality of its work.

Fourth, although it is often overlooked, the mode of clerking exerts a significant impact on the quality and nature of judicial output. The traditional federal clerking pattern exposes federal judges to a steady flow of the brightest, most promising, recent graduates, while state trial clerks, when available at all, tend to be career bureaucrats, lacking the competence and idealism of federal clerks.

Fifth, docket pressures, although difficult in the federal system, are generally far more critical in state trial courts. *See generally* Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. (forthcoming 1977).

28. *See* United States v. SCRAP, 412 U.S. 669 (1973); Flast v. Cohen, 392 U.S. 83 (1968).

29. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962). The most vigorous articulation of standing as a functional aid in the proper operation of the adversary process (as opposed to a necessary outgrowth of the separation of powers) occurred in Flast v. Cohen, 392 U.S. 83 (1968), when Chief Justice Warren declared:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to

Laird v. Tatum,[31] however, a majority of the Court adopted Justice Harlan's vision of standing as an incident of the separation of powers flowing directly from John Marshall's defense of judicial review,[32] rather than the Warren-Douglas view of standing as merely a functional aid to concrete presentation of the issues.[33] The Court's increasing preoccupation with standing as a barrier to judicial review culminated in *Warth v. Seldin*[34] and *Simon v. Eastern Kentucky Welfare Rights Organization*[35] *(EKWRO)* when a majority of the Court dramatically restricted the category of persons who may complain to the federal courts about allegedly unlawful conduct.

In *Warth* five members of the Court ruled that minority residents of a ghetto in Rochester, New York, lacked standing to

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improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.

Id. at 100-01. The current Court has rejected Chief Justice Warren's assertion and instead views standing as quintessentially a problem in the separation of powers, flowing directly from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The most articulate expression of the current Court's view of the relationship between standing and separation of powers was enunciated in Justice Powell's concurrence in United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring).

30. 405 U.S. 727 (1972) (injury in fact a prerequisite for standing).

31. 408 U.S. 1 (1972) (allegation of chilling of first amendment rights by Army surveillance of civilians failed to show injury in fact).

32. Justice Harlan's position was set forth in his dissent in Flast v. Cohen, 392 U.S. 83, 116 (1969) (Harlan, J., dissenting). It is the direct ancestor of Justice Powell's standing analysis in United States v. Richardson, 418 U.S. 166 (1974). While Justice Harlan viewed standing as primarily a question of the prudential exercise of judicial discretion, Justice Powell has demonstrated an increasing tendency to view standing as a question of power under article III of the Constitution. *Compare* Flast v. Cohen, 392 U.S. 83, 116 (1968) (Harlan, J., dissenting), *with* United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring), *and* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (EKWRO).

In large part, the renascence of standing as a separation of powers concept stems from the failure of the activist bar to have evolved an acceptable theory of judicial review which would free the process from the constraints of the model posed by John Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). So long as the *Marbury* model served as the primary apology for the phenomenon of judicial review, a renewed concern with separation of powers was virtually inevitable. Whether, after 174 years of judicial review John Marshall's rather strained defense of the practice remains its only justification seems questionable. Until an alternative theory of judicial review is advanced, however, which rationalizes the exercise of power by judges in broader terms, standing will continue to be properly analyzed as an incident of the separation of powers. Of course, to agree with Justice Powell that standing is a doctrine made necessary by separation of powers is not necessarily to agree with his application of the doctrine in particular cases.

33. For the Warren-Douglas view, see note 29 *supra*.

34. 422 U.S. 490 (1975).

35. 426 U.S. 26 (1976).

challenge an alleged pattern of exclusionary suburban zoning practices because the named plaintiffs were unable to point to a specific housing project in which they might have resided but for the challenged zoning practices.[36] Of course, the very existence of exclusionary zoning impeded any attempts at planning or constructing such housing, reducing *Warth* to a crude exercise in Catch-22.

In *EKWRO* the Court ruled that indigent persons who had been denied treatment by a private hospital lacked standing to challenge the legality of an Internal Revenue Service ruling which afforded the benefits of a "charitable" tax status to a private hospital despite the failure of the hospital to provide care to the poor.[37] Once again, as in *Warth*, the Court reasoned that the plaintiffs lacked standing because they could not demonstrate that but for the challenged Internal Revenue Service ruling they would have received increased hospital care.[38] Thus *Warth* and *EKWRO* appear to require civil rights plaintiffs to demonstrate, in order to establish standing, that the injury of which they complain was actually and wholly caused by the allegedly unlawful act they challenge.

A serious issue is raised by requiring the plaintiff in a civil rights case to prove that a defendant's allegedly unlawful acts were the sole cause of plaintiff's injury, either as a prerequisite to relief on the merits or as a requirement of standing. In order to recover on the merits in a traditional tort setting, a plaintiff must merely present some evidence that a defendant's acts were a substantial factor in causing his injury, leaving the ultimate decision on causation-in-fact to the finder of fact.[39] Moreover, in making its decision on causation, the finder of fact is authorized to use common or ordinary experience in determining whether the

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36. 422 U.S. 490, 516-17 (1975).

37. 426 U.S. 26, 28 (1976).

38. *Id.* at 45. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (EKWRO), is more ominous than Warth v. Seldin, 422 U.S. 490 (1975), since it purports to be compelled by article III limitations on the power of a federal court, rather than by the prudential considerations stressed by Justice Harlan in his dissent in Flast v. Cohen, 392 U.S. 83, 116 (1968), or by Justice Powell in his concurrence in United States v. Richardson, 418 U.S. 166, 180 (1974), and his opinion in *Warth*. While prudentially based decisions are subject to congressional reversal and are rather easily discarded by future Courts, a decision based on article III limitations on the federal judiciary is more likely to have a lasting impact.

39. The orthodox method of establishing causation-in-fact in a "garden variety" tort setting is discussed in W. PROSSER, HANDBOOK OF THE LAW OF TORTS, ch. 7, § 41, at 242 (4th ed. 1971).

existence of Fact *A* is likely to play a substantial factor in the occurrence of Fact *B*.[40] Indeed, given the wrongful nature of the defendants' alleged activities in *Warth* and *EKWRO*, it is entirely possible that properly applied tort principles would justify a shift in the burdens of production and persuasion on the issue of causation-in-fact to the defendants.[41] Finally, it is clear that if a defendant's acts were a substantial contributing cause of an injury, traditional tort principles would recognize the liability of the "partial" tortfeasor for the entire injury, so long as the causation relationship was "substantial."[42] Thus, while the exclusionary zoning at issue in *Warth* might not have been the sole cause of residential segregation in Rochester's suburbs, and the change in tax policy at issue in *EKWRO* might not have been the sole cause of the failure of proprietary hospitals to deliver health services to the poor, both were clearly contributing causes which a finder of fact would have been entitled to treat as "substantial factors" in causing the plaintiff's injury. Accordingly, when measured against traditional tort principles, *Warth* and *EKWRO* impose a far more stringent causation burden on plaintiffs seeking constitutional redress in the federal courts than the causation burden imposed on a typical tort plaintiff. That such a stringent causation rule for recovery on the merits should exist in constitutional cases is unfortunate and probably incorrect; that such a stringent caustion test should govern constitutional standing requirements is insupportable. Whatever one's views concerning

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40. *Id.*

41. Most cases which have shifted the production burden on causation-in-fact have involved joint defendants, all of which acted wrongfully. *See, e.g.*, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Benson v. Ross, 143 Mich. 452, 106 N.W. 1120 (1906); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927). *See generally* W. PROSSER, *supra* note 39, ch. 7, § 41, at 243. *See also* Clark v. Gibbons, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967) (res ipsa loquitur used to achieve a shift in the production burden). Where, as in civil rights cases, a defendant is alleged to have engaged in socially undesirable activity, a similar shift of the production burden on causation-in-fact would appear entirely appropriate. A similar process occurs in cases alleging racial discrimination where the mere assertion of statistical disparity acts to shift the production burden to the defendant. *See, e.g.*, Castaneda v. Partida, 524 F.2d 481 (5th Cir. 1975) *cert. granted*, 96 S. Ct. 2645 (1976). Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd*, 461 F.2d 1171 (5th Cir. 1971) (en banc).

42. Thus, Prosser notes that "if the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." PROSSER, *supra* note 39, ch. 7, § 41, at 240. Prosser also notes that "instructions to the jury that they must find defendant's conduct to be 'the sole cause' or the 'proximate cause' of the injury are rightly condemned as misleading error." *Id.* ch. 7, § 41, at 239.

the appropriate standard of causation in constitutional cases, it is clear that causation-in-fact is an issue which goes to the merits of the question and not to the standing of the plaintiffs, and which should be decided by the finder of fact after a plenary trial. For the purposes of satisfying the threshold question of standing, no more than arguable causation should be required.[43]

The unduly narrow vision of standing which emerges from cases such as *Warth* and *EKWRO* severely impedes the capacity of aggrieved persons to seek federal judicial review of allegedly unlawful activity. In the wake of such cases, many Americans suffer grievances but lack access to a federal court in order to seek orderly redress.[44]

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43. It is possible to read Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (*EKWRO*), as refusals to consider requests for equitable relief in the absence of a showing that judicial intervention would alleviate plaintiff's plight. If *Warth* and *EWWRO* are disguised equitable remedies cases, it is doubly unfortunate to have characterized them as standing cases. Of what relevance is the probable efficacy of equitable relief to the question of damages or the possible issuance of a declaratory judgment? Yet, viewed as standing cases, *Warth* and *EKWRO* block a court from granting any relief, not merely ineffectual equitable relief. Moreover, it is a strange rule of law which precludes a court from grappling with unconstitutional activity merely because judicial intervention cannot guarantee complete alleviation of the problem. Taken to its extreme, such a doctrine would prevent federal courts from granting relief in public school desegregation cases whenever whites were likely to withdraw into segregated private academies, since the court's decree could not result in an integrated public school.

Finally, it may well be a futile exercise to seek a principled basis for cases like *Warth* and *EKWRO*, which may stand for nothing more than the refusal of a majority of the current Supreme Court to get involved in cases challenging exclusionary zoning or the tax structure. Standing may simply be the convenient straw grasped by the Court to avoid being drawn into areas it wishes to avoid. *Compare* Bickel, *The Supreme Court*, 1960 *Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), *with* Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

44. *See also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). Ironically, when confronted by plaintiffs advancing claims with which it is in substantive sympathy, the current Court is extremely liberal in finding standing. *See, e.g.*, Craig v. Boren, 45 U.S.L.W. 4057 (Dec. 20, 1976) (vendors of 3.2 beer have standing to raise purchasers' rights); Singleton v. Wulff, 96 S. Ct. 2868 (1976) (doctors have standing to raise patients' rights); Procunier v. Martinez, 416 U.S. 396 (1974) (prison inmate has standing to raise rights of persons with whom he corresponds); Eisenstadt v. Baird, 405 U.S. 438 (1972) (seller of contraceptives has standing to raise rights of users). Furthermore, the facial overbreadth and vagueness doctrines continue to flourish in the first amendment area despite the Court's increased preoccupation with standing. *See, e.g.*, Hynes v. Mayor & Council, 425 U.S. 610 (1976) (invalidating statute as facially vague); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (invalidating statute as facially overbroad). *But see* Young v. American Mini-Theatres, Inc., 96 S. Ct. 2440 (1976). In non-first amendment contexts, vagueness and overbreadth claims have been conspicuously unsuccessful. *See, e.g.*, United States v. Powell, 423 U.S. 87 (1975); Parker v. Levy, 417 U.S. 733 (1974).

B. *Exhaustion of State Judicial Remedies*

1. The Evolution of the Nonexhaustion Model

For ninety years after its enactment, the Civil Rights Act of 1871[45] was crippled by a series of conceptually based doctrinal disputes which required many plaintiffs to exhaust state judicial remedies as a prerequisite to seeking civil rights relief in the federal courts. During this period, the Supreme Court was confronted with three recurring fact patterns. In *Case I* situations, plaintiffs alleged that a state or local official, acting pursuant to or in compliance with unambiguous state law, had committed acts which violated plaintiff's federal constitutional rights.[46] In *Case II* situations, plaintiffs alleged that a state or local official, purportedly acting pursuant to or in compliance with state law, but arguably acting in violation of state law, had committed acts which violated plaintiff's federal constitutional rights.[47] In *Case III* situations, plaintiffs alleged that a state or local official, acting contrary to state law, had committed acts which violated a plaintiff's federal constitutional rights.[48]

In *Ex parte Young*[49] and *Home Telephone & Telegraph Co. v. City of Los Angeles*,[50] the Supreme Court resolved *Case I* situations in favor of immediate access to the lower federal courts and

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45. The modern codification of the Civil Rights Act of 1871 appears in 42 U.S.C. § 1983 (1970), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

As originally enacted, the Civil Rights Act of 1871 contained a jurisdictional provision which is currently codified at 28 U.S.C. § 1343(3) (1970). The slight variation in phrasing between 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), which emerged accidentally during the 1911 codification process, has caused substantial confusion in applying the 1871 act to claims sounding in federal statutory, as opposed to constitutional, law. *Compare, e.g.*, Blue v. Craig, 505 F.2d 830 (4th Cir. 1974), *with* Aquayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974), *and* Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971).

46. Celebrated examples of *Case I* situations are Lane v. Wilson, 307 U.S. 268 (1939); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); and *Ex parte* Young, 209 U.S. 123 (1908).

47. The paradigm *Case II* example is Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See also* Barney v. City of New York, 193 U.S. 430 (1904).

48. Monroe v. Pape, 365 U.S. 167 (1961), is the classic *Case III* example.

49. 209 U.S. 123 (1908).

50. 227 U.S. 278 (1913).

against a requirement of exhaustion of state judicial remedies.[51] In both cases, however, the exhaustion issue was initially approached by the Court in a highly conceptual manner, setting an unfortunate intellectual precedent for future consideration of the exhaustion issue in *Case II* and *Case III* settings. Instead of openly confronting the exhaustion issue as one of policy and judicial discretion, the Court initially allowed the issue to turn on a highly conceptual definition of state action. Pursuant to the early *Case I* analyses, if the challenged act constituted "state action," the prerequisites of the fourteenth amendment were satisfied and immediate access to a federal court was permissible. If, however, the challenged act failed to constitute state action, no cause of action existed under the fourteenth amendment and access to federal court was denied.[52] Since, in a *Case I* setting, little or no

51. In place of an exhaustion doctrine, Congress in the wake of *Ex parte* Young, 209 U.S. 123 (1908), sought to serve values of federalism by prohibiting a single federal judge from issuing preliminary injunctive relief against a state regulatory statute on the basis of its unconstitutionality. Instead, the state statute was to be considered by a statutory three-judge court, with a direct appeal to the Supreme Court. The three-judge court requirement was extended in 1925 to permanent, as well as preliminary, injunctions. In 1948, 28 U.S.C. §§ 2281-2284 were codified in their final form.

Ironically, during the Warren era, the three-judge court, with its direct appeal to the Supreme Court, was widely employed as a device to enforce expansive notions of federal constitutional law upon recalcitrant states. The chequered history of the three-judge court in constitutional litigation was finally ended by the repeal, in August 1976, of three-judge court requirements in all but a few areas of law. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

52. Since the early *Case I* situations involved causes of action arising directly out of the fourteenth amendment, no issue of congressional intent was presented. No attempt was made in the early *Case I* situations to use the Civil Rights Act of 1871 as a cause of action because contemporaneous construction confined its scope to personal rather than property rights. *See, e.g.*, Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900). Such a dichotomy between personal and property rights was rejected by the Supreme Court in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972). In looking directly to the fourteenth amendment as a cause of action for injunctive relief, cases such as *Ex parte* Young, 209 U.S. 123 (1908), and Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), anticipated the Supreme Court's analysis in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), when the fourteenth amendment was deemed to afford a cause of action for damages.

53. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), was an ingenious attempt to inject an element of conceptual uncertainty into even *Case I* settings. In *Home Telephone* the plaintiff corporation mounted a substantive due process challenge in federal court against a rate schedule promulgated by the City of Los Angeles. The City, noting that only "state action" was properly cognizable by the federal courts under a cause of action springing directly from the fourteenth amendment, and noting that action in excess of constitutional authority had been deemed not to be state action for eleventh amendment purposes in *Ex parte Young*, argued that if its rate schedule was violative of the federal constitution it was also violative of the identically worded due process clause of the California Constitution, and thus could not constitute "state action." The City

question exists concerning the state's authorization of the challenged act, "state action" was clearly present in the early cases and exhaustion of state judicial remedies was deemed unnecessary.[53] Thus, in *Lane v. Wilson*,[54] Justice Frankfurter recognized no need to exhaust state judicial remedies prior to launching a federal challenge against allegedly unconstitutional actions taken pursuant to Oklahoma's grandfather clause. Under the conceptual "state action" approach in *Case II* or *Case III* settings, however, serious issues of authorization under state law are almost always present—arguably rendering initial resort to state court necessary to determine whether the challenged acts are, in fact, state action.

In *Railroad Commission v. Pullman Co.*,[55] Justice Frankfurter resolved a *Case II* situation in favor of exhaustion of state judicial remedies and against immediate access to federal courts. If the conceptual approach of *Ex parte Young* and *Home Telephone* is applied to *Case II* situations, exhaustion is required to clarify whether the challenged act was, in fact, authorized by the state. If the state judicial process deems the act to have been authorized by, or in compliance with, state law, state action is present and resort to federal court becomes appropriate. If, however, the state judicial process deems the act to have been unauthorized by, or in violation of, state law, resort to federal court becomes both unnecessary (since relief has been obtained under state law) and unavailable (since state action is lacking).

Under a less conceptual approach, *Pullman* abstention (*Case II* exhaustion) is justified by a preference for the avoidance of constitutional questions[56] which requires a federal court to defer constitutional decisionmaking pending an exploration of possible nonconstitutional bases of decision in state court.[57]

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suggested that the plaintiff corporation's only recourse was a challenge to the rate schedule in state court, with resort to federal court possible only if the state court upheld the rates under the California Constitution. The Court rejected the City's argument, ruling that an act which is authorized under positive state law is "state action" regardless of whether it violates a state constitutional provision worded identically to its federal counterpart. The poverty of the purely conceptual approach to the exhaustion problem is revealed by the inability of the Court to deal satisfactorily with Los Angeles' arguments in purely conceptual terms. *Compare* Chief Justice Burger's abstention position discussed in the text accompanying notes 62-69 *infra*, *with* the position of the City of Los Angeles in *Home Telephone*.

54. 307 U.S. 268 (1939).

55. 312 U.S. 496 (1941).

56. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1934).

57. Under either explanation of *Pullman* abstention, a civil rights litigant is not

In *Monroe v. Pape*,[58] the Supreme Court, rejecting the conceptual approach urged by Justice Frankfurter, resolved *Case III* situations in favor of immediate access to federal courts and against a requirement of exhaustion of state judicial remedies. Eight members of the Court in *Monroe* rejected Justice Frankfurter's insistence that an official's act in violation of state law could not be deemed the action of the state for the purposes of constitutional adjudication.[59] Instead, the majority construed section 1983 as authorizing immediate resort to a federal judicial forum whenever an official clothed with state power acts in derogation of federal constitutional rights, regardless of whether the official's acts violate positive state law as well. Thus, *Monroe* rejected the conceptual mold into which exhaustion analysis had

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required to present federal constitutional causes of action to the state courts during the abstention process. Only state law issues need be ventilated. Indeed, if a plaintiff who has been abstained upon voluntarily presents federal constitutional issues to the state courts, he will be barred by res judicata from raising them anew in federal court. *See* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964). If, however, the plaintiff files an "England Reserve" with the state courts, reserving federal issues for subsequent federal adjudication, res judicata will not bar subsequent resort to federal court. Compare the res judicata implications of *Pullman* abstention with the preclusion issues raised by Justice Rehnquist's views of comity discussed in the text accompanying notes 81-84 *infra*. The impact of *Pullman* in *Case II* settings is extensively canvassed in Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

58. 365 U.S. 167 (1961).

59. More precisely, Justice Frankfurter argued in his dissent in Monroe v. Pape, 365 U.S. 167, 202 (1961), that actions in violation of state positive law could not be deemed actions "under color of state law" within the meaning of 42 U.S.C. § 1983. Since *Ex parte* Young, 209 U.S. 123 (1908), Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), and Railroad Comm'n v. Pullman, 312 U.S. 496 (1941), had all been brought on the basis of causes of action springing directly from the Constitution, *Monroe* was the Supreme Court's first occasion to consider the issue in the context of a congressionally created cause of action, although a similar question had been resolved in favor of an expansive reading of federal judicial power over criminal cases in Screws v. United States, 325 U.S. 91 (1945), and United States v. Classic, 313 U.S. 299 (1941). Little attempt has been made to explore whether any difference exists between the concept of state action required to support a cause of action founded directly on the fourteenth amendment and the concept "under color of state law" used in 42 U.S.C. § 1983. Orthodox analysis tends to equate the two concepts. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). It is conceivable, however, that "under color of state law" as construed by the *Monroe* majority is broader than the unadorned "state action" needed for constitutionally based causes of action. The possible distinction will take on practical significance if causes of action modeled on Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), are recognized against entities which would not constitute "persons" under 42 U.S.C. § 1983. Since *Monroe* purports to be nothing more than a statutory construction case, the extent to which *Case II* and *Case III* settings constitute state action for the purposes of a *Bivens* cause of action sounding directly in the Constitution remains an open question.

been cast since *Ex parte Young*. In its place the Court in *Monroe* substituted a policy-oriented analysis which looked not to concepts of state action, but rather to the practical effect which exhaustion would have on the role of the lower federal courts as effective forums for the protection of constitutional rights. By enabling civil rights litigants to invoke section 1983 as a vehicle to gain immediate access to a federal forum for the adjudication of federal constitutional questions, *Monroe* became the lynchpin of modern constitutional litigation. As such, it has been a target of the recent Court's systematic attempt to reimpose an exhaustion requirement on civil rights litigants.

2. The Assault on the Nonexhaustion Model

a. Chief Justice Burger's Expanded Vision of Abstention

Justice Frankfurter's dissent in *Monroe v. Pape*[60] was no aberration. A significant tension exists between *Monroe's* assertion that state law remedies are irrelevant to section 1983 jurisdiction and the vision of federal jurisdiction which underlay Justice Frankfurter's decision in *Railroad Commission v. Pullman Co.*[61] Under a *Pullman* analysis, state courts are expected to play a significant role in determining whether a state law defense exists to the challenged official action and only if no such state law defense exists is a federal court to proceed to adjudicate the federal constitutional question. Under a *Monroe* regime, however, state courts play no role in applying state law and are bypassed by immediate access to a supervening federal forum.

If conceptual notions of state action are applied, *Pullman* declines to permit a federal court to adjudicate a constitutional claim until the uncertainty surrounding state authorization of the challenged act has been clarified by resort to state court. *Monroe*, on the other hand, authorizes adjudication of constitutional claims arising out of challenged acts which are clearly unauthorized by state law. If clearly unauthorized acts may be challenged immediately in federal court under *Monroe*, it is difficult to explain why actions merely of uncertain authorization should not present an *a fortiori* case for immediate federal adjudication.

If the preference for a nonconstitutional basis of decisionmaking is applied, *Pullman* requires a federal court to stay its hand while possible nonconstitutional state remedies are ex-

60. 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting).
61. 312 U.S. 496 (1941).

plored. Conversely, *Monroe* authorizes immediate federal adjudication despite the conceded existence of nonconstitutionally based state remedies. It seems anomalous, at the very least, to continue to require a *Pullman* plaintiff to pursue state remedies which may not exist, while authorizing a *Monroe* plaintiff to ignore state remedies which concededly do exist.

Throughout the Warren years an uneasy truce existed between *Pullman* and *Monroe* which called for exhaustion of state judicial remedies in *Case II* (*Pullman*) situations, but which exempted plaintiffs from exhaustion in *Case I* and *Case III*. Chief Justice Burger, perceiving the latent conflict between *Pullman* and *Monroe*, quickly attacked the uneasy truce and sought to use *Pullman* as a device to impose exhaustion on both *Case I* and *Case III* settings. Chief Justice Burger argued that since a primary purpose of the *Pullman* abstention doctrine was the avoidance of unnecessary federal constitutional adjudication, whenever a state law claim exists which would permit resolution of a case on nonconstitutional grounds, a federal court should abstain to permit state court exploration of the potential for a nonconstitutional basis of decision. In his dissent in *Wisconsin v. Constantineau*,[62] Chief Justice Burger urged that the possibility of resolving a federal constitutional challenge on state constitutional grounds warranted abstention to permit state courts to pass on the state constitutional issue. Since most federal constitutional claims enjoy a state constitutional analogue, the Chief Justice's expanded vision of abstention would have required exhaustion of state judicial remedies in virtually every constitutional case brought under section 1983. Although the Chief Justice's abstention-exhaustion thesis appeared to ignore notions of federal jurisdiction settled since *Home Telephone*, it gained three adherents in its initial airing in *Constantineau*. In *Harris County Commissioners Court v. Moore*[63] and *Boehning v. Indiana State Employees Association*,[64] it appeared to gain strength when a majority of the Court required federal courts to abstain from deciding federal constitutional questions in order to permit state court exploration of potential state constitutional remedies.[65] For-

62. 400 U.S. 433, 439 (1971) (Burger, C.J., dissenting).

63. 420 U.S. 77 (1975).

64. 423 U.S. 6 (1975).

65. In Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975), the Court directed abstention in a case challenging a Texas election practice in order to permit exploration of its validity under the complex electoral provisions of the Texas Constitution. In Boehn-

tunately, however, the drift toward using abstention as a disguised basis for overruling *Monroe* came to an abrupt halt in *Examining Board of Engineers v. Otero*[66] when a unanimous Court[67] ruled that abstention was inappropriate merely to permit Puerto Rican Commonwealth courts to explore whether the exclusion of aliens from certain professions violated the equal protection clause of the Puerto Rican, as well as the United States, Constitution.[68]

Thus, despite the Chief Justice's efforts, the uneasy truce between *Pullman* and *Monroe* remains in effect, with exhaustion of state judicial remedies required only in a *Case II* setting under the rubric of abstention. Under prevailing standards, when a challenged act may be in violation of state law or may be in excess of an official's authority as defined by state statute, *Pullman* requires abstention in order to exhaust possible state judicial remedies sounding in the state law in question. When a challenged act is clearly in violation of state law or is in excess of an official's statutorily defined authority, no abstention is required and no resort to state courts becomes necessary. The anomalous result of the uneasy truce, therefore, is to require exhaustion only of those state remedies which may not exist, but not to require exhaustion of those state remedies which certainly do exist.[69]

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ing v. Indiana State Employees Ass'n, 423 U.S. 6 (1975), the Court ordered abstention in a case involving the discharge of a public school teacher in order to permit exploration of its validity under the "arbitrary and capricious" clause of the Indiana Constitution. Thus, the state constitutional provisions were not mere analogues of the federal right. Whether such cases involve the recognition of a new variant of *Case II* remains an open question. It is difficult to reconcile such a variant with *Monroe*.

66. 96 S. Ct. 2264 (1976).

67. Justice Rehnquist dissented on the merits of the case, but not on the question of jurisdiction.

68. Since the challenged activity in Examining Bd. of Eng'rs v. Otero, 96 S. Ct. 2264 (1976), was pursuant to clear authority under Puerto Rican statutory law, *Otero* is a classic *Case I* situation. Presumably, the Court's refusal to order abstention in *Otero* to permit exploration of a state constitutional remedy which is the analogue of the federal remedy will apply in *Case III* settings as well.

69. If exhaustion of clearly available remedies is not required under Monroe v. Pape, 365 U.S. 167 (1961), it is difficult to understand why exhaustion of concededly problematic remedies should be required under Railroad Comm'n v. Pullman, 312 U.S. 496 (1941). Perhaps the continued vitality of *Pullman* in *Case II* settings, despite its analytical incompatibility with *Monroe*, may be attributable to the increasing frequency of facial challenges to state statutes. If state laws are to be struck down by federal courts as facially invalid, some mechanism must exist to doublecheck the actual reach of the challenged statute, to say nothing of permitting state courts to save portions of the statute by a narrowing construction. Abstention in *Case II* settings provides just such a mechanism. Where the federal challenge is not based, however, on a facial unconstitutionality theory, but on an "as applied" analysis, less need for such a mechanism exists.

b. Justice Rehnquist's Vision of Comity and Preclusion

i. Comity as an exhaustion device

The Chief Justice's abstention assault on *Monroe* was a frontal one. Once its implications as a disguised exhaustion doctrine were perceived, it was rejected by the full Court. Justice Rehnquist's assault on *Monroe* has been less obvious, but more dangerous. While the Burger abstention position would have resurrected and expanded Justice Frankfurter's notion that exhaustion of available state judicial remedies is a prerequisite to constitutional adjudication in a federal court, it would have served merely to delay, not to preclude, federal adjudication of constitutional issues. Justice Rehnquist's comity position, on the other hand, imposes a jurisdictional barrier on federal constitutional adjudication which not only defers adjudication pending exhaustion of state judicial remedies, but actually threatens to preclude a federal court from even a deferred adjudication.

Comity as a modern bar to federal constitutional adjudication flows from *Younger v. Harris*.[70] *Younger* merely codified what most civil rights lawyers believed was compelled by 28 U.S.C. § 2283[71]—and inherent in our federal system—that once a state criminal proceeding was underway, the action could neither be

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Thus, abstention in cases alleging overbreadth, vagueness or other facially based doctrines would continue to be appropriate even after *Monroe*. *Monroe*, however, should end abstention in cases asserting an "as applied" challenge. In Bellotti v. Baird, 96 S. Ct. 2857 (1976), plaintiffs challenged the constitutionality of a Massachusetts statute requiring parental consent prior to performing an abortion on a minor. Plaintiffs characterized the statute as granting a parental veto. Defendants argued that the statute provided merely for consultation. Since plaintiffs' challenge was premised, in large part, on a facial overbreadth analysis, abstention was appropriate as the only method of ascertaining the "true" reach of the statute. If, however, the plaintiff in *Bellotti* had been a minor seeking an abortion who had been frustrated by the statute, her "as applied" claim would not turn on the "true" meaning of the challenged statute, but on the constitutional right to an abortion under the facts of her case, and should not trigger abstention. Instead, a federal district court, consistent with *Monroe* and *Otero*, should decide the merits of the "as applied" claim without regard to the facial constitutionality of the challenged statutes. *Compare* Zwickler v. Koota, 389 U.S. 241 (1967) (an "as applied" case), *with* Bellotti v. Baird, 96 S. Ct. 2857 (1976) (a facially invalid case). The relationship of abstention to vagueness and overbreadth is discussed by Justice Powell in Procunier v. Martinez, 416 U.S. 396, 401 n.5 (1974).

70. 401 U.S. 37 (1971).

71. 28 U.S.C. § 2283 (1970) provides: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Ironically, in Mitchum v. Foster, 407 U.S. 225 (1972), the Supreme Court ruled that civil rights actions pursuant to 42 U.S.C. § 1983 were exceptions to the anti-injunction provisions of 28 U.S.C. § 2283. Thus, the *Younger* comity bar to interference with pending state criminal proceedings is based solely on amorphous notions of federalism.

removed to federal court[72] nor be enjoined by a federal judge in the absence of extraordinary circumstances. Phrased in its initial form, therefore, the *Younger* comity bar merely required a state criminal defendant in a pending trial to exhaust state judicial remedies prior to seeking federal constitutional review pursuant to habeas corpus. Since that had long been the law, *Younger* did not pose a serious threat to *Monroe* and was consistent with *Fay v. Noia*.[73]

Justice Rehnquist has not been content, however, to permit *Younger* to play such a modest role. Under his guidance, the doctrine has been expanded to impose the spectre of an exhaustion requirement across a wide variety of potential cases.

In *Huffman v. Pursue, Ltd.*,[74] Justice Rehnquist, writing for the Court, applied the *Younger* comity bar in connection with a civil action for injunctive relief against a movie theater charged with operating as a public nuisance. Stressing the similarity between nuisance abatement and criminal prosecution, Justice Rehnquist held that a defendant in each type of case must exhaust state judicial remedies prior to invoking federal judicial review.[75] Moreover, in Vail v. Juidice,[75.1] Justice Rehnquist extended the *Younger-Huffman* analysis to bar a federal court from passing on the constitutionality of pending state civil contempt proceedings.[75.2] If *Huffman* presages the application of *Younger* to civil proceedings generally, it dramatically expands the number of situations in which persons suffering a violation of federal constitutional rights must exhaust state judicial remedies as a prerequisite to seeking federal relief.

Moreover, having tentatively expanded *Younger* into the civil area, the Court ruled, in *Hicks v. Miranda*,[76] that civil rights plaintiffs in a *Case I* setting could be ousted from a pending federal action seeking adjudication of federal constitutional rights, simply by filing a proceeding in state court seeking to enforce the state law which is the target of the federal lawsuit. Under the Court's ground rules, the filing of the state enforce-

72. *See* Johnson v. Mississippi, 421 U.S. 213 (1975); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Georgia v. Rachel, 384 U.S. 780 (1966).

73. 372 U.S. 391 (1963).

74. 420 U.S. 592 (1975).

75. *Id.* at 609.

75.1. 45 U.S.L.W. 4269 (U.S. Mar. 22, 1977).

75.2. In *Vail*, the Court noted that no *Younger* bar would preclude a challenge to threatened, as opposed to pending, contempt proceedings. However, the Court held that the challengers had not adequately pleaded the threat of a future proceeding, despite their apparent vulnerability to such a proceeding. *Id.* at 4272.

76. 422 U.S. 332 (1975).

ment action acts as a "reverse-removal" technique, remitting the federal constitutional issue to state court, and thus requiring a plaintiff who had sought to invoke immediate federal adjudication under *Ex parte Young* and *Monroe* to exhaust state judicial remedies instead. Thus, under the emerging Rehnquist view of comity, *Monroe* may be outflanked by the simple expedient of answering a *Monroe* challenge to a given law or practice with a state judicial proceeding designed to enforce the challenged law or practice.

Ironically, the Court's comity-exhaustion doctrine operates most severely on *Case I* of the Frankfurter cosmology. According to Justice Frankfurter, the only civil rights plaintiff entitled to immediate access to a federal court was the plaintiff who challenged, as violative of the federal constitution, an existing or threatened official act clearly authorized by state law.[77] Yet the clearly authorized official act is precisely the species of allegedly unconstitutional conduct most likely to be affected by the new comity-exhaustion bar. Once a plaintiff seeks to challenge as unconstitutional a clearly authorized official act in federal court, the state or local official involved may frustrate access to the federal forum by filing a retaliatory state enforcement proceeding pursuant to his clear authority and by invoking *Hicks v. Miranda*[78] as a bar to further proceedings in federal court.[79] Once *Hicks* is invoked, the locus of constitutional decisionmaking, at least in the first instance, will have been shifted from a federal district court to a state trial judge.[80]

77. *See, e.g.*, Lane v. Wilson, 307 U.S. 268 (1939).

78. 422 U.S. 332 (1975).

79. Of course, Hicks v. Miranda, 422 U.S. 332 (1975), permits frustration of pending federal actions only if no "proceedings of substance" have taken place. Unless the federal court issues a restraining order immediately upon the filing of the federal complaint, however, an energetic state defendant will almost always be in a position to answer a federal complaint with a state enforcement proceeding—thus short-circuiting the potential federal action prior to proceedings of substance. The only plaintiff who is immune to *Hicks*' "reverse-removal" is one who has not yet engaged in activity which would render him vulnerable to a state enforcement proceeding, but who, nevertheless, possesses standing to challenge the threatened action. An example of such a successful plaintiff may be seen in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), where a bar owner refrained from offering topless dancers and challenged the ban in federal court. These bar owners who rendered themselves vulnerable to a state enforcement proceeding found themselves ousted from federal court under *Hicks*. Apparently, the price of avoiding comity is abstaining from constitutionally protected conduct pending a decision in federal court.

80. Justice Rehnquist's comity doctrine would have only minimal impact on *Case III* in Frankfurter's system, since when the official action at issue is clearly unauthorized by state law, a retaliatory state judicial enforcement proceeding is highly unlikely. Thus, *Case III*, the situation calling most strongly for exhaustion of state judicial remedies according to Frankfurter's system, would continue relatively free of exhaustion requirements even under Rehnquist-comity.

ii. Comity as a preclusion device

At worst, Justice Frankfurter's abstention-exhaustion doctrines were merely decision-deferral techniques which postponed access to federal court pending exhaustion of state judicial remedies, but which recognized that should state proceedings prove unavailing, ultimate federal access would be appropriate. Comity, as applied by Justice Rehnquist, is considerably more than a decision-deferral technique. Rather, he has suggested, once a putative federal plaintiff is channeled by comity into a state forum, that subsequent resort to federal court at the conclusion of the state proceedings is unavailable under settled notions of res judicata.[81] Rehnquist-comity, therefore, is not merely a mechanism for regulating the timing of federal review, as were Justice Frankfurter's theories and Chief Justice Burger's abstention doctrine. Instead, it is a device for precluding any federal district court adjudication of a wide spectrum of federal constitutional issues. Thus, while even Burger-abstention would recognize a substantial, albeit deferred, federal adjudicatory role, Rehnquist-comity precludes any federal role. If Chief Justice Burger would have overruled *Monroe* by turning abstention into exhaustion, Justice Rehnquist would repeal section 1983 by a combination of comity

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The impact of the expanded view of comity on *Case II* situations appears substantial. When a state official's authority is questionable but nevertheless arguable, the likelihood of a state judicial enforcement proceeding, as in Hicks v. Miranda, 422 U.S. 332 (1975), is quite high. Accordingly, the impact of the Frankfurter, Burger and Rehnquist positions on *Case II* situations is similar.

81. *See, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975). *But see* Steffel v. Thompson, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring).

Of course, to the extent comity funnels a federal plaintiff into a state proceeding resulting in custody, subsequent federal judicial review may be obtained pursuant to habeas corpus under Fay v. Noia, 372 U.S. 391 (1963). The existence of subsequent habeas review substantially mitigates the practical consequences of Younger v. Harris, 401 U.S. 37 (1971). With the expansion of *Younger* to civil proceedings, the availability of habeas corpus as a device to secure ultimate federal review is highly questionable. Moreover, many criminal cases raising important constitutional questions, such as loitering, disorderly conduct and leafletting statutes, rarely result in custody, thereby rendering habeas corpus unavailable. The circuits are hopelessly divided and confused over the extent to which a § 1983 cause of action is subject to traditional preclusion constraints. *See generally* N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1617-18 (Lawyers ed. 1976).

The preclusion dilemma would be resolved if the Supreme Court were to recognize 42 U.S.C. § 1983 as an exception to res judicata, at least in cases where a plaintiff was involuntarily remitted to state courts in the first instance. A similar avenue of escape from res judicata has been fashioned in an abstention context. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). This issue is pending in Maynard v. Wooley, 406 F. Supp. 1381, *prob. juris. noted*, 96 S. Ct. 3164 (1976) (No. 75-1453).

and preclusion. Only by strictly confining comity to pending criminal cases, by refusing to permit it to act as a reverse-removal device, and by recognizing it as a deferral, not a preclusion, technique, can the integrity of section 1983 be preserved.

The effect which Rehnquist-comity would have on accepted notions of federal jurisdiction is illustrated by its impact on the facts of *Ex parte Young*, where corporate attorneys obtained federal injunctive relief against the enforcement of an allegedly unconstitutional Minnesota rate regulation statute. When the Attorney General of Minnesota persisted in commencing state judicial proceedings to enforce the rate statutes, he was held in contempt for violating the federal injunction. In affirming the contempt finding, the Supreme Court established the federal district courts as a primary enforcement mechanism for federal constitutional rights.[82]

Under Justice Frankfurter's ground rules, *Ex parte Young* was correctly decided. Since the Attorney General's action was clearly authorized by state law, immediate access to federal court to test its constitutionality under the due process clause was available both under the Civil Rights Act of 1871 and as a cause of action based directly on the fourteenth amendment.

Chief Justice Burger's vision of abstention would have required the corporate plaintiffs in *Ex parte Young* to exhaust state judicial remedies under the Minnesota Constitution before invoking federal constitutional remedies.[83] Chief Justice Burger, however, would have permitted the plaintiffs to raise their federal claims in federal court once state judicial remedies had been exhausted.

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82. Ironically, under Walker v. City of Birmingham, 388 U.S. 307 (1967), the contempt citation at issue in *Ex parte* Young, 209 U.S. 123 (1908), might well be affirmed today without consideration of the legality of the underlying injunction. In *Walker* the contempt citations of civil rights demonstrators who conducted a mass march in violation of an unconstitutional injunction were upheld by the Supreme Court on the ground that the demonstrators were obliged to seek to modify or vacate the injunction prior to violating it. 388 U.S. at 320. In *Ex parte Young*, no attempt was made to vacate or modify the injunction prior to its violation. Of course, in *Walker* the issuing court possessed unquestionable jurisdiction over the persons and subject matter involved, while in *Ex parte Young* subject-matter jurisdiction was clouded by the eleventh amendment issue. Whether the *Walker* doctrine operates on injunctions issued by courts possessing only colorable subject-matter jurisdiction remains an open question.

83. It was precisely this view which was rejected by the full Court, although without persuasive analysis, in Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). The current Court, aware of the radical implication of the Burger view, has rejected it. *See* Examining Bd. of Eng'rs v. Otero, 96 S. Ct. 2264 (1976).

Justice Rehnquist's view of comity would have mandated a wholly different ending for *Ex parte Young*. Were the Rehnquist comity bar in effect in 1908, the initial federal complaint seeking injunctive relief would have been immediately answered by a state enforcement action, ousting the federal court under *Hicks v. Miranda*.[84] The federal constitutional issue would have been determined in the Minnesota courts (subject, of course, to Supreme Court review), with subsequent resort to the lower federal courts blocked by res judicata. Thus, while Justice Frankfurter would endorse *Ex parte Young* and Chief Justice Burger would modify it by deferring the role of the federal court, only Justice Rehnquist would abrogate *Ex parte Young* by eliminating any adjudicatory role for the federal district court.

C. *The Contraction of Federal Habeas Corpus*

If *Monroe v. Pape*[85] is the lynchpin of modern affirmative constitutional litigation in the federal courts, *Fay v. Noia*[86] is the key to the defensive assertion of federal constitutional rights in federal court. Pursuant to *Fay*, constitutionally questionable action by state or local officials which results in the custody[87] of an individual is reviewable in federal district court when all state remedies have been exhausted.[88]

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84. 422 U.S. 322 (1975). In *Ex parte* Young, 209 U.S. 123 (1908), the state enforcement proceeding was not commenced until after the issuance of the federal injunction. Thus, even under Rehnquist-comity, the federal injunction would probably have been respected. *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). After Hicks v. Miranda, 422 U.S. 332 (1975), no competent attorney general would wait for the entry of the federal decree, but would have commenced retaliatory state proceedings prior to "proceedings of substance" in the federal action.

Although it appears bizzare, Justice Rehnquist has suggested that if *Ex parte Young* had been a declaratory judgment, rather than an injunction, a state court would have been free to disregard it. Steffel v. Thompson, 415 U.S. 452, 478-85 (1974) (Rehnquist, J., concurring). In addition, Justice Rehnquist has studiously avoided conceding that the federal judge in *Ex parte Young* possessed power to issue a final injunction against state enforcement, although he has recognized the power to issue preliminary injunctive relief. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

85. 365 U.S. 167 (1961).

86. 372 U.S. 391 (1963).

87. The modern definition of the extent of restraint needed to trigger the concept of "custody" as the term is used in habeas corpus practice is discussed in Hensley v. Municipal Court, 411 U.S. 345 (1973). Whether the mere imposition of a fine is reviewable pursuant to habeas corpus remains an open question. A threat of restraint is present in such a situation, since the ultimate sanction for nonpayment of a fine is incarceration. *See generally* Edmund v. Chang, 509 F.2d 39 (9th Cir. 1975); Furey v. Hyland, 395 F. Supp. 1356 (D.N.J. 1975).

88. The nature of the exhaustion required in a habeas corpus situation differs markedly from the exhaustion required in an abstention setting. In a *Pullman* abstention

Not surprisingly, the current Court appears as determined to curtail access to federal courts via habeas corpus as it is to curtail access by way of the Civil Rights Act of 1871. Most recently, in *Stone v. Powell*,[89] a majority of the Court ruled that federal district courts lack habeas corpus power to review the alleged use of unconstitutionally obtained evidence in state criminal proceedings if the petitioner received a fair, albeit erroneous, hearing on the fourth amendment claim in state court.[90] *Stone* thus relegates the implementation of the exclusionary rule to the sole province of the state judiciary.[91] Nowhere has the difference between state

setting, a prospective federal plaintiff is required to present state law claims to the state courts, but is forbidden, on pain of preclusion, from submitting federal law claims to the state courts. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). In a habeas corpus setting, a prospective petitioner is required to present all claims—state and federal—to the state courts initially. If unsuccessful, the petitioner is permitted to relitigate the federal claims pursuant to habeas corpus.

The nature of the exhaustion required in a comity setting remains clouded. Clearly, state law claims must be presented. Apparently, federal claims must be presented as well. Until the nature of the preclusion flowing from a comity-enforced state determination is clarified, however, it will be impossible to predict whether something analogous to an "England Reserve" will evolve in the comity area.

Since habeas-exhaustion is obligatory in all cases, while *Pullman* abstention-exhaustion is required only in *Case II* settings, civil rights lawyers seeking immediate access to federal court in *Case I* and *Case III* situations have sought to proceed pursuant to § 1983 whenever possible. When the result of a case will be the complete release of a person from custody, however, the Supreme Court has insisted that such litigation, involving "core habeas corpus" claims, unfold pursuant to the habeas route, with its concomitant habeas-exhaustion requirement. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973). It is far from obvious whether a given claim sounds in "core habeas corpus" or whether it is cognizable under 42 U.S.C. § 1983 (1971).

Ironically, in a *Case II* setting, where an abstention delay can be anticipated, a plaintiff-petitioner may wish to proceed, if possible, by habeas corpus rather than § 1983. The delay in gaining access to federal court is no greater, and petitioner can raise the federal issues in state court with subsequent habeas corpus review available in federal court.

One caveat should be observed in anticipating federal habeas corpus review of state criminal convictions. Actual adjudication of a defendant's appeal (or state habeas corpus proceeding) by the United States Supreme Court acts to preclude habeas corpus review of a conviction. *See* 28 U.S.C. § 2244(c) (1971). While it is clear that both a denial of certiorari and a divided affirmance do not constitute such an actual adjudication, a summary affirmance or dismissal for want of a substantial federal question may well bar subsequent habeas corpus review. *Compare* Neil v. Biggers, 409 U.S. 188 (1972), *with* Hicks v. Miranda, 422 U.S. 332 (1975). Thus, when planning an appeal of a state criminal conviction to the Supreme Court, due consideration should be given to whether it should be couched as a petition for certiorari rather than a direct appeal, even if such a direct appeal is available. While couching it as a direct appeal may marginally increase the odds of plenary reivew, it risks the loss of subsequent habeas review, since the routine mode of disposing of such direct appeals is an order of summary affirmance or dismissal for want of a substantial federal question.

89. 96 S. Ct. 3037 (1976).

90. *Id.* at 3052.

91. Subject, of course, to Supreme Court review pursuant to a writ of certiorari.

and federal courts in the enforcement of federal constitutional doctrine been more marked than in the area of the exclusionary rule. Despite the application of the exclusionary rule to the states in *Mapp v. Ohio*,[92] many state trial courts were reluctant to implement it. Indeed, the history of federal habeas corpus during the past fifteen years has consisted, in large measure, of lower federal courts systematically correcting the failure of state trial and appellate judges to apply the spirit, as well as the letter, of the criminal justice reforms of the Warren era.[93] Therefore, the refusal in *Stone* to permit continued access to a federal forum in exclusionary rule cases is more than an unfortunate experiment in the neutral allocation of judicial business. By relegating the exclusionary rule to a skeptical and unsympathetic forum, *Stone* has dramatically altered its substantive contours and lessened its practical significance.[94]

Stone, then, stands as a paradigmatic example of the tendency of the current Court to effect substantive changes in the law indirectly by altering the procedures and forums available for the enforcement of the substantive rights in question. *Stone* does not alter the theoretical reach of the exclusionary rule—indeed, it purports to reaffirm it. Instead, it remits its development and application to an historically unsympathetic forum while removing the major check on the demonstrated tendency of that forum to undervalue fourth amendment claims. Moreover, as unfortunate as the *Stone* decision may be for the practical application of the exclusionary rule, it is even more ominous as a threat to the efficacy of habeas corpus jurisdiction as an effective federal check on unconstitutional state behavior. In deciding that federal district courts lack power to entertain collateral attacks on the ex-

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Certiorari was granted in fewer than 10% of the petitions presented to the Court during the past several Terms. Moreover, the opportunity for factual development which is available during the habeas corpus process is, of course, not available on certiorari.

92. 367 U.S. 643 (1961).

93. A random search of any volume of the Federal Supplement will reveal at least several instances of corrective federal action pursuant to habeas corpus.

94. Remitting the exclusionary rule to the mercies of state judges is consistent with the doubts held by several members of the current Court concerning the wisdom of an exclusionary rule at all. *See* Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971) (Blackmun, J., concurring in Mr. Justice Black's separate opinion); *id.* at 510 (White, J., concurring and dissenting). In fairness to Mr. Justice White, despite his oft-expressed disenchantment with the exclusionary rule, he dissented from its covert emasculation in Stone v. Powell, 96 S. Ct. 3037, 3071 (1976) (White, J., dissenting). *See also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 441 (1971) (Burger, C.J., dissenting).

clusionary rule determinations of state courts, Justice Powell conceded that the fourth amendment values at stake were of constitutional dimension and that, ordinarily, constitutionally based claims were cognizable pursuant to habeas corpus. Nevertheless, Justice Powell asserted the power in *Stone* to weigh each constitutional right to determine whether the right was worthy of the extra judicial protection inherent in federal habeas corpus.

Under Justice Powell's analysis, certain constitutional rights justify the additional expenditure of judicial resources inherent in a federal collateral attack procedure, while other constitutional rights are not worth the extra consideration. Presumably, the Court will enlighten us further on the distinction between a first class and a second class constitutional right. The suspicion exists, however, that the subjective sympathy with which each Justice views a given constitutional right ultimately will determine its eligibility for federal habeas corpus review.

Under Justice Powell's test, federal habeas corpus protection of constitutional rights is available only if and when the Supreme Court agrees that the "extra" effort is justified. Such a test ignores totally the existence of 28 U.S.C. § 2254, which constitutes a congressional directive to federal courts to entertain all constitutionally based habeas corpus petitions once state judicial remedies have been exhausted. Astonishingly, one searches Justice Powell's opinion in vain for a hint that a statutorily defined jurisdictional question is before the Court.

Some insight into the war being waged by the current Court against federal district court jurisdiction may be gained by contrasting Justice Powell's approach to congressional intent in *Stone* with the Court's action in *Aldinger v. Howard*.[95] In *Aldinger* a majority of the Court ruled that the failure of Congress in 1871 to include municipalities within the meaning of the term "person" in section 1983 precluded a federal district court from asserting pendent or ancillary jurisdiction over a municipality in a contemporary civil rights case.[96] In *Aldinger*, therefore, the Court seized on a highly equivocal congressional hint as a justification for denying federal jurisdiction. Conversely, in *Stone* the Court ignored an explicit congressional directive in denying jurisdiction. Apparently, to the current Court, where federal jurisdiction

95. 96 S. Ct. 2413 (1976). *Aldinger* is also relevant as a "remedies" case. *See* note 108 *infra*.

96. Aldinger v. Howard, 96 S. Ct. 2413, 2421 (1976).

over constitutional cases is concerned, congressional intent is a one-way street.

D. *The Expansion of the "Sub-constitutional Tort"*

The cause of action created by section 1983 extends only to "rights, privileges, or immunities secured by the Constitution and laws"[97] of the United States. Accordingly, wrongs committed by state or local officials which, although actionable, fail to rise to a constitutional dimension do not fall within the scope of federal judicial review as defined by section 1983. These wrongs must be redressed, if at all, in the state courts. By construing broad categories of concededly actionable state or local misconduct as sub-constitutional, the Supreme Court removes them from the purview of the federal district courts and further narrows access to a federal judicial forum by aggrieved individuals seeking redress for official wrongdoing.

There has always existed an uncertain line between official misconduct which is merely tortious (such as negligent operation of a police car) and conduct which is both tortious and unconstitutional (such as the illegal search and seizure in *Monroe v. Pape*).[98] Clearly, as *Monroe* demonstrates, the mere fact that a given governmental act constitutes a state tort does not preclude it from violating the federal constitution as well. Nevertheless, the Court held in *Paul v. Davis*,[99] with Justice Rehnquist writing for the majority, that the circulation of a flier by the Nashville Police Department wrongly branding plaintiff as an "active shoplifter" constituted only the state tort of defamation, rather than a deprivation of liberty or property under the fourteenth amendment.[100] Accordingly, the Court held that relief must be sought solely in state court, subject to state immunity defenses.[101]

Wholly overlooked in Justice Rehnquist's analysis in *Paul v. Davis* is the critical distinction noted earlier by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal*

97. 42 U.S.C. § 1983 (1970). For full text see note 45 *supra*.

98. 365 U.S. 167 (1961).

99. 424 U.S. 693 (1976).

100. *Id.* at 712.

101. *Id.* Under Tennessee law, the defendant police officials enjoy immunity from suit for good faith actions taken within the scope of their employment, rendering relief in state court virtually impossible. Under federal immunity law, defendants would be held to a far stricter standard. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975). As a general matter, state immunity law appears to lag far behind federal law, rendering it all the more critical to secure access to a federal forum.

Bureau of Narcotics[102] between general tort law, designed primarily to regulate relationships between private individuals, and constitutional law, designed to regulate relationships between individuals and the state. In *Paul* the so-called defamation committed by the Nashville Police Department could not have been committed by a private party. Private individuals would have had access to neither the information (arrest records) nor the means to disseminate it. Furthermore, the allegations of a private individual could not have had the impact of the identical allegation made by the police. Thus, the injury which plaintiff suffered in *Paul* was one which lay within the unique capacity of government to inflict. Despite the obvious differences between private slander and official stigmatization, Justice Rehnquist insisted upon merging the two concepts into a single state tort cognizable only in state court. Since even Justice Rehnquist conceded that wrongful official stigmatization is unlawful under state law, the sole effect of his opinion was to shift once again the focus of judicial review of an entire species of official misconduct from federal courts which historically have been sensitive to the issues, to state courts which traditionally have provided less vigorous protection against official abuse.

Justice Rehnquist's comity-preclusion position provides him with a potent vehicle to attack the exercise of section 1983 jurisdiction in *Case I* and *Case II* settings.[103] His analysis in *Paul* now provides him with the analytical tool to attack section 1983 jurisdiction in a *Case III* setting as well. Where, as in *Case III* situations, the challenged official action is clearly violative of state law (as was the defamatory activity challenged in *Paul*), access to a federal court may be blocked merely by characterizing the wrong as a state tort, rather than as a deprivation of a constitutional right. Justice Rehnquist performed precisely such a feat in *Paul* by ruling that the destruction of a man's reputation by a local

102. 403 U.S. 388 (1971).

103. For a discussion of the comity-preclusion position asserted by Justice Rehnquist as a bar to § 1983 jurisdiction, see text accompanying notes 81-82 *supra*. By applying comity to civil cases, by permitting the filing of a retaliatory civil enforcement proceeding to oust a federal court of § 1983 jurisdiction, and by giving the state proceeding preclusive effect, Justice Rehnquist's theories threaten the very survival of § 1983. His comity theory operates, however, only in *Case I* or *Case II* settings, where the official action in question is taken, at least arguably, pursuant to state positive law. It would seldom be relevant in *Case III* settings, since state enforcement proceedings would rarely, if ever, occur in situations where the challenged state or local action is clearly violative of state law.

police force did not impinge upon constitutionally protected values, but merely gave rise to a state tort action for defamation.[104]

IV. Restrictions on the Power of the Federal Courts to Grant Effective Remedies in Constitutional Cases

In addition to restricting access to the federal courts, the Supreme Court has prevented the federal courts from granting effective relief in many cases which have survived the current assault on civil rights jurisdiction.

A. *Restrictions on Compensatory Damages*

In *Edelman v. Jordan*,[105] Justice Rehnquist resurrected the eleventh amendment, quiescent since *Ex parte Young*,[106] to prevent federal district courts from granting compensatory damages against state agencies.[107] Since earlier decisions had already deprived federal courts of the power to award compensatory damages against municipalties in section 1983 cases,[108] a successful

104. Justice Rehnquist reached his conclusion despite Wisconsin v. Constantineau, 400 U.S. 433 (1971), which had invalidated a Wisconsin statute empowering local police to post and publish the names of "excessive drinkers" to whom liquor could not be sold. Apparently, to Justice Rehnquist, Constantineau's "property right" to purchase liquor was worthy of constitutional protection, but his reputation was not—surely a questionable value orientation. For a critical analysis of Justice Rehnquist's tendency to subordinate analysis to ideological commitment, see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293 (1976).

105. 415 U.S. 651 (1974).

106. 209 U.S. 123 (1908).

107. In Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976), the Supreme Court substantially alleviated the potential impact of *Edelman* by recognizing that Congress may, in effect, override eleventh amendment proscriptions by explicitly vesting federal courts with the power to award damages and attorneys' fees against a state. The Court in *Fitzpatrick* found Congress' power to override the eleventh amendment in § 5 of the fourteenth amendment, which grants Congress the power to enforce the fourteenth amendment rights by appropriate legislation. After *Fitzpatrick*, two questions remain: First, is 42 U.S.C. § 1983 a sufficiently explicit exercise of § 5 legislative power to overcome eleventh amendment defenses? Second, may *Bivens* causes of action which are founded, not on § 5 statutes, but directly on § 1 of the fourteenth amendment, similarly supersede eleventh amendment defenses?

108. The Supreme Court's refusal to permit federal courts to impose damage awards on municipalities in constitutional cases flows from Monroe v. Pape, 365 U.S. 167 (1961), where the Court construed the phrase "person" in § 1983 to exclude the City of Chicago. The narrow construction of "person" in § 1983 has been severely criticized as a misreading of highly equivocal legislative history. *See* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 42 S. Cal. L. Rev. 131 (1972). In Moor v. County of Alameda, 411 U.S. 693 (1973), the Court applied *Monroe* to preclude jurisdiction over a municipality in federal court, even though it was fully suable as an entity in state court. In City of Kenosha v. Bruno, 412 U.S. 507 (1973), the Court extended *Monroe* to preclude the assertion of equitable § 1983 jurisdiction over municipalities and, thus, ended the practice of asserting equitable jurisdiction over a municipality under § 1983

litigant in federal court may well be deprived of the ability to recover damages against the responsible governmental entity.[109] Instead, he is remitted to a recovery against individual defendants[110] who lack adequate resources and who are entitled to a good faith defense[111] and a qualified immunity.[112] Furthermore, the Court has clothed many of the individual defendants, such as judges,[113] prosecutors,[114] Members of Congress[115] and state legisla-

coupled with a grant of compensatory damages "incident" to the grant of equitable relief. Finally, in Aldinger v. Howard, 96 S. Ct. 2413 (1976), the Court extended *Monroe* to its outer limits in ruling that federal courts lacked power to entertain pendent state claims against municipalities in cases involving § 1983 causes of action against "persons."

109. Despite the Supreme Court's consistent hostility, two possible approaches exist to support a damage award against a local governmental entity in a constitutional case. First, some courts have read the term "person" in § 1983 broadly, despite *Monroe*, to include school boards and similar arms of local government. *See, e.g.*, Keckeisen v. Independent School Dist., 509 F.2d 1062 (8th Cir. 1975) (school board a "person"); Wright v. Arkansas Activities Ass'n, 501 F.2d 25 (8th Cir. 1974) (state athletic association a "person"); Forman v. Community Serv. Inc., 500 F.2d 1246 (2d Cir. 1974) (state funded corporation a "person"); Aurora Educ. Ass'n East v. Board of Educ., 490 F.2d 431 (7th Cir. 1973) (board of education a "person"); Gordonstein v. University of Del., 381 F. Supp. 718 (D. Del. 1974) (university a "person"); Marin v. University of P.R., 377 F. Supp. 613 (D.P.R. 1974) (university a "person"). In order to argue persuasively, care must be taken to explain why a school board should be treated differently from a municipality or a county for the purposes of § 1983 liability. The most persuasive distinction stresses the fact that the liability of municipalties and counties is almost always derivative, flowing from the unauthorized acts of agents. The liability of school boards, however, is often primary, flowing from a corporate act taken by board members who themselves constitute the board. Where the liability of the target entity is not derivative, but primary, it should be deemed a "person" for § 1983 purposes.

Second, a substantial number of courts have recognized that a constitutionally based cause of action for damages exists independent of § 1983. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Once a *Bivens* cause of action attaches to a § 1983 "nonperson," jurisdiction to enforce it has been found in 28 U.S.C. § 1343(3). *See* cases collected in N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1543-44 (Lawyers ed. 1976). The primary impediment to using a *Bivens* cause of action as a solution to the *Monroe* definition of person is its apparent inconsistency with the congressional intent to define "person" narrowly in § 1983. *See generally* Aldinger v. Howard, 96 S. Ct. 2413 (1976); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. at 398 (Harlan, J., concurring).

110. Under *Monroe*, of course, although governmental entities are not persons, the flesh and blood officials who carry out the challenged act under color of state law are suable as "persons." Equitable relief against a § 1983 "person" is, almost always, sufficient. Damage recoveries are, however, another matter.

111. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967). *See generally* Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501 (1977).

112. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 415 U.S. 232 (1974).

113. Pierson v. Ray, 386 U.S. 547 (1967).

114. Imbler v. Pachtman, 424 U.S. 409 (1975).

115. *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Gravel v. United States, 408 U.S. 606 (1972).

tors[116] with complete immunity from damages. Thus, when a civil rights plaintiff seeks compensatory damages in a federal court, he is likely to be unsuccessful, even if the plaintiff wins on the merits.[117]

B. *Restrictions on Injunctions*

The Supreme Court has linked its restrictions on damage awards with a drastic assault on the power of the federal courts to frame effective equitable relief in constitutional cases. In *Rizzo v. Goode*,[118] the Court deprived the lower federal courts of the power to fashion flexible equitable decrees to deal with police abuse. In *Rizzo*, after a scrupulous and painstaking trial which documented twenty instances of unredressed police abuse, a federal judge ordered city officials, including the mayor, to institute a program for the resolution of civilian complaints against the police. The Supreme Court reversed, after chastising the trial judge for exceeding his appropriate role.[119] *Rizzo* merely contin-

116. Tenney v. Brandhove, 341 U.S. 367 (1951).

117. The fate of the damage claims arising out of the Kent State shootings in 1974 illustrates the difficulty of asserting a constitutionally based compensatory damage claim in federal court. After extensive litigation on the issue of immunity culminating in Scheuer v. Rhodes, 416 U.S. 232 (1974), plaintiff's claims ultimately foundered on the good faith defense.

Even though the shootings had violated legal norms, no compensation to the Kent State victims was available because the degree of fault exhibited by the defendants was not sufficiently culpable to warrant shifting the loss from plaintiffs to defendants. The Kent State dilemma is a direct consequence of viewing such litigation in a bilateral perspective, involving a choice between individual plaintiffs and individual defendants as to where an acknowledged loss should fall. So long as the choice is limited to two sets of individuals, personal culpability will, and probably should, be required in order to justify shifting the loss from plaintiffs to defendants, especially when defendants are engaged in governmental activity. If, however, the litigation were perceived as multilateral, involving a decision as to how best to spread the loss, a different result would be possible in the Kent State case. Until the universe of potential defendants in constitutional cases is expanded to enable the joinder of defendants capable of spreading the loss, however, plaintiffs will continue to suffer damages as a consequence of concededly unconstitutional behavior, but will be unable to secure compensatory relief.

118. 423 U.S. 362 (1976).

119. *Id.* at 381. The Court in *Rizzo* framed its analysis in "case" or "controversy" terms, asserting that since Mayor Rizzo had not been causally connected to the proven incidents of past police abuse, he could not be brought within the purview of the court's equitable decree seeking to avoid future incidents. The Court in *Rizzo* fully recognized, of course, the power of the district court to deal with the individuals who had actually participated in the abuses. Thus, *Rizzo* imposes a rigid set of restraints on the ability to frame prophylactic or broadly remedial decrees as an effective response to the conceded existence of a problem of constitutional dimensions. Prior to *Rizzo*, article III constraints had not been thought to be independently applicable to remedial decrees incident to the resolution of a conceded "case" or "controversy." Indeed, most affirmative equitable relief

ued a trend exemplified by *O'Shea v. Littleton*,[120] in which the current Court reversed a similar imaginative decree aimed at controlling rampant racial discrimination in the administration of justice in Cairo, Illinois. If the current trend continues, federal judges will soon be deprived of the capacity to fashion meaningful relief to prevent future violations of the law.[121]

C. *Restrictions on Class Actions*

Finally, the current Court has exhibited a hostility towards the class action device, severely impairing its efficacy as a remedial tool. In 1966 the Federal Rules of Civil Procedure were amended to authorize individual litigants (whose separate claims might not be sufficient to justify the expense and uncertainty of judicial review) to aggregate their claims into a class action[122] and thus match the legal resources available to corporations or the government. The class action promised the ability to provide legal redress to thousands of Americans who might otherwise lack the resources or the capacity to protect their rights individually. It also promised the emerging public interest bar the opportunity to provide legal services to far more persons than had been thought possible in a conventional procedural posture. From the beginning, however, the Supreme Court has narrowly restricted the use of class actions. The Supreme Court's assault on class actions began in *Snyder v. Harris*,[123] when the Court ruled that members of a class could not aggregate their individual damages to satisfy the jurisdictional amount requirements of 28 U.S.C. §§ 1331 and 1332. Since one of the primary purposes of the class action procedure was to permit powerless individuals to aggregate into a powerful ad hoc entity for the purpose of litigating a specific claim, *Snyder* was a serious setback. After *Snyder*, poor persons, whose claims rarely if ever exceed $10,000 individually, were forbidden to aggregate their claims and thus were often excluded from federal court.[124] As damaging as *Snyder* was, how-

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is aimed at an official capable of overseeing its adequate implementation, regardless of whether the target official personally participated in past violations of the law.

120. 414 U.S. 488 (1974).

121. The current Court's restricted view of the equity powers of a district court will impede attempts to frame effective school integration orders. *See, e.g.*, Brinkman v. Gilligan, 539 F.2d 1084 (6th Cir. 1976), *cert. granted*, 97 S. Ct. 782 (1977) (No. 76-539); United States v. Texas Educ. Agency, 512 F.2d 896 (1975), *cert. denied*, 423 U.S. 837 (1976).

122. FED. R. CIV. P. 23.

123. 394 U.S. 332 (1969).

124. Congress has recently alleviated the impact of Snyder v. Harris, 394 U.S. 332

ever, *Zahn v. International Paper Co.*[125] was worse. In *Zahn* the Court ruled that even if the named plaintiff individually satisfied the $10,000 jurisdictional amount, no class action would be permissible unless each member of the class satisfied the $10,000 jurisdictional amount.[126] Thus, class actions have now been transformed, through the magic of a hostile Supreme Court, into a device which protects only those claims which are sufficiently large not to require class actions in the first place. Of course, where a jurisdictional basis other than diversity or federal question exists, aggregation is unnecessary since jurisdictional amount is not an issue. Even in these situations, however, the Court indicated a strong aversion to class actions. In *Eisen v. Carlisle & Jacquelin Co.*,[127] for example, the Court required a plaintiff wishing to bring a class action for damages to notify each member of the class at his expense as a prerequisite to a grant of class action status. If, as it appears likely, the same rules are applied to injunctive or declaratory class actions, only the rich will be able to afford a class action, despite the fact that the original purpose of class actions was the equalization of litigation resources between rich and poor.[128]

V. Restrictions on the Power of the Federal Courts to Award Attorneys' Fees to the Public Bar

By restricting access to the federal courts and weakening the remedial powers of the federal courts, the Supreme Court has succeeded in partially dismantling one segment of the institutional structure responsible for keeping the Warren legacy alive. In *Alyeska Pipeline Service Co. v. Wilderness Society*,[129] the Su-

(1969), in suits against federal defendants by abolishing the $10,000 jurisdictional amount in such cases. However, suits against state officials claiming a failure to abide by federal statutory norms continue to require a jurisdictional amount in excess of $10,000 if premised on 28 U.S.C. § 1331(a) (1970). Attempts to base such litigation on 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) & (4) (1970) have met with mixed success. *See generally* N. Dorsen, P. Bender & B. Neuborne, Political and Civil Rights in the United States 1552-53 (Lawyers ed. 1976).

125. 414 U.S. 291 (1973).

126. *Id.* at 292.

127. 417 U.S. 156 (1974).

128. The Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), purported to rest on a construction of Rule 23(c), applicable only to actions for damages pursuant to 23(b)(3). Thus, *Eisen* notice may not be required in a 23(b)(2) (injunction or declaratory relief) action. If the Second Circuit's due process analysis prevails, however, notice will be required in both (b)(2) and (b)(3) actions as a matter of constitutional law.

129. 421 U.S. 240 (1975).

preme Court undermined the second institutional component, the public interest bar, by denying federal courts the power to award attorneys' fees in public interest litigation in the absence of express congressional authorization. Initially the public interest bar was subsidized by foundations and in part by cause organizations, such as the American Civil Liberties Union and the National Association for the Advancement of Colored People. More recently, creation of the Office of Economic Opportunity Legal Services Corporation was an important step toward a permanent, economically viable public interest bar. The most promising source of support for an independent public interest bar, however, rests not with the foundations, not with cause organizations dependent on voluntary contributions, and not with the government. It remains with the traditional power of a court of equity to award counsel fees to a deserving attorney in a case which has benefitted society. Viewing the public interest bar as private attorneys general, the lower federal judiciary systematically awarded counsel fees in appropriate cases to lawyers whose efforts had vindicated the rights of the public. While substantial awards were not automatic and did not nearly approximate what could be earned in the private sector, court awarded fees did constitute an important source of financial support for the public bar.[130]

In *Alyeska Pipeline Service Co. v. Wilderness Society*,[131] the Supreme Court ended the practice of awarding attorneys' fees in public interest cases. In an ironic abuse of statutory construction, the Court reasoned that since Congress had repeatedly expressly approved the awarding of attorneys' fees in specific contexts, courts lacked the power to award such fees in the absence of express congressional approval.[132] Following such reasoning to its logical conclusion, when Congress wishes to approve a practice, it should never expressly authorize it in a given setting for fear that the Supreme Court will forbid it in all other situations. Whatever the merits of the reasoning in *Alyeska Pipeline*, it struck a sharp blow at the public interest bar by cutting off its most promising economic base.[133]

130. *See generally* Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301, 303 (1973).

131. 421 U.S. 240 (1975).

132. *Id.* at 260-69.

133. Congressional response to Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), was swift, culminating in an express authorization for the award of attorneys' fees in cases brought pursuant to 42 U.S.C. § 1983 (1970), and related statutes

VI. Conclusion

It is, of course, a truism that the value of a constitutional right is no greater than the procedures which exist to vindicate it. A constitutional right without a sympathetic forum in which to enforce it is problematic; a constitutional right without a lawyer to enforce it is illusory; and a constitutional right for which no remedy exists is downright dishonest. Yet, the sum and substance of the decisions of the current Supreme Court lead inexorably and dishearteningly to precisely this dilemma. Unfortunately, much of the procedural retrenching of today's Court appears to be a kind of intellectual guerilla warfare aimed at many of the more controversial substantive decisions of the Warren era. Rather than forthrightly confronting these decisions and seeking to reverse them openly, some members of the Court have apparently chosen to cripple them covertly by dismantling the apparatus needed for their enforcement. While reasonable persons may agree or disagree with many of the substantive decisions of the Warren Court, if they are to be reversed, it should be pursuant to an open process after full argument, rather than by the emasculation of the federal courts.

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set out at R.S. 1977-1981. Wide areas remain, however, such as nontax-related litigation against the federal government, administrative litigation and litigation against state officials pursuant to 28 U.S.C. § 1331(a) (1970), in which attorneys' fees may no longer be awarded. *See generally* The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641.

On Jan. 24, 1977, pursuant to the new Act, the United States District Court (S.D.N.Y.) ordered the defendants in Beazer v. New York City Transit Auth. (72 Civ. 5307) to pay $375,000 in attorneys' fees to the Legal Action Center, which had successfully represented the plaintiffs in a challenge to the refusal of the New York City Transit Authority to employ persons receiving methadone treatment. The award was based on approximately 4500 hours of work, calculated at the following basic hourly rates:

2-4 years experience—$60.00 an hour

9-11 years experience—$100.00 an hour

15 years experience—$110.00 an hour

In addition to an hourly award, the court made an incentive award of approximately $75,000. In reaching his decision, Judge Thomas P. Griesa indicated that he had considered: (1) whether fees in civil rights cases should be awarded at the same rate as an antitrust or securities case; (2) whether the award should be reduced because plaintiffs' attorneys were salaried employees of a public interest law firm receiving outside funding; and (3) whether the award should be reduced because of the defendant's current financial difficulty. Defendant has indicated an intention to appeal from Judge Griesa's award of attorneys' fees.

APPENDIX 8

(a)

[State Courts (1976)]

FINAL SELECTION OF JUDGES

Alabama.—Appellate, circuit, district, and probate judges elected on partisan ballots. Judges of municipal courts are appointed by the governing body of the municipality as of 1977.

Alaska.—Supreme Court Justices, superior, and district court judges appointed by Governor from nominations by Judicial Council. Approved or rejected at first general election held more than 3 years after appointment. Reconfirmed every 10, 6, and 4 years, respectively. Magistrates appointed by and serve at pleasure of the presiding judges of each judicial district.

Arizona.—Supreme Court Justices and court of appeals judges appointed by Governor from a list of not less than 3 for each vacancy submitted by a 9-member Commission on Appellate Court Appointments. Maricopa and Pima County superior court judges appointed by Governor from a list of not less than 3 for each vacancy submitted by a 9-member Commission on Trial Court Appointments for each county. Superior court judges of other 12 counties elected on nonpartisan ballot (partisan primary); justices of the peace elected on partisan ballot; city and town magistrates selected as provided by charter or ordinance, usually appointed by mayor and council.

Arkansas.—All elected on partisan ballot.

California.—Supreme Court and courts of appeal judges appointed by Governor with approval of Commission on Judicial Appointments. Run for reelection on record. All judges elected on nonpartison ballot.

Colorado.—Judges of all courts, except Denver County and municipal, appointed initially by Governor from lists submitted by nonparitsan nominating commissions; run on record for retention. Municipal judges appointed by city councils or town boards. Denver County judges appointed by mayor from list submitted by nominating commission: judges run on record for retention.

Connecticut.—All appointed by Legislature from nominations submitted by Governor, except that probate judges are elected on partisan ballot.

Delaware.—All appointed by Governor with consent of Senate.

Florida.—All elected on nonpartisan ballot.

Georgia.—All elected on partisan ballot except that county and some city court judges are appointed by the Governor with consent of the Senate.

Hawaii.—Supreme Court Justices and circuit court judges appointed by the Governor with consent of the Senate. District magistrates appointed by Chief Justice of the State.

Idaho.—Supreme Court and district court judges are elected on nonpartisan ballot. Magistrates appointed by District Magistrate's Commission for initial 2-year term; thereafter, run on record for retention for 4-year term on nonpartisan ballot.

Illinois.—All elected on partisan ballot and run on record for retention. Associate judges are appointed by circuit judges and serve 4-year terms.

Indiana.—Judges of appellate courts appointed by Governor from a list of 3 for each vacancy submitted by a 7-member Judicial Nomination Commission. Governor appoints members of municipal courts and several counties have judicial nominating commissions which submit a list of nominations to the Governor for appointment. All other judges are elected.

Iowa.—Judges of Supreme and district courts appointed initially by Governor from lists submitted by nonpartisan nominating commissions. Appointee serves initial 1-year terms and then runs on record for retention. District associate judges run on record for retention; if not retained or office becomes vacant, replaced by a full-time judicial magistrate. Full-time judicial magistrates appointed by district judges in the judicial election district from nominees submitted by county judicial magistrate appointing commission. Part-time judicial magistrates appointed by county judicial magistrate appointing commissions.

Kansas.—Supreme Court Judges appointed by Governor from list submitted by nominating commission. Run on record for retention. Nonpartisan selection method adopted for judges of courts of general jurisdiction in 23 of 29 districts.

Kentucky(a).—Judges of Supreme Court and circuit court judges elected on nonpartisan ballot. All others elected on partisan ballot.

Louisiana.—All elected on open (bipartisan) ballot.

Maine.—All appointed by Governor with consent of Executive Council except that probate judges are elected on partisan ballot.

Maryland.—Judges of Court of Appeals, Court of Special Appeals, Circuit Courts and Supreme Bench of Baltimore City appointed by Governor, elected on nonpartisan ballot after at least one year's service. District court judges appointed by Governor subject to confirmation by Senate.

Massachusetts.—All appointed by Governor with consent of Executive Council. Judicial Nominating Commission, established by executive order, advises Governor on appointment of judges.

Michigan.—All elected on nonpartisan ballot, except muncipal judges in accordance with local charters by local city councils.

Minnesota.—All elected on nonpartisan ballot. Vacancy filled by gubernatorial appointment.

Mississippi.—All elected on partisan ballot, except that city police court justices are appointed by governing authority of each municipality.

Missouri.—Judges of Supreme Court, Court of Appeals, circuit and probate courts in St. Louis City and County, Jackson County, Platte County, Clay County and St. Louis Court of Criminal Correction appointed intially by Governor from nominations submitted by special commissions. Run on record for relection. All other judges elected on partisan ballot.

Montana.—All elected on nonpartisan ballot. Vacancies on Supreme or district and workmen's Compensation judge filled by Governor according to established appointment procedure.

Nebraska.—Judges of all courts appointed initially by Governor from lists submitted by bipartison nominating commissions. Run on record for retention in office in general election following initial term of 3 years; subsequent terms are 6 years.

Nevada.—All elected on nonpartisan ballot.

New Hampshire.—All appointed by Governor with confirmation of Executive Council.

New Jersey.—All appointed by Governor with consent of Senate except that magistrates of municipal courts serving one municipality only are appointed by governing bodies.

New Mexico.—All elected on partisan ballot.

New York.—All elected on partisan ballot except that Governor appoints judges of court of claims and designates members of appellate division of Supreme Court, and Mayor of the City of New York appoints judges of the criminal and family courts in the City of New York.

North Carolina.—All elected on partisan ballot.

North Dakota.—All elected on nonpartisan ballot.

Ohio.—All elected on nonpartisan ballot except court of claims judges who may be appointed by Chief Justice of Supreme Court from ranks of Supreme Court, court of appeals, court of common pleas, or retired judges.

Oklahoma.—Supreme Court Justices and Court of Criminal Appeals Judges appointed by Governor from lists of three submitted by Judicial Nominating Commission. If Governor fails to make appointment within 60 days after occurrence of vacancy, appointment is made by Chief Justice from the same list. Run for election on their records at first general election following completion of 12 months' service for unexpired term. Judges of Court of Appeals, district and associate district judges elected on nonpartisan ballot in adversary popular election. Special district judges appointed by district judges. Municipal judges appointed by governing body of municipality.

Oregon.—All elected on nonpartisan ballot for a 6-year term, except that most municipal judges are appointed by city councils (elected in three cities).

Pennsylvania.—All originally elected on partisan ballot; thereafter, on nonpartisan retention ballot.

Rhode Island.—Supreme Court Justices elected by Legislature. Superior, family and district court justices and justices of the peace appointed by Governor, with consent of Senate (except for justices of the peace); probate and municipal court judges appointed by city or town councils.

(a) See footnote (d) on Table 10.

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South Carolina.—Supreme Court and circuit court judges elected by Legislature. City judges, magistrates, and some county judges and family court judges appointed by Governor—the latter on recommendation of the legislative delegation in the area covered by the court. Probate judges and some county judges elected on partisan ballot.

South Dakota.—All elected on nonpartisan ballot, except magistrates (law trained and others), who are appointed by the presiding judge of the judicial circuit in which the county is located.

Tennessee.—Judges of intermediate appellate courts appointed initially by Governor from nominations submitted by special commission. Run on record for reelection. The Supreme Court judges and all other judges elected on partisan ballot.

Texas.—All elected on partisan ballot except municipal judges, most of whom are appointed by municipal governing body.

Utah.—Supreme and district court judges appointed by Governor from lists of three nominees submitted by nominating commissions. If Governor fails to make appointment within 30 days, the Chief Justice appoints. Judges run for retention in office at next succeeding election; they may be opposed by others on nonpartisan judicial ballots. Juenvile court judges are initially appointed by the Governor from a list of not less than 2 nominated by the Juvenile Court Commission, and retained in office by gubernatorial appointment. Town justices of the peace are appointed by town trustees. City judges and county justices of the peace are elected.

Vermont.—Supreme Court Justices, superior court judges (presiding judges of county courts) and district court judges appointed by Governor with consent of Senate from list of persons designated as qualified by the Judicial Selection Board. Supreme, superior, and district court judges retained in office by vote of Legislature. Assistant judges of county courts and probate judges elected on partisan ballot in the territorial area of their jurisdiction.

Virginia.—Supreme Court and all major trial court judges elected by Legislature. All judges of General District Juvenile and Domestic Relations Court elected by Legislature. Committee on District Courts, in the case of part-time judges, certifies that a vacancy exists. Thereupon all part-time judges of General District Courts and General District Juvenile and Domestic Relations Courts are appointed by circuit judges.

Washington.—All elected on nonpartisan ballot except that municipal judges in second, third and fourth class cities are appointed by mayor.

West Virginia.—Judges of all courts of record on partisan ballot.

Wisconsin.—All elected on nonpartisan ballot.

Wyoming.—Supreme Court Justices and district court judges appointed by Governor from a list of 3 submitted by nominating committee and stand for retention at next election after 1 year in office. Justices of the peace elected on nonpartisan ballot.

District of Columbia.—Appointed by President of the United States upon the advice and consent of the United States Senate.

Guam.—All appointed by Governor with consent of Legislature from list of 3 nominees submitted by Judicial Council for term of 5 years; thereafter run on record for retention every 5 years.

Puerto Rico.—All appointed by Governor with consent of Senate.

(b)

Chapter 2

Judicial Nominating Commissions

Introduction

The judicial nominating commission is the cornerstone of the merit selection plan. Because the nominating commission has ultimate authority to determine which candidates are qualified to hold judicial office, the effectiveness of the merit plan is dependent upon the successful functioning of this body. Accordingly, this chapter is devoted to an analysis of the workings of presently established commissions in an effort to discover how such factors as the commission's composition, workload, and operating procedures affect the selection process. As an aid in this analysis the reader should refer to Table I (appearing at pp. 27-37, which outlines the composition and operation of the nominating commissions in each merit selection jurisdiction.

Our questionnaire survey of judicial nominating commissioners was designed to be a nation-wide reference point for our discussion of the issues surrounding the operation of the

commission. The questionnaire was developed and pretested in Nebraska and at a Florida Judicial Nominating Commissioners Institute in the spring of 1973. Thereafter, a questionnaire[1] was mailed to every current member of all those commissions (except Nebraska's) which we felt had enough of an operating history to be able to give informed responses. Thus, we did not question commissioners in Georgia, Indiana, Ohio, Pennsylvania, Montana, or the District of Columbia because they lacked sufficient experience as of June, 1973, the date of our mailing. We mailed 797 questionnaires to commission members in thirteen states, one city (New York City), and one county (Jefferson County, Alabama), all of which had had some form of merit selection in operation for longer than one year at the time of the mailing. For comparison purposes we also sent 85 questionnaires to "bar screening" commission members in five states whose operations are superficially similar to judicial nominating commissions.[2] From the merit selection states we received usable responses from 371 current commissioners, a response rate of 46.5%. It should be noted however that although we did succeed in obtaining a wide geographical range, the four states with the most numerous commissions and commissioners (Florida, Colorado, Iowa, and Maryland) accounted for 77.6% of the replies.

The questionnaire attempted to elicit information in three basic areas: 1) The nominating commissioners themselves: 2) The personal qualities and qualifications that commissioners regard as most important in selecting judges; and 3) The actual operations and procedures of the commissions. With the aid of a computer we also were able to determine whether significant variation occurred when commissioners were compared on the basis of age, experience, political party, occupation, and bar affiliation. Similarly, we were able to isolate certain key operational differences among the various commissions such as mode of recruiting, interviewing, and confidentiality. Finally, we encouraged each commissioner to give his impressions as to the success of his commission as well as his suggestions for improvement, if any.

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1. See Appendix 2-A.

2. Upon analyzing the responses contained in the 34 questionnaires completed and returned by "bar screeners", we found no significant differences between their evaluation of the qualities and qualifications which should be exhibited by a potential appointee and the evaluation of the commissioners in merit plan jurisdictions.

Commission Composition

Historical Development

As with other aspects of the merit selection plan, thinking regarding the question as to who should sit on the nominating commission has changed over the years. The nominating body contained in the plan conceived by Professor Kales in 1914 consisted of a judicial council, composed solely of high ranking members of the judiciary. During the 1920's, the advisability of including members of the bar in the nominating process was propounded by such men as Harold J. Laski and Herbert Lincoln Harley. Finally, at the 1931 annual meeting of the American Judicature Society, Walker B. Spencer set forth a proposal concerning the composition of the nominating body which has since met with widespread favor. Spencer proposed that candidates be nominated by a commission composed not only of judges and lawyers but non-lawyers as well.[3] In adopting a resolution in favor of a merit plan for judicial selection in 1937, the House of Delegates of the ABA appears to have given consideration to the approaches taken by both Kales and Walker in proposing that the nominating body be "composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office."[4]

When Missouri became the first state to adopt a merit plan in 1940, it included on each of its nominating commissions a member of the judiciary and an equal number of lawyer and non-lawyer members. Since then, the majority of the jurisdictions adopting a merit plan have followed Missouri's lead in including judicial, lawyer, and non-lawyer members on the commission.[5] In addition, the Model Judicial Article approved by the American Bar Association's House of Delegates in 1962 also contains a merit plan for judicial selection which utilizes nominating commissions composed of judicial, lawyer, and non-lawyer members.

In most jurisdictions which have adopted a merit plan, the judicial member of the nominating commission acts as chairman and, in certain of these jurisdictions, sits as a non-voting

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3. For an excellent discussion of this historical development, *See* Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQUESNE L.REV. 61 (1968).

4. 62 A.B.A. Rep. 893 (1937).

5. See Table I, this chapter.

member. The lawyer members of the commission are usually either elected at large by members of the bar residing in the geographic area in question or appointed by the governing body of the organized bar. The non-lawyer members of the commission are usually appointed directly by the governor.[6] Although there is little argument over the desirability of including non-lawyers, since their inclusion "assures that public expectations concerning the judiciary are influential and the non-professional attributes of a good judge are recognized",[7] the general practice of having the governor appoint these lay members has been criticized as an invitation for political machinations. Since merit selection is intended to deprive the executive of the opportunity to make judicial appointments solely on the basis of his political motivations (and to remove the political pressures on him to do so), it is thought to be self-defeating to permit the executive to have a direct say in the appointment of the nominating commissioners.[8]

To remedy this problem it has been suggested that the lay members of the commission be selected by a bi-partisan legislative committee.[9] Of course, the details of such a solution may perhaps embroil the legislature in its own partisanship, because bi-partisan rarely means nonpartisan. At any rate, there is much concern expressed by the commentators that the lay members are either particularly susceptible to undue influence or all are mere ciphers who meekly defer to the political demands of the executive, the authoritative tone of the judicial member, or the glibness and legal expertise of the lawyer members. The open-ended responses to our questionnaires reveal that very few lay members felt dominated by the lawyers and that equally few lawyer members felt the lay members to be superfluous. Our responses did indicate differences in perceptions between lawyer and laymen, and there were some suggestions that perhaps the lawyers do hold the balance of power, especially in recruiting. However, we have found little reason to doubt the need for lawyer-laymen interaction on the judicial nominating commission. An evaluation of the recent ad hoc Massachusetts judicial selection committee supports this conclusion:

6. *Id.*

7. ABA Commission on Standards of Judicial Administration, *Standards Relating to Court Organization* 40 (Tentative Draft, 1973).

8. Note, *Analysis of Methods of Judicial Selection and Tenure*, 6 SUFFOLK L. REV. 955, 968 (1972).

9. *Id.*

The interaction between lawyers and laymen on the Committee is of some interest. Except in one or two cases, most of the laymen have scant knowledge of the courts, the judiciary, or their recent problems. The laymen, however, soon realized that they were as perceptive as the lawyers about people, and equally adept in evaluating available information. While laymen had to defer to lawyer opinions about legal experience, they had strong, independent views and were by no means dominated or manipulated by the lawyers.

Lawyer perceptions of the lay members confirm the capacity and desirability of lay participation. Most felt that lay people provided a more detached view of the system, bringing a consumer citizen perspective to bear, and counteracting the "chumminess" that tends to exist among lawyers.[10]

In addition to the lawyers and laymen, many commissions provide for a judicial member as well. As indicated in Watson and Downing's seminal study of judicial selection in Missouri, this judge often has been a dominating force.[11] Indeed, this may still be a problem in that state since one Missouri commissioner complained that there was "a tendency for the Supreme Court member to stifle the arguments for or against a particular candidate. Most attorneys on the commission have been trial attorneys, and the awe, respect or dominance of judges tends to become built in." On the other hand we received generally favorable comment about the role of the judicial members in Colorado.

Aside from the judicial member, who usually serves ex-officio, most merit plan jurisdictions provide for six-year, staggered terms for commission members. All merit plans require that the lawyer and non-lawyer members be residents of the geographic area covered by the judicial offices to be filled by the commission. Although few plans contain explicit provisions which attempt to insure that the two major political parties will be given relatively equal representation on the commission,[12] most plans explicitly require that the appointing official or appointing body not give consideration to political affiliation in appointing members of the commission. In addition to these restrictions concerning political affiliation, many plans pro-

10. Robertson and Gordon, *Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASS. L.Q. 131, 138 (1973).

11. Watson and Downing, THE POLITICS OF THE BENCH AND BAR (New York: John Wiley and Sons, Inc., 1969).

12. See Table IX, Chapter 3.

hibit the appointment of a public office holder to the commission and some prohibit the appointment of persons holding office in a political party.[13] Finally, some plans prohibit commission members from serving for two consecutive terms and explicitly preclude a commission member's eligibility for judicial office while he sits on the commission and for a period of one or more years thereafter.[14]

13. See Table X, Chapter 3.

14. *Id.*

TABLE I
Judicial Nominating Commissions

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Alabama	*Constitutional* Governor appoints to interim vacancies only. Thereafter, appointee must run in partisan election at end of each term.	(2) *Jefferson County Judicial Commission* 10th Judicial Circuit Court *Madison County Judicial Commission* 23rd Judicial Circuit Court (6 year terms)	5 Members 1 judicial—elected by judges of appropriate judicial circuit. 2 lawyers—elected by lawyer residents of appropriate judicial circuit from list of nominees of the appropriate Bar Assn. 2 non-lawyers—elected by state senator and representatives from appropriate county. All serve 6 year terms.
Alaska	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(1) *Judicial Council* Supreme Court (10 year term) Superior Courts (6 year term) District Courts (4 year term)	7 Members Chief Justice of Supreme Court (Chairman). 3 lawyers—appointed by governing body of state's unified bar. 3 non-lawyers—appointed by governor, subject to legislative confirmation. All serve 6 year terms.

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State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Colorado	*Constitutional* Governor appoints. Appointee serves provisional term of 2 years; thereafter, must stand in retention election at end of each term.	(24) Supreme Court *Nominating Commission* Supreme Court (10 year term) Court of Appeals (8 year term)	12 Members Chief Justice of Supreme Court (Chairman). 5 lawyers (one from each congressional district)—elected by majority vote of governor, attorney general and chief justice. 5 non-lawyers (one from each congressional district)—appointed by governor. 1 non-lawyer—appointed by governor. All serve 6 year terms.
		Judicial District Nominating Commissions (22) District Courts (6 year term) Probate Courts (6 year term) Juvenile Courts (6 year term) Superior Court of Denver (6 year term) County Courts outside of Denver (4 year term)	8 Members Supreme Court Justice (Chairman). 3 lawyers*—elected by majority vote of governor, attorney general and chief justice. 4 non-lawyers (at least one from each county in the appropriate judicial district)—appointed by governor. All serve 6 year terms.
	Denver Home Rule Charter Mayor appoints for provisional term of 2 years. Thereafter, appointee must stand in retention election at end of each term.	*Denver County Court Judicial Nom. Commis.* Denver County Court (4 year term)	8 Members Denver County Court Presiding Judge. 3 lawyers—appointed by mayor. 4 non-lawyers—appointed by mayor. All serve 4 year terms.

*Colorado Judicial District Nominating Commissions—in judicial districts having a population of 35,000 or less, at least 4 members of the commission must be non-lawyers; the other members may be lawyers or non-lawyers, depending on majority vote of the governor, attorney general, and chief justice.

The Judicial Nominating Commissions 29

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
District of Columbia	*Statutory* President appoints with Senate confirmation. Automatic reappointment if Tenure Commission finds "exceptionally well qualified" or "well qualified" If TC finds "qualified", President has option to resubmit for Senate confirmation or not. If TC finds "unqualified", appointee ineligible for reappointment.	(1) *Judicial Nominating Commission* Court of Appeals (15 year term) *Superior Court* (15 year term)	7 Members Active or retired federal judge serving in the District—appointed by Chief Judge of the U.S. District Court for the District of Columbia. 1 lawyer or non-lawyer—appointed by President of United States. 2 lawyers—appointed by Board of Governors of the D. C. Unified Bar. 2 members (one of whom may not be a lawyer)—appointed by mayor. 1 non-lawyer—appointed by the District Council All serve 6 year terms except member apptd. by President who serves a 5 year term.
Florida	*Constitutional* Governor appoints to interim vacancies only. Thereafter, appointee must run in non-partisan election at end of term.	(25) *Supreme Court Nominating Commission* Supreme Court (6 year term) *District Courts of Appeal Nominating Commissions* (4) Courts of Appeal (6 year term) *Judicial Circuit Nominating Commissions* (20) Judicial Circuit Courts (6 year term)	Each Commission has 9 Members 3 lawyers—appointed by Board of Governors of Florida Bar. 3 electors—appointed by governor. 3 non-lawyers—elected by majority vote of other commissioners. All serve 4 year terms.
Georgia	*Executive Order* Governor appoints to interim vacancies. Thereafter, appointee must run in next general election.	(2) *Judicial Nominating Commission* Supreme Court Court of Appeals Superior Courts	10 Members 5 lawyers—serve by virtue of office in the State Bar of Georgia. 5 non-lawyers—apptd. by governor. Non-lawyers serve for terms concurrent with the governor's term.

30 The Key to Judicial Merit Selection

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Georgia (continued)	*Atlanta City Charter* Mayor appoints. Thereafter, appointee must stand in retention election at end of each term.	*Judicial Commission* Municipal Court of City of Atlanta (4 year term)	8 Members 3 lawyers—appointed by Atlanta City Bar Association. 3 lawyers—appointed by Gate City Bar Assn. 2 non-lawyers—apptd. by mayor.
Idaho	*Statutory* Governor appoints to interim vacancies only. Thereafter, appointee must run in non-partisan election at end of each term.	(8) *Judicial Council* Supreme Court (6 year term) District Courts (4 year term)	7 Members Chief Justice of Supreme Court (Chairman). 3 lawyers (including one district judge)—appointed by Board of Commissioners of Idaho Bar, with consent of Senate. 3 non-lawyers—appointed by governor with consent of Senate. All serve 6 year terms.
	Statutory District Magistrate's Commission appoints for term of 2 years. Thereafter, appointee must stand in retention election at end of each term.	*District Magistrates Commissions* (7) Magistrates of District Courts (2 year term)	5+ Members 2 lawyers—nominated by local bar assn. and appointed by Idaho State Bar. 3 mayors within appropriate district—appointed by governor. +Chairman of the Board of County Commissioners of each county within the district.
Indiana	*Constitutional* Governor appoints to initial term of 2 years. Thereafter, appointee must stand in retention election at end of each term.	(5) *Judicial Nominating Commission* Supreme Court (10 year term) Court of Appeals (10 year term)	7 Members Chief Justice of Supreme Court (Chairman). 3 lawyers (one from each court of appeals district)—elected by lawyer residents in each district. 3 non-lawyers (one from each court of appeals district)—appointed by governor. All serve 6 year terms.

The Judicial Nominating Commissions 31

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Indiana (continued)	*Statutory* Governor appoints certain County Superior Court judges for initial term of 2 years. Thereafter, appointee must stand in retention election at end of each term.	*Lake County Superior Court Nominating Commission* Lake County Superior Court *Allen County Superior Court Commission* Allen County Superior Court *Vanderburgh County Superior Court Nominating Commission* Vanderburgh County Superior Court (6 year terms)	7 Members 1 judicial (Chairman)—appointed by Chief Justice of Supreme Crt. 3 lawyers—elected by lawyer residents of appropriate county. 3 non-lawyers—appointed by governor. All serve 4 year terms.
	Statutory Governor appoints to initial term, and makes subsequent re-appointments at end of each term.	*Marion County Municipal Court Nominating Commission* Marion County Municipal Court (4 year term)	9 Members 1 judicial—appointed by Chief Judge of Court of Appeals. 2 lawyers—elected by local bar association. 2 non-lawyers—appointed by mayor. 2 non-lawyers—appointed by governor. 1 lawyer—appointed by Marion County Superior Court en banc. 1 Circuit Judge (Secretary) All serve 2 year terms.
Iowa	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(113) *State Judicial Nominating Commission* Supreme Court (8 year term)	12 Members 6 electors (one from each congressional district)—appointed by governor with Senate confirmation. 6 electors (one from each congressional district)—elected by bar members of appropriate district. All serve 6 year terms.

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State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Iowa (continued)		*District Judicial Nominating Commissions* (13) District Courts (6 year term)	11 Members 1 District Judge—appointed by Chief Judge of district. 5 electors—appointed by governor. 5 electors—elected by bar members of appropriate district. All serve 6 year terms.
	Statutory Commission appoints.	*County Judicial Magistrate Appointing Commissions* (99) Judicial Magistrates (4 year term for full-time; 2 year term for part-time)	6 Members 1 judicial—appointed by Chief Judge of District. 2 lawyers—elected by appropriate county bar. 3 non-lawyers—appointed by appropriate County Board of Supervisors. All serve 6 year terms.
Kansas	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(1) *Supreme Court Nominating Commission* Supreme Court (6 year term)	11 Members 1 lawyer-at-large (Chairman)—elected by Kansas lawyers. 5 lawyers (one from each congressional district)—elected by lawyers of appropriate district. 5 non-lawyers (one from each congressional district)—appointed by governor. All serve 5 year terms.
Maryland	*Executive Order* Governor appoints to interim vacancies only.	(9) *Governor's Commission on Appellate Judicial Selection* Court of Appeals Court of Special Appeals	13 Members 1 Chairman—appointed by governor. 6 lawyers—elected by bar 6 non-lawyers—apptd. by governor. All serve 4 year terms.

The Judicial Nominating Commissions 33

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Maryland (continued)		*Governor's Commissions on Trial Court Judicial Selection* (8) Circuit Courts Supreme Bench of Baltimore Municipal Bench of Baltimore People's Courts of Prince George and Wicomico Counties	11 Members 1 Chairman—apptd. by governor. 5 lawyers—elected by bar 5 non-lawyers—apptd. by governor. All serve 4 year terms.
Missouri	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(6) *Appellate Judicial Commission* Supreme Court (12 year term) Court of Appeals (12 year term)	7 Members Supreme Court Justice—elected by members of Supreme Court. 3 lawyers (one from each court of appeals district)—elected by lawyer residents of appropriate district. 3 non-lawyers (one from each court of appeals district)—appointed by governor. All serve 6 year terms.
		Judicial Circuit Commissions (4) Circuit and Probate Courts within St. Louis, Clay, Platt and Jackson Counties (12 year terms) St. Louis Courts of Criminal Correction (12 year term)	5 Members Chief Judge of District Court of Appeals. 2 lawyers—elected by lawyer residents of appropriate circuit. 2 non-lawyers (one from each circuit)—apptd. by governor. All serve 6 year terms.
	Charter of Kansas City City Council appoints. Thereafter, appointee must stand in retention election at end of each term.	*Municipal Judicial Nominating Commission* Municipal Court of Kansas City (4 year term)	5 Members Presiding Judge of Circuit Court of Jackson County (Chairman). 2 lawyers—elected by lawyer residents of Kansas City. 2 non-lawyers—apptd. by mayor. All serve 4 year terms.

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State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Montana	*Constitutional* Governor appoints (with Senate Confirmation) to interim vacancy only. Thereafter, appointee must run in non-partisan election at next general election.	(1) *Judicial Nomination Commission* Supreme Court District Courts	7 Members District Judge—elected by district judges and certified by Supreme Court. 2 lawyers (one from each congressional district)—appointed by Supreme Court. 4 non-lawyers—apptd. by governor. All serve 4 year terms.
Nebraska	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(51) *Supreme Court Nominating Commissions* (7) Supreme Court (6 year term) *District Court Nominating Commissions* (21) District Courts (6 year term) *County Court Nominating Commissions*** (21) County Courts (6 year term) *Juvenile Judge Nominating Commission* Juvenile Courts (6 year term) *Workman's Compensation Court Nominating Commission* Workman's Compensation Court	Each Commission has 9 Members Supreme Court Justice (Chairman)—apptd. by governor. 4 lawyers—elected by lawyer residents of appropriate district. 4 non-lawyers—apptd. by governor. All serve 6 year terms.

**Nebraska County Court Nominating Commissions—in practice, the members serving on these Commissions often serve also on the corresponding District Court Nominating Commissions.

The Judicial Nominating Commissions 35

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
New York City	*Voluntary* Mayor appoints.	(1) *Mayor's Committee on the Judiciary* Criminal Court (10 year term) Family Court (10 year term) Civil Court (interim vacancies only)	24 Members 13 lawyers or non-lawyers—each Presiding Justice of New York City's two Appellate Divisions selects 6 members; one member is selected jointly. 11 lawyers or non-lawyers—appointed by mayor. Serve terms concurrent with the mayor's term.
Ohio	*Executive Order* Governor appoints to interim vacancies only. Thereafter, appointee must run in non-partisan election at end of term.	(12) *Supreme Court Nominating Council* Supreme Court (6 year term)	11 Members 5 lawyers—appointed by governor. 5 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—appointed by governor. All serve 4 year terms.
		District Judicial Nominating Councils (11) Court of Appeals and Trial Courts within Appellate District (6 year terms)	10 Members 5 lawyers—appointed by governor. 5 non-lawyers—apptd. by governor. All serve 4 year terms.
Oklahoma	*Constitutional* Governor and Chief Justice of Supreme Court appoint. Thereafter, appointee must stand in retention election at end of each term. (Appellate Cts.) *Executive Order* Gov. appts. to interim vacancies (trial cts.).	(1) *Judicial Nominating Commission* All judicial offices within the state.	13 Members 6 lawyers (one from each congressional district)—elected by lawyer residents of appropriate district. 6 non-lawyers (one from each congressional district)—appointed by governor. 1 non-lawyer—elected by other commissioners. All serve 6 year terms except member-at-large who serves 2 year term.

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State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Pennsylvania	*Executive Order* Governor appoints to interim vacancies only. Thereafter, appointee must run in partisan election in next odd-numbered year.	(2) *Appellate Court Nominating Commission* Supreme Court Superior Court Commonwealth Court	7 Members 3 lawyers—appointed by governor. 3 non-lawyers—apptd. by governor. Supreme Court Justice who is ineligible for retention—appointed by governor. All serve 4 year terms.
		Trial Court Nominating Commission Courts of Common Pleas Community Courts Philadelphia Municipal Court Traffic Court of Philadelphia	5 Members-at-Large+ 2 lawyers—appointed by governor 2 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—appointed by governor. + 2 lawyers from each judicial district with 30+ judges (serve only for appointments within that district—districts with less than 30 judges have 1 lawyer member)—appointed by governor. All serve 4 year terms.
Tennessee	*Statutory* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(1) *Appellate Court Nominating Commission* Court of Appeals Court of Criminal Appeals (8 year terms)	6 Members 3 members (one resident from each grand division of state—only one can be lawyer) —apptd. by governor. 3 lawyers (one from each grand division of state) —elected by members of Tennessee bar. All serve 6 year terms.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Utah	*Statutory* Governor appoints. Thereafter, appointee must run in non-partisan election at next general election.	(8) *Supreme Court Nominating Commission* Supreme Court *District Court Nominating Commissions* (7) District Courts	7 Members Chief Justice of Supreme Court (Chairman). 2 lawyers—selected by Utah State Bar Assn. 2 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—selected by State Senate. 1 lawyer or non-lawyer—selected by State House of Representatives. All serve 4 year terms.
Vermont	*Constitutional* Governor appoints, subject to confirmation by the Senate.	(1) *Judicial Selection Board* Supreme Court (2 year term) Superior Court (6 year term) District Court (4 year term)	11 Members 3 lawyers—elected by lawyer residents of the state. 2 non-lawyers—apptd. by governor. 3 state senators (only one may be a lawyer)—elected by State Senate. 3 state representatives (only one may be a lawyer)—elected by State House of Representatives. All serve 2 year terms.
Wyoming	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(1) *Judicial Nominating Commission* Supreme Court (8 year term) District Courts (6 year term)	7 Members Supreme Court Justice (Chairman)—selected by Chief Justice of Supreme Court. 3 lawyers—elected by members of Wyoming bar. 3 non-lawyers—apptd. by governor. All serve 4 year terms.

(c)

SURVEY OF

judicial salaries in state court systems

APRIL 1977
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National Center for State Courts

SURVEY OF JUDICIAL SALARIES IN STATE COURT SYSTEMS

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National Center for State Courts

The National Center for State Courts is a non-profit organization dedicated to the modernization of court operations and the improvement of justice at the state and local level throughout the country. It functions as an extension of the state court systems, working for them at their direction and providing them an effective voice in matters of national importance.

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Survey Editor: Nancy Allbee

Foreword

This survey of judicial salaries lists salary figures as of April 30, 1977. Bold face figures in the charts ("Salaries—Courts of Appellate and General Jurisdictions and State Court Administrators" and "Salaries—Courts of Special or Limited Jurisdiction") indicate changes since the January 1977 issue.

The "Judicial Salaries in Appellate and Trial Courts" table lists for each state court system the date of last salary change for highest, intermediate appellate and general trial court judges. This table, like the "Rank Order of Judicial Salaries" table, utilizes salaries paid to associate justices for the highest courts and intermediate appellate courts. The general trial court salaries refer to the state-paid salary without supplements. Salaries including supplements appear in parentheses immediately beneath the figures for the state paid salary.

The section dealing with judicial salaries in courts of limited or special jurisdiction is divided into seven categories on a jurisdictional basis.

Appendix I lists salaries scheduled to take effect in the future and pending legislation which could affect judicial salaries. Appendix II indicates the states which provide for "floating" judicial salaries on the consumer price index or other cost of living adjuster.

Every effort has been made to ensure the accuracy of the survey data; figures for each state have been obtained from its office of court administration. If errors have occurred or if the data is not completely accurate, please notify us promptly.

Survey of Judicial Salaries
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RANK ORDER OF JUDICIAL SALARIES, POPULATION, AND PER CAPITA PERSONAL INCOME IN THE FIFTY STATES

The salaries reported for the highest appellate court refer to the salaries paid to associate justices. The general trial court salaries refer to the standard state-paid salary for ranking purposes. The Commonwealth of Puerto Rico, District of Columbia and United States courts are ranked relative to the states, but did not figure in the initial numbering.

JUDICIAL SALARIES

State	Highest Appellate Courts	General Trial Courts	Per Capita Personal Income[a]	Population[a]
ALABAMA	40*	47*	46	21
ALASKA	4	3	1	50
ARIZONA	30	24*	32	32
ARKANSAS	45	39	49	33
CALIFORNIA	1	1	7	1
COLORADO	17*	24*	22	28
CONNECTICUT	34	19	2	24
DELAWARE	15	12	3	47
FLORIDA	17*	16	28	8
GEORGIA	17*	27	37	14
HAWAII	11	5*	10	40
IDAHO	44	40	35	41
ILLINOIS	5*	13	4	5
INDIANA	28	43[b]	27	12
IOWA	25*	23	18	25
KANSAS	38*	33	15	31
KENTUCKY	25*	18	45	23
LOUISIANA	5*	5*	44	20
MAINE	50	46	42	38
MARYLAND	13	11	9	18

[a] U.S. Department of Commerce and Bureau of the Census, *Statistical Abstract of the United States 1976* (Washington, D.C.: U.S. Government Printing Office, 1976); 1975 income figures p. 402, 1975 population figures p. 11.

[b] Rank is based on lower figure of salary range.

* Another state has the same rank.

State	Highest Appellate Courts	General Trial Courts	Per Capita Personal Income	Population
MASSACHUSETTS	16	15	14	10
MICHIGAN	5*	41	11	7
MINNESOTA	31*	29	23	19
MISSISSIPPI	38*	34*	50	29
MISSOURI	31*	31*	30	15
MONTANA	49	47*	29	43
NEBRASKA	22	14	13	35
NEVADA	35*	34*	8	46
NEW HAMPSHIRE	37	22	33	42
NEW JERSEY	8	8	5	9
NEW MEXICO	40*	31*	48	37
NEW YORK	2	2	6	2
NORTH CAROLINA	21	28	41	11
NORTH DAKOTA	43	34*	21	45
OHIO	17*	49[b]	19	6
OKLAHOMA	29	50[b]	34	27
OREGON	27	17	26	30
PENNSYLVANIA	3	4	20	4
RHODE ISLAND	33	21	17	39
SOUTH CAROLINA	24	10	47	26
SOUTH DAKOTA	48	44	36	44
TENNESSEE	9	9	43	17
TEXAS	10	26	31	3
UTAH	46	42	39	36
VERMONT	47	45	38	48
VIRGINIA	14	7	24	13
WASHINGTON	23	20	12	22
WEST VIRGINIA	35*	30	40	34
WISCONSIN	12	38	25	16
WYOMING	42	34*	16	49
COMMONWEALTH OF PUERTO RICO	43[c]*	44[c]		
DISTRICT OF COLUMBIA	5[c]	3[c]		
FEDERAL SYSTEM	1[c]	7[c]		

[b] Rank is based on lower figure of salary range.
[c] After all the states were ranked, these courts were ranked relative to the states.

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JUDICIAL SALARIES IN APPELLATE AND TRIAL COURTS

State	Supreme Court	Intermediate Appellate Court	General Trial Court	Date of Last Salary Change
ALABAMA	$ 33,500	$ 33,000	$ 25,000 (36,700)	1/20/75
ALASKA	52,992		48,576	7/1/75
ARIZONA	37,000	35,000	33,000	1/6/75
ARKANSAS	31,189		29,013	7/1/76
CALIFORNIA	62,935	59,002	49,166	9/1/76
COLORADO	40,000	37,000	33,000	7/1/76
CONNECTICUT	36,000		34,500	1/3/73
DELAWARE	42,000		39,000	7/1/75
FLORIDA	40,000	38,000	36,000	1/1/75
GEORGIA	40,000	39,500	32,500 (44,600)	7/1/75
HAWAII	45,000		42,500	1/1/76
IDAHO	31,500		28,500	7/1/76
ILLINOIS	50,000	45,000	37,000	7/1/75
INDIANA	38,100	38,100	26,500- 31,500	6/1/75
IOWA	39,000	36,000	33,072	7/1/76
KANSAS	34,000	33,000	30,500	1/10/77
KENTUCKY	39,000	37,000	35,000	6/30/76
LOUISIANA	50,000	45,500	42,500	7/1/76
MAINE	26,000		25,500	4/1/74
MARYLAND	44,100	41,400	39,200	7/1/75
MASSACHUSETTS	40,788	37,771	36,203	1/1/74
MICHIGAN	50,000	44,478	27,700 (45,622)	1/1/77
MINNESOTA	36,500		32,000	7/1/73
MISSISSIPPI	34,000		30,000	7/1/74
MISSOURI	36,500	34,000	31,000	9/28/75
MONTANA	27,000		25,000	7/1/75

Note: Salaries including supplements are shown in parentheses immediately beneath the figures for state-paid salaries.

State	Supreme Court	Intermediate Appellate Court	General Trial Court	Date of Last Salary Change
NEBRASKA	39,750		36,500 (38,000)	1/1/77
NEVADA	35,000		30,000	1/1/75
NEW HAMPSHIRE	34,060		33,956	7/1/75
NEW JERSEY	48,000	45,000	40,000	6/28/74
NEW MEXICO	33,500	32,000	31,000	7/1/76
NEW YORK	60,575	51,627	48,998	7/1/74
NORTH CAROLINA	39,816	37,224	32,016	7/1/76
NORTH DAKOTA	32,000		30,000	7/1/76
OHIO	40,000	37,000	23,500- 34,000	11/16/73
OKLAHOMA	38,000	35,000	21,000- 32,000	7/1/76
OREGON	38,720	37,510	35,090	7/1/76
PENNSYLVANIA	55,000	53,000	45,000	7/1/76
RHODE ISLAND	36,300		34,100	6/20/76
SOUTH CAROLINA	39,272		39,272	7/1/76
SOUTH DAKOTA	28,000		26,000	4/1/75
TENNESSEE	47,629	43,659	39,690	7/1/76
TEXAS	47,400	41,800 (46,400)	32,800 (45,400)	9/1/76
UTAH	30,000		27,500	7/1/75
VERMONT	29,900		25,800	7/1/74
VIRGINIA	44,000		41,000	7/1/76
WASHINGTON	39,412	36,325	34,250	7/1/75
WEST VIRGINIA	35,000		31,500	7/1/76
WISCONSIN	44,160		29,940 (39,938)	7/1/75
WYOMING	32,500		30,000	7/1/75
NATIONAL AVERAGE	39,761[a]	40,218[b]	33,616[a]	NA
DISTRICT OF COLUMBIA	51,750		49,040	2/20/77
FEDERAL SYSTEM	63,000	44,600	42,000	10/1/75
COMMONWEALTH OF PUERTO RICO	32,000		26,000	7/31/74

Note: Salaries including supplements are shown in parentheses immediately beneath the figures for state-paid salaries.

[a] Arithmetic average figured for the 50 states.

[b] Arithmetic average figured for the 27 states that have intermediate appellate courts.

Key to Abbreviations

AC	Appellate Court
AdDirCt	Administrative Director of the Court
ADistJ	Associate District Judge
AJ	Associate Judge, Justice
AppDiv	Appellate Division
AsstJ	Assistant Judge
CA	Court of Appeals
CC	Circuit Court
CCivA	Court of Civil Appeals
CCrA	Court of Criminal Appeals
Ch	Chancellor
ChC	Chancery Court
CirJ	Circuit Judge
CJ	Chief Judge, Justice
Co	County
CoC	County Court
CoDC	County District Court
Comm	Commissioner
Comp	Compensation
CP	Court of Common Pleas
CrC	Criminal Court
CrDC	Criminal District Court
CSA	Court of Special Appeals
Ct	Court
DC	District Court
DCA	District Court of Appeals
DistJ	District Judge
DpCJ	Deputy Chief Judge
Equity C	Equity Court
ExecOff	Executive Officer
GenSessCt	General Sessions Court
J	Judge
JC	Justice Courts
JDRC	Juvenile and Domestic Relations Court
JP	Justice of the Peace
Juv	Juvenile Court
MC	Municipal Court
PC	Probate Court
PCirJ	Presiding Circuit Judge
PJ	Presiding Judge
PoC	Police Court
SC	Superior Court
SCA	State Court Administrator
SCoC	Superior County Court
SpecJ	Special Judge
SrC	Surrogate Court
StIndustCt	State Industrial Court
SupCt	Supreme Court
Supp	Supplement
VCh	Vice Chancellor

Salaries — Courts of Appellate and General Jurisdictions and State Court Administrators

State	Highest Court CJ	Highest Court AJ	State Court Administrator	Intermediate Appellate Court		General Trial Court	
ALABAMA	33,500	33,500	AdDirCt 27,170 DepAdDirCt 21,500	CCivA CCrA	33,000 33,000	State CC Local Supps.	25,000 0-46.8% of state pd. salary* * Authority for local supps is based upon local acts and general acts of local application.
ALASKA†	52,992	52,992	50,784			SC	48,576
ARIZONA	37,000	37,000	32,659	CA	35,000	SC Comm.	33,000 26,400* * Comm. salary set by Presiding Judge not to exceed 80% salary of SC Judge
ARKANSAS†	34,024	31,189	25,064			CC ChC	29,013 29,013
CALIFORNIA	66,869	62,935	49,166	CA	59,002	SC	49,166
COLORADO	42,500	40,000	37,000	CA: CJ AJ	 37,500 37,000	DC	33,000
CONNECTICUT†	40,000	36,000	38,000* * SCA is also a SupCt AJ			SC: CJ J	 35,000 34,500

DELAWARE	42,500	42,000	**30,107**			SC: PJ 39,500 AJ 39,000 ChC: Ch 39,500 VCh 39,000
FLORIDA†	40,000	40,000	31,000	DCA	38,000	CC 36,000
GEORGIA	40,000	40,000	27,500	CA	39,500	SC 32,500 Local supps. to **12,000**
HAWAII	47,500	45,000	40,000			CC 42,500
IDAHO	31,500	31,500	30,000			DC 28,500
ILLINOIS†	50,000	50,000	45,000	AC	45,000	CC: J 42,500 AJ 37,000
INDIANA	38,100 Subsistence allowance 3,000	38,100 3,000	31,000 SupCtAdm 26,000 ExDir-StCt Administration	CA Subsistence allowance 3,000	38,100	CC+SC+CrimC 26,500-31,500* * depends on pop. of county
IOWA†	40,000	39,000	24,700	CA: CJ J	37,000 36,000	DC: CJ 34,072 AJ 33,072
KANSAS	35,000	34,000	30,500	**CA:** **CJ** **J**	**34,000** **33,000**	Dist J 30,500 Local supps. 500-1,500* *only certain urban counties A Dist J 22,000 Local supps. up to 8,400 Dist Magistrate Judge 9,000-16,250

† See Appendix I

State	Highest Court CJ	Highest Court AJ	State Court Administrator	Intermediate Appellate Court		General Trial Court	
KENTUCKY†	39,500	39,000	30,000	CJ J	37,500 37,000	CC	35,000
LOUISIANA	50,000	50,000	43,450	CA	47,500	DC base * where pop. exceeds 225,000	42,500 45,000*
MAINE†	27,500	26,000	24,500			SC	25,500
MARYLAND	45,200	44,100	39,200	CSA: CJ AJ	 42,500 41,400	CC	39,200
MASSACHUSETTS	42,236	40,788	30,691	AC: CJ AJ	 39,220 37,771	SC: CJ AJ	 37,771 36,203
MICHIGAN	**50,000**	**50,000** Comm 29,461 36,038	45,330	CA	44,478	CC Local supps. Recorders Court* * Detroit	27,700 3,500-**17,922+** **45,622+**
MINNESOTA	40,000	36,500	32,000			DC Ramsey, Hennepin, St. Louis counties DC other counties	33,500 32,000
MISSISSIPPI	CJ 35,000 PJ 34,500	34,000				CC ChC	30,000 30,000
MISSOURI	36,500	36,500 Comm 36,500	28,647	CA	34,000	CC	31,000

MONTANA†	28,000	27,000	18,000		DC 25,000
NEBRASKA	39,750	39,750	**33,700**		DC 36,500 Local supps. 1,500* * where pop. over 150,000
NEVADA†	35,000	35,000			DC 30,000
NEW HAMPSHIRE	34,268	34,060	27,500		SC: CJ 34,164 AJ 33,956
NEW JERSEY†	50,500	48,000	AdDirCt **40,416-54,563** Acting AdDirCt 45,000	SCAppDiv 45,000	SC: (assignment judges) 43,000 SC 40,000 CoC 40,000
NEW MEXICO	33,500	33,500	28,920	CA 32,000	DC 31,000
NEW YORK	63,143	60,575	57,000	AppDiv, SupCt 1, 2, 3, 4th Depts PJ 55,266 AJ 51,627	SC 1st through 11th Judicial Districts 48,998
NORTH CAROLINA†	40,860	39,816	34,104	CA: CJ 38,256 AJ 37,224	SC 32,016
NORTH DAKOTA†	33,500	32,000	28,800		DC 30,000
OHIO†	43,500	40,000	**37,232**	CA 37,000	CC Pleas 23,500-34,000
OKLAHOMA	38,000 CCrA 38,000	38,000 CCrA 38,000	35,000	CA 35,000	DC: DistJ 32,000 ADistJ Pop. over 300,000 28,000 30,000 to 300,000 26,000 10,000 to 29,999 24,000 Under 10,000 21,000

† See Appendix I

State	Highest Court CJ	Highest Court AJ	State Court Administrator	Intermediate Appellate Court	General Trial Court
					SpecJ 21,000 (lawyer and nonlawyer)
OREGON	38,720	38,720	36,132	CA 37,510	CC 35,090
PENNSYLVANIA	57,500	55,000	42,500	SC: PJ 54,500* AJ 53,000* * same salary for Commonwealth Ct.	CP: PJ 45,000-47,500* J 45,000 * depends on number of judges and population
RHODE ISLAND	37,400	36,300	**25,109-29,263**		SC: PJ 35,200 AJ 34,100
SOUTH CAROLINA†	45,049	39,272	31,127		CC 39,272
SOUTH DAKOTA†	29,000	28,000	25,000		PCirJ 27,000 CirJ 26,000 Law Trained Magistrate up to 22,500 Magistrate part-time 500-9,298
TENNESSEE†	51,598	47,629	43,659	CA: PJ 45,247* AJ 43,659* * same figures for CCrA	CC 39,690 ChC 39,690 CrC 39,690 EquityC 39,690
TEXAS	47,900 CCrA 47,900	47,400 CCrA 47,400		CCivA: CJ 42,300 AJ 41,800 Local supps. to 5,600 for CJ 4,600 for AJ	DC state salary 32,800 Local supps. up to **12,600** Same figures for CrDC

UTAH†	30,000	30,000	27,500			DC: CJ &Chmn.Jud.Cncl. 28,500 J 27,500
VERMONT	31,400	29,900	25,800			SCC: PJ 26,800 J 25,800 AsstJ 25 per day
VIRGINIA†	45,000	44,000	34,987			CC 41,000
WASHINGTON†	39,412	39,412	30,825	CA	36,325	SC: 34,250 ProTemJ 82.20 per day ProTemAtty 137.00 per day
WEST VIRGINIA	35,000	35,000	31,500			CC 31,500
WISCONSIN	49,920	44,160	40,404			CC: State pay 29,940 Local supps. to 9,998
WYOMING	32,500	32,500	25,000			DC 30,000
DISTRICT OF COLUMBIA	**52,250** D.C. Court of Appeals	**51,750**	**49,040** ExecOff of D.C. Courts			SC: CJ **49,540** AJ **49,040**
FEDERAL SYSTEM	65,600	63,000	AdDirCt 42,000	CA	44,600	DC 42,000
PUERTO RICO †	32,600	32,000	30,600			SC 26,000 DC 19,300
†See Appendix I						

Salaries — Courts of Special or Limited Jurisdiction

Circuit and district courts shown here are of limited or special jurisdiction. Courts of general jurisdiction are shown in the preceding section.

State	Family Courts Juvenile Domestic	Probate Courts Surrogate Courts	Justice Courts Justice of Peace	County Courts	Circuit or District Courts	Municipal Courts Police Courts	Common Plea Courts
ALABAMA		PC 300-45,000			DC 22,500 Local Supp. up to 9,000	Recorders Ct. 500-22,000	
ALASKA †				Magistrate Ct. 6,464-30,590	DC 41,068		
ARIZONA			JP **8,600-17,000** based on registered voters in precinct			PoC **600**-36,525 set by Mayor and City Council	
ARKANSAS †			1,200-2,400	**9,000-24,000**		MC 2,400-**31,500** PoC 1,200-3,600* City Court 1,200-3,600 *Beebe County	100-900 based on cases* * This court is presided over by the CoC Judge who receives this in add. to his regular salary.
CALIFORNIA			JC 5,670 36,580			MC 45,235	
COLORADO †	Juv* 33,000 SC* 33,000 *Denver	PC* 33,000 * Denver		Denver 30,000 Others 3,000-30,000		MC 500-'30,000	

CONNECTICUT†	Juv: CJ 32,500 J 28,500	PC Fees up to 34,500					CJ 32,500 J 28,500
DELAWARE	Family Court: CJ 38,500 AJ 38,000		JP 13,000			MC Wilmington CJ 32,748 AJ 31,579 AJ 13,684* * part-time	CP CJ 38,500 AJ 38,000
FLORIDA†				Pop. less than 40,000: 26,000 Pop. more than 40,000: 34,000			
GEORGIA	Juv: Full-time **22,000-36,200** Part-time 1,226-21,000	5,400-32,450		2,400-33,450		up to 32,968	
HAWAII					DC 40,000		
IDAHO					Magistrate Div. of DC Lawyers full-time **24,255** Lay full-time **13,230-18,742** part-time **9,450-10,500**		
ILLINOIS							
INDIANA	Juv 26,500 - 31,500* * depends on pop. of cnty.	PC 26,500 - 31,500* * depends on pop. of cnty.		23,500		MC: PJ 30,500 AJ 29,500	

† See Appendix I

State	Family Courts Juvenile Domestic	Probate Courts Surrogate Courts	Justice Courts Justice of Peace	County Courts	Circuit or District Courts	Municipal Courts Police Courts	Common Plea Courts
IOWA †					ADistJ 25,500	Magistrates full-time 25,500 part-time 6,750	
KANSAS						Municipal Cts.* 0-18,678 * by city	
KENTUCKY†		Co PC up to 14,300	JC: Co. over 250,000: 9,600 Co. 60,000-250,000: 3,600 Co. 20,000-60,000: 2,400 Co. less than 20,000: 1,200			PoC: 1st class cities 25,000 2nd class cities 21,500	Quarterly Courts up to 14,300
LOUISIANA	Juv 42,500		JP (average) 1,200-1,800			New Orleans: MC 34,000 Traffic Ct. (N.O.) 34,000 City Court Under 100,000 pop. 7,600 - 11,200 plus fees Over 100,000 pop. New Orleans 35,500 Parish Court Jefferson 30,000-44,500	

MAINE †		PC 4,500-12,020			DC: CJ 24,000 DpCJ 23,500 J 23,000		
MARYLAND		Orphans Court part-time: salaried 600-18,500 others **15-25 per day**			DC: CJ 41,400 AJ 33,300		
MASSACHUSETTS	Juv: Boston 31,738 others 30,168	PC: CJ 32,944 AJ 31,738 part-time* 11,343 * 1 part-time J		Hampden Co. Housing Ct. 36,203 City of Boston Housing Ct. J 36,203 AJ 32,583	DC: CJ 31,738 AJ 30,168 part-time 9,171-12,189 spec. per diem 61-100	MC: (Boston) CJ 31,738 AJ 30,168	Land Court 36,203
MICHIGAN		PC **9,000-41,202*** * some part-time			DC: 24,930 local supp. up to 12,500	MC some part-time **3,000-33,000**	Detroit **39,000**
MINNESOTA		PC 33,500* * Hennepin and Ramsey Counties only		27,500-29,000* * learned in the law 23,500* * not learned in the law		MC 29,000 * Hennepin and Ramsey Counties only	

†See Appendix 1

State	Family Courts Juvenile Domestic	Probate Courts Surrogate Courts	Justice Courts Justice of Peace	County Courts	Circuit or District Courts	Municipal Courts Police Courts	Common Plea Courts
MISSISSIPPI	Family Court 29,000* * Harrison Co			5,400-29,000* * depends on population			
MISSOURI		PC 16,200-31,000			St. Louis Ct. of Criminal Corrections 29,000	Magistrate Ct: 19,200-25,400 PC up to 28,000	
MONTANA			JP up to 16,500			City Ct up to 15,600	
NEBRASKA	Juv 36,500 Supp* 1,500 * pop. over 150,000	PC 25,440-30,740 based on pop. AJ up to 19,080				MC 33,000	Workmen's Comp Ct 34,250
NEVADA †			JC set locally 421-23,500			MC set locally 1,200-26,500	
NEW HAMPSHIRE		PC 11,357			DC up to 30,000* depending on pop. and caseload	MC 150-5,100* *depending on pop.	
NEW JERSEY†	JDRC 40,000	SrC up to 27,000		CoDC 37,000		MC up to 27,500	
NEW MEXICO		PC 1,000-7,040		Magistrate Ct. 5,100-19,950		MC Albuquerque only: 28,139	Small Claim Ct. Albuquerque only: 20,000
NEW YORK	Family Court NYC 42,451 other 36,000-48,998	SrC NYC 48,998 others 36,000-48,998		(outside NYC) 36,000-48,998	Nassau CoDC PJ 44,500 AJ 42,000	NYC Civil Ct 42,451 NYC CrimCt 42,451	Ct. of Claims PJ 51,627 AJ 48,998

					Suffolk Co PJ 45,330 AJ 40,990		
NORTH CAROLINA†					DC CJ 25,776 AJ 24,744		
NORTH DAKOTA			CoJC up to 7,000	Of increased jurisdiction: 15,500-23,000 others: 7,600-9,900		MC set by gov. body of each munic.	
OHIO †	Juv 23,500-34,000 DR 23,500-34,000	PC 23,500-34,000		8,000 part-time		MC 21,000-31,000 part-time 11,000-20,000	
OKLAHOMA	Oklahoma has special courts manned by District Judges who receive only expenses. Courts of Tax Review and Bank Review.					MC set locally by ordinance amount unavailable	StIndustCt 30,000
OREGON			JP 960-11,750		DC 31,460	MC & City Cts 3,000-23,000	Tax Court 35,090
PENNSYLVANIA			JP 10,500-19,500 excluding Philadelphia depending on magisterial district size			MC Philadelphia Atty. Judges: PJ 41,500 AJ 40,000 Lay Judges: 21,000 Traffic Ct. PJ 22,000 AJ 21,000	
† See Appendix I							

State	Family Courts Juvenile Domestic	Probate Courts Surrogate Courts	Justice Courts Justice of Peace	County Courts	Circuit or District Courts	Municipal Courts Police Courts	Common Plea Courts
RHODE ISLAND	Family Court CJ 35,200 AJ 34,100	PC up to 11,440 Probate Judges are part-time			DC CJ 32,472 AJ 31,372		
SOUTH CAROLINA†	Family Ct. set locally	PC set locally		set locally		MC set locally	
SOUTH DAKOTA†			Lay Magistrate 500-9,298				
TENNESSEE †	JC set locally	PC set locally		GenSessCt 1,800-36,380		MC set locally	
TEXAS* * all set locally	DR and JC same as DC in county up to **45,400**	PC 5,764-39,088	JP 18.00-24,000	"Constitutional" 600-40,000 Civil, Crim, Crim Appeals, Statutory: 5,764-39,088		MC 0-26,500	
UTAH†	Juv 27,500		JP fees determined by city comm., town council. Subject to review annually			City Cts set by city ordinance 15,000-24,750	
VERMONT		PC 5,700-21,600			DC: CJ 23,700 J 22,700		

VIRGINIA †	JDRC DC 29,900-36,900				GenDC 29,900-36,900 Part-time 8,396-27,830		
WASHINGTON †			JP based on pop. If Justice receives more than 15,000 is considered full-time. Range: 1,000-15,000		DC 29,000	MC Seattle 34,250 other 9,000* * not to exceed Superior Ct	
WEST VIRGINIA						Magistrates 5,000-17,500* * based on pop.	
WISCONSIN				state pay: 13,728 county pay: 13,728 local supps up to 12,482		MC set locally	
WYOMING			JP **7,500-15,000*** *Ceilings- Board of Cnty Comm. may fix salaries not to exceed			MC set locally	
FEDERAL SYSTEM				Court of Claims 44,600	Court of Customs and Patent Appeals 44,600	Customs Court 42,000	
PUERTO RICO † †See Appendix 1			JP 6,000-8,400			MC 12,000-13,000	

Appendices

Appendix I

Future Salaries and Pending Legislation

Alaska

Due to the repeal of legislation CH 205 (SCCS HCSSB 404) ASL 1975 "An act relating to the compensation and retirement of judicial officers, legislators, and public officers and employees; and legislative per diem; and providing for an effective date," salaries of judges hired after October 15, 1976, will be as follows: Supreme Court, $44,000; Superior Court, $40,000; District Court, $33,500.

Several pieces of legislation which would affect judicial salaries have been introduced. HB 279 and SB 305 are identical bills with two major provisions: 1. Return the judicial salary scale to the level of July 1, 1975. That is, all new judges would be paid at the same rate as judges appointed prior to October 16, 1976. 2. For all judges appointed after the effective date of the legislation, a 7½ percent contribution would be required for the retirement program.

SB 90 provides for a 7½ percent contribution for retirement for all judges appointed after its effective date.

HB 278 calls for a geographic cost-of-living salary differential for judges based on the differentials paid to state employees in various locations.

HB 455 calls for a 5 percent increase for state employees. Since the Supreme Court generally follows these salaries in determining magistrates salaries, it is assumed that if HB 455 passes, the magistrates salaries will likewise increase by 5 percent.

Arkansas

Salary increases will be as follows: Supreme Court Chief Justice, FY 77-78 $37,426 and FY 78-79 $39,927; Supreme Court Associate Justice, FY 77-78 $34,308 and FY 78-79 $36,023; Circuit Court and Chancery Court FY 77-78 $31,914 and FY 78-79 $33,510; State Court Administrator FY 77-78 $27,570 and FY 78-79 $28,949. Fiscal year begins July 1.

Colorado

SB 545 currently in the state appropriations committee would give the chief justice and Supreme Court $5,000 increases; Court of Appeals, District Court (also Denver juvenile, probate and superior), and all full-time county judges $3,000. Other county judges would receive proportional increases. If adopted, these increases would be effective July 1, 1977.

Connecticut

The Court of Common Pleas, the Juvenile Court, and the Probate Courts will be merged into one court, the Superior Court, as of July 1, 1978, at which time the lower courts will attain the salary of the present Superior Court judges over a period of five years.

Florida

Proposed legislation recommends a 15 percent raise which would bring salaries up to the following: Supreme Court, $46,000; District Courts of Appeal, $43,700; Circuit Court, $41,400; County Court (county population over 40,000) $39,100 and (county population under 40,000) $29,900.

Illinois

HB 1329 seeks increases as follows: Supreme Court, $62,500; Appellate Court, $55,000; Circuit Court, $49,000, associate judges $47,000; court administrator, $55,000. If passed, the bill will become effective July 1, 1977.

Iowa

In Iowa, there is a bill to increase judicial salaries as follows: Supreme Court chief justice $50,000, associate justices $45,000; Court of Appeals chief judge $43,500, associate judges $42,500; District Court chief judge $42,000, judges $40,000; limited jurisdiction judges, full-time $33,000, part-time $8,000.

Kentucky

All the courts now listed as Limited or Special Jurisdiction courts (Quarterly Courts, County Probate Courts, Police Courts, Justice Courts) will be merged into District Court January 1, 1978. Salaries for District Court judges will be $27,500.

Maine

L.D. No. 401 seeks an across the board $7,000 increase for all judges excluding Probate Court.

Montana

SB 71 would make the following salaries effective July 1, 1977: Supreme Court chief justice, $37,000; Supreme Court associate justice, $36,000; District judge, $35,000.

Nevada

SB 424 will affect salaries from and after the first Monday in January 1979: Supreme Court justices would receive $46,000; district judges would receive $43,000.

New Jersey

Legislation seeking to increase by $6,000 the salary of every judge and legislation seeking to increase the salaries of County District Court judges from $37,000 to $40,000 are pending in committee.

North Carolina

House Bill 51 would provide salary increases for judges ranging from a low of 18% for the Chief Justice to a high of 29% for the district court judges. The raises will be divided equally over a two year period, being implemented on July 1, 1977, and July, 1978.

North Dakota

Salary increases effective July 1, 1977, are as follows: Supreme Court chief justice, $38,300; Supreme Court associate justices, $36,800; District Court judge, $34,500; State Court Administrator $30,240.

Ohio

HB 280 seeks the following salaries: Supreme Court chief justice, $54,375; Supreme Court judges, $50,000; Court of Appeals, $46,250; Court of Common Pleas, $28,500; Probate Court, $28,500.

South Carolina

A statewide family court system will begin operation on July 1, 1977; the family court judges will be state salaried at $35,345. Act No. 690, 1976 Acts and Resolutions.

HB 2210 seeks the following salaries: Supreme Court chief justice, $51,124; Supreme Court associates, $45,000; Circuit Court, $45,000; Family Court, $38,500; court administrator $31,127.

South Dakota

The following salaries are effective July, 1977: Supreme Court chief justice $34,000; Supreme Court justice $32,000; Circuit Court presiding justice, $31,000; Circuit judge, $30,000; and court administrator, $25,000.

Tennessee

The Consumer Price Index publication states that the percentage increase was 5.8 percent over 1975; Tennessee is working with the assumption that the judicial salaries will be increased by 5.8 percent in July 1977.

Utah

The following salaries will be effective May 10, 1977: Supreme Court chief justice, $36,000; Supreme Court associate justices, $35,500; District Court chief judge and Chairman, Utah Judicial Council, $34,500; District Judges, $33,500; Juvenile Court, $33,500; City Court, $30,150.

Vermont

The following salaries are effective July 1, 1977: Supreme Court chief justice, $33,250; Supreme Court associates, $31,750; Superior County Court, $30,000; Probate Courts, $6,160 to $23,330; District Court, $29,000; court administrator, $30,000.

Virginia

Legislation has been adopted that will make the following salaries effective July 1, 1977: Supreme Court chief justice, $46,000 plus $4,000 in lieu of travel expense; Supreme Court associate justices, $45,000 plus $4,000 in lieu of travel expense; Circuit Court judges, $42,000, District Court judges (General District andJuvenile and Domestic Relations), $31,700 to $37,800.

Washington

The Salary Commission has recommended the following salaries: Supreme Court, $45,000; Court of Appeals, $42,000; Superior Court, $39,000; District Court (full time) $33,000; and State Court Administrator, $35,100.

Puerto Rico

SB 214 proposes the following salaries: Supreme Court chief judge, $32,600; Supreme Court associate judge, $32,000; Superior Court, $30,000 to $31,800; District Court, $22,900 to $27,400; Municipal judges, $15,000 to $18,000; justice of the peace, $9,000 to $11,400.

Appendix II
Floating Salary Statutes

California, Massachusetts and Tennessee provide for judicial salary increases based on a consumer price index. California utilizes the California consumer price index while Massachusetts and Tennessee use the U.S. consumer price index. Maryland provides automatic salary increases for the judiciary based on general salary increases awarded to all state employees. Rhode Island provides for longevity increases as shown in this section. The statutory authority for these automatic salary increases follows.

California: The California Government Code § 68203, 1964, as amended, (Supp 1976) provides:

"In addition to the increase provided under this section on September 1, 1968, on the effective date of the 1969 amendments to this section and on September 1 of each year thereafter, the salary of each justice and judge named in Sections 68200 to 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year."

The judges named in 68200 to 68202 include the Chief Justice of California, associate justices of the Supreme Court, justices of courts of appeal, superior court judges and municipal court judges.

Assembly Bill 3844, enacted as Chapter 1183, Statutes of 1976, amends Government Code 68203 to freeze judicial salaries (for all but justice court judges) at the September 1, 1976, level (as reflected in this survey) until July 1, 1978, at which time judicial salaries will be increased by the Consumer Price Index (cost of living) for the preceding calendar year (1977) but not to exceed 5 per cent. Annual adjustments per this formula will thereafter be made on July 1 of each year.

Maryland: Maryland Code, Courts and Judicial Proceedings, § 1-703, 1974, Pay Plan: Automatic Salary Increases, provides:

"(a) Pay plan. — Section 27, Article 64A of the Code applies to judicial salaries, except for its provisions authorizing emergency salary increases with approval of the Board of Public Works.

"(b) Automatic salary increases. — Whenever a general salary increase is awarded to state employees, each judge shall receive the same percentage increase in his salary as awarded to the lowest step of the highest salary grade for classified employees in the state salary plan."

Massachusetts: Massachusetts General Laws Annotated Chapter 30 § 46, 1946, as amended, (Supp 1976-77) provides:

"The personnel administrator shall annually determine the percentum difference between the average cost of living for the next preceding calendar year and the average cost of living for the calendar year next preceding the calendar year during which the weekly rates prescribed in the above salary schedule were last revised, both as shown by the United States Consumer Price Index for such years, and shall prepare and submit to the general court a report of such determination within a reasonable time after said Index for the next preceding calendar year has become available. Whenever such determination indicates a percentum increase or decrease of at least three percentum, such report shall be accompanied by a recommendation for legislation to provide a corresponding percentum increase or decrease in the salaries of all employees in the service of the commonwealth and paid from the treasury thereof . . . Whenever such determination indicates a percentum increase of at least three percentum, as hereinbefore described, such report shall be accompanied by a recommendation of legislation to provide a corresponding percentum increase in the salaries of the chief justice and associate justices of the supreme judicial court, the appeals court, the superior court and the municipal court of the city of Boston, the judges and associate judges of the land court, the chief judge and the judges of probate and insolvency, the chief justice and the justices of the district courts other than the municipal court of the city of Boston, the justices and special justices of the Boston Juvenile Court, the justices of the Worcester, Bristol County and Springfield juvenile courts, and special justices of the district courts, including the municipal court of the city of Boston, such increase to take effect as of the beginning of the first payroll period of the year in which such report is submitted."

Rhode Island: Personnel Rules and Regulations of the State of Rhode Island provide:

Judges as well as all other court personnel are entitled to longevity increments. Longevity after seven years 5%, after eleven years 10%, after fifteen years 15%, after twenty-five years 20%.

Tennessee: Tennessee Code Annotated, § 8-2303, 1973, as amended (Supp 1975) provides:

"Beginning September 1, 1974, the compensation of judges and chancellors shall be the base salaries fixed in this law adjusted to reflect the percentage of change in the per capita personal income of the State of Tennessee, as defined and published by the United States department of commerce, between that of the calendar year 1970 and the calendar year next preceding September 1 of the year for which the salaries are to be paid. The adjustments shall occur on September 1, 1974 and on September 1 of every year thereafter for the ensuing year commencing September 1."

COUNCIL OF STATE COURT REPRESENTATIVES

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Alaska
Roger G. Connor
Associate Justice, Supreme Court

Arizona
Frank X. Gordon, Jr.
Justice, Supreme Court

Arkansas
C. R. Huie, Exec. Secy.
Judicial Dept., Supreme Court

California
Donald R. Wright

Colorado
Harry O. Lawson
State Court Administrator, Jud. Dept.

Connecticut
John P. Cotter
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Delaware
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Florida
Arthur J. England, Jr.
Associate Justice, Supreme Court

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Iowa
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Montana
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Nevada
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North Carolina
Bert M. Montague
Dir., Adm. Office of the Courts

North Dakota
William L. Paulson
Associate Justice, Supreme Court

Ohio
C. William O'Neill
Chief Justice, Supreme Court

Oklahoma
B. Don Barnes
Justice, Supreme Court

Oregon
Loren D. Hicks
State Court Administrator

Pennsylvania
Samuel J. Roberts
Justice, Supreme Court

Rhode Island
Walter J. Kane
Ct. Administrator, Supreme Court

South Carolina
J. Woodrow Lewis
Chief Justice, Supreme Court

South Dakota
Fred R. Winans
Associate Justice, Supreme Court

Tennessee
Paul R. Summers
Exec. Secy., Supreme Court

Texas
Thomas M. Reavley
Associate Justice, Supreme Court

Utah
Thornley K. Swan
Chief Judge, Utah Judicial Council

Vermont
Albert W. Barney, Jr.
Chief Justice, Supreme Court

Virginia
Albertis S. Harrison, Jr.
Justice, Supreme Court

Washington
Orris L. Hamilton
Justice, Supreme Court

West Virginia
Fred H. Caplan
Chief Justice, Supreme Court

Wisconsin
Nathan S. Heffernan
Justice, Supreme Court

Wyoming
Rodney M. Guthrie
Chief Justice, Supreme Court

District of Columbia
Theodore R. Newman, Jr.
Chief Judge, Court of Appeals

American Samoa
K. William O'Connor
Chief Justice, High Court

Guam
Joaquin C. Perez
Chief Judge, Island Court

Puerto Rico
Jose Trias Monge
Chief Justice, Supreme Court

Virgin Islands
Cyril Michael
Presiding Judge, Municipal Court

(d)

REPORT OF THE EXECUTIVE COUNCIL OF THE CONFERENCE OF CHIEF JUSTICES IN RESPONSE TO THE DEPARTMENT OF JUSTICE STUDY GROUP REPORT ON THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

The Conference of Chief Justices appreciates the opportunity to comment on the Report to the Attorney General of the Department of Justice Study Group Local Governments for Crime Control and Justice System Improvement.

We understand that Congressional proposals are still in the planning stage and anticipate the opportunity to study and comment on such proposals as they are submitted in draft form, as well as subsequent proposals from the Department of Justice.

We support the thrust of the major recommendations in the present Study Group report and in particular applaud (1) the new focus on improving and strengthening the elements of the criminal justice system rather than on "reducing crime"; (2) the emphasis on improved management and coordination functions; and (3) the call for assured minimum funding of court programs.

LONG TERM NEEDS

Our principal concern is that the report, with its focus on criminal justice, does not address the long-term needs of our nation's total justice system. From the judiciary's point-of-view, criminal and civil justice are inextricable. A broader focus is needed if state courts are to play their fundamental role in improving the administration of justice, including the criminal and juvenile components, and assume a major share of the burden now carried by the federal courts.

We do not feel that the Study Group has adequately addressed the need for a basic national policy on improvement of the total justice system and creation of the appropriate national institutions and procedures by which this policy could be implemented in keeping with the constitutional principles of federalism and the separation of powers.

There is a proper federal role in improving the justice system but it must be performed in a manner that respects the identity and independence of state courts. Federal funding must be looked upon as a means of adding strength to state judicial systems and not as a method of extending federal authority to areas better managed on a state or local basis. The Deparment of Justice should not be in a position, through funding decisions or otherwise, to set policies for the independent judiciaries of the states.

DISCRETIONARY FUNDS

The Conference of Chief Justices also is concerned that the Study Group report does not provide for continuation of national discretionary funds to provide basic support for the National Center for State Courts, the research and development arm of the state judiciaries, and for other court support organizations such as the National College of the State Judiciary. In our view, these institutions are essential to implementation of national policy for improving the administration of justice. The National Center offers a key mechanism by which federal funds can appropriately be used to assist state under present court budgets, the state court systems collectively. We strongly courts, providing resources far beyond the means of any individual state or, favor a direct Congressional appropriation towards the support of the National Center for State Courts similar to the support provided for the Federal Judicial Center.[1]

NATIONAL MODELS

We are further concerned with the Study Group recommendations for national program models. Individual states often have problems not susceptible to solution on the national level. Nor would programs for their solution, however necessary for the State involved, be appropriate for national replication. Emphasis should be on supporting solutions deemed desirable by the responsible State judicial officials and such programs should not be penalized by denying them "incentive" funding.

[1] Such a suggestion was made by Attorney General Griffin Bell in his address to the Conference of Chief Justices on August 2, 1977, at their annual meeting in Minneapolis, Minnesota.

STATE COURT FUNDING

Another basic concern of the Conference of Chief Justices is that the direct funding approach, even with minimum funding assured to the courts, could result in thousands of poorly conceived or ineffectual projects at the local court level that could do little more than add personnel or pick up routine costs. Court systems operate under state statutes and rules that place responsibility for change at the state level. Federal funding should be provided in a manner that encourages the responsible court officials to implement constructive programs meeting the priority needs of state-wide judicial systems. It also should encourage the desirable national trend toward unification both as to administration and funding of state court systems.

SPECIAL CIRCUMSTANCES

Federal funding of court programs presents a special set of issues that should be dealt with outside the framework of support for the executive branch components of the criminal justice system. In addition to the concerns expressed above, we base this position on the following facts:

1. Courts are the function of the independent judicial branch of State government and are not functions within the executive branch's criminal justice system. They stand between the accused and defender on one side and the police, prosecutorial and correctional officials on the other. Protection of the judiciary's independence is essential under the separation of power provisions of each State constitution.
2. Unlike most police, prosecutorial and correctional agencies, State and local courts are part of a State-wide system with lines of administrative and rule-making authority running from the State level (Supreme Court–Judicial Council) to trial courts at the county and municipal levels.
3. Criminal and juvenile proceedings are not isolated functions which can or should be treated independently of the total justice system.
4. The judicial branch traditionally has been underfunded at the State and local levels and does not have sufficient capacity for new program development or to adequately fund national institutions essential to judicial improvement and reform.

RECOMMENDATIONS OF CCJ

Given these facts and concerns, the Conferencee of Chief Justices makes the following recommendations with reference to the Study Group report:

1. The judicial branch should receive at the State level as directly as possible an adequate share of approximately 30 percent of each State's direct formula funds or an equivalent sum in national discretionary grants.
2. The National Center for State Courts, as previously indicated, should receive a direct Congressional appropriation toward its support similar to the financial support provided for the Federal Judicial Center.
3. The highest court or judicial council should have state-wide authority for initiating, administering, and disbursing funds for programs improving the State-wide justice system. All of the Study Group's arguments against fragmentation and for coordination support this approach as do all recent studies which point to the State-level approach as providing the highest potential for demonstrable improvements in State judicial systems.
4. Federal funds should not be limited to programs for criminal and juvenile justice in such a manner as to prevent needed improvement in the overall judicial system. This will be even more true if State courts are to assume a larger share of the caseload relative to the Federal judicial system.
5. Provision should be made for a national discretionary fund to help support national institutions of the State court systems that cannot be adequately funded through State judicial budgets.
6. Further action should be taken to enunciate a Federal policy for improvement of the nation's total justice system and plan for creation of an appropriate agency to direct and fund programs to implement that policy.

SPECIFIC COMMENTS ON STUDY GROUP REPORT

In light of these recommendations the Conference of Chief Justices has these comments on the general and specific recommendations of the Study Group:

General policy recommendations

1. We support the refocusing of the national research and development role with the understanding that this role, as it applies to the courts, not be limited to the criminal justice system but address the needs of each State's total justice system.

2. We support the shift to direct formula grants with the understanding that the judiciary receive approximately 30 perecnt of each State's allocation; that the judiciary's funds be administered at the State level, and that State courts themselves, rather than the Deparment of Justice, determine which programs best suit their individual needs.

3. We agree that there should be a "Federal government response to the problems of crime and the inefficient administration of justice." Federal funding under LEAA has been essential to the development of effective national institutions of the State judiciaries as well as major programs for improvement of individual State court systems. Funds for these programs would not have been provided by State or local legislative bodies which traditionally have kept the judiciary on limited budgets. Nor is there reason to believe that such funds will be made available in the future from State and local sources.

4. We agree that the two major strategic components of the federal role should involve (1) development of national priorities and program strategies and (2) the provision of financial assistance to state and local governments. But we believe these statements should be amended to recognize the unique position of the judicial branch in the criminal justice system, i.e., to recognize the courts as a separate branch of government and not a "component" of the criminal justice system. Implicit in this recognition would be other elements of the CCJ positions stated above, i.e., the need for involvement of non-federal organizations such as the National Center for State Courts in formulting and implementing national policy for improvement of the entire justice system; the need for allocating a specific percentage of funds to the judicial branch; and the need for state level direction of court program development and funding.

5. We concur in general with the Study Group's basic conclusions on the unwieldiness of present LEAA administrative procedures. However, we support state-wide planning for the judicial branch of government which, as noted above, differs significantly in its administrative and rule-making structure from executive branch criminal justice agencies. The problems encountered by the present executive branch state planning agencies develop principally out of factors involving differing state and local responsibilities for the criminal justice system and the separation of powers. These considerations either do not apply or do not apply with equal force in comprehensive planning for the judicial branch alone which can and should plan for all judicial branch programs, not just those financed by federal funds.

SPECIFIC RECOMMENDATIONS

1. We approve Recommendation No. 1 as conditioned by the CCJ policy statements above, i.e., principally to ask that the refocused national research and development role recognize the needs of the total justice system, not just criminal justice, and that state court systems and their national organizations play a major role in initiating programs for the judicial branch.

2. We qualifiedly approve Recommendation No. 2 provided the demonstration programs for the judicial branch are not limited to those initiated or developed at the federal level which could amount to federally established priorities for the needs of individual states court systems. (We qualifiedly approve the Study Group's second general recommendation (page 14) on direct assistance to state and local governments provided, as previously indicated, that the assistance include an appropriate share for judicial systems, administered at the state level, and that national program models are not limited to those developed by the federal funding agency.)

3. We approve Recommendation No. 3 but with the understanding that federal financial assistance to the judicial branch not be limited to criminal justice programs but support improvement of the entire state court system.

4. We qualifiedly approve Recommendation No. 4 provided an equitable percentage of the funds is received by the state court systems.

5. We qualifiedly approve Recommendation No. 5 provided Federal funding assistance, for reasons previously mentioned, is not limited to nationally developed programs or even to locally developed programs warranting national im-

plementation. Many locally developed programs may not warrant national implementation but offer excellent solutions to local problems, since all states are not alike, nor even are all courts within a state alike and amendable to only national solutions.

6. We strongly approve Recommendation No. 6. The courts must have an identified or minimum level of support that adequately recognizes their needs, their key role in the state justice system, and the fact that they are generally inadequately funded by the states.

7. We approve Recommendation No. 7 with the understanding that the responsible judicial authorities provide coordination with the judicial branch and between the judicial branch and executive branch criminal justice agencies.

8. We qualifiedly approve Recommendation No. 8 because we perceive difficulties in arriving at an effective definition of what constitutes an "improvement" and how the provision is to be monitored or enforced. Such procedures could make this option satisfactory or undesirable. Certainly the judicial branch, rather than the general government, should be responsible for determining what constitutes an "improvement" in programs of the judicial branch.

CONCLUSION

We believe the Study Group should give further consideration to the formulation of a federal policy on improvement of the total justice system and to the structuring of federal programs that can achieve national goals for the delivery of justice while being true to the constitutional principles of federalism and the separation of powers.

The preservation and the independence of state judicial systems are the imperatives which must undergird all joint efforts to deal with problems relating to the effective administration of justice and access to the courts.

Respectfully submitted.

C. WILLIAM O'NEILL, Ohio, *Chairman.*
JAMES DUKE CAMERON, Arizona, *Vice-Chairman.*
LAWRENCE W. I'ANSON, Virginia, *Sr. Vice Chairman.*
JAY A. RABINOWITZ, Alaska, *Deputy Chairman.*
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WILLIAM H. D. FONES, *Tennessee.*
DANIEL L. HERRMANN, *Delaware.*
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JOE W. SANDERS, *Louisiana.*
ROBERT J. SHERAN, *Minnesota.*

AUGUST 3, 1977.

(c)

[Resolution of the Conference of Chief Justices (Aug. 3, 1977)]

RESOLUTION

Be it *Resolved*, That the Conference of Chief Justices approve the recommendations of the Committee of Federal-State Relations concerning the following principles:

(1) Every citizen should have access to our court system as the ultimate forum for the resolution of unavoidable disputes and the protector of his constitutional rights.

(2) The demand for access to our court systems in this country can be expected to increase significantly in the years ahead—a demand which will be implemented by plans for prepaid legal insurance and other methods of making legal services more generally available.

(3) Efforts to divert, where appropriate, the processes of dispute resolution from the federal and state court systems through devices such as arbitration are to be encouraged and accelerated, but such diversion is only a partial answer to the problem.

(4) Notwithstanding reasonable expectations of dispute diversion, it can be anticipated that our federal court system will continue to be overburdened unless increased recognition is given to the role of state courts.

(5) Our state court systems are able and willing to provide needed relief to the federal court system in such areas as:

(A) Adequate review of state court criminal proceedings to assure that federally defined constitutional rights have been fully protected;

(B) Increased participation in the resolution of federal-question cases;

(C) The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts.

(6) National funding to the states should include procedures and allocations to assure that the state court systems receive an equitable share of the funds without prejudice to the independence of the judiciary.

(7) Increased communication between congressional committees considering legislation affecting state courts and such entities as the Conference of Chief Justices will be useful.

APPENDIX 9

(*a*)

THE NEEDS OF THE FEDERAL COURTS

Report of the
Department of Justice Committee
on
Revision of the Federal Judicial System

JANUARY 1977.

PREFACE

In his address to the Sixth Circuit Judicial Conference on July 13, 1975, President Gerald R. Ford expressed his deep concern about the problems confronting the federal judicial system. At the President's direction, Attorney General Edward H. Levi appointed within the Department of Justice a Committee on Revision of the Federal Judicial System. With Solicitor General Robert H. Bork serving as Chairman, the Committee conducted numerous studies and discussed various proposals through June 1976, at which time this Report was prepared. Since then some of the Committee's proposals have been modified to take account of recently-enacted laws and other developments. These changes are reflected in the recommendations offered in the Report.

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REPORT ON THE NEEDS OF THE FEDERAL COURTS

Introduction

Our federal courts have served us so well for so long that we have come to take their excellence for granted. We can no longer afford to do so. The federal court system and the administration of justice in this nation need our attention and our assistance. Law and respect for law are essential to a free and democratic society. Yet without a strong and independent federal judicial system we can maintain neither the rule of law nor respect for it.

The central functions of the federal courts established under Article III of the Constitution of the United States are to protect the individual liberties and freedoms of every citizen of the nation, to give definitive interpretations to federal laws, and to ensure the continuing vitality of democratic processes of government. These are functions indispensable to the welfare of this nation and no institution of government other than the federal courts can perform them as well.

The federal courts, however, now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. This is not a crisis for the courts alone. It is a crisis for litigants who seek justice, for claims of human rights, for the rule of law, and it is therefore a crisis for the nation.

In this century, and more particularly in the last decade or two, the amount of litigation we have pressed upon our federal courts has skyrocketed. In the fifteen year period between 1960 and 1975 alone, the number of cases filed in the federal district courts has nearly doubled, the number taken to the federal courts of appeals has quadrupled, and the number filed in the Supreme Court has

doubled. Much of this litigation is more complicated because of the rising complexity of federal regulation.

Despite this rising overload, we are asking the judges of the federal courts to perform their duties as effectively as their predecessors with essentially the same structure and essentially the same tools. They are performing wonders in coping with the rising torrent of litigation, but we cannot expect them to do so forever without assistance. This Report sets forth proposals for legislation that will enable our federal courts, now and in the future, to continue to carry out their essential mission.

I. The Threat of Rising Workload

Overloaded courts are not satisfactory from anyone's point of view. For litigants they mean long delays in obtaining a final decision and additional expense as court procedures become more complex in the effort to handle the rush of business. We observe the paradox of courts working furiously and litigants waiting endlessly. Meanwhile, the quality of justice must necessarily suffer. Overloaded courts, seeking to deliver justice on time insofar as they can, necessarily begin to adjust their processes, sometimes in ways that threaten the integrity of the law and of the decisional process.

District courts have delegated more and more of their tasks to magistrates, who handled more than one-quarter of a million matters in fiscal 1975 alone. Time for oral argument is steadily cut back and is now frequently so compressed in the courts of appeals that most of its enormous value is lost. Some courts of appeals have felt compelled to eliminate oral arguments altogether in many classes of cases. Thirty percent or more of all cases are now decided by these courts without any opportunity for the litigant's counsel to present his case orally. More disturbing still, the practice of delivering written opinions is declining. About one-third of all courts of appeals' decisions are now delivered without opinion or explanation of the results. See, *e.g.*, 538 F. 2d 307-348 (1976).

These are not technical matters of concern only to lawyers and judges. They are matters and processes that go to the heart of the rule of law. The American legal tradition has insisted upon practices such as oral argument and written opinions for very good reason. Judges, who must be independent and are properly not subject to any other discipline, are required by our tradition to confront the claims and the arguments of the litigants. They

must demonstrate to the public that they are not acting out of whim, caprice, or mere personal preference. Our tradition requires that judges explain their decisions and thereby demonstrate to the public that those decisions are supported by law and reason. Continued erosion of traditional practices could cause a corresponding erosion of the integrity of the law and of the public's confidence in the law.

These problems are only a few of the most visible symptoms of the damage that is being done to our federal court system by having more and more cases thrust upon it. There are others. Courts are forced to add more clerks, more administrative personnel, to move cases faster and faster. They are losing time for conference on cases, time for reflection, time for the deliberate maturation of principles. We are, therefore, creating a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judiciary to a bureaucracy. This development, dangerous to every citizen in our democracy, must be arrested and reversed. And it must be done in ways that will preserve the quality of justice in our federal courts.

The solutions proposed in this Report are broad in concept and in effect. Remedies of smaller scope, remedies that tinker here and there for the sake of minor and temporary relief, are simply not adequate to meet a problem of broad scale. Caseloads will continue to increase dramatically according to almost all predictions. The solutions offered, therefore, are designed not only to afford immediate relief to the courts and the public but to provide for the future. Their adoption should at once preserve our federal courts for their central task of guarding human rights and democratic government while improving the quality of justice, as well as cutting the time and cost of securing it, for every person who goes to federal court.

II. Remedial Measures

To cope with the crisis of volume, three basic approaches are recommended. First, we must enlarge the resources of the federal courts to handle the caseload—by adding judges and creating new tribunals. Second, we must lighten the load of work that falls upon the courts by reducing the categories of matters they must entertain and decide. With regard to the Supreme Court, this requires rescinding their obligatory jurisdiction in certain types of appeals. With respect to the district courts, it involves the elimination of diversity jurisdiction; it also requires that litigants exhaust alternative avenues of relief before bringing certain cases into the federal courts. Third, we must adopt measures to enhance the effectiveness and the efficiency of the system. This includes improving the way we select judges and creating a capability in the system to anticipate and deal with new developments in federal law that are likely to have serious impact upon the volume or nature of the federal courts' work.

A. *Enlarging the Capacity of the Federal Judicial System*

1. *Additional judges, better selected*

One response to the problem of overload is the appointment of more federal judges. Bills creating more judgeships for our district courts and courts of appeals (S. 286, 287) have been pending in Congress for several years. Provisions for more judgeships should be enacted without further delay.

The quality of federal justice depends on the quality of federal judges. There are currently 596 judgeships in the various federal court systems under Article III of the Constitution, including the Supreme Court, the Circuit Courts of Appeals, the District Courts, the Court of Claims, the Court of Customs and Patent Appeals,

and the Customs Court. Although the quality of the federal bench is in fact high and perceived to be high, few would deny that there is room for improvement on both the trial and appellate levels. Our efforts must be to assure excellence in judicial appointments.

The Constitution provides that federal judges are to be appointed by the President, "by and with the advice and consent of the Senate." In fact, however, there has developed over the years a system of judicial selection that has come to be known as "Senatorial courtesy." This term refers to a veiled selection process that is heavily political and grounded in outdated notions of senatorial patronage. This practice is consistent with neither the interests of the American public nor the needs of the federal judicial system.

For the purpose of reassessing the current selection procedures, the Committee recommends creation of a Commission on the Judicial Appointment Process. This group should include representatives of diverse segments of the legal community and the public at large. It should recommend: (1) standards to be utilized in the selection of candidates for judicial appointment; (2) useful roles for the various individuals and institutions concerned with the selection of federal judicial candidates; and (3) procedures and structures to attract and retain highly qualified judicial personnel.

Although it is clearly essential today that Congress increase the number of judges to cope with the rising tide of litigation, and that they be judges of high quality, such an approach does not promise a long-term solution. Swelling the size of the federal judiciary indefinitely would damage collegiality, an essential element in the collective evolution of sound legal principles, and diminish the possibility of personal interaction throughout the judiciary. These developments would be harmful

to the quality of judicial decision and would also increase the likelihood of conflicting decisions between district courts and between the courts of appeals for the various circuits. That would lessen public confidence in the courts, create confusion about legal rules, and increase the amount of litigation and its cost to the public.

Moreover, a powerful judiciary, as Justice Felix Frankfurter once observed, is necessarily a small judiciary. That is so for several reasons. Large numbers dilute the great prestige that properly attaches to a career on the federal bench and, given the low compensation that we provide for federal judges, that dilution will make it increasingly more difficult to attract first-rate men and women. We will never pay the incomes to judges that they could earn in other pursuits and we must not create conditions that require us to settle for second best in the federal courts.

Over the long run, therefore, we need more than additional judgeships. We cannot go on expanding the size of the federal judiciary indefinitely. We must also reexamine the responsibilities with which our courts are charged to ensure that this precious and finite resource can continue to function in the best interests of all our citizens.

2. *Non-Article III Tribunals*

The proposal with the most significance for the future of our federal court system is the creation of new tribunals to shoulder the enormous and growing burden of deciding the mass of technical or repetitious factual issues generated by federal regulatory and welfare programs.

Few changes in our government during the past 50 years have been so remarkable as the growth of federal welfare and regulatory programs. Federal legislation now addresses our most basic needs: air, water, fuel, electric power, medicines, food, education, and safety. Special federal

programs provide assistance for the poor, the jobless, the disabled, and other needy citizens. These crucial matters deserve special attention. Yet this vast network of federal law has been entrusted, in large part, to a judicial system little changed in structure since 1891. Review of agency action, and lawsuits arising directly under federal statutes, now constitute as much as one-fifth of the business of the federal courts, and litigation under new legislation will make the effect even more substantial. For example, the Mine Safety Act potentially could generate more than 20,000 full jury trials each year in the district courts, a burden that would overwhelm the courts and defeat rights the new legislative programs are designed to extend.

There is no immediate prospect that this process of adding new federal programs will end. Whatever we may think of that trend, we should at a minimum take care that we do not swamp the federal courts and with them the needs of the litigants. It can only be disheartening for a litigant whose claim requires no more than a thoughtful and disinterested factfinder to be forced into competition with all other civil and criminal business for the precious time of an Article III judge. Although Article III courts are uniquely qualified to protect individual freedoms, interpret federal laws, and preserve democratic processes of government—the indispensable functions of the federal courts—they are not unique in their ability to adjudicate relatively unsophisticated, repetitious factual issues. Many other kinds of tribunals perform that function as accurately and as well.

The Committee, therefore, proposes creation of a new system of tribunals that can handle claims under many federal welfare and regulatory programs as capably as the Article III courts and with greater speed and lower cost to litigants. The shifting of these cases to the new tribunals will also preserve the capacity of the

Article III courts to respond, as they have throughout our history, to the claims of human freedom and dignity.

The cases that should be transferred to new tribunals are those that involve repetitious factual disputes and rarely give rise to important legal questions. Among these are, for example, claims arising under the Social Security Act, the Federal Employers Liability Act, the Consumer Products Safety Act, and the Truth-in-Lending Act. These matters have great individual and social significance but the questions they raise could be handled as effectively and justly by trained administrative judges as by Article III judges burdened with the pressing business of a general criminal and civil jurisdiction.

None of the special competence of our present Article III courts would be lost to litigants in these new tribunals. If a substantial question of constitutional or statutory interpretation arose in the administrative system, that question could be referred to the appropriate Article III court for decision. Review of that legal determination could be sought by petition for certiorari in the Supreme Court. Litigants would retain every important right they now possess and would gain much in savings of time and money.

New administrative tribunals also could provide much needed flexibility. For example, an administrative court system could consist of an Article I trial division, in which all cases would be filed in the first instance, and an administrative court of appeals. The trial division could serve the function now served by administrative law judges in many cases, thereby compressing and expediting internal agency review. Procedures before the trial court would vary with the complexity of the case and the needs of the parties. Many cases could be handled informally and without counsel unless the claimant desired one, giving some of the advantages of

small claims courts. Other cases, involving technical matters, might require rigorous procedural and evidentiary rules, but could be more easily handled with the assistance of a permanent expert staff.

These proposals avoid a major pitfall of comparable proposals, for the administrative court would not be specialized by a single subject matter. The administrative judge would be able to maintain a broad perspective while developing increased familiarity and expertise in dealing with administrative cases. In addition, the caseload would be sufficiently general to attract judges of high caliber.

Specialized courts and boards already play an important role in our governmental system. The Tax Court, for example, has provided a useful alternative to suits in federal district courts. The Armed Services Board of Contract Appeals and other similar boards resolve the great majority of contract disputes involving the government. The Board of Immigration Appeals provides valuable service in the specialized matters within its jurisdiction. And administrative tribunals have long been accepted in foreign countries such as Belgium, Italy, and France. These tribunals may serve as useful models for creation of a system of administrative courts.

The gains for Article III courts would be substantial. Implementing this proposal now would relieve them each year of more than 20,000 cases, perhaps more than 30,000 cases. Avoiding a growing and ultimately crushing burden in the future is even more important. It is essential that litigation under future federal programs be directed to the tribunal in which it can be handled most effectively. For too long, Congress has ignored the effect of new federal programs on our overworked judicial system.

Although this proposal is simple in concept, implementing it will, of course, require much experimentation. For that reason, the Committee suggests that the proposal be referred to the Council on Federal Courts (proposed later in this Report) for development of additional details. The plan might then be implemented in stages, beginning with a pilot study conducted by assigning to these new tribunals a few categories of cases, such as Social Security disability claims and Mine Safety Act disputes, in a limited number of federal districts. The pilot effort could be reviewed carefully, both to ensure that no injustices occurred and to find the best procedures. The system of new tribunals should then be gradually expanded, both by subject matter and geographically, until it has attained its full potential.

B. *Reducing the Burdens on the Federal Judicial System*

Other measures must also be taken to curtail the flow of cases into the court system, or into particular courts where the pressures of excessive volume are most acute. The jurisdiction of the federal courts has been revised several times in the past, always with beneficial results. It is now necessary again. Approaches must vary, of course, depending on whether they relate to the jurisdiction of the Supreme Court, the courts of appeals or the district courts.

1. *Supreme Court: Elimination of Mandatory Appellate Jurisdiction*

The business of the Supreme Court, like that of the other federal courts, has expanded significantly in recent years. After growing steadily for three decades, the number of filings in the Supreme Court began to accelerate ten years ago, increasing from 2,744 cases in the 1965 Term to 4,186 in 1974. Fortunately, Congress has given the

Court discretionary (or *certiorari*) jurisdiction over much of its docket, enabling the Court to hold nearly constant the number of cases (150 to 160) it decides on the merits after oral argument. These are the cases that necessarily consume the bulk of the Justices' time. Nevertheless, despite the broad scope of its discretionary jurisdiction, the Supreme Court is needlessly burdened by appeals the Court has no power to decline. The Committee therefore recommends that the remaining mandatory appellate jurisdiction of the Supreme Court be abolished.

During the past several years Congress has taken significant steps to reduce the burden of the Supreme Court's mandatory docket, most notably by eliminating in large part the cases heard by three-judge district courts and appealed directly to the Supreme Court. The Court is still required, however, to consider on the merits cases from the state court systems in which a federal law has been invalidated or a state law upheld in the face of a federal constitutional attack. In addition, the Court must consider on the merits appeals from federal courts of appeals and, more significantly, from district courts when a federal statute has been held to be invalid.

Obligatory Supreme Court review of appeals from state courts and federal courts of appeals should be eliminated, as the Federal Judicial Center's Study Group on the Caseload of the Supreme Court concluded four years ago. While these cases have typically accounted for only a small percentage of the Supreme Court's business, the number of cases appealed from the federal district courts and courts of appeals will increase as a result of the virtual elimination of three-judge district courts. The Committee believes there is no reason why they should be subject to special treatment.

Nor is there sufficient reason to require the Supreme Court to review on the merits all cases in which the highest court of a state invalidates a federal law or upholds a state statute in the face of a federal constitutional attack. Mandatory Supreme Court review in these circumstances implies that we cannot rely on state courts to reach the proper result in such cases. This residue of implicit distrust has no place in our federal system. State judges, like federal judges, are charged with upholding the federal constitution. Indeed, the Supreme Court itself now summarily disposes of nearly all these state cases, deciding them without briefing or argument. In effect, the Supreme Court is exercising discretionary jurisdiction although the statute makes review mandatory. It is time to conform the law to the reality.

Congress should, therefore, eliminate those sections of the United States Code imposing mandatory review jurisdiction and make the certiorari practice applicable throughout the Supreme Court's jurisdiction. There is no reason to presume that issues raised on appeal are more important than issues raised on certiorari. We now trust the Supreme Court to decide important issues; we should trust it to decide which cases are most in need of review.

2. *Relief for the Courts of Appeals and District Courts*

In order to provide essential relief to the lower federal courts, (1) diversity jurisdiction should be abolished and (2) state prisoners should be required to exhaust their state remedies before starting a federal suit to attack prison conditions.

a. *Elimination of Diversity Jurisdiction*

Claims under state law are the basis of the vast majority of lawsuits in this country. When the litigants are residents of the same state, these cases are decided in state

tribunals, and no one objects to that. However, when the litigants are citizens of different states, such suits have long been allowed to enter the federal courts, even though they involve only questions of state law. These diversity cases account for a large part of the federal district courts' caseload.

More than 30,000 diversity cases were filed in the district courts during fiscal 1975, constituting almost one-fifth of the total filings. During the same year, diversity cases accounted for more than 25 percent of all jury trials and, notably, 68 percent of all civil jury trials. Appeals from diversity cases constitute slightly more than 10 percent of the filings in the courts of appeals.

The burden diversity jurisdiction imposes on the federal courts can no longer be justified. State courts, not federal courts, should administer and interpret state law in all such cases. Federal judges have no special expertise in such matters, and the effort diverts them from tasks only federal courts can handle or tasks they can handle significantly better than the state courts. Federal courts are particularly disadvantaged when decision is required on a point of state law not yet settled by the state courts. The possibilities both of error and of friction between state and federal tribunals are obvious.

The modern benefits of diversity jurisdiction are hard to discern. The historic argument for diversity jurisdiction—the potential bias of state courts or legislatures—derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. As the Chief Justice has remarked, "[c]ontinuance of diversity jurisdiction is a classic example of continuing a rule of law when the reasons for it have disappeared." Other Justices of the Supreme Court, as well as prominent legal scholars and practitioners, agree. Diversity cases involving less than

$10,000 have been left to the States for many years without noticeable difficulty. The additional burden on the state courts would be small since the cases would be distributed among the fifty state systems. What is needed therefore is full elimination of diversity jurisdiction.

b. *Requiring Exhaustion of State Remedies in Prisoner Civil Rights Act Cases*

Prisoner cases now constitute a significant part of the district courts' work. In fiscal 1975, prisoners filed 19,307 petitions, approximately 16 percent of the new civil filings. Of these, about 11,000 were *habeas corpus* petitions or motions to vacate sentence. The remainder consisted primarily of civil rights actions, which normally attack the deficiencies of prison conditions.

Most civil rights actions of this type are filed by state prisoners. The 6,000 filings by state prisoners are more than triple the number filed five years ago and 27 times the number filed in 1966. Only a small percentage go as far as an actual trial, but the burden on the federal courts from these cases is significant and it appears to be growing.

H.R. 12008, introduced on February 19, 1976, authorizes the Attorney General of the United States to institute suits on behalf of state prisoners, after notice to prison officials, and to intervene in suits brought by private parties upon a certification by the Attorney General "that the case is of general importance." The bill also provides that "[r]elief shall not be granted" in individual actions under 42 U.S.C. 1983 unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available. An exception is made when "circumstances [render] such administrative remedy ineffective to protect his rights."

When prisoner complaints are based on allegations of system-wide problems, representation by the Attorney General should correct the situation. Exhaustion of state administrative remedies would eliminate from the federal courts at least the cases decided favorably to the prisoner. Unsuccessful litigants might continue to press their claims in federal courts, but the court should have the benefit of a more complete record and more focused issues. The bill will also encourage the states to develop more responsive grievance procedures. It is the responsibility of the states to provide adequate penal facilities and treatment for state prisoners and, in the initial stages, the administrative process is better suited than a federal court to handle typical prisoner complaints. New procedures instituted by the Federal Bureau of Prisons seem to be supplying a useful grievance mechanism for federal prisoners and reducing the number of federal suits.

C. *A Planning Capability for the Federal Judicial System*

The work of the federal courts will continue to change rapidly and substantially. If we are to act responsibly, we must anticipate new problems and develop solutions before the difficulties confronting the courts reach an advanced stage.

To satisfy the immense demands on them, the federal courts need the very best structure and the most effective procedures the nation can provide. They must be able to respond as soon as trends in the volume and nature of the courts' work can be identified. To have this, the courts will need a permanent agency that has the responsibility for making proposals to the Congress and to the Judicial Conference of the United States.

The concept of creating a planning capability for the third branch of government is not novel. Six years ago Chief Justice Burger urged consideration of the idea of forming a Judiciary Council of six members, comprised

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of two appointees of each of the three branches of Government. The Council would report to the Congress, the President and the Judicial Conference on the wide spectrum of developments that affect the work of the federal courts.

A slightly different version of the proposal was advanced in 1975 by the Commission on Revision of the Federal Court Appellate System, which supported creating a standing body to study and make recommendations regarding the problems of the federal courts.

Whatever its form, an agency is needed to project trends, foresee needs and propose remedial measures for consideration by the profession, the administration, the Congress and judicial groups. The judicial planning agency could draw on work done by Committees on the Judiciary of both Houses, the Federal Judicial Center, the Judicial Conference of the United States, the Department of Justice and private groups. The role of systematically auditing the functions of the federal courts must be an ongoing effort that permits the members of a permanent panel to develop deep, expert knowledge and a sure feel for what the courts need today and are likely to need tomorrow. This is not now being done in any coordinated or coherent way.

The Committee therefore recommends creation of a Council on Federal Courts.

III. The National Court of Appeals

After extensive study and hearings the Commission on Revision of the Federal Court Appellate System proposed in 1975 creation of a National Court of Appeals, a new seven-member tribunal, standing between the present regional Courts of Appeals and the Supreme Court. The Commission viewed the purpose of the tribunal as filling the need to resolve conflicts in rulings among the courts

of appeals on issues of national law and to enlarge the capacity of the federal judicial system to make definitive declarations in significant cases of national law, whether or not intercircuit conflicts were involved. It was not a goal of the proposal—which is now under review by a Senate subcommittee in the form of two bills (S. 2762, S. 3423)—to provide relief for the very heavy workload of the Supreme Court. Under the current version of the plan the National Court of Appeals would get its docket from the cases referred to it by the Supreme Court, with the possibility of ultimate return to that Court.

While recognizing the thought and effort behind the Commission report, the Committee opposes creation of a new National Court of Appeals at this time.

Adding a National Court of Appeals almost surely would increase the already heavy burden on the Supreme Court. The Justices, experienced at simply accepting or declining to accept cases for review, would have to decide in addition whether cases should be reviewed initially by the Supreme Court or referred to the National Court of Appeals. That determination would require considerable study to identify the pivotal issues of cases and to understand their ramifications. There would, inevitably, be disagreements about which of three choices, rather than the present two, was best. The problems inherent in that process are considerable. The quite natural effect of expanding the options will be to increase the complexity of the choice and thereby increase the time needed for these threshold determinations, which the Supreme Court is now able to make rapidly. The large growth in Supreme Court filings would then become substantially more of a burden than it now is.

Moreover, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Supreme Court to ensure that an issue had not been finally resolved, or even dicta pronounced, in a manner contrary to its own views. An erroneous decision by a National Court of Appeals obviously carries far graver consequences than a similar decision by one of the present courts of appeals. The necessity of granting plenary review of a decision of the National Court might arise frequently, particularly if the judicial philosophies of the two benches should differ to any significant degree. That would impose upon many litigants four separate stages of federal adjudication with the expense and delay we all want to avoid, and a still further increase in the burden upon the Supreme Court.

In light of these dangers and others, a new National Court should be created only if the current need is clear and compelling. It is not. Rather than giving relief to the Supreme Court, or the other existing courts of appeals, the National Court of Appeals is aimed at increasing national appellate capacity in order to decide cases that involve conflicts in the circuits and significant issues that the Supreme Court, at least for a time, would not address. But there is little evidence that the Supreme Court has refrained from resolving any significant number of inter-circuit conflicts that involve recurring issues or questions of general importance. Moreover, a high proportion of the other cases deemed suitable for the National Court of Appeals involve specialized areas of tax or patent law. If more nationally-binding decisions are needed in these fields, the proper approach is to create national courts of tax and patent appeals. This not only would increase national appellate capacity for tax and patent cases, but also would benefit the courts of appeals by relieving them of such cases. Any other important cases that the Supreme Court should, but cannot now, decide could be handled under the existing system as the Supreme Court is relieved of its mandatory appellate jurisdiction.

Before we create a new national court with power and prestige exceeded only by the Supreme Court itself, we must be able to say that we are taking this momentous step because other remedial measures have been found wanting and because the gains clearly offset the disadvantages. At this time, such a statement cannot be made. The subject may warrant further study after the other proposals in this Report have been implemented; until then the National Court of Appeals proposal should not be adopted.

CONCLUSION

In speaking about improving the federal courts, we are considering how we can make a great institution greater. The plain answer is to give the courts the capacity to do the vital work the country expects of them. The dramatic increase in the business of the federal courts shows that we as a people believe in the rule of law and trust our courts to give us justice under law. It also shows that in the 201st year of the country's life we are still devoted to the Constitution's basic concept that the judicial branch is an equal partner in our government.

The American people expect that the courts will be reasonably accessible to them if they have claims they want judged. They also expect that the courts will not be so costly that they price justice out of reach. And they expect, too, that the courts will not be so slow that justice will come too late to do any good. People also have a right to expect that when they go into the federal courts, whether as litigant, witness or juror, they will be treated with decency and dignity. In short, they are entitled to believe that the courts will be humane as well as honest and upright.

To ensure that the federal court system continues to meet these legitimate expectations, the Commitee urges that serious consideration be given to the recommendations made here. They are necessary and will immeasurably strengthen our system of justice.

(b)

PART VII

Diversity Jurisdiction

UP TO THIS POINT, save for the brief excursion into motor vehicle accident litigation, I have been dealing entirely with categories where federal jurisdiction is predicated upon the federal nature of the claim. We come now to the one area where it rests upon the identity of the parties—the long controverted subject of diversity jurisdiction. As Professor Wechsler wrote in 1948, diversity and alienage jurisdiction "pose the deepest issue of the uses of the federal courts. In these instances the jurisdiction is employed not to vindicate rights grounded in the national authority but solely to administer state law."[1] Urging a thorough re-examination of the jurisdiction but recognizing the lack of political attractiveness in such an effort, he thought "[s]upport must come . . . from the disinterested sources, the judiciary and the bar—including the law members of the Congress—content to view the issue in its right dimensions as a problem of the uses of the federal courts."[2] The increase in "rights grounded in the national authority" during the last quarter-century has affected the issue of diversity jurisdiction in two ways: The new tasks given the federal courts have heightened the required showing of justification for retaining diversity; and many cases that could previously have come within federal cognizance only because of diversity are now subject to federal jurisdiction by virtue of this growth of federal law.[3]

1. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 235 (1948).
2. *Id.* at 240.
3. Professor Wechsler called attention to the possibility of this development, *id.* at 239. Judge J. Skelly Wright has recognized that "the prominence of diversity as a legal institution is dwindling today because of the rapidly expanding coverage of federal law," *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L.

I am not certain that I qualify as "disinterested" on the issue of diversity jurisdiction; at the very least I would be subject to a peremptory challenge. My first signed piece of legal writing, nearly forty-five years ago, concluded by noting that the growth in the work of the federal courts in administering federal law would "not abate, since it is responsive to deep social and economic causes," that only diversity jurisdiction "is out of the current of these nationalizing forces," and that "[t]he unifying tendencies of America here make for a recession of jurisdiction to the states . . . ."[4] Some might regard that statement as showing remarkable prescience, others as indicating that I never learn. Although I do not like to be cast in the role of a Cato, I cannot but affirm my deep conviction that these thoughts, believed to be true in 1928, are *a multo fortiori* so in 1972.

We may begin by considering the dimensions of the problem. Of the 96,173 civil cases filed in the district courts in 1972, 24,109 were predicated on diverse citizenship.[5] Ten years ago they comprised 18,359 out of 61,836 civil filings.[6] While their proportion and ratio of increase have thus been less than for civil filings as a whole, a head

REV. 317, 329–30 (1967), but curiously refuses to draw the conclusion that this substantially weakens the case for diversity jurisdiction. While he thinks that diversity jurisdiction will ultimately shrivel as a result of "the rapidly expanding coverage of federal law," *id.*, there is no evidence that it will, in absolute as distinguished from relative terms. *See* pp. 140–41 *infra*. On grounds I am unable to comprehend, Professor Moore also considers the extension of federal law to be an argument in favor of retaining diversity, *see* Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 20 (1964).

4. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928). The article called attention to a 1914 report of a distinguished committee including such now legendary figures as Charles W. Eliot, Louis D. Brandeis and Roscoe Pound, which had stated that "the concurrent jurisdiction of state and federal courts on the ground of diversity of citizenship often causes much delay, expense and uncertainty." PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE 28 (1914). While one source of the "uncertainty" was removed by Erie R.R. v. Tompkins, 304 U.S. 64 (1938), another was substituted. *See* pp. 142–43 *infra*.

5. A.O. ANN. REP., Table C2 (1972). The largest categories are insurance, "other contract actions," motor vehicle personal injury, and "other personal injury." These comprise 82% of the total.

6. A.O. ANN. REP., Table C2, at 196 (1962).

of jurisdiction constituting 25% of the civil filings cannot be ignored as *de minimis* or as of sharply decreasing significance. Opponents of diversity are not required to shoulder the burden of showing it is "working badly"[7] which some have tried to cast upon them. Rather the proponents have the burden of showing sufficient reasons for its retention at a time when the federal court system is severely pressed.

The first and greatest single objection to the federal courts entertaining these actions is the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state. There is simply no analogy between today's situation and that existing in 1789 when, in the words of the ALI Study, "[s]ince diversity of citizenship was one of the major heads of federal judicial business, it contributed to the expansion of the federal courts throughout the nation" and thus "enhanced awareness in the people of the existence of the new and originally weak central government."[8] Without diversity jurisdiction, the circuit courts created by the First Judiciary Act would have had very little to do. Perhaps this is as good an explanation as any why the statute made a broad grant of diversity jurisdiction, although this had been hotly contested and not very staunchly supported in the ratifying conventions,[9] including the invocation of a jurisdiction supposedly based on prejudice against out-of-staters by a citizen of the state where the suit was brought.

As indicated in an earlier portion of these lectures, the problem of the volume of cases filed is not simply in the district courts, where the addition of judges may afford opportunity for relief, but in the courts of appeals and the Supreme Court. In 1972 diversity accounted for 18% of civil appeals to the courts of appeals; if habeas corpus and other types of federal and state prisoner petitions were excluded from the "civil" category, the proportion would be 24%.[10] A significant number of these cases must translate themselves into petitions for certiorari, although almost none are granted.[11] For the moment I

7. J. P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 8 (1963).
8. ALI STUDY 101.
9. Friendly, *supra*, 41 HARV. L. REV. at 487–99.
10. A.O. ANN. REP., Table B7 (1972).
11. Although the Supreme Court does not record the number of petitions

shall defer discussing whether *anything* is accomplished by having these cases in federal court. Certainly the accomplishment is materially *less* than when a federal question is present, and if anything must be eliminated from the business of the federal courts, beyond the categories discussed in the preceding section, diversity cases are the prime candidate. Mr. Justice Frankfurter said that "[a]n Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."[12] Twenty-three years after that statement, the time for such relief has come.

A second difficulty with diversity jurisdiction is that in such cases federal courts cannot discharge the important objective of making law. When the state law is plain, the federal judge is reduced to a "ventriloquist's dummy to the courts of some particular state."[13] Much worse are the cases where, in Judge Wright's phrase, "state law on the point at issue is less than immaculately clear."[14] Whereas the highest court of the state can "quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,"[15] a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest state court would ultimately decide.[16] In

for certiorari where jurisdiction is based solely on diversity of citizenship, the following data on full opinions by the Court shows how few are deemed worthy of the Court's attention:

Term	Total Dispositions with Full Opinions	Diversity Case Dispositions with Full Opinions
1966	119	4
1967	127	3
1968	120	4
1969	94	0
1970	122	2
1971	151	2

These statistics appear in the annual Supreme Court Note in the *Harvard Law Review*.

12. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 651 (1949) (dissenting opinion).
13. Richardson v. CIR, 126 F.2d 562, 567 (2d Cir. 1942) (Frank, J.).
14. J. Skelly Wright, *supra*, 13 WAYNE L. REV. at 321.
15. *Id.* at 322.
16. Judge Wright refers to Judge Medina's opinion in Merritt-Chapman & Scott Corp. v. Public Util. Dist. No. 2, 319 F.2d 94 (2d Cir. 1963), *cert. denied*, 375 U.S. 968 (1964), which contains 71 citations of

other cases what passes as an attempt at prediction is a mere guess or fiat without any basis in state precedents at all.[17] All such cases are pregnant with the possibility of injustice.[18] Furthermore, the very availability of litigation in a federal court postpones an authoritative decision by the state courts that otherwise would be inevitable.[19] Diversity jurisdiction thus "can badly squander the resources of the federal judiciary" since it uses them in a way which precludes the attainment of one of a judge's most important functions, namely "to establish a precedent and organize a body of law."[20]

New York decisions, many of New York statutes and public documents, 38 to cases from other jurisdictions, and 23 to treatises or law review articles. *See also* Evans v. S. J. Groves & Sons Co., 315 F.2d 335 (2d Cir. 1963), where we had to decide three unsettled questions of New York tort law, one of which had given rise to three separate opinions in the Appellate Division for the First Department and another of which provoked a *dubitante* concurrence by Judge Swan.

The difficulty in determining questions of state law in certain cases has led the Fifth Circuit to abstain in a diversity action where state law on the governing point was particularly unclear. United States Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.) (en banc), *cert. denied*, 377 U.S. 935 (1964). The case was finally decided after the Texas Supreme Court affirmed dismissal of a declaratory judgment action brought by the parties to clarify Texas law. 358 F.2d 714 (5th Cir. 1966). While this approach causes much delay and arguably runs counter to Supreme Court decisions, Note, *Abstention Under* Delaney: *A Current Appraisal*, 49 TEXAS L. REV. 247 (1971), it underscores the difficult posture of the federal courts when left to guess on issues of unclear state law.

17. In one such case I began the opinion by saying "[o]ur principal task . . . is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir.), *rev'd for consideration of a recent California decision, relevant but not dispositive, which had not been brought to our attention*, 365 U.S. 293 (1961), *adhered to*, 290 F.2d 904 (2d Cir.), *cert. denied*, 368 U.S. 901 (1961). Judge Clark has recently used a rather similar phrase in Allstate Ins. Co. v. Employers Liab. Assurance Corp., 445 F.2d 1278 (5th Cir. 1971). In Holt v. Seversky Electronatom Corp., 452 F.2d 31 (2d Cir. 1971), our court had to predict how the New York Court of Appeals would choose between the conflicting views of Corbin and Williston on a point of contract law.
18. *See* ALI STUDY 100.
19. *See* J. S. Wright, *supra*, 13 WAYNE L. REV. at 322–23, and cases there cited. *See also* Employers Liab. Assurance Corp. v. Travelers Ins. Co., 411 F.2d 862, 865–66 (2d Cir. 1969).
20. J. S. Wright, *supra*, 13 WAYNE L. REV. at 323. *See also* ALI STUDY 99.

What, then, are the arguments for retaining diversity jurisdiction for the vast bulk of cases which could have been brought in the state courts? We can dispose of some of them quite speedily. Whatever force there may ever have been in the claim, recently repeated by Professor Moore,[21] that diversity jurisdiction was needed to prevent inferior federal judges from becoming narrow technicians, mired in the intricacies of admiralty, bankruptcy, copyright and patent law, with consequently diminished attractiveness in joining the federal bench, and in my view there never was much,[22] it has been wholly drained by the proliferation of new federal statutes and the birth of the federal common law.[23] The overview I have given of federal jurisdiction in the 1970's or, for that matter, a thumbing of the Federal 2d and Federal Supplement reports, affords conclusive evidence that one ailment from which federal judges are not suffering is lack of breadth which diversity is needed to cure. To the contrary, the dullest cases, at least in the truly civil field, are generally those arising from the diversity jurisdiction. Perhaps Professor Moore would find fascination in construing the opaque language of a fire insurance policy or determining the sufficiency of the evidence that a car was on the wrong side of the road, but most federal judges do not.

Related to this is the contention that diversity is needed to give lawyers an exposure to the federal procedural system and thus enable them to take the pollen back to the states. Today it simply is not true that "for ordinary lawyers without a federal specialty, only under diversity do opportunities for repeated exposure to the federal courts come about."[24] "Ordinary lawyers" appear frequently as assigned

Diversity jurisdiction can also be used to *create* needless conflict between federal and state court proceedings involving the same facts. *See* Ungar v. Mandell, — F.2d —, slip op. p. 819 (2d Cir., Dec. 6, 1972).

21. *See* Moore & Weckstein, *supra*, 43 TEXAS L. REV. at 23.
22. Professor Fairman's study of the Supreme Court under the chief justiceship of Chase records the tedium from the diversity cases which constituted the bulk of the Court's business at the time of Chase's appointment and how the new Chief Justice felt at having left great affairs of state for the decision of questions of such small impact and interest. HISTORY OF THE SUPREME COURT OF THE UNITED STATES, vol. VI: RECONSTRUCTION AND REUNION 1864–88, at 32–35.
23. *See* pp. 110–11 *supra*.
24. J. S. Wright, *supra*, 13 WAYNE L. REV. at 327.

counsel in federal criminal cases and state and federal habeas corpus petitions and, on a retained basis, in all sorts of cases governed by federal law relating to securities, labor, consumer protection, environment, and many other subjects. It is rather diversity that is more nearly the field of the specialist, at least in the metropolitan areas, with nearly two-thirds of the cases being insurance and personal injuries.[25]

We can also dismiss a variation on the lawyers' "interplay" theme, namely, that diversity creates what is called a valuable "partnership of federal and state courts."[26] No explanation is offered as to just what this "partnership" consists of, unless it is a federal court's often unwelcome prediction of state law. Diversity is hardly needed today to make a state court aware of the Federal Rules of Civil Procedure. In any event, the many types of concurrent jurisdiction under federal law afford ample opportunities for partnership—not to speak of the more fruitful organized effort represented by the State-Federal Judicial Councils now existing in almost all the states as a result of the impetus given by Chief Justice Burger.[27]

I find equally unconvincing the argument that federal court justice "like student-lunch programs and free technical advice from the Department of Agriculture, is a socially beneficent service which the federal government should extend when it is constitutional to do so."[28] Apart from the lack of evidence that a federal court, with its

25. A.O. ANN. REP., Table C2 (1972). In almost all personal injury cases the defendant's lawyer is retained by an insurer.

26. *See* Moore & Weckstein, *supra*, 43 TEXAS L. REV. at 27.

27. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 933 (1970); *Deferred Maintenance*, 57 A.B.A.J. 425, 426–27 (1971).

28. J. S. Wright, *supra*, 13 WAYNE L. REV. at 327. This is substantially the approach taken in Moore & Weckstein, *supra*, 43 TEXAS L. REV. 1. They would eliminate the provision, dating back to the Judiciary Act of 1789, § 12, that removal cannot be effected by a citizen of the forum state, and any requirement of jurisdictional amount, also prescribed from the beginning, § 11, and would repeal the amendments of 1958 and 1964, whereby a corporation is deemed a resident of the state of its principal place of business as well as of the state of incorporation, and an insurer is deemed a citizen of the same state as the insured. *Id.* at 34–35. The authors say at one point that "[t]he large number of diversity cases filed in and removed to the federal district courts is itself evidence of the desirability and need for the jurisdiction." *Id.* Almost any institution or practice could be justified on such a basis.

built-in inability to make a firm determination of state law, will handle a personal injury or insurance case notably better than a state court having much greater experience, the marginal utility of this service must rank exceedingly low in any scale of priorities of what the Federal Government should do for citizens of the several states.

When all is said and done, the only justification for diversity jurisdiction having the slightest substance is the one so quaintly put by Chief Justice Marshall:[29]

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

On analysis, this concept breaks down into two rather different notions. One, to which I have already adverted, is that the state courts simply are not good enough that a nonresident should have to go there. Evidence reviewed in my 1928 article[30] shows that the state of the state courts in 1789 was indeed such that the Constitution might legitimately entertain such apprehensions or hold indulgent views toward the apprehensions of suitors, and therefore wish to provide a federal forum in cases where the disparate citizenship of the parties afforded a suitable peg. But, at least in most of the states, this surely is not true today. Very likely the federal trial courts, partly because of the method of appointment and the tenure of judges, partly because of their very smallness, are somewhat "better" than most state courts. But there is simply no evidence that "protracted delay, inefficient or untrained personnel, and procedural complexities and restrictions"[31] are characteristic of state trial courts in the 1970's or that such courts are incapable of dispatching ordinary civil litigation not having a federal aspect. On the appellate

29. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

30. *See* Friendly, *supra*, 41 HARV. L. REV. at 497–99.

31. ALI STUDY 101.

level the difference is even less. At all times in the country's history, it has had state appellate judges of a stature altogether comparable to those on the federal bench.[32] If ever there was an American appellate court, even including the Supreme Court, superior to the New York Court of Appeals under the chief judgeships of Hiscock and Cardozo, I have not heard of it.

The other facet of the argument is prejudice properly so called. Obviously, like the point just considered, this does not explain why the in-state citizen should be allowed to invoke federal jurisdiction when he initiates the action, although he cannot do it on removal, and that is the theme of the ALI's proposed reform. But how does the matter stand generally? Looking at the cases of suit or removal by the out-of-stater, the only ones where prejudice could possibly be a factor, we find these categories:

(1) Out-of-state individual plaintiff versus in-state corporate defendant;
(2) Out-of-state corporate plaintiff versus in-state individual defendant;
(3) Out-of-state individual plaintiff versus in-state individual defendant;
(4) Out-of-state corporate plaintiff versus in-state corporate defendant;
(5) In-state individual plaintiff versus out-of-state corporate defendant;
(6) In-state corporate plaintiff versus out-of-state individual defendant;
(7) In-state individual plaintiff versus out-of-state individual defendant;
(8) In-state corporate plaintiff versus out-of-state corporate defendant.

It is hard to believe there is much possibility of prejudice in most suits between corporations, categories (4) and (8).[33] Where an individual and a corporation are adversaries, any prejudice is likely to derive from that fact, not from the corporation's having an out-

32. Until 1891 there were no true federal appellate judges except for the Justices of the Supreme Court.
33. One should except, I suppose, the controversy between the big out-state and the small in-state corporation.

of-state charter.[34] This takes care of categories (1), (2), (5) and (6). We are thus left with items (3) and (7). But the great bulk of the cases in these categories are personal injury actions where the jury knows the real defendant is almost certain to be an insurer, and any prejudice will stem from that and will exist in equal measure in federal court.[35]

Furthermore, the aid a federal court can give in avoiding prejudice against an out-of-stater at least in jury cases is exceedingly limited. Whatever may have been the situation in the past, federal juries are now drawn from the same registration or voting lists as those of the state, although, to be sure, generally from a wider area.[36] One way in which a federal judge, protected by tenure during good behavior, might help the out-of-stater against prejudice by jurors is by greater freedom in directing verdicts or setting them aside. But the power of a federal judge to do the former is surely no greater and in many states may well be less than that of a state judge.[37] The

34. Whether or not Professor Moore is right in thinking that the availability of diversity jurisdiction has been valuable in stimulating out-of-state investment, *supra*, 43 TEXAS L. REV. at 16–17, there is no evidence that this is a significant factor today. *See* ALI STUDY 105–06 n.10.

35. Efforts at empirical study of the effect of bias, real or fancied, on resort to diversity jurisdiction have yielded disparate results. *Compare* Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937–38 (1962), *with* Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 179–84 (1965), and *see* the comment in D. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 5 n.19 (1968). Note also the statement by Judge Joseph S. Lord III in *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 175 (1972).

36. Jury Selection and Service Act of 1968, § 101, 82 Stat. 54, 28 U.S.C. §§ 1861–63.

37. While the Supreme Court has refrained from deciding whether federal courts are to apply a state or federal standard of sufficiency of evidence in cases dealing with state created rights, Dick v. New York Life Ins. Co., 359 U.S. 437, 444–45 (1959); Mercer v. Theriot, 377 U.S. 152, 156 (1964), the Fourth, Fifth and Ninth Circuits have come out for a federal standard, Wratchford v. S. J. Grover & Sons Co., 405 F.2d 1061, 1064–66 (4th Cir. 1969); Boeing Co. v. Shipman, 411 F.2d 365, 368–70 (5th Cir. 1969) (en banc); Safeway Stores v. Fannan, 308 F.2d 94, 97 (9th Cir. 1962), which severely limits the judge.

standard for the granting of new trials is clearly federal,[38] but I have no basis for believing this to be broader than in most of the states. The argument must therefore be that the federal judge will more freely exercise such powers as he has. This, plus his greater authority to comment on the evidence than is possessed by judges in some states,[39] seem to be the only ways in which he can afford protection against prejudice in jury trials that his opposite number might not—assuming, which is not always the case, that he is less of a xenophobe than his state counterpart. This is an exceedingly scant basis for a jurisdiction that makes up over 25% of the civil docket of the district courts. Whatever may be thought of the proposition that it is better for a thousand guilty to go free rather than have one innocent man suffer, the use of scant federal judge-power cannot be justified simply on the basis that in the small proportion of diversity cases where prejudice against the out-of-stater may exist, a federal court might be of some help in a few. As has been well said, "[T]he security given out-of-state interests by this jurisdiction is not worth the burden of defining and administering it."[40] There need not be concern regarding the added burden that abolition of diversity would cast on the state courts, since their volume of civil litigation is so great that the increment would be unsubstantial.[41]

I would retain two, and only two, pieces of the present diversity jurisdiction. One is for suits between a citizen and foreign states or

38. F.R. Civ. P. 59(a).

39. C. Wright, Handbook of the Law of Federal Courts 416 (1970).

40. D. Currie, *supra*, 36 U. Chi. L. Rev. at 49.

Echoing an observation of Mr. Justice Frankfurter, National Mut. Ins. Co. v. Tidewater Transfer Co., *supra*, 337 U.S. at 651 (dissenting opinion), a commentator has said that "[t]he present utilization of diversity as a head of federal jurisdiction is better explained by the lack of sufficient interest to eliminate it than by any useful purpose it serves." Note, *ALI Proposals to Expand Federal Diversity Jurisdiction: Solution to Multiparty, Multistate Controversies?*, 48 Minn. L. Rev. 1109 (1964).

41. ALI Study 473–74. A study of 30 states by the Senate Judiciary Committee shows that the increase in the civil business of state courts of general jurisdiction from abolition of federal diversity jurisdiction would range from .27 to 1.5%. Burdick, *Diversity Jurisdiction Under American Law Institute Proposals: Its Purpose and Effect on State and Federal Courts*, 48 North Dakota L. Rev. 1, 14–15 (Table 4) (1971).

citizens or subjects thereof.[42] Here, where the burden is exceedingly slight, I join in the conclusion of the *ALI Study* that:[43]

> It is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the assurance that he can have his case tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it.

I would also retain the Interpleader Act[44] with the addition proposed by the ALI.[45] While the ALI's proposal for a new chapter[46] covering other diversity cases where no state can obtain jurisdiction over all necessary parties is sound in theory, the provisions are, of necessity, exceedingly complicated and its adoption should await demonstration that, with the general enactment of "long-arm" statutes and attendant judicial resourcefulness, there is any real need for them.[47]

It may well be said in criticism that my proposal ignores the realities of political life, and that one should settle for the ALI proposal to eliminate the anomaly of the in-state plaintiff being able to invoke federal jurisdiction against the out-state defendant as the best one can get. I am not convinced that if the forces for judicial reform can overcome the combination of opponents of the ALI proposal—plaintiffs' lawyers who wish the greatest possible freedom of choice of forum, lawyers for corporations doing a nation-wide business who wish to preserve the right of removal, and other disinterested but, in my view, misguided federalophils—they cannot almost as readily perform the complete job. However, if the whole loaf is unattainable, half would be no small blessing.

If the ALI proposals should prove to be the line the solution

42. This is the present 28 U.S.C. § 1332(a)(2) and (3). Since the basis for the jurisdiction would be the possible effect on international relations, I would not be inclined to modify the latter, as Professor Currie suggests, *supra*, 36 U. CHI. L. REV. at 20, to eliminate jurisdiction in the rare case where the foreign plaintiff and defendant are citizens of the same foreign state.
43. ALI STUDY 108.
44. 28 U.S.C. §§ 1335, 2361.
45. ALI STUDY § 2375.
46. *Id.* ch. 160, at 67, 375.
47. *See* D. Currie, *supra*, 36 U. CHI. L. REV. at 29–32; Note, *supra*, 48 MINN. L. REV. 1109.

will take, I would alter them in a few respects. I would eliminate the proposal making an "in-stater" of any individual "who has and for a period of more than two years has had his principal place of business or employment" in the state.[48] This was intended to catch the resident of Greenwich, Connecticut, who commutes every weekday to New York City, or the resident of Camden, New Jersey, who works in Philadelphia, and as to them it is sound enough. But there are only a half-dozen places where this phenomenon occurs on any scale, and the formulation might comprehend other cases, *e.g.*, the commander of an Army base or the teacher on a three-year assignment outside his state, to whom its rationale is only dubiously applicable. The whole game thus is not worth the candle.[49]

On the other hand, I would oppose, for reasons that must be apparent, a number of the ALI proposals for expanding diversity jurisdiction, which, as I stated at the outset, were developed before the explosion of federal court litigation began.[50] The most important of these is allowing one of several defendants to remove whenever he would have been able to do so "if sued alone by any party making a claim against him in the State court action," subject to a right in the federal court to remand all matters that "considered separately would not be within its jurisdiction."[51] One objective of this was to overcome the difficulties arising from the present "separate and independent" claims provision[52] which, with its predecessors, has been deservedly characterized as "one of the most unfortunate provisions

48. ALI STUDY § 1302(c).

49. *See* D. Currie, *supra*, 36 U. CHI. L. REV. at 47. On the other hand, I strongly disagree with Professor Currie's rejection of the provision, § 1302(b), relating to the foreign corporation, etc. "that has and for a period of more than two years has maintained a local establishment in a state,"—one of the most valuable of the ALI's proposals. I perceive no justification for allowing a national chain store to remove when a customer has slipped on a banana peel, although the local department store or restaurant could not. *See* Field, *Proposals on Federal Diversity Jurisdiction*, 17 S. CAR. L. REV. 669, 672–73 (1965). Professor Currie's fears of "enormous gray zones that will plague the courts with additional problems of construction" are vastly overdone.

50. *See* p. 4 *supra*.

51. ALI STUDY § 1304(b). I would favor, however, some judicial relaxation on what constitutes fraudulent joinder. See *id.* at 141–42.

52. 28 U.S.C. § 1441(c).

in the entire Judicial Code."[53] I would remove the difficulties more cleanly, without increasing federal jurisdiction, by repealing that clause. The real issue, as Professor David Currie has pointed out,[54] is whether or not we wish to live with Chief Justice Marshall's requirement of complete diversity.[55] I would in the vast run of cases, since it limits the jurisdiction on a rationale at least as satisfactory as any that would broaden it. This is true even though one can conceive of cases where the requirement may produce results not wholly consistent with the traditional justification.[56] Efforts to take care of every variation produce complexity and breed litigation, which is simply not worthwhile when the only consequence of requiring complete diversity is a trial in a state court. Whatever abstract logic these proposals to expand diversity jurisdiction in some respects may have, they are overcome by the greater logic that if the ideal is to abolish the jurisdiction, Congress should not do anything to increase it, even by way of a partial trade-off.

With these qualifications, I endorse the ALI diversity proposal as a significant interim step toward the larger goal of "relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business."[57] If even that modest reform cannot be enacted with more than deliberate speed, I see no reason why busy district courts should not promulgate rules that after a certain date all other proceedings shall be preferred for trial over actions where federal jurisdiction is invoked solely on the basis that the parties are citizens of different states, or why circuit councils should not require them to do so.[58]

53. D. Currie, *supra*, 36 U. CHI. L. REV. at 22.
54. *Id.* at 25.
55. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
56. *See* D. Currie, *supra*, 36 U. CHI. L. REV. at 18–19.
57. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941).
58. For obvious reasons such a rule could not be applied in cases of removal.

APPENDIX 10

(*a*)

PART II
The Explosion of Federal Court Litigation and the Consequent Problems of the District Courts, the Courts of Appeals and the Supreme Court

THOMAS REED POWELL, long a teacher at this law school, used to speak with disdain of the kind of social study where "counters don't think, and thinkers don't count." I have seen many samples of what he had in mind; I recall, for example, a thesis establishing, with elaborate statistical detail, that there was a closer correlation between the marriage rate and the birth rate than between either and the business cycle—a conclusion which most could have reached without aid from the computer. But figures do not have to be dull. In any event I see no way to examine the present situation and future prospects of the federal courts without them, although I will also try to get behind the figures and identify the causes. If your verdict should accord with Reed Powell's, I shall simply have to bear it. The three layers of federal courts must be treated separately, since each has its special problems and—what has not been sufficiently realized—the problems are more intractable at the appellate than at the trial level.

The observer looking broadly at the loads of the district courts at the end of fiscal 1968, and I shall use fiscal year figures as regards the federal courts save when otherwise stated, would not have found much cause for concern. Civil filings,[1] which by 1961 had declined rather drastically to a level of around 58,000 as a result of the 1958 legislation[2] that raised to $10,000 the jurisdictional amount in diversity and general federal question cases and broadened the definition of corporate citizenship to include the state of the corporation's principal place of business—with the addition, in 1964, of a provision that in direct actions against liability insurers the latter should be

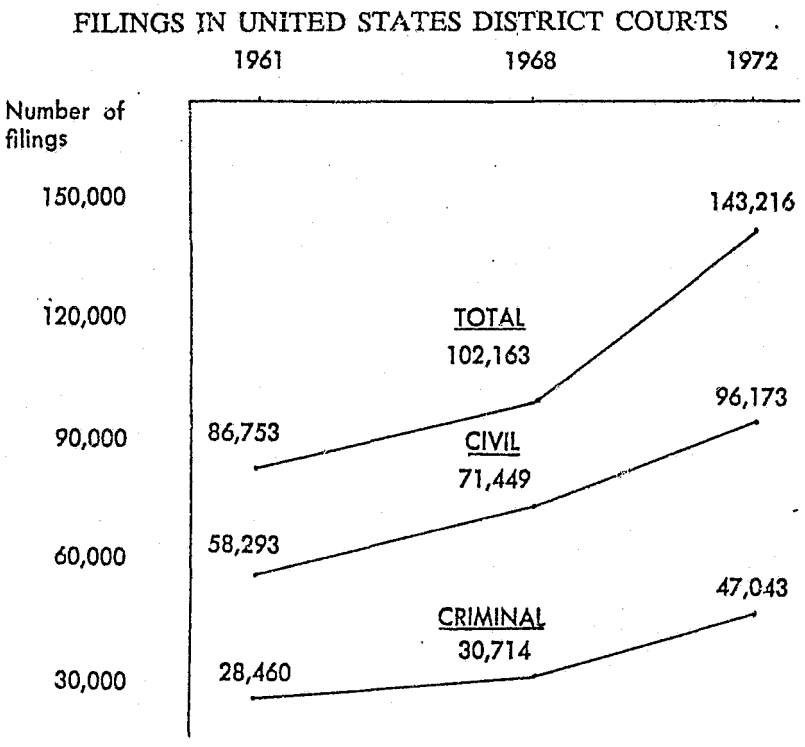
1. Bankruptcy proceedings are not included in the figures of filings.
2. 72 Stat. 415, *amending* 28 U.S.C. §§ 1331, 1332.

deemed to have also the citizenship of the true defendant[3]—had climbed to 71,449,[4] a sizeable increase but still only 23% over seven years. The picture on the criminal side seemed even more comforting. Criminal filings had risen only imperceptibly; 30,714 cases in 1968 as against 28,897 a decade before.[5] With district judgeships having increased from 245 in 1960 to 342 in 1968, the situation seemed well under control—at least for the country as a whole.

The observer would have been badly mistaken in his optimism. Civil filings jumped from 71,449 in 1968 to 87,321 in 1970,[6] approximately the same increase in two years as in the preceding seven. They grew further to 93,396 in 1971[7] and 96,173 in 1972.[8] The change on the criminal side has been even more dramatic. After the almost static picture of the previous decade, these bounded from 30,714 in 1968 to 38,102 in 1970,[9] 41,290 in 1971,[10] and 47,043 in 1972.[11] The total filings in the district courts have thus increased from the 1961 low of 86,753 or the not uncomfortable 1968 figure of 102,163 to 143,216 in 1972—roughly 10,000 added cases a year.

This, however, is by no means the whole story. Unlike the expansions of earlier years, what has recently been experienced is not simply the gradual increase that could be expected as a result of population growth but is concentrated in areas that have increased and will increase at a far greater rate. Here I shall mention just two examples: Between 1961 and 1970, civil rights actions grew from 296[12] to 3,985,[13] or 1346%. In the same period state prisoner petitions, including both those seeking release and those complaining of maltreatment, increased from 1,020 to 11,812,[14] or 1158%. In 1972 there were 6,133 civil rights actions,[15] and 12,088 state prisoner peti-

3. 78 Stat. 445, *amending* 28 U.S.C. § 1332(c).
4. A.O. ANN. REP. 105–07 (1968).
5. *Id.* at 117.
6. A.O. ANN. REP., Table C2, at 231 (1970).
7. A.O. ANN. REP., Table C2, at 262 (1971).
8. A.O. ANN. REP., Table C2 (1972).
9. A.O. ANN. REP., Table D1, at 264 (1970).
10. A.O. ANN. REP., Table D1, at 317 (1971).
11. A.O. ANN. REP., Table D1 (1972).
12. A.O. ANN. REP., Table C2, at 238 (1961).
13. A.O. ANN. REP., Table C2, at 232 (1970).
14. *Id.* Table 16, at 121.
15. A.O. ANN. REP., Table C2 (1972).



tions.[16] Civil rights actions and state and federal prisoner petitions constituted 22% of the civil actions filed in the district courts in 1972 as against some 5% in 1961.

Before we can intelligently determine what courses may be appropriate with respect to the jurisdiction of the lower federal courts, we must attempt to identify the causes underlying these increases in workload. At least three distinct, yet interrelated, forces can be perceived—decisions of the federal courts themselves, the attitude of litigants, and the work of Congress.

Although Congress in the first instance prescribes the framework of jurisdiction of the federal courts, both procedural and substantive decisions by these courts, and notably by the Supreme Court, have an important effect upon its content. While it is an impossible task to ascertain the quantitative impact of any single decision, one can readily discern certain areas where judicially effected doctrinal development has had substantial consequences upon the business of

16. *Id.* Table 17.

the federal courts. At this point I shall simply attempt to identify these areas; the issues whether legislative response is appropriate and, if so, what, will be considered later.

One such development has been the selective incorporation[17] of the Bill of Rights into the due process clause of the Fourteenth Amendment.[18] This process, in combination with the Supreme Court's landmark habeas corpus decision, *Brown v. Allen*,[19] has required the lower federal courts to assume an extremely heavy supervisory role with respect to state systems of criminal justice. Although, as I shall later develop, the last few years have seen some decrease in state prisoner petitions attacking convictions, this is more than offset by the dramatic growth in petitions challenging the length and conditions of confinement, also on the basis of selective incorporation, primarily of the First and Eighth Amendments.

Judicial expansion of federal substantive law has been important on the civil side as well. Here the greatest single development has been the Supreme Court's revitalization of the Fourteenth Amendment guarantee of "equal protection of the laws." The implementation of *Brown v. Board of Education*[20] has demanded Herculean effort, in no way reflected by the mere number of case filings. A single

17. At this point in history it is far easier to catalogue those provisions of the first eight amendments which have *not* been incorporated into the due process clause by the Supreme Court than those that have. Those in the former category are: the Second Amendment guarantee of the right to bear arms; the Third Amendment guarantee regarding the quartering of soldiers; the grand jury requirement of the Fifth Amendment; the Seventh Amendment guarantee of jury trial in suits at law where the value in controversy exceeds $20; and finally the Eighth Amendment guarantee that "[e]xcessive bail shall not be required, nor excessive fines imposed . . . ." One can hardly doubt that the last will be incorporated. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971), and U.S. ex rel. Goodman v. Kehl, 456 F.2d 863 (2d Cir. 1972).
18. This is the foremost instance in which legislative retrenching on the substantive side is not possible; nor for that matter would I expect much judicial back-tracking in this area. *See* Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 385–86 (1971). Action on the procedural side, including judicial or legislative modification or even the overruling of Fay v. Noia, 372 U.S. 391 (1963), is another matter.
19. 344 U.S. 443 (1953).
20. 347 U.S. 483 (1954), 349 U.S. 294 (1955).

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school desegregation action may require a half dozen long hearings and decisions by a district judge. While we may be nearing the end of this problem in the South, we may be only at the beginning of it in the North and West. As revealed in a recent scholarly article,[21] the complexities of the problem of de facto segregation are such that it is impossible that a single Supreme Court decision can make these disappear. Reapportionment has likewise imposed a burden, altogether beyond that reflected by case filings, of which we have not seen the end. Two types of claims of discrimination, those based on age and on sex, which had not figured very prominently in the dockets of the past, now bulk large, and the latter will bulk still larger if a constitutional amendment addressed specifically to sex discrimination should be adopted.[22] Still more important are some decisions indicating that a statute which on its face is as equal as can be may be held invalid because it bears more heavily on the poor. Whatever the ultimate stance may be,[23] and the attack on the historic method for financing public education will be a testing case, the Court has already done and said enough to provide a flow of litigation through the lower courts on this subject that could not have been anticipated as recently as 1968.

The prime vehicle for equal protection litigation, as well as for state prisoner applications attacking the length or conditions of custody, has been the Civil Rights Act of 1871,[24] 42 U.S.C. section 1983, and its jurisdictional implementation, 28 U.S.C. section 1343(3), which are peculiarly attractive because of the appropriate absence of any amount in controversy requirement. However, civil rights litigation has not been limited to actions brought under section 1983, with its requirement of state action. The Supreme Court has

21. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 69 CALIF. L. REV. 275 (1972).
22. Consider such an unexpected example as Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972), where a male convicted of escaping from a Maine prison complained that the punishment was more severe than that of a female escaping from a reformatory.
23. *See* Friendly, *supra*, 85 HARV. L. REV. at 387–88, and cases there cited; Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).
24. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

displayed a penchant for breathing new life into old civil rights statutes just at the time when the enactment of new ones has largely removed the need for this. The textbook example is the discovery, in *Jones v. Alfred H. Mayer Co.*,[25] to which I will return in Part IV, of a theretofore unsuspected meaning in 42 U.S.C. § 1982. A ruling having equal or greater potential for new litigation is the decision in *Griffin v. Breckenridge*[26] eliminating, in certain types of cases, any state action requirement for application of the civil rights conspiracy statute.[27] It is too early to determine what effect *Griffin* will have upon federal court dockets, since, among other reasons, it leaves a number of important questions unanswered.[28] But it is impossible to doubt that these two decisions will cause a further increase in civil rights actions. We have yet to see what will be the impact of the Court's holding that, at least in the field protected by the Fourth Amendment, a federal remedy can be implied from the Constitution itself.[29] In a quite different area, the Supreme Court's announcement of a federal common law of nuisance[30] will give rise to many complicated cases when an industry in one state affects the environment of another.

Turning from essentially substantive developments, we are confronted with a wealth of decisional law that has increased the accessibility of a federal forum for private litigants. Thus, the Supreme Court has liberalized the requirements for standing to initiate federal judicial proceedings,[31] and has contracted the concept of what con-

25. 397 U.S. 409 (1968). *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).
26. 403 U.S. 88 (1971).
27. 42 U.S.C. § 1985(3).
28. *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 95–104 (1971). If Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971), was correctly decided, *Griffin* goes far beyond conspiracies to thwart the civil rights of blacks and of those traveling to aid them. *See also* Dombroski v. Dowling, 459 F.2d 190 (7th Cir. 1972).
29. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). It has been suggested that, in light of this decision, the Civil Rights Act may have been unnecessary. See the interesting article, Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1559 (1972).
30. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).
31. *Compare* Flast v. Cohen, 392 U.S. 83 (1968), *with* Frothingham v. Mellon, 262 U.S. 447 (1923).

stitutes a political question and is therefore immune from judicial consideration.[32] Even more important is that in an era when the federal government has assumed heretofore unprecedented regulatory and supervisory functions with respect to almost every aspect of our society, the courts have taken an increasingly generous view of the ability of private parties to seek judicial review of administrative action.[33] A further development is the successful effort by litigants to establish implied private actions in the context of various federal regulatory statutes which on their face provide only for administrative enforcement. While the importance of implied private actions has been most dramatically seen with respect to the federal securities laws, efforts have been and will continue to be made to imply such actions in other contexts. Along with these developments and others I am about to mention, note should be taken of the growth of the class action as a result of the 1966 revision of Rule 23 of Federal Civil Procedure. The vast increase in the size of a recovery made possible by class action designation affords a powerful incentive for the bringing of litigation by lawyers who otherwise might not find the financial prospects attractive. Admittedly, this often has its good side; for the present I merely note it as an important business enhancing factor.[34] I would add that the importance of this increase cannot be measured by the number of suits; the administration of a class action, even the disbursement of a settlement, imposes burdens on federal judges altogether beyond those reflected in the statistics.

These developments have been both a consequence of and a stimulus for the attitude of litigants. The impression is abroad that if a problem cannot be remedied elsewhere, a solution must exist in the federal courts. There are a number of causes for this: One is the lack of adequate machinery within the executive branch for the cor-

32. Baker v. Carr, 369 U.S. 186 (1962). *See also* Powell v. McCormack, 395 U.S. 486 (1969).

33. *See, e.g.*, Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Investment Co. Institute v. Camp, 401 U.S. 617 (1971). This subject is further discussed at pp. 113–16 *infra*.

34. One must be grateful for the Supreme Court's refusal to endorse what would have been another large source of business—suits by a state as *parens patriae*, Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972).

rection of "maladministration" by lower officials; although we have talked of ombudsmen for a decade, we have done almost nothing to provide them.[35] Another has been the slowness of our legislatures, due partly to the power of lobbies and partly to sheer inertia, to respond to demonstrated needs.[36] Beyond that is the availability of the Constitution in providing the courts with a norm to which executive or legislative action must be required to conform. De Tocqueville's time-worn statement, "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question,"[37] has come to have an application far wider than he could have foreseen. As has been well said, "Americans have become a people of constitutionalists, who substitute litigation for legislation and see constitutional questions lurking in every case."[38] To quote the same authors: "No observer of the American scene is likely to doubt that the courts, under the vigorous leadership of the Supreme Court, have recently come to regard themselves as an agency for supplying legal reforms which are demanded by public opinion but not effected by Congress."[39]

Moreover, Congress has been far from idle in creating new federal statutory rights during the last decade. I shall be able to mention only a few of the categories in which Congress has been active.

A considerable portion of the increase in civil rights cases is attributable to such important pieces of federal legislation as the Civil Rights Act of 1964,[40] the Voting Rights Act of 1965,[41] the Age Discrimination in Employment Act of 1967,[42] and the Civil Rights

35. *See* SCHWARTZ & WADE 207.

36. *See* Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963), *reprinted in* BENCHMARKS 41 (1967); THE FEDERAL ADMINISTRATIVE AGENCIES 166–68 (1962).

37. 1 DEMOCRACY IN AMERICA 290 (Bradley ed. 1954).

38. SCHWARTZ & WADE 6 (footnote omitted).

39. *Id.* 15–16.

40. 78 Stat. 241, *as amended*, 42 U.S.C. §§ 1971, 1975a–d, 2000a to 2000h–6.

41. 79 Stat. 437, *as amended*, 42 U.S.C. §§ 1971, 1973, 1973a to 1973bb–4.

42. 81 Stat. 602, 29 U.S.C. §§ 621–34.

Act of 1968.[43] Clearly these are not the last major statutes that Congress will enact in an effort to outlaw unwarranted discrimination; at least they ought not to be. Recent Congresses have also passed many important but as yet relatively unknown statutes dealing with a host of problems ranging from brokers to polluters. Some of these are enforceable in the district courts; others create new tasks for the courts of appeals; and still others involve both direct enforcement in the district courts and review of agency actions in the courts of appeals.

Probably the most important single group are statutes relating to problems of the environment. The head and front of this is the National Environmental Policy Act of 1969.[44] Perhaps the framers did not think this would impose a burden on the courts; the agencies would simply comply with the obligations placed upon them. This failed to take account of two factors—agency stubbornness and the desire of conservationist groups to test in court not only agency procedures but the merits of agency action. Along with this are more specific statutes concerned with air and water quality which will give rise to public and, in some cases, private actions.[45] Clearly we are at the beginning of this development, not the end. If the present pace continues, both statutory and non-statutory environmental actions may become as large a head of federal jurisdiction, at least in terms of burden, as actions under the Civil Rights Acts.

In still other fields Congress has given the district courts new tasks varied in both procedural and substantive complexity. For example, under the Securities Investor Protection Act,[46] district courts

43. 82 Stat. 81–90, 42 U.S.C. §§ 3601–19, 3631.
44. 83 Stat. 852, 42 U.S.C. §§ 4321–47.
45. *See* Clean Air Amendments of 1970, §§ 4(a), 12(a), 84 Stat. 1676, 42 U.S.C. §§ 1857d(g), 1857h–2 (permitting actions by the Attorney General on behalf of the Administrator of the Environmental Protection Agency and, on certain conditions, by any person to enjoin violations of the Act); Water Quality Improvement Act of 1970, § 102, 84 Stat. 100, 33 U.S.C. § 1163(i) (authorizing actions by the United States to enjoin violations of the Act); Ports and Waterways Safety Act of 1972, 86 Stat. 424 (1972) (permitting actions by the United States to collect fines); Noise Control Act of 1972, § 11, 86 Stat. 1234 (1972) (authorizing actions by the United States to restrain violations of the Act).
46. 84 Stat. 1636 (1970), 15 U.S.C. §§ 78aaa–*lll*.

have been given jurisdiction analogous to, but independent of, a Chapter X bankruptcy proceeding. The Act provides for applications in the district courts by the Securities Investor Protection Corporation (SIPC) for a decree "adjudicating that customers of such member [broker] are in need of the protection provided by this chapter."[47] If the decree issues, the district court then appoints a trustee,[48] and presides over a highly complex "liquidation proceeding."[49] The Act further provides that the SEC may, if necessary, seek an order from the district court wherein SIPC maintains its principal office, requiring SIPC to discharge its obligations under the Act.[50]

An example in a quite different area is the Federal Railroad Safety and Hazardous Materials Transportation Act of 1970.[51] This authorizes the Secretary of Transportation to promulgate regulations and standards on all aspects of railway safety. Both the Secretary and state regulatory agencies are entrusted with the investigation of violations of these regulations. The Secretary and, in certain instances, the state agencies, may, with the assistance of the Attorney General, institute proceedings in the district courts to enjoin violations and recover civil penalties.[52] A variety of other recent enactments placing new responsibilities on the district courts for the enforcement of federal regulatory programs are listed in a footnote.[53] The last Con-

47. § 5(a)(2), 15 U.S.C. § 78eee(a)(2). For a decision arising under this act see SEC v. Allen Hughes, Inc., 461 F.2d 974 (2d Cir. 1972).
48. § 5(b)(3), 15 U.S.C. § 78eee(b)(3).
49. § 6, 15 U.S.C. § 78fff.
50. § 7(b), 15 U.S.C. § 78ggg(b).
51. 84 Stat. 971, 45 U.S.C. §§ 421–41, 49 U.S.C. §§ 1761–62.
52. §§ 207, 209, 210. 45 U.S.C. §§ 436, 438, 439.
53. The statutes below are a representative but by no means a complete sampling of recent legislation authorizing actions in the district courts to enforce federal regulatory schemes: Investment Company Act Amendments of 1970, § 20, 84 Stat. 1428, 15 U.S.C. § 80a–35 (permitting actions by the SEC and private parties for certain violations of the Act); Egg Products Inspection Act, §§ 20, 21, 84 Stat. 1631–32 (1970), 21 U.S.C. §§ 1049, 1050 (authorizing actions by the United States for the seizure of products which are to be sold in violation of the Act); Fair Credit Reporting Act, § 601, 84 Stat. 1134 (1970), 15 U.S.C. § 1681p (actions by private parties to recover penalties specified in the Act); Public Health Cigarette Smoking Act of 1969, § 2, 84 Stat. 89, 15 U.S.C. § 1339 (authorizing actions by the Attorney General to enjoin violations of the Act); Federal Coal Mine

gress adopted a Consumer Product Safety Act, and the prospect of legislation greatly expanding consumers' suits is very real.[54]

Another quite different category consists of legislation adopted under the "spending power." Congress has increasingly engaged in grants-in-aid to the states conditioned on their conforming to federal standards. Although the Aid to Families with Dependent Children program goes back to the Social Security Act of 1935,[55] it has been only in recent years that many suits involving the conformance of state programs to federal standards have been reaching the courts.[56] Now this legislative example has been followed in the field of medical care,[57] and this also has given rise to abundant and difficult litigation.[58] There have been similar developments with respect to hous-

Health and Safety Act of 1969, § 108, 83 Stat. 756, 30 U.S.C. § 818 (authorizing actions by the Secretary of the Interior to enjoin violations of the Act); Consumer Credit Protection Act, § 130, 82 Stat. 157 (1968), 15 U.S.C. § 1640 (suits by private parties to recover statutory penalties); Interstate Land Sales Full Disclosure Act, 82 Stat. 595 (1968), 15 U.S.C. § 1710 (suits for untrue statement or omission to state material fact, or for prohibited sale or lease); Wholesome Meat Act, § 16, 81 Stat. 597–99 (1967), 21 U.S.C. §§ 671–74 (actions by private parties to challenge certain determinations of the Secretary of Agriculture and actions by the Secretary to enjoin violations of the Act); National Traffic and Motor Vehicle Safety Act of 1966, § 110, 80 Stat. 723, 15 U.S.C. § 1399 (authorizing actions by the Attorney General to enjoin violations of the Act); 1971 Economic Stabilization Act Amendments, 85 Stat. 743 (suits in respect of prices exceeding those permitted by Price Commission); Federal Water Pollution Control Act Amendments of 1972, § 309(b), 86 Stat. 815 (suits by Administrator to enjoin violation of the Act).

54. 86 Stat. 1207 (1972); *see also* the article by Representative John E. Moss, *Consumer Legislation in Congress*, 58 A.B.A.J. 632 (1972).
55. Ch. 531, 49 Stat. 627, *as amended*, 42 U.S.C. §§ 601–10.
56. The first significant Supreme Court decision was King v. Smith, 392 U.S. 309 (1968).
57. *See* the Medicare Act and the Grants to States for Medical Assistance Programs Act, 79 Stat. 290–343, 343–53 (1965), (codified in scattered sections of 26, 42, 45 U.S.C.), and the Social Security Amendments of 1967, 81 Stat. 821, 42 U.S.C. §§ 301, 415, providing, among other things, for the expansion and improvement of Medicare, 81 Stat. 845–59, of Medical Assistance Programs, 81 Stat. 898–911, and of AFDC, 81 Stat. 877–98.
58. *See, e.g.*, Catholic Medical Center of Brooklyn & Queens, Inc. v. Rockefeller, 305 F. Supp. 1256, 1268 (E.D.N.Y. 1969) (three-

ing;[59] this too has led to important litigation.[60] In a different area, a retail store or wholesale concern disqualified from participation in the food stamp program is entitled not merely to judicial review but to trial *de novo* in a district court.[61] The full impact of this extensive legislative output under the spending power has not yet been felt in district court dockets.[62] Experience shows that some time is required before such statutes make themselves felt in the courts. Moreover, potential litigation under all these statutes has been greatly increased by two developments already mentioned—the liberalization of the requirement of standing and the growth of the class action. Here again we are by no means at the end of the road. A single recent issue of *The New York Times* reported two developments that could add significantly to the flow of federal litigation in this area—attempts by poverty groups, probably to be joined by the Department of Health, Education and Welfare, to enforce the neglected provision of the Hill-Burton Act requiring hospitals that had received federal funds for construction to furnish a reasonable amount of free care,[63] and likely enactment of a bill that would withhold certain federal grants from states that did not seasonably enact and enforce proper land development codes.

Taking all these developments into account, it is not surprising that on June 30, 1972, the backlog of civil cases pending in the district courts reached an all-time high of 101,032 an increase of 8.4% over 1970.[64]

judge court), *vacated and remanded*, 397 U.S. 820, *aff'd*, 430 F.2d 1297 (2d Cir.), *appeal dismissed*, 400 U.S. 931 (1970); Maxwell v. Wyman, 458 F.2d 1146 (2d Cir. 1972).

59. *See* 42 U.S.C. ch. 8 (Low Rent Housing); *id.* ch. 8A (Slum Clearance, Urban Renewal and Farm Housing).
60. *See, e.g.*, Thorpe v. Housing Authority, 393 U.S. 268 (1969); Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971); English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971).
61. 7 U.S.C. § 2022. *See* Martin v. United States, 459 F.2d 300 (6th Cir. 1972).
62. Much of the legislation may only be implemented after the designated agency has promulgated appropriate standards, and there is thus a built-in time lag before any attempts are made to enjoin violators.
63. 60 Stat. 1043 (1946), *now* 42 U.S.C. §§ 291, *et seq. See* Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972).
64. A.O. ANN. REP., Table C3a (1972).

Beyond all this is what may have constituted the greatest single source of new business in the last year or so, additions to the more conventional federal catalogue of crimes, coupled with intensified prosecutorial activity. In the next section I shall have more to say about the philosophy of some of these new statutes. It will suffice here to mention the criminal sanctions against loan sharking,[65] the restructuring of the federal criminal statutes concerning harmful drugs[66] and the updating of the provisions regulating firearms,[67] the last of which, one may hope, will be expanded. All this has been accompanied by rapid growth in prosecutorial staffs and the creation of strike forces. Such expenditures must justify themselves by statistics, the statistics then generate new expenditures, and so on.

There are only two areas of district court litigation where, in the absence of limiting legislation, significant decreases can be expected. One is selective service cases. These are not insubstantial. Criminal prosecutions under the draft laws more than doubled from 1,826 in 1968 to 4,539 in 1971 and 5,142 in 1972;[68] there have also been a significant number of suits for pre-induction review or post-induction release. The other, due to a very recent statute later discussed, is personal injury suits by harbor workers. Making due allowance for drastic reduction in such cases, we must contemplate a continuation and, indeed, an intensification of the sharp upward trend in district court litigation that first became manifest in 1969. This would be further accentuated if Congress should adopt legislation affording judicial review to prisoners or parolees adversely affected by actions of the Federal Parole Board.[69] Continued increases of 10,000 cases per year are altogether expectable; indeed this estimate is rather on the low side. On that basis, the district courts would have twice as many cases in 1978 as they did in 1968.

65. This was enacted as part of the Consumer Credit Protection Act, tit. II, §§ 201–03, 82 Stat. 159–62, *as amended*, 18 U.S.C. §§ 891–94, 896.
66. Comprehensive Drug Abuse Prevention and Control Act of 1970, tit. II, §§ 401–11, 84 Stat. 1260–69, 21 U.S.C. §§ 841–51.
67. Gun Control Act of 1968, tit. I, § 102, 82 Stat. 1214–26, *amending* 18 U.S.C. §§ 921–28.
68. A.O. ANN. REP., Table D2 (1972).
69. *See* H.R. 16,276, 92d Cong., 2d Sess. § 4221 (1972); S. 3979, 92d Cong., 2d Sess. (1972).

Many people answer this with a simple "So what?" The numbers are still small compared with the caseloads of the state courts. As against 8,800 civil cases filed in the four federal districts of New York in 1971,[70] some 86,000 were filed in the civil terms of the New York Supreme Court.[71] On the criminal side, the disproportion is greater still. As against some 2,900 prosecutions begun in the four New York federal district courts,[72] dispositions by the criminal terms of the New York Supreme Court within New York City alone were nearly 16,000[73]—not to speak of the caseloads of the Supreme and County Courts outside New York City[74] and of the Criminal Court of New York City, whose business is primarily with misdemeanors. The Superior Court of California has about the same number of judges[75] as the federal district courts throughout the land. If one state can manage over 400 judges in its lowest court of general jurisdiction, what would be wrong with having 800 federal district judgeships instead of 401? Judge J. Skelly Wright has posed this question in vigorous terms. Resisting the proposals of the American Law Institute for some retraction of diversity jurisdiction, he thinks it "a scandal" that we resort "so haltingly" to "appointing a few additional judges."[76] Whether Judge Wright would consider another 400 district judges to be only "a few" is a point to which I cannot speak.

Strong voices have been raised against unrestrained expansion of the federal trial bench. A notable one was Professor Frankfurter's. Speaking at Cornell in 1928, he said:[77]

A powerful judiciary implies a relatively small number of judges. Honorific motives of distinction have drawn even to the lower federal

70. A.O. ANN. REP., Table C3, at 266 (1971).
71. SEVENTEENTH ANNUAL REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, Table 7, at A70 (1972).
72. A.O. ANN. REP., Table D3, at 322 (1971).
73. SEVENTEENTH ANNUAL REPORT, *supra* note 71, Table 30, at A108.
74. In 1971, the Supreme and County Courts outside the City of New York disposed of some 11,000 criminal cases. *Id.*
75. For 1969–70, 416 judgeships were authorized for the California Superior Court. *See* THE JUDICIAL COUNCIL OF CALIFORNIA ANNUAL REPORT 105 (1971).
76. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 319 (1967).
77. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515–16 (1928).

bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. . . . Subtle considerations of psychology and prestige play havoc with the mechanical notion that increase in the business of the federal courts can be met by increasing the number of judges.

A quarter of a century later he wrote these views into the United States Reports. Arguing that the time to abolish diversity jurisdiction had arrived, he asserted:[78]

The business of courts, particularly of the federal courts, is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant. . . . In the farthest reaches of the problem a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely affect the whole system.

[I]nflation of the number of the district judges . . . will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts.

While my own view generally accords with Justice Frankfurter's, as it so often has, I recognize that, at the district court level, his thesis cannot be established with certainty. Indeed, one could point to some evidence against it. When I look at the names of the six judges of the Southern District of New York in the year Professor Frankfurter spoke at Cornell, I find only one, perhaps two, of real distinction, although two more were in the offing; the present court has at least a half dozen who would deserve that description and the average is decidedly better. With the number of judges in the Eastern District of New York trebled since 1924, from three to nine, the overall quality has markedly improved. How far that same happy situation prevails elsewhere I cannot say; certainly the reports disclose that many districts have judges of high ability.

Nevertheless, as it seems to me, there must come a point when

78. Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (concurring opinion). While disagreeing with this statement, Professor Moore concedes that a federal judge "should not be reduced to a factory robot clearing a certain number of statistics daily from his docket." Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1, 26 (1964). Many district judges would regard this as a fair description of their present plight.

an increase in the number of judges makes judging, even at the trial level, less prestigious and less attractive. Prestige is a very important factor in attracting highly qualified men to the federal bench from much more lucrative pursuits. Yet the largest district courts will be in the very metropolitan areas where the discrepancy between uniform federal salaries[79] and the financial rewards of private practice is the greatest, and the difficulty of maintaining an accustomed standard of living on the federal salary the most acute. There is real danger that in such areas, once the prestige factor was removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice. Further, as district courts grow in size, there is a more than corresponding increase in the amount of administrative work. Either an increased amount of time of each judge must be spent on administration or, more likely, this function must be delegated to an administrative judge or board. This will impair the kingship of the judge in his own courtroom, subject only to appellate review, which has been one of the attractions of the district bench. Whether because of increased time spent on administration or for some other reason, increases in the number of district judges have not produced corresponding augmentation of output.[80] Moreover, there are many functions which a district court must or should perform as a court, rather than as individual judges. In addition to the preparation of local rules, Congress has given the district courts responsibility for devising plans for the administration of the Criminal Justice Act[81] and the Jury Selection Act,[82] and the Rules of Criminal Procedure now require each district court to adopt a plan for the speedy trial of criminal cases.[83] There are other subjects where a district court could act collegially to adopt uniform standards. Instances are the rules for the conduct of the trials of unruly criminal defendants adopted by the

79. While nothing in the nature of things requires such uniformity, I suspect the chances of Congress' authorizing geographical differentials in judicial salaries, even based on such objective standards as living costs, are negligible.

80. *See* Note, Ross v. Bernhard: *The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 125 n.74 (1971).

81. 18 U.S.C. § 3006A(a).

82. 28 U.S.C. § 1865(a).

83. F.R. CRIM. P. 50(b).

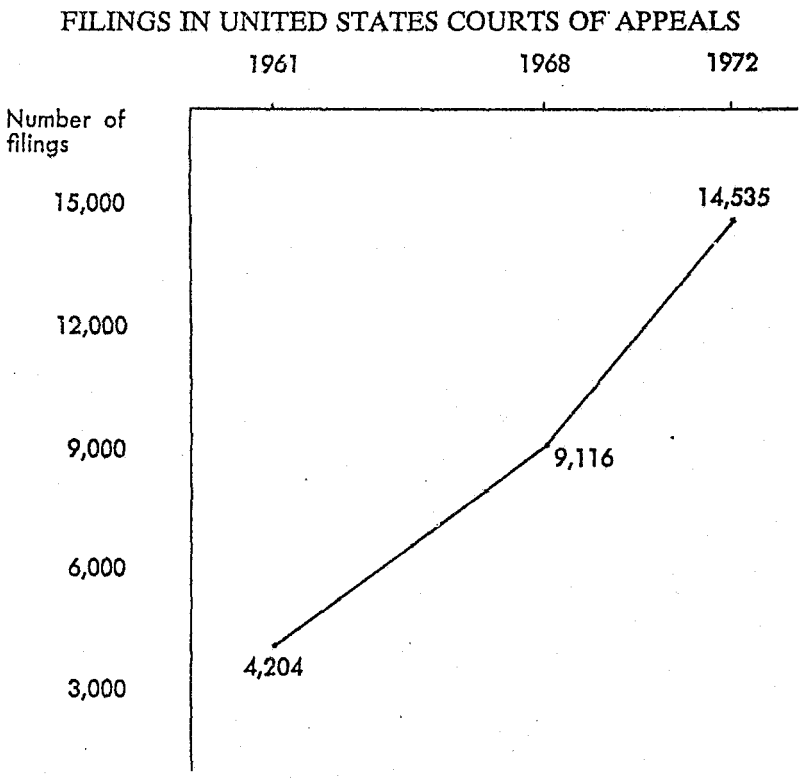
Northern District of Illinois,[84] and the General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education adopted by the Western District of Missouri.[85] Sentencing is another area where conferences among the district judges could do much to answer the complaints about lack of uniformity. None of these things can be done effectively in a 40-man district court.

Any deterioration in the quality of the district judges individually or of their performance collectively would destroy the very values the federal court system is meant to attain. Once such a deterioration began, it would get steadily worse. However, I can afford to leave the question how far we can safely multiply the number of district judges undetermined. For even if we could assume that the number of judges at the district court level could be doubled without adverse consequences to those courts,[86] any such increase would prove utterly destructive to the courts of appeals and to the Supreme Court.

The courts of appeals are already in a state of crisis. In 1960, when 87,421 cases were filed in the district courts, there were 3,899 in the courts of appeals.[87] By 1968 district court filings had grown modestly to 102,163, but filings in the courts of appeals had more than doubled, to 9,116.[88] A study made for the Administrative Office of the Courts in 1967[89] projected 1972 filings of 9,197. As noted, that figure was approached before the ink on the survey was dry. In 1972 when district court filings had grown to 143,216, filings in the courts of appeals increased to 14,535, not only an all-time high, but the biggest jump over the previous year yet experienced.[90]

Why, with a 64% increase in district court filings between 1960 and 1972, was there an increase of 273% in the workload of the

84. *See In re* Trials of Pending and Future Criminal Cases, 306 F. Supp. 333 (1969).
85. 45 F.R.D. 133 (1968).
86. One factor that might hold down the rate of increase in district judgeships otherwise required is the availability of United States magistrates, 28 U.S.C. § 636, to perform many pre-trial functions.
87. A.O. ANN. REP., Table B1, at 210 (1960).
88. A.O. ANN. REP., Table B1, at 174 (1968).
89. Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243, 261.
90. A.O. ANN. REP., Table B1 (1972).



courts of appeals?[91] Not surprisingly, criminal appeals more than quadrupled; with the Government providing a free lawyer and a free transcript for an indigent defendant, more liberal bail procedures, and, except in most unusual cases, an assurance against a heavier sentence on retrial,[92] it is hard to see why almost every convicted defendant should not appeal. However, there was also a trebling of what are characterized as "private civil appeals," although these include petitions by state and federal prisoners which are not "civil" in the usual

91. The two figures are not entirely comparable since about 12% of the workload of the courts of appeals in 1972 came from administrative agencies and the Tax Court. *See* A.O. ANN. REP., Table B3 (1972). However, since these only doubled during the decade, the disproportion between the growth of district court filings and of appeals from district court decisions was even greater.

92. North Carolina v. Pearce, 395 U.S. 711, 719–26 (1969). The grant of certiorari in *Michigan v. Payne*, — U.S. —, 41 U.S.L.W. 3207 (Oct. 17, 1972) (No. 71-1005), may presage some reconsideration of this decision.

sense. Almost all of these cases involve questions of principle and not merely of money, where a successful plaintiff's offer to accept a small reduction or a successful defendant's willingness to waive costs has prevented many an appeal.

There is no reason to suppose that the high percentage of appeals to dispositions experienced in the last few years will not continue. Indeed, as suggested, one wonders why the criminal appeal rate should not ultimately approach 100%. But there are added factors that are certain to aggravate the problems of the courts of appeals. Sometime Congress will get around to abolishing the anomalous procedure for review of Interstate Commerce Commission cases by three-judge district courts.[93] While only 52 of these were heard in 1972,[94] they are considerably more burdensome than the usual appeal. Hopefully the three-judge court is on its way out in most other cases as well, as a result of the proposal of the American Law Institute[95] or the more radical and better ones of the Judicial Conference[96] and Senator Burdick,[97] now strongly endorsed by the Chief Justice.[98] Since almost all such cases would be appealed, this would add still another 258 cases[99] of more than usual difficulty, although there would be some compensation in eliminating appeals on the issue whether a single judge had erred in refusing to ask that a court of three be convoked and the service of at least one circuit judge on the three-judge court. Congress will ultimately heed the Supreme Court's requests to be relieved of direct review in government civil antitrust cases;[100] while the filings that such a reform would

93. *See* ICC v. Atlantic Coast Line R.R., 383 U.S. 576, 586 n.4 (1966).

94. A.O. ANN. REP., Table 47b (1972). Three-judge court hearings in other than ICC cases grew from 62 in 1963 to 258 in 1972. A.O. ANN. REP., Table 47b (1972).

95. *See* S. 1876, 92d Cong., 1st Sess. § 1374 (1971).

96. *See* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78-79 (1970), introduced by Representative Celler as H.R. 3805, 92d Cong., 1st Sess. (1971).

97. S. 3653, 92d Cong., 2d Sess. (1972).

98. Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972).

99. A.O. ANN. REP., Table 47b (1972).

100. United States v. Singer Mfg. Co., 374 U.S. 174, 175 n.1 (1963); *id.* at 202 (Harlan, J., dissenting); Tidewater Oil Co. v. United States, — U.S. —, 41 U.S.L.W. 4053 (Dec. 6, 1972). Mr. Justice Douglas dissociated himself from this expression.

add to the dockets of the courts of appeals would not be significant, numbers do not afford a fair indication of the burden these cases impose.

More important than any of the above factors is the host of recent but as yet relatively little known statutes providing for direct review by the courts of appeals of determinations of administrators under specialized administrative schemes. To take just one example, the Occupational Health and Safety Act of 1970[101] authorizes the Secretary of Labor to propose health and safety standards which, upon objections by interested persons, are to be reviewed in a public hearing.[102] Final promulgations of standards by the Secretary may then be challenged in the court of appeals by "any person who may be adversely affected."[103] The Act further provides for the inspection of any working establishment by the Secretary,[104] and the citation of employers failing to comply with promulgated standards.[105] The Secretary also has the power to assess civil penalties.[106] Citations for failure to comply, as well as assessments of civil penalties, are appealable to the Occupational Health and Safety Commission and, thereafter, to the court of appeals.[107]

This is but one of many pieces of new legislation placing additional responsibilities on the courts of appeals in reviewing agency action.[108] The old idea that administrative appeals concern mainly the

101. 84 Stat. 1590, 29 U.S.C. §§ 651–78.
102. § 6, 29 U.S.C. § 655.
103. § 6(f), 29 U.S.C. § 655(f).
104. § 8, 29 U.S.C. § 657.
105. § 9, 29 U.S.C. § 658.
106. § 17, 29 U.S.C. § 666.
107. § 11, 29 U.S.C. § 660. Under this section, the Secretary may also proceed in the court of appeals to procure enforcement of orders issued by him under the Act.
108. The statutes below are a representative sample of recent legislation authorizing proceedings in the courts of appeals to review agency action and to procure enforcement of agency orders: Education Amendments of 1972, 86 Stat. 235, § 415D(b) (authorizing action by state in court of appeals to challenge disapproval of student incentive grant plan by Commissioner of Education); § 708(b) (authorizing review in court of appeals of Commissioner's disposition of state financing plans as to construction of undergraduate academic facilities); § 1058(b)(2) (authorizing state administrative agency to challenge in court of appeals Commissioner's action as to occupational education financing plans); The Older Americans Act Amend-

independent agencies—the NLRB, FCC, FTC, CAB, FPC, SEC, FMC, and AEC—has gone by the board, although we are not yet fully aware of it. It is not going too far to predict that by the end of the decade appeals to courts of appeals from agencies within the executive branch will be as numerous as those now coming from all independent commissions other than the NLRB.[109]

ments of 1972, 86 Stat. 93 (providing for review of Secretary's final action with respect to approval of a state plan on petition of dissatisfied state); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 507, 84 Stat. 1273, 21 U.S.C. § 877 (review by "persons aggrieved" of "[a]ll final determinations, findings, and conclusions" of the Attorney General under the Act); Egg Products Inspection Act, § 7, 84 Stat. 1625 (1970), 21 U.S.C. § 1036 (review by persons "adversely affected" of the Secretary of Health, Education and Welfare's pasteurizing and labeling requirements); Child Protection and Toy Safety Act of 1969, § 2(b), 83 Stat. 187, 15 U.S.C. § 1262(e) (review by "any person who will be adversely affected" of determinations of the Secretary of Health, Education and Welfare); Federal Coal Mine Health and Safety Act of 1969, § 106, 83 Stat. 754, 30 U.S.C. § 816 (review by "any person aggrieved" of determinations by the Secretary of the Interior); Animal Drug Amendments of 1968, § 101(b), 82 Stat. 343, 21 U.S.C. § 360b(h) (review by applicants of the refusal or withdrawal of approval of certain drugs by the Secretary of Health, Education and Welfare); Natural Gas Pipeline Safety Act of 1968, § 6, 82 Stat. 724, 49 U.S.C. § 1675 (review by "any person who is or will be adversely affected or aggrieved" of orders by the Secretary of Transportation under the Act); Wholesome Poultry Products Act, §§ 8(c), 16(c), 82 Stat. 799, 805 (1968), 21 U.S.C. §§ 457(c), 467(c) (review by any person "adversely affected" of determinations by the Secretary of Agriculture under the Act); Radiation Control for Health and Safety Act of 1968, § 2(3), 82 Stat. 1177, 42 U.S.C. § 263f(d) (review by any person who will be adversely affected of the validity of regulations issued by the Secretary of Health, Education and Welfare); Flammable Products Act Amendments, § 3(e), 81 Stat. 569 (1967), 15 U.S.C. § 1193(e) (review by persons adversely affected of standards and regulations of the Secretary of Commerce); Wholesome Meat Act, § 6(c), 81 Stat. 588 (1967), 21 U.S.C. § 607(e) (review by persons affected by determinations on markings and labelings by the Secretary of Agriculture); National Traffic and Motor Vehicle Safety Act of 1966, § 105, 80 Stat. 720, 15 U.S.C. § 1394 (review by persons affected of orders of the Secretary of Transportation); Federal Metal and Nonmetallic Mine Safety Act, §§ 6, 12, 80 Stat. 774, 781 (1966), 30 U.S.C. §§ 725, 731 (review by persons aggrieved of standards and other determinations of the Secretary of the Interior).

109. Since the orders or regulations here considered generally become effective immediately or within a short interval, applications for

I have not yet mentioned the worst spectre of all—appellate review of sentences. I do not call it a spectre because of lack of sentiment for it.[110] But I would hope there will be enough good judgment in Congress to realize that adoption of such a measure would administer the *coup de grâce* to the courts of appeals as we know them. The problem of volume is not so much with the cases where a sentence is imposed after a trial, since most of these will be appealed anyway[111] and the sentence would be just one more point to be considered, although sometimes an important and difficult one, but with the great mass of convictions, nearly 90% of the total, obtained on pleas of guilty or *nolo contendere*.[112] If the sentences in only half these were appealed, and that seems a conservative figure since most proponents of appellate review of sentences reject out of hand the main device, a possible increase of sentence on an appeal by the defendant,[113] that might have a limiting effect,[114] the caseload of the

stays will usually accompany such appeals. These represent a considerable added burden. The court must either spend a substantial amount of time considering the merits in deciding whether or not to grant a stay or grant one rather routinely in any case having some apparent merit conditioned on an expedited hearing of the appeal. This latter course often creates pressure for very speedy decision, on briefs that are likely to be inadequate because of the short time available for preparation.

110. *See, e.g.*, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 94–95 (1964); ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968); FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 317 (1971); S. 1540, 90th Cong., 1st Sess. (passed by the Senate); S. 2228, 92d Cong., 1st Sess.; Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1, 23–28 (1972).

111. In 1972, 3,980 criminal appeals were filed in the courts of appeals as compared with 5,506 convictions after trial. A.O. ANN. REP., Tables B1, D4 (1972).

112. These amounted to 31,714 in 1972. *Id.* Table D4 (1972). Although the ABA STANDARDS, *supra* note 110, propose a so-called "streamlined" procedure for guilty plea cases, at 35–37, 39–41, I do not perceive that this will materially lighten the tasks of the reviewing court.

113. *See* ABA STANDARDS, *supra* note 110, § 3.4 at 54–55, & accompanying commentary, 55–63. The ABA STANDARDS also reject a procedure requiring leave to appeal from sentence. *Id.* at 37–38.

114. The only other factor that might have a limiting effect would be if all or substantially all guilty pleas included a sentence approved in

courts of appeals would be doubled by this means alone. While there would not be an equivalent increase in burden, Professor Carrington is right in saying that if even a small percentage of those convicted on pleas of guilty should appeal their sentence, "the courts would be swamped."[115]

I do not mean by this to minimize the problem of disparate or excessive sentences, but rather to indicate that the solution does not lie in imposing still another burden on the courts of appeals. Appellate judges are ill equipped for the task, and there would be almost as much danger of disparity among panels of a court of appeals as there is among district judges. A far better solution is the creation in each circuit of a standing sentence review panel of district judges, chosen because of their special interest in sentencing and with ready recourse to penologists, psychiatrists and sociologists who could aid them in their work. This would achieve a circuit-wide uniformity, at least at any one time, which shifting panels of circuit judges would not.[116] Such a system would have the further advantage of divorcing the sentencing problem from review on the merits, with the attendant danger of trade-offs.[117] In any event, whatever the desiderata may be, the courts of appeals simply cannot take on this added task.

There are a few reforms, relating specifically to court of appeals

advance by the judge, *compare* ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3, at 71–72 (1968), since there would be almost no chance of reversal in that event. But that is not the present situation.

115. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 578 (1969).

116. *See Hearings on H.R. 7378 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 25 (1972) (testimony of Judge Lumbard). The principal objection voiced to this system is that the panel could not achieve objectivity since it would sometimes have to pass on sentences of members or colleagues. *See* ABA STANDARDS, *supra* note 110, at 121–22. This could be mitigated by having the panel composed of judges who would be temporarily relieved from criminal work. If the objection is deemed truly serious, consideration could be given to following the English model of a separate court for review of sentences, perhaps on a national basis.

117. Judge Frankel has forcefully argued that this danger is less than feared—indeed that, to some extent, a court reviewing the merits should or, at any rate, does have the severity of sentence in mind. Frankel, *supra*, 41 U. CINN. L. REV. at 24–26. Still the danger seems existent in some degree.

jurisdiction rather than federal jurisdiction generally, that might help in a small degree. Two minor ones with respect to the review of administrative orders, to be later discussed,[118] would, after taking account of the increase from court of appeals review of ICC orders, effect a net diminution of five or six hundred such cases a year. The power of a district judge or of a single judge of the court of appeals to issue a certificate of probable cause in state prisoner habeas corpus cases[119] should be eliminated and placed solely in the court of appeals.[120] The same procedure should be applied to appeals from the denials of motions by federal prisoners under 28 U.S.C. section 2255 for vacation of judgment or reduction or correction of sentence. In all these instances the case has already gone through, or had an opportunity to go through, the judicial hierarchy at least once, and has now been considered by a district judge again; before further time of an appellate court is taken, the court should be convinced there is some merit in the appeal. On the same theory, that one review of right is enough, an argument could be made for a certiorari type jurisdiction when a district judge has reviewed the decision of a referee in bankruptcy, at least when such a review has resulted in an affirmance. There are further possibilities along these lines which I will explore when I come to review of administrative orders.[121] There could be wider provisions, or wider use of existing provisions such as FRAP 38, for the award of more substantial costs, but, apart from other difficulties, these would be of little avail in the most rapidly growing heads of appeals—criminal appeals, post-conviction attacks by indigents, and civil rights litigation.

The very best one could hope from such reforms, and I believe this to be overly optimistic, is that the volume in the courts of appeals might be held at not greatly in excess of present levels[122] *if there were*

118. *See* pp. 173–90 *infra*.

119. 28 U.S.C. § 2253; *see* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 144 n.9 (1970).

120. Experience has shown that the reversal rate in these cases, small as it is in total, is even smaller when the certificate has been granted by the district judge.

121. *See* pp. 173–90 *infra*.

122. This assumes, of course, that the courts of appeals will not be required to review sentences.

no significant increase in district court litigation. But if I am anywhere near right in thinking that under the present jurisdictional framework district court litigation in 1978 will be twice the 1968 volume, the filings in the courts of appeals will be more than double the 9,116 in 1968 when the complement of circuit judges was raised to 97. Indeed, if the recent experience whereby each 1% increase in district court filings translates itself into a 4% increase in appeals should continue, they would far exceed that; a figure as high as 25,000 is by no means unrealistic.

There are some other expedients that should be mentioned before considering whether a way to handle such volume can be found in Judge Wright's "few more judges." The two circuits which for years have had a wholly disproportionate number of filings and have thus had to go beyond the traditional maximum of nine judges—the Fifth and the Ninth—could be subjected to the same surgery as the Eighth Circuit experienced, without ill effect, when the Tenth was carved out of it some forty years ago.[123] The Act of 1891 creating the courts of appeals[124] simply adopted the circuit boundaries as these had gradually evolved from the three circuits established by the First Judiciary Act.[125] Even if one were to assume that more thought was given the matter than seems to have been the case,[126] eighty years have wrought changes of sufficient significance to be taken into account. In 1891 the Deep South was only twenty-six years from the disastrous war between the states and fifteen years from the end of Reconstruction; the character of the region has entirely changed, although its federal courts remain especially burdened with the unhappy heritage of the past. In 1891 the seven states allotted to the Ninth Circuit accounted for 3.6% of the country's population; today these same states, along with Alaska, Hawaii and Guam, account for 14.9%, including the nation's most populous state, California. While I am no mathematician, I know the claims that the addition of two more circuits will produce an equivalent increase in conflicts of decision must be statistically wrong, and I do not see that the prestige of

123. Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346.
124. Act of March 3, 1891, ch. 517, 26 Stat. 826.
125. Ch. 20, § 4, 1 Stat. 74 (1789).
126. *See* FRANKFURTER & LANDIS 100 n.200; Carrington, *supra*, 82 HARV. L. REV. at 586 n.197.

the courts of appeals would be much affected if the number of circuits grew from 11 to 13. On the other hand, I think it would seriously decline if the increase were to say 20. To alter slighty the words of Professor Geoffrey Hazard, "what were once authoritative appellate tribunals, subject to occasional review by the Supreme Court . . . would have been converted into a judicial Tower of Babel. The proliferation of utterances could divest any one of these courts of significant authority."[127]

While Congress has now provided for a commission to study a revision of the circuits,[128] I see no likelihood that, aside from the splitting of the Fifth and Ninth Circuits,[129] this carries real promise of relief[130] unless we are prepared for a vast increase in the number of circuits, a course I would deprecate for the reasons stated. Even

127. Hazard, *After the Trial Court—The Realities of Appellate Review*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 60, 81 (H. Jones, ed. 1965).

128. Pub. L. No. 92-489, 86 Stat. 807 (1972). The Commission is also authorized to study and make recommendations with respect to "the structure and internal procedures of the Federal courts of appeals." The Conference Report makes clear that this does not include the jurisdiction of the district courts. Whether the Commission can study and make recommendations with respect to the jurisdiction of the courts of appeals is unclear; I rather doubt this.

129. It has been argued that splitting these unwieldy circuits would accomplish nothing since judge-power would not be increased and indeed might be applied less efficiently than now. See statements of Chief Judge Brown of the Fifth and Chief Judge Chambers of the Ninth Circuit in *Revision of Appellate Courts, Hearing on S.J. Res. 122 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 49–50, 107–08, 155 (1972). But there is no reason why states producing large amounts of business need be left with the existing number of judges; in a split circuit Texas might well have more than four and Florida more than three judges. New York has had six since 1961.

It is true that splitting the Ninth Circuit affords less promise of relief than dividing the Fifth along the line of the Mississippi River because of the high proportion of the work of the Ninth Circuit, approximately 60%, furnished by California. Still the creation of a northwestern circuit would provide appreciable relief and also save substantial travel and communication costs for litigants and the Government.

130. Shifting a state from one circuit to another would also create a serious problem whether the governing precedents were decisions of the old circuit or the new.

that would not be of much help to the Second Circuit, long the most heavily beleaguered save for the Fifth and Ninth, since 90% of its business comes from New York. Whatever the objections to a circuit of only a single state, and these may have been exaggerated,[131] we surely do not want a state to have more than one circuit.

There has recently been a flurry of proposals to get more work out of each circuit judge. Congress has authorized an executive for each circuit.[132] This will ultimately prove a help, although most of the items proposed for the agenda of this office relate primarily to the district courts. Partly because of this, at the moment I can only echo the Chief Justice's comment:[133]

> The function of a court executive is something none of us really knows very much about.

The Fifth Circuit has developed an elaborate procedure for screening out frivolous appeals and others determined not to warrant oral argument;[134] the judges of that court are enthusiastic about the practice;[135] and it has now been followed closely by the Sixth[136] and Eighth Circuits[137] and in slightly different forms by the First,[138] Fourth,[139] and Tenth.[140] The procedure is doubtless valuable in curtailing the number of arguments in those circuits where distance is

131. While it is important that a court of appeals contain judges from different kinds of communities, I am not altogether clear why this could not be furnished by judges living outside the large metropolitan areas in the same state as well as by judges from outside the state. Perhaps the chief virtue of preserving the multi-state circuit is in mitigating against the chances of one political party control of a court of appeals that would exist if the same party retained the presidency and had the senatorships from a single state for a long period.
132. 84 Stat. 1907 (1971), 28 U.S.C. § 332(e), (f).
133. Burger, *Deferred Maintenance*, 57 A.B.A.J. 425, 428 (1971).
134. 5TH CIR. RULES 17, 18, 20.
135. *See* Murphy v. Houma Well Serv., 409 F.2d 804, 805–08 (5th Cir. 1969); Huth v. Southern Pacific Co., 417 F.2d 526, 527–30 (5th Cir. 1969); Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 410–14 (5th Cir. 1970).
136. 6TH CIR. RULES 3(e), 7(e), 8, 9.
137. 8TH CIR. RULES 6, 8, 9.
138. 1ST CIR. RULE 6.
139. 4TH CIR. RULE 7(a)–(b).
140. 10TH CIR. RULES 8, 9.

a source of inconvenience and expense to judges and counsel; whether the procedure, which necessarily involves a large amount of paper shuffling among the judges, effects a net saving of judicial time as against those followed by other circuits, smaller in geographical size, in limiting the time for argument[141] and often summarily affirming from the bench has not been established.[142] Other appellate courts have adopted still different procedures to get more work done.[143] The proportion of cases in which opinions are written has been reduced and could be further diminished. Counsel in criminal appeals should make greater use of the procedure, sanctioned in *Anders v. California*,[144] of filing a brief demonstrating that he has considered all possible appealable issues and has found that none exists, rather than blindly following the safe course of seeking a reversal to which he knows his client is not entitled; the courts should not hesitate to refuse or reduce compensation under the Criminal Justice Act in cases of flagrant abuse. Yet, when full account is taken of all these possibilities, most of which are already reflected in the rate of disposition, it is still true that, under our present notions with respect to what an appeal should be, courts of nine judges in active service, a figure already equalled, approached or exceeded in ten of the eleven circuits, will not be able to handle the caseloads of most of the circuits in the 1980's unless the rate of increased intake at the district court level is materially slackened.

In contrast to techniques directed at making the assembly line move at increased speed, an imaginative proposal of a different sort was made by Judge Shirley Hufstedler in her Charles Evans Hughes lecture of 1971.[145] The gist of this is as follows: Appellate courts perform two different kinds of functions—review for error in

141. *See* 2D CIR. RULE 34(d); 7TH CIR. RULE 11. Rules of the Third, Ninth, and District of Columbia Circuits provide for dispensing with oral argument altogether, as well as for limiting it. 3D CIR. RULE 12(6); 9TH CIR. RULE 3(a); D.C. CIR. RULES 11(d)–(e), 12(b).

142. Alternatives are affirmance "on" or "for substantially the reasons stated in" the district court's opinion.

143. *See Panel Discussion, Improving Procedures in the Decisional Process*, 52 F.R.D. 51 (1971).

144. 386 U.S. 738 (1967).

145. Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971).

the trial of the particular case (the "corrective function") and review for the determination or redetermination of principles of law (the "institutional function"). She would confide the corrective function, including the disposition of post-trial motions now handled by the trial judge, to a court of review composed of the trial judge and two appellate judges. It would meet shortly after the judgment or sentence, and its procedures would be most informal, generally without a trial transcript unless one happened to be available. It would render an oral opinion or a written memorandum, which would not be citeable as precedent. Review by the next tier of courts, the court of appeals in the federal system, would be discretionary and limited to cases where some important principle was at stake.

Perhaps because of the author's felicity of expression and, if one may still dare to say so in these days of women's liberation, her personal charm, perhaps also because of sheer desperation, this proposal has been received with more interest than it seems to me to deserve. One regards with horror what might be considered still another tier of courts, with the attendant delay and expense.[140] One is even more bothered over the trial judge sitting in judgment of himself. Judge Hufstedler's attempted vindication on the basis of the old circuit system[147] is not convincing. The presence of the district judge in these courts was one of the causes for dissatisfaction that led to the creation of the courts of appeals; it was said that:[148]

> Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.

I know a few trial judges who could be trusted to view their own decisions with appropriate neutrality—but only a few. Would the two appellate judges feel as free to criticize a trial judge sitting with them as below them? Would both of them? Could they properly perform

146. *See* Hazard, *supra* note 127, at 82.

147. Hufstedler, *supra*, 44 S. CAL. L. REV. at 912.

148. W.B. Hill, *The Federal Judicial System*, 12 A.B.A. REP. 289, 307 (1889), *quoted in* FRANKFURTER & LANDIS 87. It has been said of the earlier practice of having Supreme Court Justices pass on their own decisions at circuit, that this "gave the judges a vested interest in error . . . ." G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 97 (1970).

the corrective function, particularly on questions of the admissibility of evidence, if they had no transcript and were largely dependent on the notes of the trial judge? Is the distinction between the "corrective" and the "institutional" function viable?[149] What would the court of review do when there was a question as to the proper rule of law? In good conscience it would feel compelled to study this with some care, just as a court of appeals does on a novel and important issue of constitutional law even though it knows its decision will be reviewed and will have no precedential effect. When the court of appeals had denied review, could certiorari be sought from the Supreme Court? Judge Hufstedler has answers to many of these criticisms; I shall not attempt to make them for her.[150] The very most I would favor with respect to this proposal would be to see the experiment tried out in some state or, still better, in part of one. In advance of such a trial we surely cannot rely on it as a panacea for country-wide application in the federal judicial system.

We thus reach the question whether there is any sufficient objection to increasing the number of judges in a court of appeals above nine. While I confessed that the case for not increasing the number of district judges in any large measure was not one that could be proved, I have no such doubt with respect to the courts of appeals. The essential difference is that the latter are collegial. Under the Act of 1891 they had only three judges each, so the same judges always sat together. As the business increased, more judges were added and the three-judge panel system developed. There was no great trouble in maintaining this effectively so long as there were no more than five judges in any court of appeals. According to my rudimentary mathematics, with five judges there would be ten possible panels and every one would have at least one member who had been on any

149. A good example of the difficulty in drawing this distinction is furnished by Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). The district judge and the three judges of the court of appeals agreed on the applicable "principles"—that a serviceman did not give up his First Amendment rights but that the interest of maintaining discipline justified curtailments that would not have been permissible for the ordinary citizen. They disagreed whether the disciplinary measure taken by the Army was justified by the conduct at issue. Is this "error" or "policy?"

150. *See* Hufstedler, *supra*, 44 S. CAL. L. REV. at 912–15.

previous panel. The possibility of one panel's proceeding in ignorance of what another was doing thus did not exist. Even with the six judges of "Learned Hand's Court"[151] the chances of this were small. With nine they are much greater, and with eleven, thirteen or fifteen, greater still. There is a method for dealing with this problem, namely, the circulation of all proposed opinions to each judge, as is done to a considerable extent in the Third, Fourth and District of Columbia Circuits, but this means more work[152] and certainly more delay, particularly in view of the present condition of the mails. An increase in the number of judges would increase the number of requests for votes upon en banc consideration, although not in direct proportion, and would greatly enhance the difficulty of handling those that were granted. And the suggestion that en banc proceedings be limited to a "reviewing division," presumably of the active judges ranking highest in precedence although with an age limitation,[153] would inevitably breed justifiable dissension.

151. *See* SCHICK, LEARNED HAND'S COURT (1970).

152. If it be said the procedure would not involve more work since, presumably, all the judges read all the opinions *after* they appear, I would strongly disagree. The responsibility I would feel with respect to a proposed opinion is quite different from that concerning one that has already appeared. In the latter case, I am concerned only with two situations: One is where the result seems so wrong on a point within the ambit of F.R.A.P. 35(a)—a situation usually flagged by a dissent—that I should make or support a request for reconsideration en banc. The other is where some remark, very likely not affecting the result, is in conflict with a previous decision of our court or the Supreme Court or otherwise contains serious seeds of future trouble, so that I should ask the opinion writer to consider a modification. If I saw the opinion prior to its filing and thought the result wrong, could I in good conscience refrain from saying so, even though I would not regard the precedent as sufficiently important that I would support reconsideration en banc? Would I not feel an obligation to suggest changes where I thought the language murky or the reasoning illogical, even though I agreed with the result? In short, does not the practice result either in largely defeating the very objective of the panel system or in a judge sitting by and saying nothing about what he regards as mistakes? To me neither result is attractive.

153. *See* testimony of Judge J. Skelly Wright in *Revision of Appellate Courts, Hearing on S.J. Res. 122 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 21–22 (1972). The asserted analogy to the

Again, the judges of the circuit "in regular active service" constitute the judicial council for the circuit, which is directed to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."[154] Since an increased number of judges would interfere with this function, it has been proposed that only the senior five, or seven, or what-have-you, should participate. I do not like the idea of second-class judges. Moreover, I am not confident that the oldest judges can make the greatest contribution to some of the council's work; yet they would rightly resent being ruled by their juniors, especially with respect to the management of their own court.

Beyond all this is the desirability of judges of a collegial court really knowing each other, by talking together, lunching together even—perhaps particularly—drinking together. This promotes understanding, prevents unnecessary disagreements, and avoids the introduction of personal animosity into those differences of opinion that properly occur. I believe that close personal relationships have been one of the sources of strength of the Supreme Court; when these have degenerated, so has the Court's performance. I thus agree again with Professor Geoffrey Hazard that "[i]t will therefore be simply impossible, in the foreseeable future, to solve the problem of 'too many appeals' by increasing the number of judges."[155]

Appellate Divisions of the Supreme Court of New York is inapposite. While called a division of the Supreme Court, the Appellate Divisions are in fact intermediate courts of appeals.

154. 28 U.S.C. § 332.

155. Hazard, *supra* note 127, at 82. *See also* FRANKFURTER & LANDIS 187, and the views of Judge Lumbard, *supra* note 116, at 21–22.

Professor Carrington has proposed an elaborate plan for endeavoring to meet the problem by separating courts of appeals of many members into subject-matter divisions through which the various judges will rotate and which will be the ultimate authority, subject only to Supreme Court review, in the type of cases confided to them. *See* Carrington, *supra*, 82 HARV. L. REV. at 587–96. Many of the difficulties in this scheme are recognized by the author but, to my mind, are not answered. A complete analysis of my grounds for disagreement would be too space-consuming. Some have been suggested in the preceding text. Another is that appeals do not neatly divide by subject-matter. For example, a criminal case may turn on the construction of a labor statute, a tax statute, or a

The final reason why we must limit the volume of cases decided by the courts of appeals and, in order to achieve this, the number of filings in the district courts, is the effect of an increase on the volume of petitions for certiorari to the Supreme Court.[156] In sharp contrast to decisions of state courts, every decision of a court of appeals is a potential for the Supreme Court's docket. There is no requirement that such a decision involve a federal question or even that it be a final judgment. Requests by the Court to the bar for restraint in the filings of such petitions have fallen on deaf ears. As said by Mr. Justice Frankfurter:[157]

> The litigious tendency of our people and the unwillingness of litigants to rest content with adverse decisions after their cause has been litigated in two and often in three courts, lead to attempts to get a final review by the Supreme Court in literally thousands of cases which should never reach the highest Court of the land.

Filings in the Supreme Court grew from 1,940 for the 1960 Term to 3,643 for the 1971 Term.[158] The widespread notion that this increase results primarily from *in forma pauperis* cases is a grave error. While these cases did increase from 1,098 in the 1960 Term to 1,942 in the 1969 Term, there was almost the same propor-

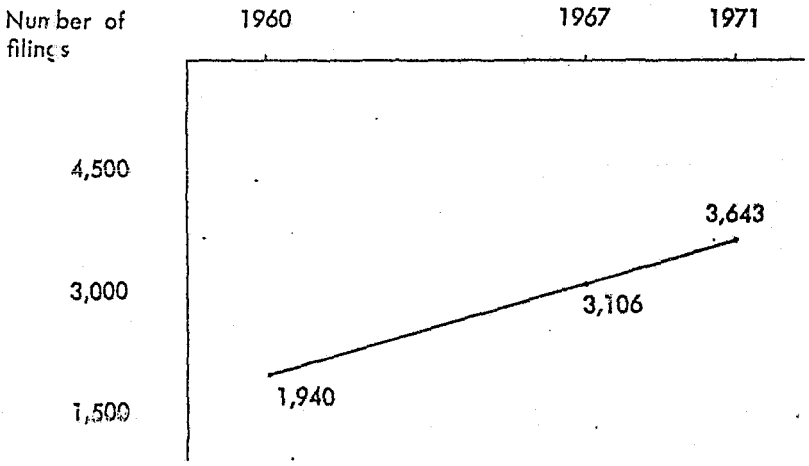
securities statute. A tax claim can turn up in bankruptcy. Questions under the Administrative Procedure Act may arise in almost any litigation against government officers or agencies; issues under the Federal Rules of Civil Procedure may crop up in every piece of civil litigation. Evidence questions can arise anywhere. Furthermore, a judge of the court of appeals should not be required to sit by and allow a decision of his colleagues on an important matter with which he disagrees to become "the law of the circuit" and remain so unless and until other judges constituting that "division" choose to reconsider. While Professor Carrington is to be applauded for trying, his proposal would introduce more problems than it solves.

156. Neither more work out of judges, more circuits, more judges, nor Professor Carrington's proposal offers any help on this score.

157. Dick v. New York Life Ins. Co., 359 U.S. 437, 459 (1959) (dissenting opinion).

158. SUPREME COURT REPORT, Table II, at A2. Filings in the Supreme Court, of course, are not directly comparable with those in the courts of appeals since the Supreme Court disposes of only some 12% of its filings on the merits; in the others its task is simply to decide whether to decide.

FILINGS IN THE SUPREME COURT OF THE UNITED STATES



tionate increase in cases on the Appellate Docket—from 842 to 1,457.[159] Viewing the matter in another way, as the filings in the courts of appeals somewhat more than doubled, from 4,823 in 1962 to 10,248 in 1969,[160] petitions for certiorari to the courts of appeals nearly doubled, from 941[161] to 1,668.[162] Along with this, the grant ratio in applications to review decisions of the courts of appeals has declined from approximately 10% in 1962[163] to less than 6% in 1970.[164] If I am right in thinking that, unless the intake in the district courts is restricted, the filings in the courts of appeals will pass the 20,000 mark well before the end of the decade, the Supreme Court will then have some 3,400 petitions for certiorari from these courts alone,[165]—as many as the Court's entire filings for the 1969

159. A.O. ANN. REP., Table A1, at 204 (1970). If the figures were to be viewed from a longer time span, the conclusion would differ. *See* Mr. Justice Douglas' dissent in Tidewater Oil Co. v. United States, *supra*, — U.S. at —, 41 U.S.L.W. at 4060.
160. A.O. ANN. REP. 104 (1969).
161. A.O. ANN. REP., Table B2, at 184 (1962).
162. A.O. ANN. REP., Table B2, at 188 (1969).
163. *See* A.O. ANN. REP., Table B2, at 184 (1962).
164. *See* A.O. ANN. REP., Table B2, at 214 (1970).
165. I am indebted to E. Robert Seaver, Esq., then Clerk of the Supreme Court, for some of these computations. He has pointed out that for the years 1962–1970, the ratio of petitions for certiorari to the courts of appeals to filings in those courts has remained within a narrow range, from a low of 16% to a high of 19%.

Term. Since the number of full arguments the Court can hear is finite, this will mean a further decrease in the percentage of courts of appeals decisions in which certiorari can be granted. Yet this will not decrease the burden of picking out the cases to be reviewed.

A Study Group on the Caseload of the Supreme Court has recommended that the Court's burdens be eased by creation of a National Court of Appeals composed of seven circuit judges.[166] All matters now coming before the Supreme Court,[167] other than the few cases of original jurisdiction, would go to the National Court. It could take one of three courses: deny review, which would be the end of the road;[168] certify cases to the Supreme Court, of the order of 400 per year; or review with finality. The *Report* is a bit opaque on the point whether the National Court can follow the last course in any case or can only resolve conflicts among the circuits—indeed the *Report* strongly indicates the latter. The Supreme Court could dispose of the 400-odd cases as it saw fit, including a remand to the National Court in a case where the Supreme Court perceived a conflict among circuits but did not regard the issue as of sufficient comparative importance to warrant its hearing the matter. It seems curious that other cases certified by the National Court but denied review by the Supreme Court should wither on the vine as presumably they are more important than ones the National Court has decided to decide, unless, as appears to be intended, the National Court can only decide cases of conflicts among circuits. It is unfortunate that the Group did not put its proposal in statutory language. This "clears the mind wonderfully" and also would let the country know just what the proposal is. Conceding there are "objections that can be raised

166. SUPREME COURT REPORT 19.

167. This includes cases from state courts, whether by appeal, whose abolition the *Report* recommends, *id.* at 36–38, or by certiorari.

168. *Id.* at 21. This is qualified by allowing the Supreme Court to grant certiorari before judgment in a court of appeals, before denial of review in the National Court, or before judgment in a case set down for hearing or heard there, *id.* "The expectation would be that exercises of this power would be exceptional," *id.*, as the Court's exercise of the first power has been. However, nothing would prevent frequent application for such a grant, and the incentive would be much greater than now in view of possible preclusion of Supreme Court review by action of the National Court.

against this recommendation" but not truly measuring their extent and validity, the *Report* says "relief is imperative."

Is it? Before that can be determined, one should take account, apart from longer-range proposals made in these lectures, of two steps that could be made effective quite speedily. One is the Group's sound recommendation to abolish all mandatory Supreme Court appellate jurisdiction—by eliminating three-judge courts to review Interstate Commerce Commission orders and in cases challenging the constitutionality of state and federal statutes, by abolishing direct appeal in Government civil antitrust suits, and by making all review of state and federal court decisions discretionary.[169] While these reforms would not decrease the number of certioraris, the net saving of the Court's time would be substantial.

The other step would be changes in the Court's internal handling of certioraris. The *Report* says that "the tendency appears to be to allot the greater part of a clerk's time to the study of petitions for certiorari and the preparation of memoranda on them . . ." and, indeed, that some Justices require from their clerks "a memorandum concerning every petition for certiorari or other item to be considered by the Conference."[170] This seems unnecessary. There must be a good half of the petitions which a Justice could decide to deny on the basis of a few minutes talk with the clerk or "a memorandum" something like "The only substantial point raised is the sufficiency of the evidence to support submission of this criminal case to the jury." On the other hand, if the Justices, or most of them, have become afflicted with memorandumania, there is no reason why nine clerks need write memoranda on each petition. Justices desiring to participate in a joint program could pool their clerks;[171] others, who did not desire to do this, could be given a fourth clerk if they wished. Another possibility, dismissed by the *Report*, is for a small senior staff to summarize petitions and make recommendations;[172] I would

169. *Id.* at 25–38. Many of these proposals are discussed in other portions of these lectures.

170. *Id.* at 7, 43.

171. Apparently Mr. Justice Powell has suggested this, and five Justices have joined in the plan. *See* The National Observer, Nov. 11, 1972, at 14.

172. SUPREME COURT REPORT 15–16. Such a staff would be particularly valuable in the study of *in forma pauperis* petitions, where it may be necessary to obtain papers from lower courts.

add with instructions to recommend consideration of the grant of review in say three times the number of cases in which the Court could hear argument, something like the 400 that are to be forwarded by the National Court. While each Justice would read each staff memorandum and call for the papers when he desired, he and his own clerks would devote most of their attention to the cases, say 20% to 25% of the total, where consideration of review was recommended. Either program, or a combination of them, would save an enormous amount of time of the Justices and their clerks, yet would keep control of the Court's docket where it ought to be. The chance that, under such procedures, any truly worthy petition would escape the eye of every Justice seems minimal. If that should occur, the issue would surely arise again.

Rather than await the result of the recommended jurisdictional changes and altered administration, including such mundane things as increasing the efficiency of the law clerks by providing them with secretaries and modern office equipment,[173] the *Report* insists that, at whatever cost, the Justices must forthwith be relieved of any responsibility for the large number of petitions whose fate is foredoomed. Although the present system may waste some of the Justices' time, it is scarcely possible to engage in deep constitutional contemplation all day long, and there is no specific showing that the country has suffered from this diversion of energy. While the *Report* says that "[i]ssues that would have been decided on the merits a generation ago are passed over by the Court today,"[174] it does not cite any instances where a temporary passing over has really mattered; the impression I gain from thumbing the volumes of "a generation ago" is that the Court was deciding a good many cases not meriting its attention—as several Justices thought. In my view, if the Court's docket can be kept at or near its present size, the proposed cure is worse than the ailment.

The first problem which *saute aux yeux* is how rotating judges of the National Court of Appeals will manage better in sorting the mounting volume of certioraris into three piles than the abler and more experienced Justices of the Supreme Court can do in dividing them into two. The answer must be that the National Court will do

173. *Id.* at 45.
174. *Id.* at 6.

very little in *deciding* cases and thus will spend most of its time in screening; this must be why the *Report* lays such stress on the National Court's role in resolving intercircuit conflicts on issues of relatively minor importance, without ever quite saying this is all the National Court can decide. While the *Report* is full of talk about intercircuit conflicts, it contains no figures showing how many the Supreme Court resolves or leaves unresolved in a typical term. My own impression is that, with the exception of federal tax cases, for which a better solution has long been known,[175] and divergent views on constitutional issues, which the Court must handle in any event, resolved and unresolved conflicts in any term are relatively few.[176] If there are only a score or so of such cases each year, and say half of these are all the National Court of Appeals can decide, one can readily understand why service upon it should be deemed a sacrifice rather than a privilege,[177] and the court is badly misnamed. On the other hand, if the National Court were allowed to decide cases comparable with those decided by the Supreme Court in number although not in consequence,[178] the burden would simply have been transferred into less capable hands.

A second objection, important if the National Court were to engage substantially in decision making, goes to its composition. In an effort to avoid the possibility that a President might seek to stack the National Court in a manner that would lead it to keep cases away from the Supreme Court, the Study Group has come up with a proposal "for three-year staggered terms by a system of automatic rotation."[179] Apart from the undiscussed question whether this is constitutionally permissible, the method seems designed to insure that, instead of the National Court being served by the best qualified

175. *See* pp. 161–66 *infra.*

176. Review of the opinions of the 1971 Term indicates only eight (including two tax cases) where certiorari had been granted to resolve intercircuit conflicts on other than constitutional issues.

177. SUPREME COURT REPORT 19.

178. Some have thought there should be greater review of courts of appeals administrative law decisions, which frequently have large records. This was one of the motivations behind the proposal, rejected by the Study Group, *id.* at 16, for a new court "to hear and decide cases referred to it by the Supreme Court . . . ."

179. *Id.* at 19.

circuit judges, it will reflect only the average, and also that, as soon as a judge has gained real experience on the National Court, he will be sent back to his former post.[180] How can one believe that a court so constituted could have "the confidence of the profession, of the Supreme Court, and of the country" and, most important, of the courts of appeals and the state courts, as a decision making body?[181] While the proposed gadgetry could be replaced by a different method of appointment, we would then be back with the problem the gadgetry was designed to overcome.

A third objection, at least if the National Court were allowed to decide important questions of federal law where there was no conflict, is its effect on the prestige and morale of the courts of appeals. One does not like to imagine what Judge Learned Hand would have said about having his decisions reviewed by anything like the National Court. To be sure, not every circuit judge now regards each member of the Supreme Court as his intellectual superior, but all have a respect and reverence for the Court as an institution that they could never entertain for a body like the proposed National Court.[182]

Somewhat less important is the matter of delay. While the *Re-*

180. The problem created for the courts of appeals is glossed over with a single sentence. "It is to be noted that some additional circuit judgeships would have to be created." *Id.* at 19. The only feasible way of handling this would be a statute creating an additional temporary judgeship in any circuit from which a member had been drafted. This has several difficulties. A good part of the three-year term of the departing member might have passed before his replacement was nominated and confirmed, and had become familiar with his duties. If the circuit then lost its place on the National Court, it would have a possibly unwanted member when the departing brother returned. Also the balance among the states within the circuit would be altered.

181. *See id.* at 19.

182. The Report's lack of sensitivity to this problem is indicated by its suggestion, *id.* at 21 n.3, that the jurisdiction of the National Court "could be extended to cover also intra-circuit conflicts between panels and thus avoid the increasing problems of *en banc* hearings by the courts of appeals." It is hard to see how such problems are avoided by making the litigants go to Washington and placing decision in a body with no more than one member having any familiarity with the "law of the circuit."

port has the merit of avoiding the worst delays incident to a complete new level of appellate courts, an appreciable amount of time would be lost in the 400-odd cases which the National Court would send on to the Supreme Court. Although no new papers need be filed, there would be two sets of considerations whether or not to review, and still further delay in the cases remanded to the National Court for decision.

Finally, there is the stubborn fact that, despite the efforts made to insure that almost all meritorious cases will get to the Supreme Court, the proposal does impair the Supreme Court's control of its own docket. The Court would no longer be a body "in which every member is charged and properly charged with making an independent examination of the right of access to the court."[183] The thrust of the *Report* is that this principle now is served only in name and that the function of initial screening, presently performed with large aid from the clerks, had better be delegated to a court of seven circuit judges, with any three having the right to send a case forward, which would also engage in a very limited amount of decision making.

If the National Court is to do only this, the *Report* does not make a sufficient case for its creation at the present time. If it is to do more, along with the problem of burden, there would have to be a method of appointment designed to recruit and keep the best circuit judges—with the attendant dangers which the computerized method of selection and rapid rotation are meant to avoid. The greatest contribution made by the *Report* is in thus revealing the painful choices that will confront the country, at the Supreme Court level, if decisions by the courts of appeals and petitions to review them were to double, as they will unless fundamental corrective action is taken to prevent this.

183. Dick v. New York Life Ins. Co., *supra*, 359 U.S. at 460 (Frankfurter, J., dissenting).

(b)

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RATIONING JUSTICE

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"If we are to keep our democracy, there must be one commandment: Thou shall not ration justice." Learned Hand

THE words of Judge Hand are echoed in other recent pronouncements that call for a wider availability of effective access to the procedures of justice. *Gideon v. Wainwright*[1] and related cases extending the right to counsel in defense of criminal accusation, the legal assistance component of the

[1] Gideon v. Wainwright, 372 U.S. 335 (1963). Gideon v. Wainwright held that counsel must be provided to a defendant charged with a felony who had requested appointment of counsel but who had no means of his own to pay an attorney. It overruled an earlier decision, Betts v. Brady, 316 U.S. 455 (1942), and subsequent cases relying on it, which held that counsel need be provided only where on "an appraisal of the totality of facts in a given case," it appeared that the criminal proceeding would be manifestly unfair if the defendant were obliged to proceed without counsel.

Provision of counsel for indigents can be made through either tax-supported public defender systems, charitably supported legal aid systems, appointment *ad hoc* of private attorneys, or a combination of those procedures. See generally, Silverstein, Defense of the Poor in Criminal Cases in American State Courts (1965). *Gideon* itself was a felony case, but the language and rationale of the decision seem applicable as well to misdemeanor charges. See People v. Witenski, 15 N.Y.2d 392, 259 N.Y.S.2d 412 (1965). In that event, the scope of the problem of providing counsel for indigents is considerably magnified. There are roughly 300,000 felony prosecutions a year nationally; there are about 5,000,000 misdemeanor prosecutions a year nationally. See Silverstein, *op. cit. supra* at 7, 10.

Federal Anti-Poverty Program,[2] the rapid escalation of privately funded legal aid[3] and, in broader terms, the demand for greater accountability and regularity in the administration of public welfare programs themselves,[4] all reflect the concern for lessening the disparity of rich and poor in their procedural position before the law. It is, however, odd to think of these developments as responsible to a commandment that justice *not* be rationed, for in a strict sense they all are the quintessence of rationing: an allocation of resources that departs from the distribution afforded in the marketplace.

The commandment was of course not intended to be taken so literally. But it seems worthwhile to consider some of the implications that follow if the commandment is reformulated in more strictly accurate, if less poetic, terms: thou shall ration justice—but on what terms?

The implications that arise from the question begin with the broad one of providing a system of justice in the first place and extend to subsidiary and more parochial questions about the relation between private and public participation in the doing of justice. The general point to be advanced is that the appropriateness of particular commitments to "fairness" in the administration of justice can be illuminated, if not determined, by assessing the economic choices that are involved. This is not a new point, but it is one worth some reconsideration, especially in the light of the intensifying common interest in the problem.

It should be recognized at the outset that an administered legal system is itself a social welfare program. The act of government represents the erection of a framework of rules and supporting policies that call for alterations in community behavior patterns in the name of the common good. The point is put formally, for example, in the preamble of the United States Constitution: "In order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty . . .". The same point is implicit in the establishment and maintenance of any government. An essential step of implementation in societies more complex than the most primitive is the creation of an apparatus of administered legal justice—keepers of the peace such as police, judges and jailers, and, in modern systems, complex adminis-

[2] Shriver, The OEO and Legal Services, 51 A.B.A.J. 1064 (1965); Berry, The Role of the Federal Government—National Conference on Law and Poverty, 51 A.B.A.J. 746 (1965); Wald, Law and Poverty: 1965; Working Paper for the National Conference on Law and Poverty (1965).

[3] See Statistics of Legal Aid Work in the United States and Canada, published annually in National Legal Aid and Defender Association, Summary of Conference Proceedings.

[4] See Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L.J. 1347 (1963); *cf.* Cahn and Cahn, The War on Poverty: a Civilian Perspective, 73 Yale L.J. 1317 (1964).

trative and judicial systems with a supporting cast of thousands of public functionaries.

To have a system of law and administered justice presupposes that there has been a practically effective political monopolization of internal force, an assumption of final legitimate authority in specially designated officials, and a delegation within the legal framework of specialized functions of law-making, law enforcement and adjudication. These arrangements have not only political, ethical and social elements—the subject of political theory and legal philosophy—but economic ones as well. In the crudest sense, to the extent the system of justice is effective, it supplants expenditure for domestic fortification, armed guards and an apparatus of precaution with expenditure for more pacific private purposes and for the apparatus of official justice. Refinement in the concept of administered justice requires further allocations, dictated by parallel estimates of common expediency.

Whatever else it is, creation of a system of justice is an expression of collective economic choice to alter the situation that would otherwise result from the exercise of unregulated choices. From a political point of view, reasonably decent and effective administration is a primary consideration of government because the adjacent political processes are turmoil and rebellion. Hence, it may be said that reasonably decent and effective administration of justice is an irreducibly necessary social service and therefore outside the ordinary calculus of economic choices. But the fact that a reasonably decent and effective system of justice is a political and social necessity does not detract from the fact that economically it is a commitment of collective resources to a program whose special object is the peaceful protection of life, limb and possessions. In its objectives, organization and cost consequences, a system of administered justice is thus a social welfare program in substantially the same sense as the modern refinements of social security, health insurance and public education are social welfare programs.

Moreover, whatever the minimum political requirements in the way of a system of justice may be, it seems quite clear that systems of justice can be developed upward from that minimum to various "service" levels. Put another way, "reasonably decent and effective administration of justice" admits of a wide range of possibility and expectation, depending on the collective preference for public order and individual justice as compared with the achievement of other objectives. The service level in the administration of justice can be established by economic calculation essentially similar to the calculation involved in establishing any other public welfare program: how badly do we want well-trained judges in all courts, jury trial for parking tickets, policemen in every subway station, street lights on every corner?

It is thus apparent that justice can be "bought" in the sense that different

measures of the service of administered justice can be obtained depending on the price that is paid. In ethical and legal discussion, "justice" in adjudication is sometimes spoken of as though it were an impalpable or an absolute. In operational terms, which is to say economic terms, it is surely not. In the doing of justice, as elsewhere, what can be obtained is limited by what can be funded. And if it is true that no amount of money can buy perfect juridical insight, it is clear enough that approximations of perfection in an organized social structure are possible only with substantial expenditure. Hence, all decisions about the measure of justice that should be accorded in the system are also decisions about public expenditure.

A second implication is that decisions about the desired level of service in the public welfare program of administered justice are economically competitive with decisions to engage in other types of public welfare programs. This is perfectly plain in the case of a city council's decision whether to add to the police department at the expense of the recreation department's budget, and it is no less true, if less directly perceptible, in the wider dimension of the national economy. Hence, administered justice is a commodity for which differential preference has to be established by comparison with other possibilities. This is particularly the case, and the importance of calculation of alternatives more pressing, when the alternatives include public welfare programs whose general objectives include those that are among the aims of the system of administered justice itself. For example, more public recreation facilities may diminish propensity to criminal recreation, which in turn diminishes the required service level of police, judges and jailers; broadening social accident insurance may reduce the number and difficulty of tort claims, and thereby reduce the need for claims adjusters, lawyers and juries, and so on.

The fact that these differential cost calculations are exceedingly hard to make with precision does not alter the fact that such calculations are necessary, or the fact that they are made every day, or the fact that they constitute rationing of justice. Nor does the fact that the expression of preferences represents a pluralist and diffuse decisional process, involving the courts, the legislatures and the taxpayers, alter the fact that collectively decisions are made to stand any given moment of time. Just this sort of calculation is being made in the Federal Anti-Poverty Program, where a finite budget has to be allocated among educational programs, medical services, family counseling and legal services. It is, moreover, in part a recognition of these cost implications, and the relinquishment of other goals that is required as a result, that underlies the anxiety and hostility expressed in some quarters concerning the extensions of Due Process by the Supreme Court. Due Process, a procedural aspect of adjudication and preadjudication, costs money that could plausibly be spent otherwise.

At stake is the ration of justice as compared to the ration of other things. This question has been at issue all along, for the *status quo ante* itself represented a scheme of choices. The differences that have been introduced by such developments as *Gideon v. Wainwright*,[5] the stepping up of legal aid services for the poor and the Anti-Poverty Program are twofold. First, the prior rationing system has been drawn into serious dispute by elements in the community whose voices have to be heeded, so that the questiton is not so easily put aside. Second, the scale of resource reallocation required to meet the new demands is so large that the economic dimension of the question has become a matter of real political concern, and not merely financially *de minimis*. The day of political and economic reckoning is not coming; it is already here.

The particular terms of reckoning are beyond the scope and purpose of this paper, but a few points may be mentioned. The first is suggested by calling to mind the aphorism that medieval justice was political rigor tempered by administrative inefficiency. In modern times, administrative techniques, especially in areas relevant to the criminal law, have remarkably increased in their efficiency: record-keeping generally, systems of property identification, professional police, photography and telephony, ballistics, finger-printing, and like methods have all been developed, and invested in heavily by the public, since the beginning of the 19th century. Parallel development is found in areas of inter-personal dispute, such as contracts (writing, recordation), torts (collision reconstruction), and property conflicts (surveying, handwriting analysis). By and large, there has been over the same historical period no diminution in the will to control private behavior. If anything, the trend has been the other way: gambling, the use of narcotics and alcohol, dissemination of fraudulent and obscene literature, and trade and fiscal adventurism were not generally criminal before the modern era. On the civil side, our concept of wrong in contract, tort and property shows similar refinement.

The improvement of law-enforcement and adjudicative techniques and the simultaneous expansion of the area of their employment represent an enormous increase in investment in favor of inducing conforming behavior. Certainly it far surpasses in sophistication and cost the modest apparatus of Elizabethan justice. Most of this is occasioned by the social necessities arising from living more complex lives, in closer quarters and at a more rapid pace of interchange. These tendencies seem to be strengthening in recent times, if the demand for lawyers and the supply of new regulations are indications. It seems fairly clear, therefore, that we are in a secular trend of rising investment in administered justice, of which the largest part has been invested on the side of regulatory administration. In this view, it should not be surprising to

[5] See footnote 1, *supra*.

see demands for parallel investment in behalf of those unable to marshal their own resources to the level currently available to most elements in society. The crude balance approximating equality before the law that is essential for political stability in modern society could not be maintained otherwise.

The second point is related to the first but is somewhat more difficult to make. If one could imagine a society in which administrative perfection had been so far achieved that for practical purposes all who were officially accused could be safely regarded as guilty, it is difficult to imagine how such a society could be free in any sense of the word. This would be so unless it were also assumed that a society approximating such administrative perfection were also content to limit its intrusions into private affairs to rigorously confined areas of concern, so that the apparatus of administration touched individuals only infrequently. This assumption seems wildly improbable, however, if only because technical efficiency has a normative ethic of its own which tends to inflate into substantive regulation by a slow but relentless Parkinsonian process. In any event, the modern trend seems to be toward constant filling of the gap between conduct which is within the reach of regulatory technique and that which is actually regulated. This is as notable in the criminal law as it is in civil relationships.

The most recent introduction of additional investment in the system of administered justice has been largely on the defensive side, in the form of criminal defense and civil aid. This new rationing can be considered a redress of the balance of government toward reducing its effectiveness, counterposing increases in government's administrative efficiency with obstacles to its success. As Mr. Justice Black observed in *Gideon v. Wainwright*:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries . . . [The] noble ideal [in which every defendant stands equal before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[6]

Parallel counterpositions have occurred in earlier periods of history, balancing seditious libel with jury trial, public prosecutors with public defenders, and prohibition with inadequate police. In any case, the new rationing of justice, at still higher levels of technical efficiency on both sides than in the past, can be regarded as an effort to redress an imbalance which in righteous

[6] 372 U.S. at 344.

moments is too easily ignored: the social latitude that follows from having much misbehavior remain unpunished.

The current debate over police and prosecution practices, and over extension of legal assistance to the poor in civil matters, is a debate over the system of rationing administered justice. One of the issues unresolved, and generally undiscussed in that debate, is the extent and character of present need for an effective regulatory regime.[7] It is agreed on most sides that a substantial increase in the effectiveness of measures to prevent street violence, robbery, burglary and other unambiguously criminal conduct is desirable. It is not agreed, however, whether there should be more restrictive control of civil demonstrations and civil disobedience, particularly activities associated with the Civil Rights movement. Nor is there agreement in inner critical circles concerning the propriety and efficacy of attempting to maintain controls on narcotics use, gambling and other conduct which can be viewed as wrong only because the law makes it so. Finally, there is not agreement concerning the present and potential administrative capability of law enforcement agencies. Some courts and some commentators see the law enforcement apparatus as relatively powerful and capable of being effective despite introduction of procedural inhibitions that would make achievement of its enforcement objectives more complicated and therefore more expensive. Law enforcement officials, on the contrary, see themselves as under-manned and under-equipped and confronted with an ever-rising tide of responsibilities with which they see no way to cope effectively. And shadowing all the areas of disagreement are the unstated contrary views about the appropriate level and range of conformity to law that should be established in the community.

This debate involves exceedingly complicated issues at best, but it is further confused by three collateral factors. In the first place, the debate proceeds in a multitude of forums—courts, legislatures, law enforcement groups, and the academies—with most of the participants talking past each other rather than joining issues. Second, the state of information about the efficacy of various investments in law enforcement and regulatory administration on the one hand, and measures of constraint and defense on the other, is appallingly meagre.[8] Hence, even if issues were joined there would be little in the way of satisfying evidence that could be adduced. This state of ignorance is being remedied to some extent, but it is also being perpetrated by reliance on all sides on pronouncements that are more fervently held than the available evidence warrants.

Finally, the debate is confused by the failure to put the issues in economic

[7] Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 (1964).

[8] *Cf.* Space-General Corporation, Prevention and Control of Crime and Delinquency, Prepared for Youth and Adult Corrections Agency, State of California, Final Report (1965).

terms, to consider the cost consequences against the value added in effectiveness of various methods of dealing with particular problems. The following may be illustrative:

1. It is possible, and for rational analysis essential, to consider alternative "service" levels that might be established for procedural processes in the administration of justice. For example, the problem of equalizing the procedural position of the indigent criminal accused was resolved in *Gideon v. Wainwright* by providing the defendant with counsel to balance the counsel for the state. A theoretical alternative would be to withdraw counsel for the state, which would result in a similar procedural parity but at perhaps less cost. This alternative seems clearly plausible in parking violations and quite possibly could be considered in regard to some more serious offenses. There is no *a priori* reason why a reduced level of adjudicative "service," so long as it maintained reasonable balance between prosecution and defense, would not be as justifiable as a higher service level. Does every public school class "require" a teacher-student ratio of 1:25, or 1:40, or 1:1? Similar questions can cogently and profitably be put concerning a wide range of judicial and administrative processes.

2. It is possible, and similarly essential, to consider the implications for substantive legal policy that ensue from the decisions made concerning the procedural "service" level that is to be established. If it is determined that a given level of procedural refinement ought to be adopted, and if it is further decided that the cost of providing service at that level on a general basis is prohibitive, then it might be concluded that the law enforcement objective to which the particular procedural process is related ought to be abandoned. In short, insufficiency of means may require abandonment of the end—as it does in any simple problem of economic choice.

For example, it has been postulated by the Supreme Court, for what can be assumed are justifiable and sufficient reasons, that illegally obtained evidence may not be used in the prosecution of criminal offenses.[9] This rule establishes a legal minimum on the procedural refinement that must be observed in enforcing criminal law. It requires that the police, in obtaining evidence on which to base prosecution, do so by processes more punctillious than dragnet searches. To use such other methods—preliminary surveillance, specification of the objects to be searched for and justification of proposed searches before a magistrate—takes more time and therefore requires more money per case.[10]

[9] Mapp v. Ohio, 367 U.S. 643 (1961), holding that evidence obtained by illegal search and seizure—neither with a search warrant nor upon a search properly an incident of a lawful arrest—is inadmissible in evidence in a subsequent prosecution. See Traynor, Mapp v. Ohio at Large in The Fifty States, 1962 Duke L.J. 319 (1962).

[10] *Cf.* Specter, Mapp v. Ohio: Pandora's Problems for the Prosecutor, 111 U. Pa. L. Rev. 4 (1962) "The community pays a high price in less effective law enforcement by elevating the right of privacy over the police power" p. 45.

Because the procedural refinements also have the effect of thwarting search efforts which the police might otherwise undertake, they also have the likely effect of reducing the percentage of search success that the police will achieve on the average. This is most clearly the case regarding "victimless" crimes, such as gambling, vice and narcotics offenses, where there is no party to the offense who is interested in reporting it to the police.

The result may be—many police believe the result is— that within the foreseeably available limits of police forces and the presently applicable procedural rules, it is possible only to have sporadic enforcement of certain criminal laws, such as those against gambling. If this is true, and if neither available police forces nor procedural rules are changed, the question arises whether sporadic enforcement of the particular law is a worthwhile objective. Sporadic enforcement of the anti-gambling laws means, among other things, that gambling is not being effectively suppressed even though that is the laws' ostensible object. It means also that application of the anti-gambling laws is haphazardly distributed among the gamblers, a *de facto* inequality that may approximate pure arbitrariness. At the latter point, where we may now be, it is not clear what is achieved by continuing to make gambling a crime.

The problem of search and seizure in the enforcement of anti-gambling and other laws has been thrown into a state of acute tension of late. The police are expected, by themselves and to a lesser extent by the public, to enforce not only gambling and narcotics violations that they can see but also those which they "know about." At the same time, the police are expected, by the courts and to a lesser extent by the public, to keep their enforcement within the procedural limits prescribed by the Supreme Court. If the question were put in the terms suggested here, the tension, if not the gambling, could be reduced and the wisdom of trying to repress gambling drawn into straightforward discussion.

3. The reassessment of procedural service levels, and the reassessment of substantive legal policy that may in turn thereby be invited, taken together may raise further questions about more general questions of public policy. This kind of ramification is suggested by a problem that has recently attracted attention in regard to the program of Aid to Needy Families (Aid to Dependent Children, or ADC, as it was formerly known).[11] This program, commonly called "welfare," provides public cash assistance to certain families "in need," that is, those whose income sources fall below scheduled levels.

Among the questions that arise in determining need is whether the family seeking public assistance has its own sources of income, for if such sources exceed the scheduled minimum, then the family is ineligible for assistance. The most common source of such income is presumably wages earned by the adults in the family, and specifically the father or male standing *in loco*

[11] See 42 U.S.C. §§ 601-609.

paternus in the family. The first question in determining eligibility for welfare assistance is therefore whether there is such a wage-earner who is in fact contributing to the family income, or in the vernacular of public assistance administration, whether there is a "man in the house."

It is obviously to the interest of the welfare recipient that it not be discovered that there is a "man in the house," and a nocturnal pattern of family life may develop as a consequence. It is also obviously to the interest of welfare administrators, under the impulse of pressure from appropriations authorities, to discover whether there is a "man in the house," whose presence raises the inference of income and therefore the consequence of ineligibility for public assistance. The convergence of these patterns of behavior is the so-called "midnight raid" by welfare investigators, an unannounced inspection of the assistance recipient's abode in the dead of night or at the hour of dawn.

It has been suggested, with what seems persuasive force, that the midnight raid is a legally invalid procedure, for reasons substantially parallel to those applied to searches and seizures.[12] If this procedure is invalid, it seems quite probable that enforcement of the substantive legal rule, that is, the eligibility requirement, is unenforceable at acceptable levels of administrative cost. And if it is economically infeasible to enforce the eligibility requirement, it follows that a social welfare assistance program predicated on a concept of eligibility is itself drawn into question. It may be, that is to say, that once the ration of procedural justice is changed, however good the reasons, that the rationing system of general income itself will have to be materially changed. The issue thus presented is of course not unique. The same line of analysis applies *mutatis mutandis*, for example, to such problems as the income tax law: we do not tax most types of "imputed income" for what in the end are reasons of procedural decency and economy.

These illustrations may be multiplied. Common to them, and to all problems in the administration of justice, is that achieving effectiveness of substantive regulatory compliance by the citizenry and achieving procedural regulatory compliance by administrative officials are both expensive processes. They are, moreover, calculable expenses and within broad political limits ones that may be substituted for each other at various levels of preference. They are also susceptible of substitution in favor of other types of expenditure —for parks, housing and television sets. The question of rationing remains.

[12] See Reich, *supra* note 4.

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There Shall Be "One Supreme Court"

By ARTHUR J. GOLDBERG*

In discussing the proposal for a National Court of Appeals[1] (the Mini-Supreme Court) I start, as one must, with the Constitution of the United States. Article III, section 1 of the Constitution states: "The judicial Power of the United States, shall be vested in one supreme Court . . . ." Opponents of the proposed National Court of Appeals have argued that the creation of such a court would violate this article in that a delegation of the exercise of the Supreme Court's jurisdiction would create, in effect, two Supreme Courts.[2]

To some extent, Congress can alter the specific substantive areas that fall within the Court's appellate jurisdiction. But once Congress vests jurisdiction in the Supreme Court, can it delegate to another court responsibility for deciding cases which are properly filed in the Supreme Court? Does not the power to decide cases presuppose the power to consider them and to make a final decision with respect to them when properly filed? In other words, is delegation to another court of cases properly before the Supreme Court consistent with the Constitution's command that there be "one supreme Court"?

Even if these constitutional doubts are not well-founded, what the Constitution does not command, it may still inspire. There is the greatest value in citizens being able to believe that, as a matter of principle, every person has a right to take a claim involving basic rights and liberties to the Supreme Court of the United States for final action, without reference to any other tribunal. It is this belief that in part inspires the great popular belief of the Supreme Court as a palladium of liberty and a citadel of justice.

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* Former Justice of the United States Supreme Court.

1. *See* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND REPORT].

2. *See, e.g.*, Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 17; Warren, *A Response to Recent Proposals to Dilute the Jurisdiction of the Supreme Court*, 20 LOYOLA L. REV. (NEW ORLEANS) 221, 229 (1974).

The controversy relating to the mini-court commenced on December 19, 1972 with the release of a Federal Judicial Center study group report, popularly known as the Freund Report.[3] Mr. Freund, a distinguished Harvard professor and constitutional scholar, and his colleagues on the study group recommended a major change in the structure of our judicial system. After examining the workload of the Supreme Court, the group concluded that the rising caseload has imposed a "staggering burden" upon the justices.[4] The group proposed that Congress create a new National Court of Appeals, made up of a rotating panel of seven presently sitting federal appellate judges. This new court would screen the 4,000 or so petitions for review that are now filed each year with the Supreme Court; the great majority would be finally denied, but about 400 petitions would be certified to the Supreme Court itself for further screening and disposition. The new court would also hear and determine on the merits cases involving conflicts among the federal courts of appeal, a function traditionally performed by the Supreme Court.[5]

There were other recommendations in the Freund Report which did not arouse the same degree of controversy: the abolition of three-judge courts in special cases with direct appeal to the Supreme Court;[6] and the establishment of an ombudsman, rather than an untutored prison lawyer to advise prisoners as to their prospects of success in seeking review by the Court.[7]

As a result of the considerable opposition to the Freund Report's recommendations, Congress created the Commission on Revision of the Federal Court Appellate System.[8] This distinguished commission heard testimony, sponsored studies, and on June 20, 1975 submitted its report and recommendations to Congress for change in the structure and internal procedures of the federal appellate system.[9] In this commentary I shall not deal with the part of the commission report regarding the internal procedures of the existing courts of appeal. I shall confine myself to the commission's recommendations affecting the Supreme Court.

3. FREUND REPORT, *supra* note 1.
4. *Id.* at 5.
5. *Id.* at 18-19.
6. *Id.* at 27.
7. *Id.* at 14.
8. Act of Oct. 13, 1972, Pub. L. No. 92-489, §§ 1-7, 86 Stat. 807, *as amended*, Pub. L. No. 93-420, 88 Stat. 1153 (1974).
9. U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter cited as COMMISSION REPORT].

The commission recommended that Congress establish a National Court of Appeals, consisting of seven judges appointed by the president with the advice and consent of the Senate.[10] The National Court of Appeals would have jurisdiction to screen or hear cases (a) referred to it by the Supreme Court (reference jurisdiction), or (b) transferred to it from the regional courts of appeal, the Court of Claims, and the Court of Customs and Patent Appeals (transfer jurisdiction).[11]

With respect to any case before it on petition for certiorari, the Supreme Court would be authorized:

(1) to retain the case and render a decision on the merits;

(2) to deny certiorari, thus terminating the litigation;

(3) to deny certiorari and refer the case to the National Court of Appeals for that court to decide the merits of the case; or

(4) to deny certiorari and refer the case to the National Court of Appeals, giving that court discretion either to decide the case on the merits or to deny review.[12]

If a case filed in a court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals is one in which an immediate decision by the National Court of Appeals is in the public interest, it may be transferred to the National Court of Appeals provided it falls within one of the following categories:

(1) the case turns on a rule of federal law and the federal courts have reached inconsistent determinations with respect to it; or

(2) the case turns on a rule of federal law applicable to a recurring factual situation, and a showing is made that the advantages of a prompt and definitive determination of that rule by the National Court of Appeals outweigh any potential disadvantages of transfer; or

(3) the case turns on a rule of federal law which has theretofore been announced by the National Court of Appeals, and there is a substantial question about the proper interpretation or application of that rule in the pending case.[13]

The National Court of Appeals would be empowered to decline the transfer, and decisions by the National Court of Appeals accepting or rejecting cases would not be reviewable under any circumstances.[14] Any case decided by the National Court of Appeals, whether upon refer-

10. *Id.* at 30.
11. *Id.* at 32, 34.
12. *Id.* at 32-33.
13. *Id.* at 34-35.
14. *Id.* at 35.

ence or after transfer, would be subject to review by the Supreme Court upon petition for certiorari.[15]

The underlying rationale of the commission's report is that the Court is overburdened and as a consequence is unable adequately to deal with transcendent constitutional issues, to resolve conflicts between the circuits, and to determine national law authoritatively and efficiently.

The recommendations of the commission have, in the main, received the support of the Chief Justice of the United States, Mr. Justice White, Mr. Justice Blackmun, Mr. Justice Powell, and Mr. Justice Rehnquist. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall have, by and large, opposed the recommendations of the commission as did Mr. Justice Douglas while he was on the Court.[16] Almost everyone who has sat on the Supreme Court has agreed that three-judge courts with direct appeals to the Supreme Court should be abolished[17] and that federal diversity jurisdiction also should be terminated.

Let me first deal with the question of the "staggering burden" on Supreme Court justices. During my tenure, the Court's caseload was not as heavy as it is today; filings have increased from approximately 2,400 during the 1962 term to approximately 4,000 during the 1974 term.[18] Although the number of filed cases that the Court must screen has risen dramatically, I am of the view that certiorari petition screening, though highly important, represents one of the less time-consuming aspects of a justice's work. The vast majority of certiorari petitions raise no significant legal issue, and under existing legislation, the Court has discretion to deny petitions without a hearing or a formal opinion. Indeed, an astonishing number of filed cases present questions that a third-year law student can immediately recognize as inappropriate for the Supreme Court.

The more historically important and time-consuming aspect of a justice's work—the hearing and determination of cases on the merits—has not become correspondingly more burdensome over the years. The number of decided cases has remained relatively constant, averaging about 150 annually during recent times.[19]

15. *Id.* at 38.

16. *See id.* at 172-88.

17. Recent legislation has eliminated three-judge courts except in cases challenging the constitutionality of the apportionment of legislative districts and a few other cases. Pub. L. No. 94-381, §§ 2284, 2403, 45 U.S.L.W. 1 (Aug. 12, 1976).

18. FREUND REPORT, *supra* note 1, at A2.

19. COMMISSION REPORT, *supra* note 9, at 6.

I frankly do not see how the recommendations of the commission would diminish the workload of the Supreme Court. Rather it seems that were this procedure to be adopted, the workload of the Supreme Court would be increased. The Court would be required to undertake review of certiorari cases twice: first, on the original application for certiorari, and subsequently after the National Court of Appeals decides these cases on the merits or by denial of review.[20]

The commission apparently hopes that the Supreme Court would allocate less time and work for the second review than it did for the first. But my experience teaches that some, or even all, of the Supreme Court justices would conclude that a second review similar to the first probably would be necessary in fairness to the litigants and in discharge of the Court's responsibility. It seems to me unlikely that the Supreme Court by rule would dispense with the first review in particular cases or in groups of cases.

The commission's referral proposal seems to imply that the Supreme Court should concern itself primarily with constitutional issues, and that the National Court of Appeals should deal with other important issues of national law and conflicts between the regional circuits. Yet Supreme Court justices are interested in various areas of the law, and rightly so. Questions of statutory interpretation are illustrative of the scope of appropriate exercise of jurisdiction by the Supreme Court. I doubt very much that the proposed procedure would materially alter the Court's decision-making process with respect to certiorari application of these kinds of cases.

I further adhere to the view that resolving conflicts between the circuits and therefore necessarily overruling a particular court of appeals is a sensitive process even when performed by the Supreme Court. To vest this function in a court of lesser stature than the Supreme Court, however distinguished it may be, would inevitably create tension in the appellate system. Further, the Supreme Court often delays resolution of a conflict situation until the problem is ripe for adjudication.

In summary, it is my belief that the recommendations of the commission would not alleviate the workload of the Supreme Court, but would add to it. Despite the disclaimer of the commission, its recommendations would create a "fourth tier" in our federal judicial system, leading to greater delays and greater expense than now exist. The proposed transfer jurisdiction for the National Court of Appeals like-

20. *Id.* at 32-38.

wise seems unrealistic. The commission obviously hopes that in both reference and transfer jurisdiction the Supreme Court would refuse to review decisions and actions of the National Court of Appeals except in the most summary fashion. I do not conceive that regional courts of appeal would readily yield their jurisdiction except to the Supreme Court.[21]

It is perhaps the greatest virtue of the Supreme Court that it is designed to serve, as it now functions, as a guarantee to all citizens of whatever estate, race or color that our highest court is open for consideration of their claims that they are being denied equal and relevant justice under the Constitution. I am convinced that grave injury would be done by creation of a National Court of Appeals to the great concept engraved at the very entrance of the noble edifice which houses the Court: Equal Justice Under Law.

I believe that to create a National Court of Appeals would be a serious mistake. The commission's proposal, if implemented according to its intent, would deny to Americans their historic right to take any case raising substantial constitutional questions or significant matters of national law to the highest court in the land for final resolution by the Supreme Court and by the Supreme Court alone. I profoundly believe that the Supreme Court as it now functions is discharging its great responsibilities as the ultimate guardian of our liberties under the Constitution. Let us maintain the purpose and spirit of the institution.

21. The proposed transfer jurisdiction has been eliminated in S. 3423, 94th Cong., 2d Sess. (1976), introduced by Senator Hruska, the chairman of the commission. Senator Hruska correctly states in his explanatory statement relating to this proposal that it has aroused intense and widespread dissent. My own discussions with various judges of the courts of appeals and others confirm this statement by Senator Hruska. It is my opinion that elimination of transfer jurisdiction in S. 3423 is well advised.

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A COMMENTARY ON CONGESTION IN THE FEDERAL COURTS

TOM C. CLARK*

> If we want to improve the administration of justice in this country, we must try some things that some lawyers and judges may not find convenient or agreeable. . . . Our thinking must be imaginative, innovative, and dynamic, and we must experiment and search constantly for better ways, always remembering that our objective is fairness and justice, not efficiency for its own sake.[1]

This comment by Chief Justice Burger should be the polestar of our thinking in seeking to alleviate the terribly overburdened dockets of the federal courts. The federal court system now has more work than it can properly handle. The number of civil cases commenced in the district courts has increased over 100 percent in the last fifteen years. Approximately 57,800 civil cases were filed in 1960 as compared with 117,300 in 1975.[2] Similarly, approximately 26,000 criminal cases were filed in 1960 while 37,500 criminal cases were filed last year, reflecting a forty-four percent increase in the criminal caseload.[3] This burgeoning docket continues unabated. If the high standards we as a nation expect from our judiciary are to be maintained, judges must have the time to properly reflect upon and consider their decisions. This is impossible with a congested court system.

One of the primary reasons for the overcrowded federal docket is

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1. Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1127-28 (1973).

2. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, IMPACT STUDY: THE EFFECT OF MAJOR STATUTES AND EVENTS ON CRIMINAL AND CIVIL CASELOAD IN THE U.S. DISTRICT COURTS DURING FISCAL YEARS 1960-1975, at 1 (1976).

3. *Id.* chart 1, criminal caseload section.

the ease in moving between state and federal forums. The more a court system expands to meet existing demands, the more efficient and accessible a court system becomes, the greater the volume of filings. This has occurred within the federal court system causing a shift in the caseload from state courts to federal courts although many of the cases now appearing on the federal docket should be taken up in the state court system.

Since the Congress has not made any comprehensive reexamination of federal jurisdiction in over a hundred years, I believe the time has now come for a thorough review of the federal judiciary by the Congress. This paper will consider three broad areas, two of which, I feel, need congressional attention.

JURISDICTION

The simplest way to relieve the federal docket is to limit jurisdiction. Many legal commentators, including myself, believe the time has passed for continuing jurisdiction in federal courts based upon diversity of citizenship.[4] As Dean Pound admonished the bar at the turn of the century, the work of the American courts in the twentieth century cannot be carried on with the methods and procedures of the eighteenth and nineteenth centuries.[5] The abolition of diversity jurisdiction would eliminate over twenty-six percent of the civil cases presently filed in federal courts.[6] The federal courts should not be burdened with cases which no longer require protection from colonial self-interest and prejudice.

Some legal commentators believe that by raising the jurisdictional amount, this diversity problem will disappear. But experience teaches the contrary. Lawyers are sufficiently ingenious—even in these times of decreasing skill—to avoid the impact of such a game plan.

One of the primary reasons for this increase in the federal caseload is the lack of congressional foresight in specifically delimiting the ambit of federal concern. A large number of the cases filed are based upon

4. *See generally* Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Fraser, *Proposed Revision of the Jurisdiction of the Federal District Courts*, 8 VAL. U.L. REV. 189 (1974).

5. Address by Dean Roscoe Pound, American Bar Association Annual Meeting, Aug. 29, 1906.

6. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, IMPACT STUDY: THE EFFECT OF MAJOR STATUTES AND EVENTS ON CRIMINAL AND CIVIL CASELOAD IN THE U.S. DISTRICT COURTS DURING FISCAL YEARS 1960-1975, at 29 (1976).

statutes and procedures intended for quite different purposes but so broadly framed by the legislators that the language used can be interpreted to cover them. Statutes enacted by the Congress that create new bases of federal jurisdiction, or expand present ones, should be framed so that the explicatives of the legislation leave no doubt as to where the lines of federal jurisdiction are drawn. This, I believe, would go a long way in eliminating the present rash of bootstrap cases.

Federal criminal jurisdiction is presently in utter disarray. It appears that federal jurisdiction so overlaps that of the states that prosecutions for the same offense may be brought in either federal or state courts. This overreach is aptly illustrated by the fact that federal courts still hear prosecutions for drunk driving, auto theft, simple larceny and theft, gambling, prostitution, and drug abuse, among others.[7] Congress should review the federal penal code and eliminate all such proliferation where the matters involved are of local concern and the federal interest is merely peripheral. This would add more responsibility and dignity to local law enforcement offices and would tend to upgrade their performance.

STRUCTURE

It is often said that the pragmatic approach in the federal system to the increasing caseload is to create more circuits and to appoint more trial judges. I submit that neither of these two proposals is the answer. First, the creation of more circuits in the areas of heaviest congestion would necessarily result in having a territorial division of a state into two circuits. For example, it is proposed that California be divided, one-half remaining in the Court of Appeals for the Ninth Circuit and the other in a new circuit.[8] The result would be an unfortunate conflict in the interpretation of California law. It is also argued that more judges may detract from the prestige and overall quality of the federal judiciary. As the late Justice Frankfurter stated years ago, "a powerful judiciary implies a relatively small number of judges."[9] I support neither more circuits nor more judges.

7. *See* 18 U.S.C. § 13 (1970) (drunk driving); *id.* §§ 641-44 (simple larceny and theft); *id.* § 1955 (gambling); *id.* §§ 2312-15 (auto theft); *id.* §§ 2421-24 (prostitution); 21 U.S.C. §§ 841-43 (1970) (drug abuse).

8. *See Hearings on S. 2988, S. 2989 and S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 1, at 35-38 (1974). Other suggestions for division of the Ninth Circuit that were rejected by the subcommittee may also be found in the report. *Id.* at 38-46.

9. Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928).

The answer to the circuit problem is to divide the congested circuits into divisions, somewhat along the lines that the district courts have been divided. The Fifth Circuit,[10] for example, could be divided into three divisions so that an even caseload in each division would be maintained. In case of conflicts the senior active judge or his designee of each division would sit to resolve such cases, and appellate review would lie in the Supreme Court through certiorari or appeal.

As to the district courts, our experience shows that an increase in judgeships is a temporary palliative. I would, therefore, depend on the more effective use of more magistrates, the improvement of trial techniques and procedures, and th assistance and cooperation of the practicing bar.

Two other structural changes within the federal judiciary need to be made—the removal of all tax and patent litigation from district courts and courts of appeals. I believe our present specialized courts, such as the Court of Claims and the Tax Court on tax cases and the Court of Customs and Patent Appeals on patents and copyrights, should handle these matters with certiorari direct to the United States Supreme Court. These specialized courts not only are better equipped to deal more effectively with these kinds of cases, but such a change would also contribute to the reduction of the caseload in the district courts and the courts of appeals.[11]

The tax litigant who questions his tax liability presently has three avenues he can pursue to obtain relief. If he is willing to pay the tax liability, suit for refund may be brought in either the federal district court or the Court of Claims. On the other hand, if the taxpayer is not willing or is unable to pay the tax liability, suit may be instituted in the Tax Court of the United States. The most troublesome aspect of such a splintered procedure is that there is no single resolution of tax disputes short of a pronouncement by the United States Supreme Court. This problem, coupled with the imposition upon the federal court judge to master the highly technical intricacies of the Internal Revenue Code, points up the necessity for placing initial jurisdiction in the Tax Court with certiorari to the Supreme Court.

10. Other suggested divisions for the Fifth Circuit may be found in *Hearings on S. 2988, S. 2989 and S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 1, at 29-34 (1974).

11. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR, Table 4 at XI-17, Table 17 at XI-33, and chart at XI-35. These tables and chart show the figures for the different types of cases brought in the courts of appeals and the district courts.

Similar problems are encountered in patent litigation. If the patent litigant disputes a decision of the U.S. Patent Office, recourse can be had either in the Court of Customs and Patent Appeals or in district court. This bifurcated approach is exacerbated by the terribly undignified practice of forum shopping by litigants. A patentee who wants to sue for infringement will select a circuit which is favorably disposed towards patents whereas a user who wants a declaration of noninfringement or invalidity will select a circuit which is less receptive towards patents. A specialized court system would avoid unseemly forum shopping and relieve federal judges of this protracted and complicated litigation.

PROCEDURE

There is much that can be done to improve judicial administration now without having to await the time-consuming process of legislative action. We, as judges and officers of the court, can take the initiative in hastening caseflow through the stricter use and enforcement of rules and procedures promulgated for this purpose. In other words, the judges must exercise greater control over the pace of litigation through the judicial process.

The judge can fix a firm time limit for discovery, educate his courtroom clerk to expedite the procedures, and back up the clerk in the process. This is especially true in regard to the early requirement of pretrial discovery, the denial of continuances, eliminating dilatory motions, creating an atmosphere of early trials, and strictly adhering to the court rules and orders, all of which could significantly lessen the backlog of cases. On pretrial motions, judges can save time by either having one hearing where all motions are heard orally and ruled upon at that time by the court or by the submission of motions without argument, with the granting of a hearing only in unusual cases.

In conjunction with the above, the federal courts should more fully appreciate the utility of magistrates. As assistant judges, they could be of considerable help in performing duties and functions short of actually adjudicating cases. This would relieve the judges of many time-consuming tasks, especially in the pretrial phase, thus permitting them to devote more time to more pressing trial matters.

The criminal process can be expedited through the simple use of

techniques such as the omnibus hearing[12] or open file policy. By utilizing this process effectively, both guilty pleas as well as dismissals are expedited. Unfortunately, the Department of Justice frowns upon this procedure. But we—the judges—are the ones responsible for our dockets and where we find a procedure helpful, we should direct it.

To insure that these rules and procedures will be known and understood by both the bench and the bar, seminars or schools should be organized under the auspices of the judge and conducted by the bar and a local law school, at which the judge might appear from time to time to explain his requirements, participate in the training of the lawyers, and develop a closer relationship with the trial bar.

CONCLUSION

The federal judiciary is not the only court system warranting concern. The state judicial systems are experiencing the side effects of congestion. The trend away from state courts to federal courts must be slowed, if not stopped. If this shift in case flow is not remedied, the possibility exists that our state courts may become token judicial bodies. The Congress is presently considering Congressman Bennett's bill, H.R. 13219,[13] which would abolish diversity of citizenship as a basis for federal jurisdiction. As previously indicated, adoption of such a measure would be helpful in relieving the docket congestion. It is the duty of judges to aid in the adoption of these modernizations in our practice and procedures. If we do it in our own courts and encourage the law schools, the bar, and the public to assist us, we can accomplish our purpose—the disposition of lawsuits in an orderly, speedy, and effective manner.

12. *See generally* Clark, *The Omnibus Hearing in State and Federal Courts*, 59 CORNELL L. REV. 761 (1974); Comment, *The Omnibus Proceeding: Clarification of Discovery in the Federal Courts and Other Benefits*, 6 ST. MARY'S L.J. 386 (1974).

13. 122 CONG. REC. 3354 (daily ed. Apr. 13, 1976).

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FEDERAL JUDICIAL CENTER REPORT

OF THE STUDY GROUP

on the

CASE LOAD OF THE SUPREME COURT

FOREWORD

In the fall of 1971 the Chief Justice, as Chairman of the Federal Judicial Center, appointed a Study Group, under the auspices of the Center, to study the case load of the Supreme Court and to make such recommendations as its findings warranted. The membership of the Study Group includes lawyers in private practice with experience in Supreme Court litigation and professors of constitutional law and federal procedure. Three have served as law clerks to Supreme Court Justices, each in a different decade. The Study Group members are:

Professor Paul A. Freund, Chairman
Harvard Law School

Professor Alexander M. Bickel
Yale Law School

Peter D. Ehrenhaft, Esq.
Member of the District of Columbia bar

Dean Russell D. Niles
Director, Institute of Judicial Administration, New York

Bernard G. Segal, Esq.
Member of the Philadelphia bar, former President of the American Bar Association

Robert L. Stern, Esq.
Member of the Chicago bar, former Acting Solicitor General

Professor Charles A. Wright
University of Texas Law School

The Study Group had the privilege of meeting as a group with each of the Justices presently serving. Three law clerks were also interviewed: one was then serving the Chief Justice; the others had served, respectively, Jus-

tices Black and Harlan during their last Term on the Court. The Office of the Clerk of the Supreme Court provided helpful data from its records on the current docket of the Court. The Study Group was furnished invaluable assistance in the collection and analysis of a wide range of statistical information by the staff of the Federal Judicial Center, and in particular by Mr. William Eldridge, the Center's Director of Research. Mr. Eldridge's contribution is reflected in the appendices of this Report.

The Study Group considered a great variety of possible jurisdictional and procedural changes, the more important of which are discussed in this Report. The proposals that we make may seem unduly modest to some. Others may believe that, however unsatisfactory the present situation may be, any substantial change would be inadvisable. But our recommendations express the group's unanimous judgment that some significant remedial measures are required now. The changes proposed are advanced in the conviction that they will better enable the Court to perform its unique and vital role in our federal democracy without reducing its opportunities for providing justice and protecting the rights of all our citizens.

I. NATURE AND DIMENSIONS OF THE PROBLEM

Any assessment of the Court's workload will be affected by the conception that is held of the Court's function in our judicial system and in our national life. We accept and underscore the traditional view that the Supreme Court is not simply another court of errors and appeals. Its role is a distinctive and essential one in our legal and constitutional order: to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.

The cases which it is the primary duty of the Court to decide are those that, by hypothesis, present the most fundamental and difficult issues of law and judgment. To secure the uniform application of federal law the Court must resolve problems on which able judges in lower courts have differed among themselves. To maintain the constitutional order the Court must decide controversies that have sharply divided legislators, lawyers, and the public. And in deciding, the Court must strive to understand and elucidate the complexities of the issues, to give direction to the law, and to be as precise, persuasive, and invulnerable as possible in its exposition. The task of decision must clearly be a process, not an event, a process at the opposite pole from the "processing" of cases in a high-speed, high-volume enterprise. The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before.

We turn now to examine the development of the Court's business over recent years.

The bare figures of the Court's workload present the problem most vividly. Approximately three times as many cases were filed in the 1971 Term as in the 1951 Term. The growth between 1935 and 1951 was gradual and sporadic, from 983 new filings to 1,234. But by 1961 the number was 2,185, an increase of 951, and by 1971, 3,643[1] new cases were filed, an increase of 1,458 in ten years. See Table II, Appendix. Since the Court endeavors to keep abreast of its docket, the number of cases disposed of at each Term conformed closely to the number filed, not dropping below 95% of that number in any of the last ten Terms. Indeed, in the 1971 Term, the Court disposed of 3,651 cases, which was eight more than the number of new filings. Nevertheless the carryover or backlog has been growing gradually from 146 in 1951 to 428 in 1961 and 864 in 1971. See Table I, Appendix.

The most dramatic growth has been in the number of cases filed *in forma pauperis* (ifp) by persons unable to pay the cost of litigation, mostly defendants in criminal cases. The following table shows what has happened (see Table II, Appendix):

Term	Ifp Cases Filed
1941	178
1946	528
1951	517
1956	825
1961	1,295
1966	1,545
1971	1,930

This tremendous increase results both from a substantive enlargement of defendants' rights in the field of criminal justice and from the greater availability since *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), of counsel to indigent criminal defendants. In the 1971 Term, provision of counsel was extended to misdemeanor cases in

[1] These figures do not include the few but increasing number of original docket cases.

which the defendant could be imprisoned. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). There is no reason to believe that this number will decline; since it has remained about the same since the 1969 Term, we cannot be sure as to the future trend. The *in forma pauperis* cases now constitute over half of the cases filed.

The regular appellate filings (the non-ifp cases) have also steadily increased, only a little less explosively. The number was almost 2½ times as many in the 1971 Term as in 1951. (See Table II, Appendix.)

Term	Non-ifp Filings
1951	713
1956	977
1961	890
1966	1,207
1971	1,713

A number of factors have contributed to this trend. The population of the nation will have grown from 132 million in 1940 to 210.2 million at the end of 1972. More and more subjects are committed to the courts as the fields covered by legislation expand. Civil rights, environmental, safety, consumer, and other social and economic legislation are recent illustrations. And lawyers are now provided to a markedly increasing extent for persons who cannot afford litigation. Changes in constitutional doctrines have also contributed, as the reapportionment and school desegregation cases, as well as the criminal cases, attest.

Of course, no one can foresee how future events, laws or cases will affect the Supreme Court's docket. The lesson of history teaches that, independent of other factors, the number of cases will continue to increase as population grows and the economy expands.

With no substantial difference in the number of cases argued, the percentage of petitions for certiorari granted has sharply dropped as the filings have increased, as appears from Table III, Appendix. In 1971, 5.8% were

granted,[2] in contrast to 17.5%, 11.1% and 7.4% in 1941, 1951 and 1961 respectively.

This diminution is in part attributable to the fact that a much larger proportion of the ifp cases (only 3.3% of which were granted in 1971[2]) lacks any merit. But the decline also in the percentage of paid petitions granted (19.4%, 15.4%, 13.4% and 8.9% for 1941, 1951, 1961 and 1971) would seem to reflect, not a lessening of the proportion of cases worthy of review, but rather the need to keep the number of cases argued and decided on the merits within manageable limits as the docket increases. One result is that a conflict between circuits is not as likely to be resolved, at least as speedily, by the Supreme Court as when the docket was much smaller.

The number of appeals to the Court has also substantially increased. The appeals, most of which come from three-judge federal district courts or state appellate courts, comprise less than 10% of the cases on the Court's docket (see Table VII–a), but they constitute about one third of the cases decided with opinion after argument. The appeals from district courts, in particular, impose a substantially heavier burden on the Court than their proportion of its case load would suggest. See Part III, *infra.*

The significance of these figures for the workload of the Justices appears even more clearly from a breakdown showing the Court's weekly burden. The number of filings during the 1971 Term, on a 52-week basis, averaged almost exactly 70 per week. The conference list for March 17, 1972, after a three-week recess, showed that the Court planned to consider and presumably took action on 17 jurisdictional statements on appeal, 193 petitions for certiorari and 55 miscellaneous motions, or a total of 265 different matters, in most of which at least two documents were filed, and in some as many as six.

[2] The figures for 1971 are adjusted to exclude an exceptional group of 133 cases in which petitions were granted and the cases remanded following the Court's controlling decision in the death-penalty case.

And this does not include the consideration given to deciding argued cases on the merits.

Many of these matters are necessarily disposed of without oral discussion at the Court's conferences. If all Justices agree that a petition for certiorari is without merit, it is not placed on the "discuss list"; it is denied without more. Otherwise the conferences would become hopelessly bogged down. But all matters must be considered by each Justice in preparation for the conference.

The actual time spent in hearing cases in which review has been granted has declined since the Court reduced the standard time for oral arguments from one hour to 30 minutes per side.

The number of cases argued and decided by opinion has not changed significantly despite the rising flood of petitions and appeals. Since 1948 the number of arguments has ranged between 105 in 1954 and 180 in 1967. In recent years the number of arguments rose from 144 in the 1969 Term to 177 in 1971, but in some still earlier years, when the total case load was less than one-third of what it is now, there were more oral arguments. The number of cases decided by full opinion has ranged from 84 in 1953 to 199 in 1944. At the 1971 Term 143 cases were so disposed of, with 129 opinions of the Court; during the preceding 15 years the average was 120 cases, with 100 opinions. (See Table IV.)

The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.

Over the past thirty-five years, as has been seen, the number of cases filed has grown about fourfold, while the number of cases in which the Court has heard oral

argument before decision has remained subtantially constant. Two consequences can be inferred. Issues that would have been decided on the merits a generation ago are passed over by the Court today; and second, the consideration given to the cases actually decided on the merits is compromised by the pressures of "processing" the inflated docket of petitions and appeals.

Statistics, to be sure, do not reveal in a qualitative way the difficulty of the cases on the docket; and in fact the character of the cases filed, and particularly of those granted review, has changed within the past generation. But the change has hardly mitigated the demands on a Justice's time and intellectual energy. The *in forma pauperis* category does yield a relatively small percentage of cases appropriate for review. And there are fewer cases involving patents, utility rates, and corporate reorganizations, which typically presented large and complex records. But there are very many more cases involving the most sensitive issues of human conflict, arising as problems of equal protection, public assembly, freedom of the press, church and state relations, and the administration of the criminal law, which surely are no less demanding of a judge and of the collegial process than the mastery of technical data. There has been a proliferation of federal regulatory and welfare legislation in recent years, legislation that requires interpretation, that produces conflicting judicial decisions, and that frequently raises constitutional problems. There is no basis to foresee anything but an intensification of this trend in the period ahead, and with a larger and active bar, increasing legal assistance, and the possibility of an increase in the number of federal judicial circuits, the prospects of a still further increase in the number of review-worthy cases reaching the Court cannot be gainsaid.

To be sure, each Justice now has the services of three law clerks, and these appear to be invaluable under existing conditions if the members of the Court are to keep up in any way with their docket. The law clerks,

however, do not provide an ultimate solution to the excessive workload of the Court. They do not relieve the Justices of responsibility for passing on each matter personally. They can provide only limited aid if the Justice himself is to do the judging. Moreover, the law clerks themselves are overburdened. Individual Justices, as might be expected, utilize their law clerks in somewhat different ways. The tendency appears to be to allot the greater part of a clerk's time to the study of petitions for certiorari and the preparation of memoranda on them for the Justice. Thus the emphasis is on the mitigation of the burden of the screening function of the Court, but at the cost of sacrificing the time of law clerks that might more fruitfully be applied to research, the critique of drafts of opinions, and service in general as intellectual foils for judges who are inevitably limited in their access to other minds.

There is an additional doubt about further resort to multiple law clerks. The Court is an institution of nine Justices, who bear non-delegable responsibilities of judgment and exposition; it must not become a federation of nine corporate aggregates or chambers. A certain amount of consultation and dialogue with a law clerk is highly useful and fruitful; but in the end the consultation, dialogue, reciprocal critique and accommodation ought to be carried on among the Justices themselves. It is important that inexorable pressures to keep abreast of the docket should not turn the center of gravity inward in the several chambers, depersonalize the work, and jeopardize the collegial character of the Court's labors.

The statutory membership of the Court was fixed at nine in 1837, with only brief fluctuations thereafter. An increase in membership, we are persuaded, would be counter-productive. As Chief Justice Hughes said of the President's court reorganization plan in 1937, there would be more judges to hear, more to consult, more to be convinced. Division into panels would not be

an acceptable device. Aside from the constitutional question whether a Court acting through panels would conform to the Article Three prescription of "one Supreme Court," a delegation to panels of responsibility for decision would depreciate the authority of the Court and would expose decisions in the name of the Court to the changes and chances of the composition of the panels. This element of a lottery, inescapable in the circuits and incongruous enough for litigants and counsel in particular cases, is incompatible with the responsibility of the Supreme Court to the law itself.

There has been a recognized need over the years for a periodic reexamination of the Court's business, to relieve its members of excessive pressure and to create conditions enabling them to perform their essential responsibility. In 1891 the Circuit Court of Appeals Act relieved the Justices of circuit riding duties and established regularized review in a separate tier of intermediate appellate courts. At the 1890 Term 623 new cases were filed. With the benefit of the Act of 1891, the number dropped sharply in the 1892 Term to 275. But a steady rise again set in as the volume of litigation rose in the lower courts. Thirty years later, at the 1923 Term, there were almost 750 new filings, a majority of which reached the Court on petition for certiorari. See Frankfurter and Landis, *The Business of the Supreme Court* (1928) 101–102, 295, 297. The cases on the obligatory docket were still, however, excessive in number. The burden was becoming unmanageable, and a more thoroughgoing reform was urged by the Court itself, under the aegis of Chief Justice Taft.

Accordingly, in 1925 Congress enacted the Judges' bill, sponsored by the Court, reducing drastically the obligatory appellate jurisdiction of the Court and introducing certiorari as the normal procedure for seeking review.

Now, however, these solutions have become part of the problem. The Courts of Appeals have encountered

a dramatic rise in their own business, with a proportionate outflow to the Supreme Court; and the task of coping with the discretionary jurisdiction on certiorari overhangs all of the Court's work.

We are concerned that the Court is now at the saturation point, if not actually overwhelmed. If trends continue, as there is every reason to believe they will, and if no relief is provided, the function of the Court must necessarily change. In one way or another, placing ever more reliance on an augmented staff, the Court could perhaps manage to administer its docket. But it will be unable adequately to meet its essential responsibilities.

Remedial measures comparable in scope to those of 1891 and 1925 are called for once again.

II. JURISDICTIONAL CHANGES

A. *Remedies Considered and Rejected.*

(a) *A constitutional court.* Suggestions have occasionally been made that the jurisdiction of the Supreme Court be limited to cases presenting constitutional issues. It is true that the proportion of so-called constitutional cases heard and decided has grown notably, and may presently exceed more than half the total. And yet a division of jurisdiction on these lines would be unfortunate for a number of reasons. Highly important questions of federal administrative authority and of judicial procedure may not be of a constitutional nature. Moreover, constitutional issues and issues of statutory construction are frequently intertwined, making awkward and artificial their separation in advance of decision. Flexibility and resourcefulness in determining appropriate grounds of decision would be sacrificed. Time and energy would be expended in an effort to draw jurisdictional lines between categories of cases that in fact have a double, rather than a distinct, aspect. Counsel and perhaps Justices themselves would tend to inflate legal questions to constitutional dimensions in justification of the jurisdiction of the Court. All in all, we believe that a limitation resting on a criterion of "constitutional" cases would be mistaken in conception and unhealthy in its consequences.

(b) *Exclusion of certain classes of cases.* The committee gave serious consideration to the possibility of providing by statute that certain classes of cases not be subject to review in the Supreme Court, but concluded that this would be unwise. It would be difficult to say of any class of litigation that there could *never* be a case within it important enough for Supreme Court

review. Even diversity cases, which are least likely to be accepted for review, can involve constitutional, procedural, or jurisdictional questions of importance. *E. g., Fletcher* v. *Peck,* 6 Cranch 87 (1810); *Dred Scott* v. *Sandford,* 19 How. 393 (1857); *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938). We believe that screening, rather than categorical exclusion, should be the practice.

(c) *Specialized courts of administrative appeals.* The carving out of subject-matter jurisdiction to be vested in one or more new tribunals of last resort has been advanced from time to time as a reform for its own sake, apart from its alleviation of the workload of the Supreme Court. Federal specialties such as taxation, labor law, or, more broadly, administrative law, have been candidates for a specialized tribunal, either supplementing the federal courts of appeals as a new tier of review, or supplanting those courts as a reviewing tribunal for cases from designated agencies. It is not necessary to rehearse the considerations for and against such tribunals in the general context of judicial review of administrative bodies. We would suggest that, in general, the more specialized the appellate tribunal the greater the risks. There would be a loss of the judicial perspective afforded by a broader range of review, and inconsistencies would develop among various specialized appellate tribunals in resolving pervasive, common problems of administrative justice. Moreover, there is the possibility that in dealing with a narrow subject-matter the judges might form polarized blocs; and that, as a corollary, there might be a politicization of the appointing process around a single set of issues.

Despite these risks and disadvantages, a case might be made for a specialized administrative court of appeals, national in scope, in one or more fields. Federal taxation, because of the complexity of the subject, the volume of litigation, and the urgent need to resolve uncertainties and conflicts in the interest of both taxpayers and Treas-

ury, may be deemed a particularly appropriate subject for a specialized court of appeals.

Without pursuing the question further, we suggest that, however the merits of specialized courts of administrative appeals may be appraised, such a plan would have only marginal value in conforming the work load of the Supreme Court to the Court's essential functions. It would have little impact on the volume of petitions confronting the Court, and no great effect on the task of hearing and deciding cases where review has been granted. (The special problem of appeals from three-judge district courts, including review of I. C. C. orders, is a separate and significant one, and is discussed in Part III of this Report.)

(d) *A court of criminal appeals. The problem of prisoners' petitions.* The dangers of polarization and politicization would be particularly intense in an appellate court whose only concern was the review of criminal convictions. Moreover, there is an inherent dilemma in such a plan, turning on whether or not there would be further review on certiorari in the Supreme Court. If such review were provided, the screening function of the Supreme Court would not be materially relieved. If review were not provided, defendants in criminal cases would be placed in an inferior and invidious position with respect to access to the Supreme Court. We reject a proposal that would put this class of litigants in that position.

But the problem of prisioner petitions, which the Supreme Court shares with lower federal courts and to some extent with State courts, has grown ever more pressing in the last decade or so, and does demand special attention. We refer both to collateral attacks on criminal convictions and to complaints concerning conditions in prisons.

On the Supreme Court's docket at the October Term, 1971, the number of petitions in habeas corpus and other collateral attack cases was 758. Total State and federal

prisoner cases filed in the lower federal courts in 1971 came to 16,266. Most of the cases are brought by State rather than federal prisoners, although filed in federal courts, and most are habeas corpus petitions. But a substantial number of prisoner cases—3,129 filed in the federal courts in 1971—are civil rights complaints concerning conditions in prisons, and these will increasingly filter up to the Supreme Court. The continuing rise in the volume of prisoners' petitions, on the docket of the Supreme Court as also on the dockets of all federal courts, is reflected in figures collected by the Solicitor General. There is close identity between these petitions and filings *in forma pauperis*. The Solicitor General reports that the number of papers filed by his office in the Supreme Court at the 1971 Term in ifp cases increased by 35.1% over the previous Term. The comparable increase in paid cases was 17.3%. (Memorandum To The Solicitor General's Staff, July 6, 1972.)

The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone on Supreme Court Justices. Moreover—and this is at least as important—these overburdened judges and Justices, charged with so many other highly important functions, are less likely to give full and careful attention to each petition than officials whose special task it might be made to do so. The problem is somewhat analogous to one faced by the medical profession. Mass screening of thousands of people will uncover cancer in very few, but it will diagnose it in some at a stage where prospects of cure are good. The mass screening enterprise is, therefore, justified. But the screening is not conducted by highly trained surgeons. To use surgeons for this purpose would be to misuse

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them. Nor, unless they are relieved of their other, more demanding functions, will surgeons likely perform this routine task with the care it routinely requires, if undertaking it at all is to be justified.

As the Solicitor General has remarked (Memorandum To The Staff, *supra*), "[i]t seems obvious that there should be a better way to deal with these questions [presented by ifp prisoner petitions], at least with respect to collateral review." It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk. The question is, would it not be better to substitute for the edifying symbol, and the illusion that it presents, the reality of actual, initial consideration by a non-judicial federal institution charged exclusively with the task of investigating and assessing prisoner complaints of the denial of federal constitutional rights. This institution, headed by an official of high rank, would have a staff of lawyers and investigators, and a measure of subpoena and visitatorial powers. It would be charged to investigate complaints, make a response to them, and where possible, try to settle in-prison grievances by mediation.

All petitions for collateral review or for redress of grievances concerning prison conditions, from State or federal prisoners, which could now be filed in a federal court, would go initially to this new institution at the election of the prisoner or by referral to it at the discretion of the court in which a petition is filed. Three months might be allowed the new service for dealing with a complaint or petition lodged originally with it. At the end of this period the prisoner could file his papers with an appropriate court, but the papers would be accompanied by a report from the new institution. Thereafter, the matter would proceed as it would now.

Obviously, the details of this proposal remain to be worked out; we believe it merits prompt further study and consideration.

(e) *Screening measures.* Certain devices that have been proposed for relief of the Court in its screening function are properly classified as procedural measures or as changes in internal practice, subjects considered later in this Report. Since, however, they furnish a convenient introduction to jurisdictional changes about to be discussed, it seems appropriate to discuss them at this point.

The right to file jurisdictional statements and petitions for certiorari in the Supreme Court of the United States might be conditioned upon certification of the case by the State or federal court in which final judgment was had, or by its chief judge. Such a method of screening would, we fear, lack coherence, and might at times lack as well, and more often appear to lack, objectivity.

Assistance might be provided to the Court by forming a new, quite small, senior staff responsible to it somewhat after the fashion of a master, which would screen petitions for certiorari, or both petitions and jurisdictional statements, and make recommendations to the Court. Since this would be a staff, not in any sense a body exercising judicial powers, and the responsibility would remain with the Court, the Court would necessarily select and appoint the persons involved. At present, each Justice has at his disposal the assistance of three law clerks. If they make recommendations, they make them to their own Justice, not to the Court, and their recommendations will not have the weight that could be accorded to the recommendations of senior, experienced staff. Yet if each Justice is to retain the responsibility, then some Justices at any rate, though perhaps not all, would find themselves no more relieved by the recommendations of a senior staff than they are now by the recommenda-

tions of their own law clerks. They would find, as they do now, that the responsibility carries with it the function; that they can be, as they are now, aided in the discharge of the function, but that they cannot be relieved of it so long as they retain the responsibility. If, on the other hand, the scheme were to operate "successfully," so that in practice staff recommendations were accepted in a large number of cases as a matter of course, and an acknowledged gap were thus to be opened between function and responsibility in the denial of certioraris and the dismissal of appeals, then we fear that public confidence in the Court would be impaired.

(f) *A new national court: various proposals.* Creation of a new national court of one sort or another would avoid the difficulties with the suggestions discussed above for relief in the screening of cases. Proposals of a new national court take various forms, some of which we have touched on already. The idea is in the air, and as we shall indicate presently, a variant of it is what we recommend.

One proposal to which we gave close attention but which we concluded would do both too little and too much is a suggestion for a new court, intermediate between the present Courts of Appeals and the Supreme Court, to hear and decide cases referred to it by the Supreme Court and cases of conflict between circuits filed initially with it rather than with the Supreme Court. Decision in the new court would be final. This proposal does not address itself to the screening function and so fails appreciably to relieve the Supreme Court of the burden of the docket. On the other hand, the proposal is largely intended to, and if fully availed of might, turn the Supreme Court into a purely constitutional court, less and less in touch, in its decision of argued cases, with other major aspects of national law. This is an outcome which, as we have said, we consider undesirable.

A second proposal to which we gave the most serious consideration would establish a National Court of Review composed of fifteen judges, whose jurisdiction would be as extensive as the present appellate jurisdiction of the Supreme Court, including all cases coming from State as well as federal courts. The National Court of Review would sit in three divisions of five: a civil, an administrative, and a criminal division. But it would be a single court. All of its judges would be qualified to sit in any division, and none would sit in the same division longer than a given period of time, perhaps five years. There would be no further recourse to the Supreme Court in cases which the Court of Review had declined to hear, but the Supreme Court would have discretionary jurisdiction by certiorari after final judgment in all cases decided in the National Court of Review, and also before judgment in the National Court of Review or in a court of appeals. The Court of Review might be expected to decide on the merits some 450 cases a year, on the average 150 in each division, which would be reviewable on certiorari in the Supreme Court. These cases would constitute the maximum possible total appellate docket of the Supreme Court, save only the exceptional case that it might take before judgment below. From the cases decided by the Court of Review, the Supreme Court would select a limited number for further review. Matters decided in the Supreme Court could be expected to continue to range over the entire body of national law.

We believe that the time may come when this proposal, or one closely similar to it, may have to be adopted, and a new court of great dignity created that speaks to and for the entire nation. But the change is a drastic one. While increasing the opportunity for decision in a national court, the change would add yet another stage of litigation in some hundreds of cases each year. And in considerable measure the National

Court of Review, sitting in panels defined by subject matter, would labor under many of the disadvantages to which we believe specialized courts are subject. Such a change as this should not be made until the need is undeniable and the change unavoidable. In our judgment, the time is not yet. The change can still be avoided, and may never prove necessary.

B. *Recommended: A National Court of Appeals.*

Our own recommendation builds on the Judiciary Act of 1925. Its aim is twofold. It deals first with that part of the solution embodied in the Act of 1925 which has since itself become a problem, namely the screening of a mass of petitions for review; and, second, with the pressure exerted on the Supreme Court by cases of conflict between circuits that ought to be resolved but that are otherwise not of such importance as to merit adjudication in the Supreme Court.

We recommend creation of a National Court of Appeals which would screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits. Petitions for review would be filed initially in the National Court of Appeals. The great majority, it is to be expected, would be finally denied by that court. Several hundred would be certified annually to the Supreme Court for further screening and choice of cases to be heard and adjudicated there. Petitions found to establish a true conflict between circuits would be granted by the National Court of Appeals and the cases heard and finally disposed of there, except as to those petitions deemed important enough for certification to the Supreme Court.

The composition of the National Court of Appeals could be determined in a number of ways. The method of selection outlined here draws on the membership of the existing courts of appeals, vesting the judges of

those courts with new functions in relation to the new Court. The National Court of Appeals, under this plan, would consist of seven United States circuit judges in active service. Assignment to this Court should be for limited, staggered terms. Thus the opportunity to serve on the National Court of Appeals would be made available to many circuit judges, the Court would draw on a wide range of talents and varied experience while not losing its identity and continuity as a court, and the burden of any personal inconvenience would not fall too heavily on any small group of judges. Appointments should be made by a method that will ensure the rapid filling of vacancies, and itself tend to provide the court with the widest diversity of experience, outlook and age, in order to help secure for it the confidence of the profession, of the Supreme Court, and of the country.

Assignment of circuit judges to the National Court of Appeals could be made for three-year staggered terms by a system of automatic rotation, as follows. A list of all United States circuit judges in active service would be made up in order of seniority. All judges serving as chief judges, or who would have succeeded to a chief judgeship during their term of service on the National Court of Appeals had they been selected, and all judges with less than five years' service as United States circuit judges would be struck from the list. Appointments to the National Court of Appeals would be made from the resulting list by alternating the judge most senior in service and the most junior, except that each judge would have the privilege of declining appointment for good cause; no two judges from the same circuit could serve at the same time on the National Court of Appeals, and no judge who had served once would be selected again until all other eligible judges had served. It is to be noted that some additional circuit judgeships would have to be created.

In any case in which the National Court of Appeals lacked a quorum because of the extended absence or the disqualification of one or more members, the next circuit judge who would be assigned to the court if there were a vacancy would be called to sit on an *ad hoc* basis for the disposition of that case.

The seat of the National Court of Appeals would be in Washington, but its members would have the right to remain in residence in their circuits, if they chose.

The threshold jurisdiction of the National Court of Appeals would be co-extensive with the present appellate jurisdiction of the Supreme Court. We assume, as we shall urge, that access to that jurisdiction will be entirely by certiorari. The optimum operation of this proposal is an additional argument for converting what are now appeals into certioraris. But the proposal is, strictly speaking, independent of that recommendation. We shall recommend also that three-judge courts and certain opportunities for direct review of decisions of a single district judge be abolished, but again the present proposal is independent of that recommendation.

Aside from its original jurisdiction, and from a rarely invoked jurisdiction in cases certified by courts of appeals, the Supreme Court now exercises appellate jurisdiction by appeal or certiorari in cases coming from state and federal courts. We recommend that all cases now within the Supreme Court's jurisdiction, excepting only original cases, be filed initially in the National Court of Appeals, preferably on certiorari, but in any event on papers having the same form and content they would have if they continued to be filed in the Supreme Court directly.

The National Court of Appeals would have discretion to deny review, governed by the considerations now mentioned in Rule 19 (1) of the Rules of the Supreme Court, or in such further Rules of the Supreme Court as may be made, or in Rules of the National Court of Appeals made subject to the supervening rule-making power

of the Supreme Court. Denial of review by the National Court of Appeals would be final, and there would then be no access to the Supreme Court.

The National Court of Appeals would also have discretion, similarly governed, to certify a case to the Supreme Court for disposition. Possibly the concurrence of three judges (one less than a majority) of the National Court of Appeals might suffice for a decision to certify a case to the Supreme Court. In cases where a court of appeals has rendered a decision in conflict with a decision of another court of appeals, the National Court of Appeals would certify the case to the Supreme Court for disposition if it finds the conflict to be real and if the issue on which the conflict arises, or another issue in the case, is otherwise of adequate importance. In all other cases of real conflict between circuits, the National Court of Appeals would set the case down for argument, and proceed to adjudication on the merits of the whole case. Its decision would be final, and would not be reviewable in the Supreme Court.[3]

It should be plain on the face of the proposal, and if found necessary could be made plain by statement, that where there is serious doubt, the National Court of Appeals should certify a petition rather than denying review. The expectation would be that the National Court of Appeals would certify several times as many cases as the Supreme Court could be expected to hear and decide—perhaps something of the order of 400 cases a year. These cases would constitute the appellate docket of the Supreme Court, except that the Court would retain its power to grant certiorari before judgment in a Court of Appeals, before denial of review in the National Court of Appeals, or before judgment in a case set down for hearing or heard there. The expectation would be that exercises of this power would be exceptional.

[3] This function of the National Court of Appeals could be extended to cover also intra-circuit conflicts between panels and thus avoid the increasing problem of *en banc* hearings by the courts of appeals.

Once a case had been certified to it, the Supreme Court would, as now, have full discretion to grant or deny review or limited review, to reverse or affirm without argument, or to hear the case. In cases of conflict among circuits, the Supreme Court would, in addition, be able to grant review and remand to the National Court of Appeals with an order that the case be heard and adjudicated. This would be the disposition indicated in a case in which the Supreme Court agreed that the conflict was a true one, but did not view the issue involved as being of sufficient comparative importance to warrant a hearing in that Court.

In no instance would the parties need to file additional papers. A certified petition and the brief in opposition would come forward to the Supreme Court, and in the rare event of a remand of a conflict to the National Court of Appeals, the papers would simply go back.

The National Court of Appeals, or any judge thereof, would have power to issue stays, writs, and the like. The expectation would be that litigants would come to this Court or its members before going to the Supreme Court or to its members and that there would be a diminution in the chambers practice of Supreme Court Justices, although none of their powers in this respect would be affected.

The Supreme Court would have power to make rules governing the practice in the National Court of Appeals, although that court would also have rule-making power for itself, on matters not affected by Supreme Court rules.

The National Court of Appeals would not have power to make a limited certification of a case to the Supreme Court, but it could append a statement to the certification pointing to the issues in the case that it deemed of special importance.

We are aware of objections that can be raised against this recommendation. But relief is imperative, and among possible remedies, none of which is perfect, this appears to us to be the least problematic.

Undoubtedly some room is opened up for the play of the subjectivity of the judges of the National Court of Appeals in the exercise of discretionary judgments to deny review. But someone's subjectivity is unavoidable. We believe our recommendation minimizes the chances of an erratic subjectivity. There are safeguards in the method of designation of the judges; and if the vote of three of the seven judges were to suffice for certification to the Supreme Court the concurrence of five of the seven would be required to deny the certification. We believe that a National Court of Appeals such as we propose would succeed in gaining the confidence of the country, the Supreme Court and the profession.

Again, some measure of loss of control by the Supreme Court itself is inevitable if the Court's burden is to be lessened. We believe this recommendation involves the least possible loss of control. The Supreme Court would select cases for decision on the merits from a docket of several times the number it would be expected thus to decide. Certiorari before final action in the court below, though not a procedure to be encouraged, remains available. Finally, the Supreme Court's readiness to reopen what had seemed to be settled issues, its impatience with, or its interest in, one or another category of cases—all this, we think, would communicate itself to the National Court of Appeals, and would be acted upon. We suggest, however, that the Supreme Court would be well-advised to return to the early practice of writing an occasional opinion to accompany a denial or dismissal of certiorari, and to offer a sentence or two in opinions on the merits by way of explanation of the grant.

We know of no way to quantify the relief that this recommendation would provide for the Supreme Court. Obviously, the chaff on the docket is less time-consuming than the marginal cases that hover between a grant and a denial, and of the latter the Court would still see some few hundred. But when the chaff is counted in the thousands, the burden is bound to be considerable. We

are confident that a substantial amount of Justices' and law clerks' time would be conserved, and more imponderably, that there would be an appreciable lessening of pressure. We think that the costs of the proposal recommend—not merely the material ones, and not merely to litigants, but in terms of the values of the legal order and of the judicial process—are minimal. Balancing these costs against probable benefits, we are entirely persuaded that the proposal is worth adopting. An incidental advantage is that it would allow for experimentation for a period of years without a commitment to a permanent new tier of judicial review and a permanent new judicial body. It may turn out merely to palliate, or it may serve as a cure for at least as long as the reforms of 1891 and 1925 did in their time. Only experience will tell. We believe it should be allowed to tell.

III. PROCEDURAL CHANGES: THREE-JUDGE COURTS AND DIRECT REVIEW; APPEALS AND CERTIORARI

In conjunction with our recommendation for a National Court of Appeals, or independently of it, we recommend that direct appeals from district courts to the highest court be abolished, and more broadly that all cases be brought to the Supreme Court (or to the National Court of Appeals) by certiorari rather than by appeal.[4] As we shall indicate, direct appeals are unduly burdensome to the Supreme Court, particularly in cases where a three-judge court has been convened to consider the constitutionality of a state or federal statute. The power to grant certiorari before judgment in a court of appeals, 28 U. S. C. § 1254 (1), although a measure that should be used very rarely, is a means by which the Supreme Court can act promptly when expedition is important.

At present, through the certiorari procedure, the Court largely has control of its own docket. Of the 4,371 cases on the appellate docket in the 1971 Term, 4,001, or 91.7%, came to the Court by certiorari rather than by appeal. The discretionary-mandatory distinction between certiorari and appeal has been largely eroded. The concept that all appeals are argued while most certiorari cases are disposed of summarily has not been true for many years. A study made a decade ago showed that the Court heard argument in 22.8% of the cases brought to it by appeal. Douglas, *The Supreme Court and Its Case Load,* 45 Corn. L. Q. 401, 410 (1960). See also Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State*

[4] For convenience, references are to the Supreme Court; but if a National Court of Appeals is established, the recommendations made herein are applicable to access to that Court.

Courts, 63 Col. L. Rev. 688 (1963). In an address to the Association of the Bar of the City of New York in 1970, Justice Douglas reported that in recent years the proportion of appeals that were heard on oral argument had run from 12% in the 1966 Term to 23% in the 1964 Term. These percentages would be much lower if direct appeals from three-judge and single-judge district courts were not included; the latter categories present special problems, which we consider at a later point.

In fact, then, apart from appeals from district courts, there is no substantial difference between certiorari and appeal from the standpoint of gaining a full hearing, but the existence of two different procedures for access to the Court is confusing and burdensome to the bar, and there is even some ambiguity about the significance of a dismissal for want of a substantial federal question or a summary affirmance. Compare, *e. g., Serrano* v. *Priest,* 5 Cal. 2d 584, 615–618, 487 P. 2d 1241, 1263–1264 (1971), with *Spano* v. *Board of Education,* 68 Misc. 2d 804, 328 N. Y. S. 2d 229 (1972). In theory, in passing upon a jurisdictional statement on appeal, the Court addresses itself to the substantive issues presented and not merely to whether the case is worthy of further review. But in view of the great number of cases now reaching the Court, and the little time available for each, the disposition of most appeals on a summary basis is not a satisfactory equivalent for the judgment on the merits it is supposed to be.

Since somewhat different considerations apply to direct appeals from district courts than to appeals from state courts or federal courts of appeals, we discuss these categories separately.

A. *Appeals from Federal District Courts*

(a) *Three-Judge Court Cases.* Although there are other situations in which the statutes provide for a three-judge district court with direct appeal to the Su-

preme Court, the most significant are those in which the constitutionality of state or federal statutes is challenged, 28 U. S. C. §§ 2281, 2282, and those for review of Interstate Commerce Commission orders, 28 U. S. C. § 2325. We recommend elimination of the three-judge court, and of direct review, in these classes of cases. The historical grounds for this jurisdiction, and its consequences in practice, have not been reviewed by Congress for more than a generation. In connection with such a reexamination Congress would have an opportunity to consider whether more recent special provisions for three-judge courts, in the Civil Rights Act of 1964 (42 U. S. C. §§ 1971g, 2000a–5 (b), 2000e–6 (b)) and the Voting Rights Act of 1965 (42 U. S. C. §§ 1973b (a), 1973c, 1973h (c)), should or should not be retained.

Review of ICC orders by a three-judge court with direct appeal to the Supreme Court is an historical anomaly. At one time there was similar review for other agencies, but this was changed in 1950, and review of the other agencies was transferred to the courts of appeals. 5 U. S. C. § 1032. The reasons given for making this change for the other agencies are fully applicable to the ICC.

> "The provision for review by the Supreme Court in its discretion upon certiorari, as in the review of other cases from circuit courts of appeals, will save the members of the Supreme Court from wasting their energies on cases which are not important enough to call for their attention, and enable them to concentrate more fully upon cases which require their careful consideration. By allowing certiorari, the Court * * * will not any longer be required automatically to hear cases which are not of a nature to merit its consideration." (H. Rep. 2122, p. 4, and S. Rep. 2618, p. 5, 81st Cong., 2d Sess. (1950).)

In recent years the Commission has abandoned its opposition to similar treatment for its orders. Proposals

for review of ICC orders by the courts of appeal, supported by the Judicial Conference of the United States and, so far as we know, opposed by no one, have been before Congress for several years. Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified.

We also recommend abolition of three-judge courts and of direct appeals in cases challenging the constitutionality of statutes. It was possible only a few years ago to conclude that "the burden on the federal judicial system that a three-judge court creates is outweighed by the beneficial effect it has on federal-state relations." American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 320 (Off. Dr. 1969). Events of recent years require that the balance now be struck differently. The most recent figures available to the Institute when it took that position were for fiscal 1967, in which there were 171 cases heard by three-judge courts, and in the years 1960 to 1964 the average had been 95.6 cases per year. *Id.*, at 317. But the use of the three-judge court has increased very rapidly. In fiscal 1971 there were 318 cases requiring a court of three judges, an increase of 86% in the four years since the last year for which the Institute had figures.

The burden that this imposes on the judges of the district courts and courts of appeals is well known. It was primarily to alleviate that burden that the Judicial Conference of the United States endorsed abolition of three-judge courts. 1970 *Rept. Jud. Conf.* 78–79. The device has also become a burden on litigants, and particularly on the states, for whose protection it was first adopted. When, where, and how to obtain appellate review of an order by or relating to a three-judge court is a hopelessly complicated and confused subject that in itself has produced much unnecessary litigation. Judicial and other literature on the subject is voluminous. There are rules

and subrules and exceptions to rules. See Stern & Gressman, *Supreme Court Practice* 48–61 (4th ed. 1969); ALI, *Study of the Division of Jurisdiction between State and Federal Courts* 331–335 (Off. Dr. 1969); Wright, *Federal Courts* § 50 (1970 and 1972 Supp.). As is illustrated by such cases as *Gunn* v. *Committee to End the War in Vietnam,* 399 U. S. 383 (1970), and *Board of Regents of the University of Texas System* v. *New Left Education Project,* 404 U. S. 541 (1972), review of these matters has become so mysterious that even specialists in this area may be led astray.

But wholly aside from the burdens that the three-judge court imposes on lower court judges and on litigants, it creates heavy and unnecessary burdens on the Supreme Court. In terms of the total docket, this class of cases may not seem unduly burdensome. A study of all cases on the appellate docket in the 1971 Term shows that only 2.7% of the cases were from three-judge courts. This figure, however, is quite misleading, for the cases consume a disproportionate amount of the limited time for oral argument available to the Court. Over the last three terms, 22% of the cases argued orally were from three-judge courts, and the figure is quite stable from term to term.

Some of these were cases of great moment, and would ultimately have had to be resolved by the Supreme Court however they came to it. Many of them, however, were not, and were cases in which the Court might well have been content to allow a decision of a court of appeals to stand without further review.

Nor is the burden that these cases impose on the Court fully measured by the amount of argument time they require. A three-judge court is not well adapted for the trial of factual issues. Courts of that kind are reluctant to hold an evidentiary trial, even when there are factual matters to explore, and the judges are likely either to attempt to induce the parties to stipulate facts, where often a trial might be advisable, or to resort to pro-

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cedural devices to shortcut the factual hearing. The situation that the Court criticized in *Askew* v. *Hargrave*, 401 U. S. 476, 478–489 (1971), is far from uncommon. On direct appeal from the decision of a three-judge court, the Supreme Court often must choose between reaching decision on the basis of an inadequate and defective record or, as in *Askew*, prolonging the litigation by remand for development of a better record. Even when the record is adequate, direct appeal means that the Supreme Court does not have the benefit of the preliminary screening and sharpening of issues that the courts of appeals ordinarily provide. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937, 938 (1952) (separate opinion of Burton and Frankfurter, JJ.).

Important questions of constitutional law involving federal and state statutes can even now be decided by a single district judge, provided only that injunctive relief is not sought. Thus single judges render declaratory judgments on such questions, having binding effect on the litigants unless set aside. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963). Where there is the added element of a prayer for an injunction, resort would be available to a court of appeals for interlocutory relief from the improvident grant or denial of an injunction. Thus whatever ultimate protection a court of three judges may afford would not be lost.

For all these reasons, we regard the repeal of 28 U. S. C. §§ 2281, 2282 as a matter of urgent importance and we hope that Congress will act promptly to provide this relief for the federal judicial system, for litigants, and, most pertinently, for the Supreme Court.

(b) *Antitrust Suits under the Expediting Act.* Under § 2 of the Expediting Act of 1903, as it has been broadened over the years, direct appeal to the Supreme Court lies from final judgment of a district court in actions brought by the United States to enforce the antitrust laws, the Interstate Commerce Act, and portions of the

Communications Act. 15 U. S. C. §§ 28, 29; 49 U. S. C. §§ 44, 45; 47 U. S. C. § 401 (d).

As the Court has noted:

> "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. * * * Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." (*United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 175 n. 1 (1963).)

The committee believes that this statement by the Court is sound with regard to all direct appeals, but the point is especially compelling in antitrust cases, for reasons expressed by Justice Harlan in his separate opinion in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 364–365 (1962):

> "At this period of mounting dockets there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single district judge's findings of fact are supportable. The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law. And under modern conditions it may well be doubted whether direct review of such cases by this Court truly serves the purpose of expedition which underlay the original passage of the Enabling Act. I venture to predict that a critical reappraisal of the problem would lead to the conclusion that "expedition" and also, over-all, more satisfactory appellate review would be achieved in these cases were primary appellate jurisdiction returned to the

> Court of Appeals, leaving this Court free to exercise its certiorari power with respect to particular cases deemed deserving of further review. As things now stand this Court must deal with *all* government civil antitrust cases, often either at the unnecessary expenditure of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made.

Over the last 5 terms an average of 6 cases per year have come directly to the Supreme Court by virtue of the Expediting Act. The Court has disposed of 60% of these summarily, with the risk of "inadequate appellate review" of which Justice Harlan wrote, and thus has given plenary consideration to an average of 2.4 cases of this kind per term. Although that number in itself is not large, the nature of the cases and the fact that there has been no preliminary review of them by a court of appeals means that they occupy a disproportionate share of the Court's time.

There is less consensus on how to replace the Expediting Act. Some proponents of repeal would continue to provide direct review if the Attorney General or the district court certifies that immediate appeal is in the public interest. ALI, *Study of the Division of Jurisdiction between State and Federal Courts*, 324 (Official Draft 1969). This would be an improvement over the present situation, in which all of these cases come directly to the Supreme Court, but our belief that the Supreme Court should not have cases forced upon it for decision on the merits and that intermediate review in a court of appeals is useful to the Court impels us to recommend that these cases should come to the Court by the usual procedure of certiorari to a court of appeals.

(c) *Direct Criminal Appeals.* Under the Criminal Appeals Act of 1907, a very ill-defined class of appeals in criminal cases went directly from the district courts

to the Supreme Court. It has been recognized for some years that this provision for direct appeals was "a failure." *United States* v. *Sisson,* 399 U. S. 267, 307 (1970). In 1971 Congress spoke to this problem and changed the statute so that all appeals in criminal cases, when permissible, go to the courts of appeals. 18 U. S. C. § 3731, as amended by the Act of Jan. 2, 1971, § 14 (a), 84 Stat. 1890. The amended statute applies only to criminal cases begun after the amendment became effective, and the Court still must grapple with cases brought directly to it under the former version of the statute. *E. g., United States* v. *Weller,* 401 U. S. 254 (1971); *United States* v. *Vuitch,* 402 U. S. 62 (1971); *United States* v. *Marion,* 404 U. S. 307 (1971). This, however, is a problem that will soon solve itself, and therefore we do not recommend further action in this regard.

(d) *Decisions invalidating Acts of Congress.* Direct appeal to the Supreme Court lies when any federal court, including a one-judge district court, has held a federal statute unconstitutional. 28 U. S. C. § 1252. That provision applies only if the United States or an agency, officer, or employee thereof, was a party to the suit, but this must be read in the light of 28 U. S. C. § 2403, allowing the United States to intervene in any case in which a constitutional question is raised about a federal statute.

Eliminating this basis for direct appeal will not unburden the Supreme Court to any significant extent. In recent years it has been very rare for district courts to strike down Acts of Congress and thus the direct appeal provision is used very little. But there is no need for the statute in the rare cases to which it might apply. Direct review is available, if it is truly necessary, through prejudgment certiorari, and even that drastic device ordinarily need not be invoked. It has been seen that the courts are capable of acting rapidly even while following the normal and desirable pattern

of certiorari after judgment in a court of appeals. In one important case in which time was of the essence, the judgment of the district court was entered on October 21st, the appeal was argued before the court of appeals on October 22nd and decided by that court on October 27th, and the case was argued before the Supreme Court on November 3d and decided November 7th. *United Steelworkers of America* v. *United States*, 361 U. S. 39 (1959). See also *Aaron* v. *Cooper*, 357 U. S. 566 (1958). Accordingly, we recommend repeal of 28 U. S. C. § 1252.

B. *Appeals from the Courts of Appeals.*

At the 1971 Term, 2,799 cases came to the Supreme Court from the federal courts of appeals. Of these, 2,784 came by petition for certiorari, and only 15 by appeal. More than 99% of all courts of appeals decisions are now reviewed in the Supreme Court only by certiorari. We recommend that the tiny fraction in which there is now a statutory right to appeal from a court of appeals to the Supreme Court be brought within the certiorari jurisdiction.

In theory appeal will lie to the Supreme Court under 28 U. S. C. § 1252 if the court of appeals holds an Act of Congress unconstitutional in a civil case, but this is theoretical only. So far as is known, no case has ever been appealed to the Supreme Court under that statute from a court of appeals. Stern & Gressman, *Supreme Court Practice* 31 (4th ed. 1969). In practice the handful of appeals that do come from the courts of appeals are those in which a state statute has been held unconstitutional on federal grounds. 28 U. S. C. § 1254 (2).

That statute has a complicating qualifying clause, limiting the scope of review if appeal is taken and providing that an appeal precludes review by certiorari. The precise effect of the qualifying clause, read as it must be with the 1962 amendment to 28 U. S. C. § 2103,

providing that improvident appeals are to be taken as petitions for certiorari, is not at all clear. See *City of El Paso* v. *Simmons,* 379 U. S. 497, 501–503 (1965). In a case involving both constitutional and other issues, counsel cannot be sure of the procedure best suited to the protection of his client's position, and may be well advised to forego his right of appeal and instead petition for certiorari. Stern & Gressman, *Supreme Court Practice* 33–34 (4th ed. 1969); Wright, *Federal Courts* 478–479 (2d ed. 1970).

All of these complications can be avoided by making all review of decisions of courts of appeals by certiorari. As things stand at present, this would be beneficial to litigants and lawyers but would have a measurable effect on the workload of the Supreme Court. In a five-year period for which statistics are available, the Court did not hear argument in a single case appealed to it from a court of appeals. Douglas, *The Supreme Court and its Case Load,* 45 Corn. L. Q. 401, 410 (1960). However, the situation will change if, as we have recommended earlier, 28 U. S. C. § 2281, providing for a three-judge court in cases seeking to enjoin enforcement of state statutes, is repealed. A case in which a state statute is held unconstitutional would then go to the courts of appeals, and its affirmance would go by appeal to the Supreme Court if 28 U. S. C. § 1254 (2) is allowed to stand. This could become a significant burden on the Court. It is preferable that all of this jurisdiction be by certiorari, so that the Court would not be required either to hear or to decide summarily on the merits those cases in which the decision of a court of appeals setting aside the application of a state statute is not sufficiently momentous or doubtful to justify a Supreme Court decision.

We also recommend repeal of the authorization for certification of questions from a court of appeals to the Supreme Court. This is an undesirable and virtually obsolete form of jurisdiction. Certificates bring to the

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Court abstract questions of law, divorced from a complete factual setting in which they may be more carefully explored. The Court may, of course, order up the whole record; but in that event the situation resembles certiorari before judgment in the court of appeals, which may be sought by either litigant in that court, *United States* v. *Bankers Trust Co.*, 294 U. S. 240 (1935), but which remains subject to the discretion of the Supreme Court. The only case in which the Court has accepted a certificate in the last quarter century, *United States* v. *Barnett,* 376 U. S. 681 (1964), is a highly exceptional case, since the court of appeals, sitting as a court of original jurisdiction rather than as an appellate court, was equally divided on a threshold question, but even there review under 28 U. S. C. § 1254 (1) would have sufficed.

We recommend repeal of subdivisions (2) and (3) of 28 U. S. C. § 1254.

C. *Appeals from State Courts.*

Section 1257 of 28 U. S. C. provides for appeal from state courts to the Supreme Court (1) when a federal statute or treaty has been held unconstitutional, and (2) when a state law challenged under the United States Constitution has been held valid. All other cases involving federal questions come to the Supreme Court by certiorari. Once again the great bulk of the jurisdiction is certiorari jurisdiction. At the 1971 Term, 90% of the cases coming to the Supreme Court from state courts were on certiorari. The appeals from state courts made up only 3.6% of all of the cases coming to the Court in that period. See Table VII–a, Appendix.

Since state courts seldom hold federal laws unconstitutional, few appeals are taken under § 1257 (1). These few cases are cases that the Court would almost certainly choose to take if its jurisdiction over them were discretionary.

The cases are much more numerous in which a state court has upheld a state statute against attack on federal constitutional grounds, and in which appeal lies under § 1256 (2). But in the bulk of such cases there is no substantial basis for the constitutional claim. A study by Justice Douglas in 1960 showed that 87% of all appeals from state courts were disposed of summarily, usually for lack of a substantial federal question. Douglas, *The Supreme Court and Its Case Load*, 45 Corn. L. Q. 401, 410 (1960).

It is to be noted that whether a decision of a state court comes to the Supreme Court by appeal or certiorari depends on how the state court has decided the constitutional question. Appeal lies only if the state ruling is against the federal claim. Thus, for example, a challenge to state aid to parochial school pupils would give rise to an appeal if the decision dismissed the challenge, but to certiorari if the challenge was upheld. There is no reason to believe that the Court, in the exercise of a wholly discretionary jurisdiction, would not adequately protect the interests of our constitutional order as well in one situation as in the other.

Furthermore, the present system gives rise to confusion and complication. Some federal issues in a case may be reviewable on appeal while others are reviewable only by certiorari. Often it is difficult to tell which is which and a party may have to file both an appeal and a petition for certiorari to avoid mistake. Sometimes whether a case falls in one category or another depends on how the question has been phrased. An appeal lies if an application of a state statute to particular facts has been challenged as unconstitutional, but review is by certiorari if the attack is upon the constitutionality of an official's particular exercise of his statutory powers. *E. g., Zucht* v. *King*, 260 U. S. 174 (1922); *Charleston Federal Savings and Loan Ass'n.* v. *Alderson*, 324 U. S. 182, 185 (1945); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 717, 726–

727 (1961). See also *Hanson* v. *Denckla*, 357 U. S. 235, 244 (1958).

These lines of distinction are difficult to follow, both for counsel and for the Court. "Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important." *United States* v. *Sisson*, 399 U. S. 267, 307 (1970). The confusion is only partly alleviated by the provision, 28 U. S. C. § 2103, that if an appeal is improvidently taken, the appeal papers should be treated as a petition for certiorari. Although appellants' jurisdictional statements should contain all the arguments that would be presented for granting certiorari, often they do not. And the Supreme Court is supposed to apply different standards, depending upon the category in which an issue falls.

These complications for counsel and the Court arising from a bifurcated system of review can be avoided if all cases come to the Court via the discretionary route. There is no reason to presume that when a state court has rejected a federal constitutional claim it has done so erroneously. And the ambiguity that necessarily attaches to the orders of the Court summarily disposing of 87% of the appeals that come to it from state courts creates problems for lower courts and makes unnecessary work for the Court itself in the future as litigants, uncertain of the significance of a summary disposition, seek clarification by bringing to the Court other cases raising the same point.

For all of these reasons we conclude that the extra burden imposed by the distinction between appeal and certiorari outweighs the presumed advantages of supposedly mandatory review. We recommend that for cases coming from state courts, as for others, appeals to the Supreme Court be abolished and certiorari be made the exclusive method of review. This could be accomplished by deletion of subdivisions (1) and (2) of 28 U. S. C. § 1257.

IV. INTERNAL PRACTICES

Although it is of course difficult for outsiders to assess the internal practices of the Court, the Committee felt that it could appropriately consider existing practices that are well understood and evaluate possible measures for the assistance of the Court in coping with its docket.

(a) *The rule of four.* Passage of the Judges' bill of 1925 followed upon representations by the Court that it intended to exercise its certiorari jurisdiction through the "Rule of Four," that is, by permitting the vote of only four Justices to bring a case before the full Court. Permitting a minority of the Court to require plenary review was based, first, on the concept that if so substantial a number of Justices (though a minority) wanted to hear a given case, a grant was an appropriate act of discretion for the Court as a whole. Further, at the time the Act of 1925 was adopted, fear was expressed that the Court would undertake to hear too few cases. Relaxation of the usual rule that the majority acts for the Court was therefore considered particularly appropriate for actions committing the Court only to hear a case.

In the past thirty-five years, as has been pointed out in Part I of this Report, the Court has agreed to hear a remarkably constant number of cases. At most Terms it has heard oral argument in about 130 to 160 cases and written full opinions in about 120. But the number reviewed in comparison to the number filed has fallen substantially. Nevertheless, few would now say that the Court is shirking its duty to hear cases, although opinion may be divided on the question whether the Court, if its processing function were reduced, should hear more, different, or fewer cases.

It is clear that whatever one's views on the optimum number of cases the Supreme Court ideally should hear,

a material reduction in the number given plenary review should alleviate pressure on the Court's members. A change in the Rule of Four might produce that result.

The Committee believes this solution is, nevertheless, untenable. To be sure, circumstances have changed drastically since 1925 so that it might not be considered inappropriate for the Court to advise the Congress that the growth of the docket had impelled the abandonment of the Rule of Four. But if a change to five would produce only a marginal reduction in the caseload heard, it would probably not be worth the sacrifice of the important principle that a minority can at least require the Court to give a case consideration. A more drastic change to require, say, six to grant certiorari would raise the question whether it was an unconstitutional deviation from the principle that the "one Supreme Court" mandated by the Constitution always acts by a simple majority of its nondisqualified members. Such a change might make processing of the certiorari docket even more time-consuming and onerous than at present, since presumably even greater care would be needed to determine which cases would be selected for a contracted appellate docket. The change would not relieve what is a major burden on the Court: handling the load of applications for review. Finally, a change in the Rule of Four might be viewed as an invidious effort to reduce access to the Court with respect to particular classes of cases.

(b) *Prolonging or eliminating the annual Term.* In the early days of the Republic when the Justices performed circuit duty, Congress carefully prescribed the Court's Term to assure that it would not sit for more than a month. The Term was gradually lengthened, although today, while the beginning of each Term is fixed by law, tradition alone sets its end. The Term begins in early October and ends in late June. The pressure to complete all work on the docket—at least to hand down opinions in all argued cases—results in

what has been aptly described as the "end of Term crunch." After years of experience the press and the public are alert to awaiting decisions in the most difficult or controversial cases during those last few opinion days each Term. This drive to complete the Term's work must create substantial pressure on the Justices, perhaps to decide before they may be ready to decide; to agree to positions they might, with more time, modify; to write separate opinions that might be avoided if time were available for the necessarily time-consuming discussions of possible grounds of accommodation.

Nevertheless, the tradition of the close of the Term furnishes a certain discipline. It tends to prevent the accumulation of argued but undecided cases from one Term to the next. Moreover, the period between the end of Term and the beginning of the new Term is an important resource that the Justices should not be compelled to surrender. It is the only time when, free from the pressures of a regular schedule, they can reflect on some of the most important matters due to come before them. It is the only significant period available for relaxation, reading, and the recharging of intellectual batteries. A change would probably be illusory in any case. At the present time, the month of September is generally devoted to work on certiorari petitions and to conferences to pass on the petitions that have accumulated inexorably throughout the summer. During the summer these are distributed to the Justices at a rate of 70 or 80 per week. There is little room for changing advantageously the existing practice with respect to Terms of the Court.

There is, however, one practice whose retention seems to us to be dubious. Cases that have been argued but are, despite the efforts of the Justices, not ready for decision with opinions at the end of a Term are generally set down for re-argument at the next Term. Unless there is some special reason for a re-argument, such as the participation of a newly appointed Justice,

this practice seems to be of limited utility beyond preserving in form the principle that all cases finally argued during a Term are decided at that Term. Where there is no other reason for ordering a re-argument the costs of the practice militate against it, from the standpoint of the Court's time, delay in ultimate decision, and counsel fees and other expenses borne by the litigants. Instead, the Court could simply announce in an occasional case that the decision would be reached and delivered at the following Term.

(c) *Reducing oral arguments.* The Court has already found increased time by changing the standard argument time for each side from one hour to one-half hour. Additional time is given only on request or, on occasion, when the Court feels that some additional discussion would enable it or counsel to complete consideration of a point under discussion. But could oral argument be eliminated entirely? If not in all cases, in at least a substantial number? The average level of oral advocacy in the Court is judged to be disappointingly low. Nevertheless, good oral argument is often of significant aid to the Court in understanding a case, in providing an opportunity for clarifying troublesome points in the briefs or record and in ventilating theories about the case with counsel who have presumably given extensive thought to the facts, the law and the implications of a decision.

The Committee would not suggest that the Court could or should abandon oral arguments or reduce the argument time from the present standards. Quite the contrary. On the other hand, it does feel that consideration might perhaps be given to a reorganization of the Supreme Court bar, under which more would be required for admission than three years of membership in a State bar and a filing fee. But the creation of a specialized bar of Supreme Court "barristers" could well create problems of its own. And although oral arguments of a high order are undoubtedly of great value and might

make the task of the Justices at least somewhat more manageable, the Committee recognized that a higher level of arguments provided too intangible a benefit to be of present major significance. Accordingly, we have simply concluded that the creation of a new Supreme Court bar might appropriately be studied, perhaps by a committee of that bar, as a possible, long-range measure.

(d) *Law clerks; other professional assistance.* Before World War II, each Justice of the Court had a single law clerk. Beginning in 1947, each Justice was afforded two law clerks. Since 1969, each has had three. (The Chief Justice has generally had one more, who acts as a senior clerk.) These expansions in support staff have coincided with increases in the docket, in particular the *in forma pauperis* docket. The law clerks have, as a rule (although not universally), been recent graduates of the best known law schools and the position has been viewed as a recognition of outstanding achievement and as affording an opportunity for incomparable professional and personal education. Most clerks serve one term, some two; but service for more than two terms is a rare exception.

The members of the Court use their law clerks in different ways. Some require a memorandum concerning every petition for certiorari or other item to be considered by the Conference. When that is required, the law clerks have correspondingly more limited time for other matters, such as research for opinion drafts, the thorough review of records or the preparation of "bench memos" for use by a Justice on the bench during oral argument. Other Justice, drawing on long experience with the certiorari docket, and believing that they can far more easily than their law clerks review the weekly stack of petitions, prefer to invest more of their own time in this process and to save their clerks for other tasks, particularly preparing memoranda embodying research on argued cases.

Could some of the pressure on the Justices be relieved if law clerks were older and more experienced; if they were employed for more than one or two Terms of the Court; if each Justice had, say, four, five, or six clerks; or if the law clerk staff were complemented by an increase in library and other supporting personnel?

To the extent that increasing numbers of clerks have had prior experience as clerks to judges of the Courts of Appeals or the District Courts, the factor of inexperience is partly alleviated. On the positive side, the recent legal education of the law clerks probably furnishes a valuable source of contact to the Justices with the currents of legal scholarship. The demanding work schedule and relatively modest compensation would probably make it difficult to attract more experienced lawyers of comparable zest and intellectual qualities, or to hold them for an indefinite tenure.

An increase in the number of law clerks would not be a constructive step, in the view of the Committee, for reasons suggested in Part I of this Report. Every decision must still be made by the Justice, and increasing his staff does not relieve him of that responsibility. Even three clerks have proved to be a large number for developing the close, personal relationship with a good clerk that a Justice requires (and, incidentally, that every good clerk seeks). Further expansion of personal professional staff would tend to reflect an operating model of nine insulated chambers rather than of one tribunal composed of nine members. As a practical matter, finally, the physical arrangements of the Justices' chambers make a further enlargement of their personal staffs almost impossible—at least without a massive remodeling of the Court's building.

For obvious reasons this study does not address itself to methods and practices employed by individual Justices in reviewing petitions, jurisdictional statements, and other aspects of cases. Some economy in the use of law clerks' time might be achieved by assigning to a

few law clerks, from different chambers, on a rotating basis, the task of preparing the preliminary memoranda for all or many of the Justices, analyzing the facts and issues in each case filed. Whether individual Justices would still prefer that this function be performed by their own law clerks is a decision that would lie with them; in any event the Justices themselves would continue to bear the responsibility of judgment in passing upon these voluminous preliminary applications.

The Committee is persuaded that the Court could well use assistance in other areas. Law firms are increasingly employing legal assistants, sometimes called paraprofessionals, to do statistical analyses and other kinds of research not exclusively legal. Persons could be attached to the office of the Clerk of the Court with particular, long-term responsibilities for statistical analysis of the Court's work, for maintaining an overview of developments in the *ifp* docket or for keeping abreast of the chambers practices of the Justices and of extraordinary actions requested of or taken by the Court. Qualified reference librarians, with backgrounds in other disciplines than the law but allied with it—economics, history or similar subjects—can make the Court's excellent collection of books and materials a much more useful resource.

(3) *Physical improvements.* The limited information available to the Committee has suggested that the work of the Court is made more difficult by the absence of physical amenities common to most well-administered law firms, university faculties and many other courts in the Nation. For example, the law clerks spend great amounts of time personally typing their memoranda. They do not have secretarial aid; they are not all even equipped with electric typewriters. With some practice the use of dictating equipment would undoubtedly increase their productivity. The Justices, too, should have greater assistance in handling the transcription of opinions, correspondence, filing, and receiving visitors than

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is provided by the single secretary each now has. Data processing equipment might ease problems of the Justices, for example in reviewing prior litigation histories of criminal petitioners. The Committee is not in a position to make detailed recommendations on such items. But it is convinced that a study of these more routine matters could provide useful suggestions for enabling the Court to work more efficiently.

V. SUMMARY OF RECOMMENDATIONS

In summary, the Committee recommends:

1. The establishment by statute of a National Court of Appeals, with a membership of seven judges drawn on a rotating basis from the federal courts of appeals and serving staggered three-year terms. This Court would have the twofold function of (1) screening all petitions for certiorari and appeals that would at present be filed in the Supreme Court, referring the most review-worthy (perhaps 400 or 450 per Term) to the Supreme Court (except as provided in clause (2)), and denying the rest; and (2) retaining for decision on the merits cases of genuine conflict between circuits (except those of special moment, which would be certified to the Supreme Court). The Supreme Court would determine which of the cases thus referred to it should be granted review and decided on the merits in the Supreme Court. The residue would be denied, or in some instances remanded for decision by the National Court of Appeals.

2. The elimination by statute of three-judge district courts and direct review of their decisions in the Supreme Court; the elimination also of direct appeals in ICC and antitrust cases; and the substitution of certiorari for appeal in all cases where appeal is now the prescribed procedure for review in the Supreme Court. This recommendation is not dependent on the adoption of the preceding recommendation. If a National Court of Appeals is established, these recommended changes in appellate procedure would become applicable to it.

3. The establishment by statute of a non-judicial body whose members would investigate and report on complaints of prisoners, both collateral attacks on convictions and complaints of mistreatment in prison. Recourse to this procedure would be available to prisoners

before filing a petition in a federal court, and to the federal judges with whom petitions were filed.

4. Increased staff support for the Supreme Court in the Clerk's office and the Library, and improved secretarial facilities for the Justices and their law clerks.

Respectfully submitted,

Alexander M. Bickel
Peter D. Ehrenhaft
Russell D. Niles
Bernard G. Segal
Robert L. Stern
Charles A. Wright
Paul A. Freund,
Chairman

TABLE I

Overall Case Load

(a)	(b)	(c)	(d)	(e)
Term	Cases on Docket	I. F. P. Certiorari Cases on Docket	Cases Disposed Of	Cases Carried Over
1935	1,092	—	990	102
1936	1,052	—	942	110
1937	1,091	—	1,013	78
1938	1,020	—	923	97
1939	1,078	—	946	132
1940	1,109	120	985	124
1941	1,302	178	1,168	134
1942	1,118	147	997	121
1943	1,118	214	962	156
1944	1,393	339	1,249	144
1945	1,460	393	1,292	168
1946	1,678	528	1,520	158
1947	1,453	426	1,322	131
1948	1,596	456	1,425	171
1949	1,441	454	1,301	140
1950	1,321	533	1,202	119
1951	1,353	529	1,207	146
1952	1,429	559	1,278	151
1953	1,453	632	1,293	160
1954	1,557	709	1,352	205
1955	1,849	811	1,630	219
1956	2,021	875	1,670	351
1957	1,990	878	1,765	225
1958	2,044	995	1,763	281
1959	2,143	1,102	1,787	356
1960	2,296	1,085	1,911	385
1961	2,570	1,330	2,142	428
1962	2,801	1,412	2,327	474
1963	2,768	1,307	2,401	367
1964	2,655	1,170	2,173	482
1965	3,256	1,610	2,665	591
1966	3,343	1,615	2,890	453
1967	3,559	1,798	2,946	613
1968	3,884	2,121	3,117	767
1969	4,172	2,228	3,379	793
1970	4,192	2,289	3,315	877
1971	4,515	2,445	3,651	864

Sources: 1935–1939 terms: Annual Rep., Director of the Administrative Office of U. S. Courts. (Table A)

1970–1971 terms: Supreme Court of the United States, Office of the Clerk

TABLE II [1]

New Cases Filed

(a)	(b)	(c)	(d)
Term	Cases Filed	In Forma Pauperis Cases (Miscellaneous Docket) [2]	Paid Cases Filed [3]
1935	983	59	924
1936	950	60	890
1937	981	97	884
1938	942	85	857
1939	981	117	864
1940	977	120	857
1941	1,178	178	1,000
1942	984	147	837
1943	997	214	783
1944	1,237	339	898
1945	1,316	393	923
1946	1,510	528	982
1947	1,295	426	869
1948	1,465	447	1,018
1949	1,270	441	829
1950	1,181	522	659
1951	1,234	517	717
1952	1,283	539	744
1953	1,302	618	684
1954	1,397	684	713
1955	1,644	749	895
1956	1,802	825	977
1957	1,639	811	828
1958	1,819	930	889
1959	1,862	1,005	857
1960	1,940	1,098	842
1961	2,185	1,295	890
1962	2,373	1,414	959
1963	2,294	1,276	1,018
1964	2,288	1,246	1,042
1965	2,774	1,578	1,196
1966	2,752	1,545	1,207
1967	3,106	1,828	1,278
1968	3,271	1,947	1,324
1969	3,405	1,942	1,463
1970	3,419	1,831	1,588
1971	3,643	1,930	1,713

1 Figures presented in this table are subject to the qualifications noted in footnotes 2 and 3. The impact of these qualifications on the overall distribution of filings between paid and unpaid classification, however, is considered negligible.

2 At various times in the period from 1935–1971 the method of transferring cases between the appellate and miscellaneous dockets has changed, resulting in some variations in the precise makeup of the miscellaneous docket. Footnotes to Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1945, 1950, 1959, and 1969 detail these changes. The miscellaneous docket was abolished beginning with the 1970 term and the clerk's office began reporting, as a category, the number of *in forma pauperis* cases docketed during a term.

3 Paid cases from 1935–1969 have been calculated by subtracting column (c) from column (b). However, a small number of paid cases, *e. g.*, petitions for writs of mandamus, prohibition and habeas corpus were also carried on the miscellaneous docket; thus, the number of paid cases may be slightly understated for some terms.

Sources: 1935–1969 terms: Annual Report, Director of the Administrative Office of U. S. Courts (Table A1)
1970–1971 terms: Supreme Court of the United States, Office of the Clerk, Statistical Sheets (Final).

TABLE III
Certiorari Cases

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
Year	All Cert. Petitions Acted On	Cert. Petitions Granted	Percent Granted	Paid Petitions Acted On	Paid Petitions Granted	Percent Paid Pet. Granted	Ifp Petitions Acted On	Ifp Petitions Granted	Percent Ifp Pet. Granted
1941	951	166	17.5%	773	150	19.4%	178	16	9.0%
1951	1,017	113	11.1%	612	94	15.4%	405	19	4.7%
1956	1,425	177	12.4%	664	139	20.9%	622	38	6.1%
1961	1,899	141	7.4%	768	103	13.4%	1,131	38	3.4%
1966	2,470	177	7.2%	1,043	121	11.6%	1,427	56	3.9%
1971	3,286	317	9.6%	1,433	128	8.9%	1,853	189	10.2%
	*[3,153]	[184]	[5.8%]				[1,720]	[56]	[3.3%]

*At the 1971 Term 133 petitions *in forma pauperis*, many of them filed at previous Terms, were granted in cases challenging the validity of the death penalty, after the controlling decision of the Court was handed down. The figures in brackets, which exclude these 133 petitions, are therefore more reflective of the normal certiorari practice.

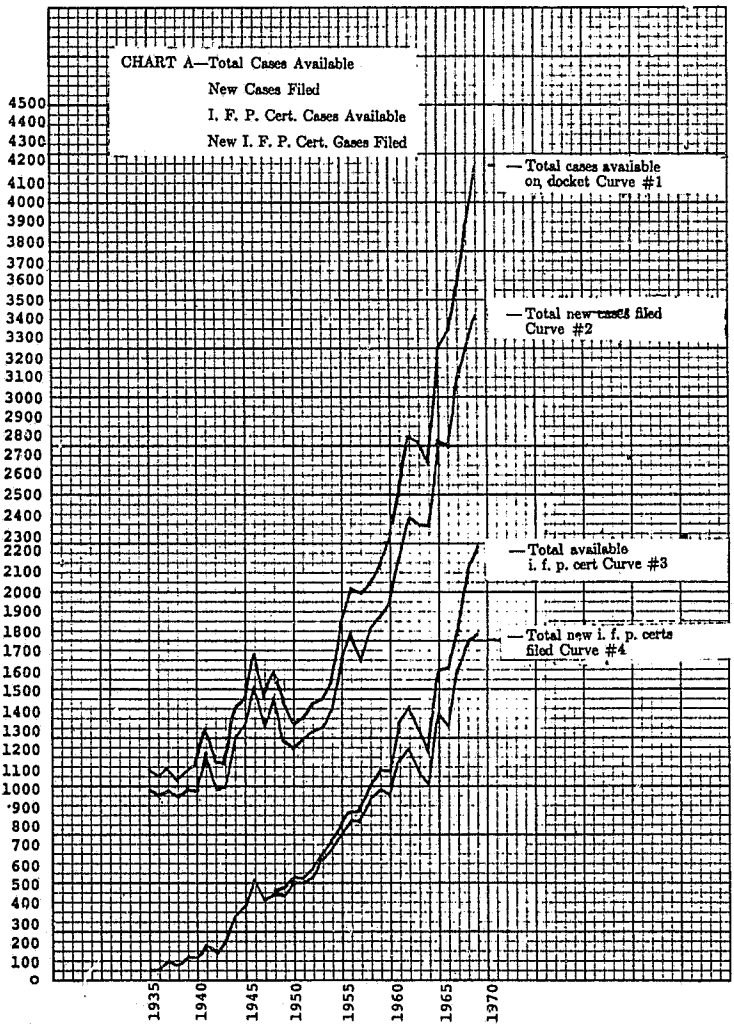
CHART A—Total Cases Available
New Cases Filed
I. F. P. Cert. Cases Available
New I. F. P. Cert. Gases Filed
— Total cases available on docket Curve #1
— Total new cases filed Curve #2
— Total available i. f. p. cert Curve #3
— Total new i. f. p. certs filed Curve #4
4500
4400
4300
4200
4100
4000
3900
3800
3700
3600
3500
3400
3300
3200
3100
3000
2900
2800
2700
2600
2500
2400
2300
2200
2100
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
1000
900
800
700
600
500
400
300
200
100
0
1935
1940
1945
1950
1955
1960
1965
1970

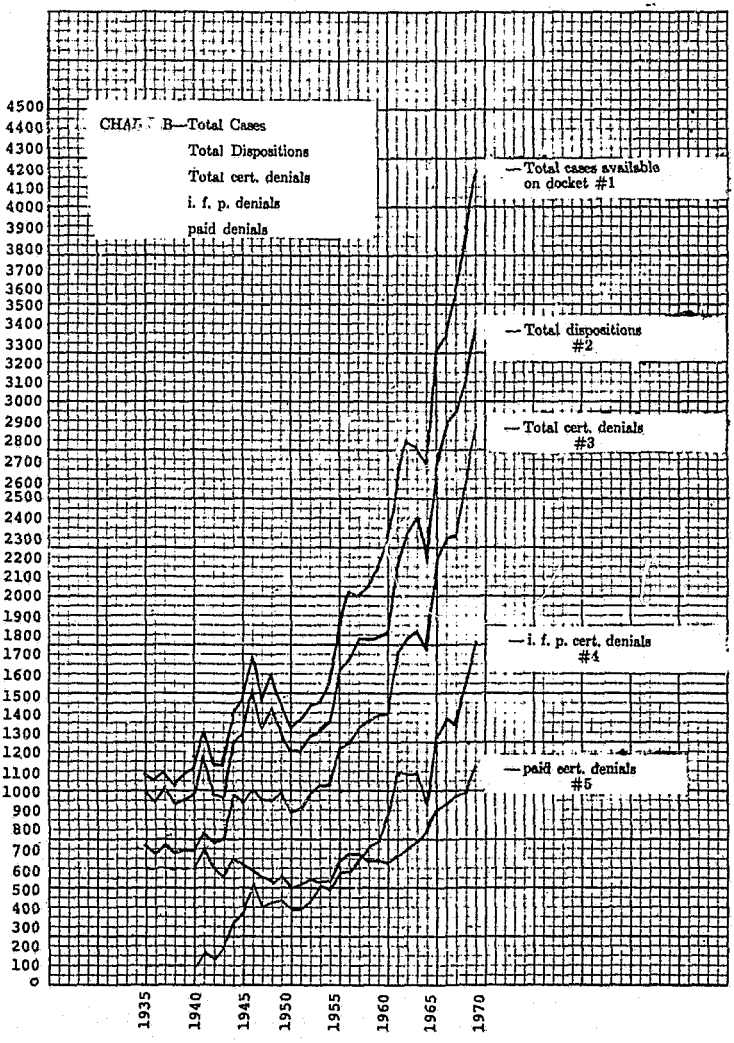
CHART B—Total Cases
Total Dispositions
Total cert. denials
i. f. p. denials
paid denials
—Total cases available on docket #1
—Total dispositions #2
—Total cert. denials #3
—i. f. p. cert. denials #4
—paid cert. denials #5
4500
4400
4300
4200
4100
4000
3900
3800
3700
3600
3500
3400
3300
3200
3100
3000
2900
2800
2700
2600
2500
2400
2300
2200
2100
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
1000
900
800
700
600
500
400
300
200
100
0
1935
1940
1945
1950
1955
1960
1965
1970

A5

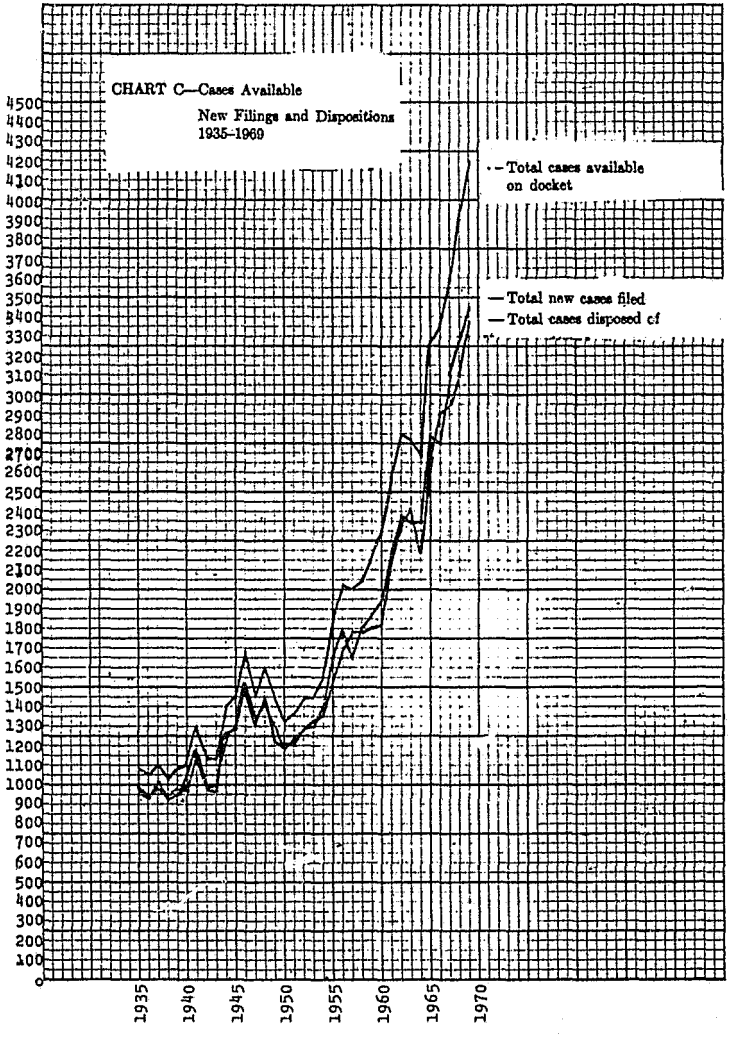
CHART C—Cases Available
New Filings and Dispositions
1935–1969
Total cases available on docket
Total new cases filed
Total cases disposed of
4500
4400
4300
4200
4100
4000
3900
3800
3700
3600
3500
3400
3300
3200
3100
3000
2900
2800
2700
2600
2500
2400
2300
2200
2100
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
1000
900
800
700
600
500
400
300
200
100
0
1935
1940
1945
1950
1955
1960
1965
1970

A6

TABLE IV

Oral Arguments and Opinions

(a)	(b)	(c)		(d)	
Term	Number of Cases Argued Orally	Number of Cases Disposed of by Signed Opinions		Number of Cases Disposed of Without Signed Opinions	
1935	Not Available	187	[145] [1]	803	[72] [2]
1936	"	180	[149]	762	[80]
1937	"	180	[152]	833	[102]
1938	"	174	[139]	749	[65]
1939	"	151	[137]	795	[97]
1940	"	195	[165]	790	[86]
1941	"	175	[151]	993	[201]
1942	"	196	[147]	801	[63]
1943	"	154	[130]	808	[56]
1944	"	199	[156]	1,050	[75]
1945	"	170	[134]	1,122	[45]
1946	"	190	[142]	1,330	[66]
1947	"	143	[110]	1,179	[65]
1948	162	147	[114]	1,278	[91]
1949	128	108	[87]	1,193	[94]
1950	129	114	[91]	1,088	[77]
1951	128	96	[83]	1,111	[101]
1952	141	122	[104]	1,156	[71]
1953	113	84	[65]	1,209	[86]
1954	105	86	[78]	1,266	[102]
1955	123	103	[82]	1,527	[127]
1956	145	112	[100]	1,561	[134]
1957	154	125	[104]	1,640	[184]
1958	143	116	[99]	1,647	[135]
1959	131	110	[97]	1,677	[122]
1960	148	125	[110]	1,786	[136]
1961	137	100	[85]	2,042	[120]
1962	151	129	[110]	2,198	[225]
1963	144	123	[111]	2,278	[240]
1964	122	103	[91]	2,070	[150]
1965	131	120	[97]	2,545	[218]
1966	150	132	[100]	2,758	[270]
1967	180	156	[110]	2,790	[306]
1968	140	116	[99]	3,001	[230]
1969	144	105	[88]	3,274	[242]
1970	151	137	[109]	2,968	[292]
1971	177	140	[129]	3,190	[286]

[1] No. of written opinions shown in brackets.

[2] Includes number of cases disposed of by per curiams, which are in brackets.

TABLE V

Summary Tabulation of Characteristics

Cases Docketed in the Supreme Court of the United States
1971–72 Term

	Number	*% of Total*
I. TOTAL CASES DOCKETED	4371	100.0
A. *Nature of Cases*		
1. Civil	1751	40.1
2. Criminal	1862	42.6
3. Habeas and Other Collateral Attack	758	17.3
B. *Costs Status*		
1. Paid	2024	46.3
2. Unpaid	2347	53.7
C. *Jurisdictional Grounds*		
1. Certiorari	4001	91.5
2. Appeal	370	8.5
3. Certified Question	0	0.0
4. Extraordinary Remedy [See Attachment]		
5. Other	0	0.0
D. *Court Below*		
1. State Courts	1341	30.7
2. United States Courts of Appeals	2799	64.1
3. United States District Courts	79	1.8
4. Three-Judge Courts	120	2.8
5. Other Courts	32	0.7

	Number	*% of Civil*
II. CIVIL CASES DOCKETED	1751	100.0
A. *Costs Status*		
1. Paid	1352	77.2
2. In Forma Pauperis	399	22.8
B. *Jurisdictional Grounds*		
1. Certiorari	1440	82.2
2. Appeal	311	17.8
3. Other Grounds	0	0.0
C. *Court Below*		
1. State Courts	445	25.4
2. United States Courts of Appeals	1078	61.5
3. United States District Courts	77	4.4
4. Three-Judge Courts	119	6.8
5. Other Courts	32	1.9

Continued

TABLE V—*Continued*

	Number	*% of Crim.*
III. CRIMINAL CASES	1862	100.0
A. *Costs Status*		
1. Paid	579	31.1
2. In Forma Pauperis	1283	68.9
B. *Jurisdictional Grounds*		
1. Certiorari	1811	97.3
2. Appeal	51	2.7
3. Other Grounds	0	0.0
C. *Court Below*		
1. State Courts	765	41.0
2. United States Courts of Appeals	1095	58.8
3. United States District Courts	1	0.1
4. Three-Judge Courts	1	0.1
5. Other Courts	0	0.0

	Number	*% of Habeas*
IV. HABEAS AND OTHER COLLATERAL ATTACK	758	100.0
A. *Costs Status*		
1. Paid	93	12.3
2. In Forma Pauperis	665	87.7
B. *Jurisdictional Grounds*		
1. Certiorari	750	98.9
2. Appeal	8	1.1
3. Other Grounds	0	0.0
C. *Court Below*		
1. State Courts	131	17.3
2. United States Courts of Appeals	626	82.6
3. United States District Courts	1	0.1
4. Three-Judge Courts	0	0.0
5. Other Courts	0	0.0

EXCEPTIONAL CASES

These cases were not included in the total number of cases listed listed on the preceding summary of the Supreme Court's docket.

Original	20
Special	3
Miscellaneous—Paid	25
Miscellaneous—In Forma Pauperis	88
Total	136

TABLE VI

Appeals at 1971 Term

APPEALS ACTED ON

253

APPEALS DISPOSED OF
WITHOUT ARGUMENT

209

PERCENTAGE OF APPEALS
DISPOSED OF
WITHOUT ARGUMENT

82%

APPEALS ARGUED

44

TABLE VII–a

SUPREME COURT CASES DOCKETED—1971 Term

All Cases Filed; Each Category as Percent of Total Number of Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW	Certiorari	Appeal	Total
State Court	1183 27.1%	158 3.6%	1341 30.7%
U. S. Court of Appeals	2784 63.8%	15 0.3%	2799 64.1%
U. S. District Court	3 0.1%	76 1.7%	79 1.8%
Three-Judge Court		120 2.8%	120 2.8%
Other Court	31 0.7%	1 0.0%	32 0.7%
Total	4001 91.7%	370 8.3%	4371 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

TABLE VII–b

SUPREME COURT CASES DOCKETED—1971 Term

Total *Civil* Cases; Each Category as Percent of Total Number of Civil Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW	Certiorari	Appeal	Total
State Court	340 19.4%	105 6.0%	445 25.4%
U. S. Court of Appeals	1066 60.8%	12 0.7%	1078 61.5%
U. S. District Court	3 0.2%	74 4.2%	77 4.4%
Three-Judge Court		119 6.8%	119 6.8%
Other Court	31 1.8%	1 0.1%	32 1.9%
Total	1440 82.2%	311 17.8%	1751 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

TABLE VII-C

SUPREME COURT CASES DOCKETED—1971 TERM

Total *Criminal* Cases; Each Category as Percent of Total Number of Criminal Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW	Certiorari	Appeal	Total
State Court	717 38.4%	48 2.6%	765 41.0%
U. S. Court of Appeals	1094 58.7%	1 0.1%	1095 58.8%
U. S. District Court		1 0.1%	1 0.1%
Three-Judge Court			
Other Court			
Total	1811 97.1%	51 2.9%	1862 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

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TABLE VII–d

SUPREME COURT CASES DOCKETED—1971 Term

Total *Habeas* Cases; Each Category as Percent of Total Number of Habeas Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW

	Certiorari	Appeal	Total
State Court	126 16.6%	5 0.7%	131 17.3%
U. S. Court of Appeals	624 82.3%	2 0.3%	626 82.6%
U. S. District Court		1 0.1%	1 0.1%
Three-Judge Court			
Other Court			
Total	750 98.9%	8 1.1%	758 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

APPENDIX

Biographies of Members of Study Group

PAUL A. FREUND, chairman, is Carl M. Loeb University Professor at Harvard University and has been a member of the Harvard Law School faculty since 1939. He served in the Office of the Solicitor General of the United States (1935–1939, 1942–1946) and was law clerk to Mr. Justice Brandeis during the 1932 Term. He is the author of several books on the Supreme Court and constitutional law, including *The Supreme Court of the United States: Its Business, Purposes and Performance* (1961), and *On Law and Justice* (1968); co-editor of *Cases on Constitutional Law* (3d edition 1967); and editor-in-chief of the *History of the Supreme Court.*

ALEXANDER M. BICKEL is Chancellor Kent Professor of Law and Legal History at Yale Law School, where he has been a member of the faculty since 1956. He served as law clerk to Mr. Justice Frankfurter during the 1952 Term. Before that (1949–1950), he served as law clerk to Chief Judge Calvert Magruder of the U. S. Court of Appeals for the First Circuit. He is author of several books on the Supreme Court, including *The Supreme Court and the Idea of Progress* (1970), *The Least Dangerous Branch* (1962), and *The Unpublished Opinions of Mr. Justice Brandeis* (1957). He has served as consultant to the Subcommittee on Separation of Powers, Committee on the Judiciary of the United States Senate (90th–91st Congress).

PETER D. EHRENHAFT, a member of the Washington, D. C., law firm of Fried, Frank, Harris, Shriver and Kampelman, practices before the Supreme Court, where he served during the 1961 Term, as law clerk to the Chief Justice. Before that (1957–1958), he served as a law clerk to the Court in the U. S. Court of Appeals

for the D. C. Circuit. He has authored various legal articles.

RUSSELL D. NILES is Director of the Institute of Judicial Administration and Charles Denison Professor at the School of Law of New York University. He was Chancellor and Executive Vice-President of N. Y. U. from 1964 to 1966 and Dean of its Law School from 1948 to 1964. He has been a member of the faculty since 1929. He served as president of the Association of the Bar of the City of New York from 1966 to 1968.

BERNARD G. SEGAL is a member of the Philadelphia law firm of Schnader, Harrison, Segal and Lewis and practices frequently before the Supreme Court. Among numerous bar and government positions in which he has served, he has been president of the American Bar Association (1969–1970), president of the American College of Trial Lawyers (1964–1965), chairman of the board of the American Judicature Society (1958–1961), vice-president of the American Law Institute (since 1968), and a member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (since 1959).

ROBERT L. STERN is a member of the Chicago law firm of Mayer, Brown and Platt and participates frequently in litigation before the Supreme Court and other appellate courts. He was an attorney in the Office of the Solicitor General of the United States from 1941 to 1954, serving there as either Acting Solicitor General or as First Assistant (1950–1954). Before that (1934–1941), he served in the Anti-Trust Division of the Department of Justice. He was a member of the American Law Institute's Advisory Committee for the Study on the Division of Jurisdiction between State and Federal Courts (1963–1969). He is co-author (with Eugene Gressman) of *Supreme Court Practice* (4th edition, 1969) and served as a member of the Advisory Committee on Appellate Rules of the Judicial Conference of the United States (1960–1968).

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Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised"

Justice Brennan has joined those opposing the creation of a National Court of Appeals to screen cases to be heard by the Supreme Court, as proposed by the Freund study group. The following is an editorial adaptation of a statement made by Justice Brennan to the First Circuit Judicial Conference.

THE STUDY Group on the Caseload of the Supreme Court, often referred to as the Freund committee, recommends a number of far-reaching changes—changes that would surely rank in importance with the creation of the Circuit Courts of Appeals in 1891 and with the reduction of the Court's mandatory appellate jurisdiction in 1925. Many of the recommendations seem to me entirely sound.

In particular, I share the study group's view that the existence of two distinct lines of access to the Supreme Court, appeal and certiorari, can no longer be justified. Direct appeals to the Supreme Court, whether from a one-judge court under the antitrust Expediting Act or from a three-judge court convened to consider the constitutionality of a state or federal statute, are my special candidates for repeal, and it is encouraging that Congress is now considering this legislation. These cases consume a disproportionate amount of the limited time available for oral argument. Yet we are regularly constrained to grant review, not so much because the question presented is especially important or because the district court may well have erred, but rather because we are reluctant to deprive the losing litigant of any opportunity for appellate review of the trial court's decision. Since the policy considerations that gave rise to the distinction between review by appeal and review by writ of certiorari have long since lost their force, I support most enthusiastically the proposal to abandon the appellate jurisdiction and leave a writ of certiorari as the only means of obtaining review by the Supreme Court.

This proposal is not, however, the major focus of the study group's report; it is only incidental to a far more important and far more controversial recommendation. Having reviewed the size of our docket and considered the burden of screening out the cases that will be set for plenary review, the study group concludes that a fundamental restructuring of the federal judiciary is warranted. Specifically, they propose the creation of a National Court of Appeals, made up of seven United States circuit judges, who would assume upwards of 90 per cent of the screening burden that now falls to the Supreme Court. That proposal seems to me fundamentally unnecessary and ill advised, and I strongly hope that Congress will reject it. . . .

Much has already been said about the study group's proposal, and I expect that much more will appear in the coming months. I see no need to touch every base and present my views on every argument for and against the proposal. I do not plan to discuss, for example, the argument that the plan would violate the constitutional provision of Article III establishing "one Supreme Court" or the argument that the assignment to serve on the court would affront the intellect and patience of a United States circuit judge. Nor will I discuss the drawbacks of having a new court decide finally and on the merits certain supposedly unimportant questions as to which the circuits are in conflict. Others have fully discussed those questions.

But my now almost seventeen years' service as an associate justice of the Supreme Court do afford me an unusual perspective on the proposal, and I can describe what seem to me two glaring defects in the plan.

First, its fundamental premise that "consideration given to the cases actually decided on the merits is compromised by the pressures of processing the inflated docket of petitions and appeals" is entirely unsupportable. Contrary to the study group's assumption, the Supreme Court is not overworked. Indeed, my law clerks tell me each year that the burden on the district and circuit courts with which they served before coming to me is no less substantial than the burden on the Supreme Court. Our docket has most definitely not swollen to a point where the burden of screening cases has impaired our ability to discharge our other vital responsibilities.

Only the Court Should Screen Cases

Second, the study group has regrettably misconceived both the nature and the importance of the screening process. Even if it were as time consuming and difficult as the study group believes, that would underscore, not diminish, its importance. It is a task that should, I am convinced, be performed only by the members of the Court. The removal of seven eighths of that function from the Supreme Court would substantially impair our ability to perform the responsibilities conferred on us by the Constitution.

The study group observes, and I fully agree, that "the indispensable condition for discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before." But insofar as that observation implies that the screening function is so time consuming and onerous that it imperils existence of the "indispensable condition," I emphatically disagree.

It is true, of course, that the number of cases docketed has increased greatly over the past thirty or forty years. There were 3,643 cases filed with the Court during the 1971 term, as the study group report itself points out, and the indication was in late May this year that the total filings during the 1972 term will be within 1 per cent of that figure. This is twice as many as were filed in my first term seventeen years ago and three and a half times the number filed in 1935.

Those statistics might lead one to believe that the Court is surely in need of help. But to concentrate merely on raw statistics, as the study group seems principally to have done, is misleading, and I think that is especially true in this situation. As Eugene Gressman remarked in the March, 1973, *American Bar Association Journal:*

> Raw statistics as to case filings . . . are but the starting point for identifying and evaluating the real workload of the Court. How much time is actually spent by the nine justices and their law clerks in screening cases? How many of the cases are easily and quickly disposed of, and how many require more prolonged consideration? If it be true, as various justices have indicated, that more than 60 per cent of the paid cases and 90 per cent of the *in forma pauperis* cases are utterly without merit for review purposes, cannot these petitions for review be denied with a minimum of time and effort? How many cases are actually discussed at the Court's conferences? None of these questions or their answers are found in the [study group] report.

The answers to these questions are critical to an evaluation of the proposal, and I shall undertake to answer them from the vantage point of my service on the Court. For we ought not replace present procedures if there is no pressing problem justifying their replacement. And I do not think that there is such a problem.

Let me explain briefly the timetable and the procedure used by the Court to screen thirty-six hundred cases submitted for review. As cases are filed with the Court, they are collected by the clerk's office and eventually placed on conference agenda. The agenda, together with the relevant papers as to the cases listed thereon, are circulated to the various chambers approximately two weeks prior to the scheduled conference date. We have about thirty scheduled conferences each term. Approximately half of the cases are paid filings, with the other half being *in forma pauperis* filings. The ratio of petitions for certiorari to appeals is about nine to one, the vast majority of the appeals being among the paid filings.

Screening Does Not Compromise Other Tasks

The method of screening the cases differs among the individual justices, and I confine myself to my own practice. That practice reflects my views that the screening function is second to none in importance. I try not to delegate any of the screening function to my law clerks and to do the complete task myself. I make exceptions during the summer recess when their initial screening of petitions is invaluable training for next term's new law clerks. And I also must make some few exceptions during the term on occasions when opinion work must take precedence. When law clerks do screening, they prepare a memorandum of not more than a page or two in each case, noting whether the case is properly before the Court, what federal issues are presented, how they were decided by the courts below, and summarizing the positions of the parties pro and con the grant of the writ.

For my own part, I find that I don't need a great amount of time to perform the screening function—certainly not an amount of time that compromises my ability to attend to decisions of argued cases. In a substantial percentage of cases I find that I need read only the "questions presented" to decide how I will dispose of the case. This is certainly true in at least two types of cases—those presenting clearly frivolous questions and those that must be held for disposition of pending cases.

Because of my familiarity with the issues of pending cases, the cases to be held are, for me, easily recognizable. For example, we heard argument early this term in eight obscenity cases because we decided to undertake a general re-examination of that subject. All agenda since then have included several cases of conviction or injunction under state obscenity laws, and I simply mark those cases "hold."

"Are Negroes in Fact Indians?"

Similarly, with other cases I can conclude from a mere reading of the question presented that for me at least the question is clearly frivolous for review purposes. For example, during recent weeks, I thought wholly frivolous for review purposes questions such as: "Are Negroes in fact Indians and therefore entitled to Indians' exemptions from federal income taxes?" "Are the federal income tax laws unconstitutional insofar as they do not provide a deduction for depletion of the human body?" "Is the Sixteenth Amendment unconstitutional as violative of the Fourteenth Amendment?" and "Does a ban on drivers' turning right on a red light constitute an unreasonable burden on interstate commerce?"

Nor is an unduly extended or time-consuming examination required of many of the cases that present clearly nonfrivolous questions. For very often even nonfrivolous questions are simply not of sufficient national importance to warrant Supreme Court review. And after a few years of experience, it is fair to say that a justice develops a "feel" for these cases. For example, when the question is whether a court of appeals in a diversity case correctly applied governing state law or correctly directed entry of a judgment notwithstanding the verdict, the question of error, if any, ordinarily does not fall within the area of questions warranting Supreme Court review.

As to cases in which my initial reading of the questions presented suggests to me that the case may merit Supreme Court review, the special "feel" one develops after a few years on the Court enables one to recognize the cases that are candidates for this review. I need not spend much time examining the papers in depth when the questions strike me as worthy of review or at least as warranting conference discussion.

After examining or having law clerks examine each of the cases on the week's agenda, each justice advises the chief justice of the cases that he wishes to have stricken from the agenda and laid over to a later date so that further views can be requested of the parties or of an interested nonparty, such as the solicitor general. Several days before conference, the chief justice circulates a "discuss list" that designates the cases on the agenda that he believes are worthy of discussion at conference. Any justice who wishes to add cases to the discuss list can do so simply by making such a request. On the day before conference, the completed discuss list is circulated to the individual chambers and the papers and memoranda relating to those cases are collected and taken to the conference room.

The conferences are ordinarily held on Friday and usually last the better part of the day, with much of the time devoted to discussion of motions and argued cases and the remainder of the time to the discussion of cases seeking plenary review. The initial conference at the beginning of the term lasts several days and is devoted exclusively to the discussion of appeals and petitions listed on the summer conference agenda. These agenda contain approximately a fourth, or about nine hundred, of the total cases filed during the term, and thus much of the term's screening work is completed even before the term actually begins.

Most Cases Are Not Discussed at Conference

Up to three hundred cases are discussed over the several days of the initial conference; at a regular Friday conference during the term, the number of cases discussed may vary from as few as ten to as many as thirty or forty. Over-all, however, approximately only 30 per cent of the docketed cases are discussed at conference. In other words, the Court is unanimously of the view in 70 per cent of all docketed cases that the questions sought to be reviewed do not even merit conference discussion. That has proved to be true throughout my time on the Court, and a check I made in early May shows that it will be true this term.

The longer one works at the screening function, the less onerous and time-consuming it becomes. I can state categorically that I spent no more time screening the 3,643 cases of the 1971 term than I did screening half as many in my first term in 1956. Unquestionably, the equalizer is experience, and for experience there can be no substitute—not even a second court. I subscribe completely to the 1958 observation of the late Mr. Justice Harlan that "Frequently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules." Mr. Gressman ex-

pressed the same thought this way: "[The Court's] present monitoring of all cases on the docket gives the Court a feel for the subjects of its ultimate judicial administration powers and an intuitive knowledge of when and where it is necessary to execute those powers."

I fear that the study group gave insufficient weight to this vital fact in assuming that inflated numbers of appeals and petitions must inevitably make the screening function a more onerous and time-consuming burden.

Screening Process Assures Flexibility

Moreover, the proposal that a National Court of Appeals be created to ease the Supreme Court's workload may properly be challenged, not only with respect to the study group's understanding of that workload but also with regard to its understanding of the nature of the screening process itself. As I noted, approximately 80 per cent of all cases docketed annually (that means in this term, eleven hundred cases) are placed on the "discuss list" each term. Under this system a single justice may get a case for discussion at conference and, in many instances, that justice succeeds in persuading three or more of his colleagues that the case is worthy of plenary review. Thus, the existing system provides a forum in which the particular interests or sensitivities of individual justices may be expressed and therefore assures a flexibility that is essential to the effective functioning not only of the screening process but also of the decisional process of which it is an inseparable part.

Much of this flexibility would be lost, however, if the scheme advanced by the study group were to be adopted. As envisioned by its proponents, the National Court of Appeals could certify a case to the Supreme Court only if three of its seven judges concurred. It is estimated that about four hundred cases per term would be passed on to the Supreme Court in this manner for final consideration. As a result, each year the justices of the Supreme Court would be denied the opportunity even to consider the merits of approximately seven hundred cases that would be deemed now of sufficient importance to warrant full debate at conference. This loss of flexibility in the screening process would necessarily have a substantial and detrimental effect on the functions and responsibilities of the Court.

Similarly, an artificial limitation of the Supreme Court's docket to only four hundred cases per year would seriously undermine the important impact dissents from denial of review frequently have had on the development of the law. These dissents often herald the appearance on the horizon of a possible re-examination of what may seem to the judges of the National Court of Appeals to be an established and unimpeachable principle. Indeed, a series of dissents from denials of review played a crucial role in the Court's re-evaluation of the reapportionment question and the question of the application of the Fourth Amendment to electronic searches. Actually, every justice has strong feelings about some constitutional view that may not yet command the support of a majority of the Court.

For example, I thought that the Court was quite wrong in adopting "same evidence" rather than "same transaction" as the test of "same offense" for the purposes of double jeopardy. The question has recurred in case after case since the Court made that choice a few years ago. In each instance I and two of my colleagues have recorded our continued adherence to my minority view.

Another example is the view shared by Mr. Justice Douglas with the late Mr. Justice Black in obscenity cases. They dissented in 1957 from the holding that obscenity does not enjoy First Amendment protection, and in every obscenity case since then Mr. Justice Douglas and, until his death, Mr. Justice Black, recorded their dissent from applications of the holding that obscenity is not protected speech. Only a brave man would say that their view could never prevail in the Court. The history of their dissents that have become law in cases involving reapportionment, the right to counsel, and the application of the Bill of Rights to the states are too fresh in mind to ignore.

The creation of a National Court of Appeals that would certify the four hundred "most review worthy" cases to the Court each term would inevitably sacrifice this invaluable aid to constitutional adjudication by denying certification in cases that might otherwise afford appropriate vehicles for these dissents.

Which Cases Are "Most Review Worthy"?

Moreover, the assumption that the judges of the National Court of Appeals could accurately select the four hundred "most review worthy" cases wholly ignores the inherently subjective nature of the screening process. The cases docketed each term cannot simply be placed into a computer that will instantaneously identify those that are "most review worthy." And this is particularly true with respect to distinctions among the eleven hundred or so cases now deemed to be of sufficient "review worthiness" to merit discussion at one of our weekly conferences.

Indeed, a question that is "substantial" for me may be wholly "insubstantial" to some, perhaps all the rest, of my colleagues. For example, I have long thought that the Court should decide the intensely controversial question whether the president's authority to prosecute hostilities in Indochina is a justiciable question. I and two of my colleagues have stated as much in dissents from denial of review. Yet others feel strongly that the issue is so clearly nonjusticiable as to be utterly "insubstantial."

For the more statistically oriented, the subjective nature of the decision whether a particular case is of sufficient "importance" to merit plenary consideration is amply demonstrated by the voting pattern of the justices in the screening process. Under our rules a case may be granted review only if at least four of the

nine justices agree that review is appropriate. It is noteworthy that, of the cases granted review this term, approximately 60 per cent received the votes of only four or five of the justices. In only 9 per cent of the granted cases were the justices unanimous in the view that plenary consideration was warranted. Thus, insofar as the key determinant is the "substantiality" of the question presented, there can be no doubt that the appraisal is necessarily a subjective one.

And I share the concern voiced by Chief Justice Warren, who has warned that

> the delegation of most of the screening process to the National Court of Appeals would mean that the certiorari "feel" of the rotating panels of that court would begin to play a vital role in the ordering of our legal priorities and in the control of the Supreme Court docket. More than that, this lower court "feel" would be divorced from any intimate understanding of the concerns and interests and philosophies of the Supreme Court justices; and that "feel" could reflect none of the many other intangible factors and trends within the Supreme Court that often play a role in the certiorari process.

That observation effectively exposes the fallacy of of the suggestion of the study group that "the Supreme Court's readiness to reopen what had seemed to be settled issues, its impatience with, or its interest in, one or another category of cases—all this we think would communicate itself to the National Court of Appeals, and would be acted upon."

Administrative Efficiency Would Not Be Improved

In response to these objections, it might, of course, be suggested that the National Court of Appeals certify to the Supreme Court not four hundred cases per term but, rather, all eleven hundred or so cases normally placed on the "discuss list." As I have already indicated, however, by far the greatest portion of the Court's time and energy now devoted to the screening process is concentrated not in the selection of cases to be discussed at conference but, rather in the selection from that group of cases of the one hundred and fifty to two hundred cases that will be granted plenary review each term. Thus, even if the judges of the National Court of Appeals could accurately identify all or most of the cases that normally would be placed on the "discuss list," such a scheme would inevitably prove virtually useless in terms of administrative efficiency.

Finally, it should be noted that the study group's recommendation that the breadth of the Court's screening function be curtailed rests in part on what I consider to be the mistaken assumption that the screening function plays only a minor and separable part in the exercise of the Court's fundamental responsibilities. In my view, the screening function is inextricably linked to the fulfillment of the Court's essential duties and is vital to the effective performance of the Court's unique mission, as the study group's report says, to "define the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union."

Calendar Mirrors a Changing Society

The choice of issues for decision largely determines the image that the American people have of their Supreme Court. The Court's calendar mirrors the ever-changing concerns of this society with ever more powerful and smothering government. The calendar is therefore the indispensable source for keeping the Court abreast of these concerns. Our Constitution is a living document, and the Court often becomes aware of the necessity for reconsideration of its interpretation only because cases filed reveal the need for new and previously unanticipated applications of constitutional principles.

For example, the due process clause provides that no person shall "be deprived of life, liberty or property, without due process of law." The interest of the defaulting conditional sales purchaser in the refrigerator or kitchen stove or bedroom furniture that he bought on time clearly does not constitute "property" in the traditional sense of the word. Similarly, welfare benefits, automobile drivers' licenses, retail liquor licenses, and the like were traditionally viewed as "statutory entitlements" rather than as "property." Vast societal changes over the past few decades, however, have substantially altered the function and importance to the individual of these previously unprotected interests. A long series of seemingly unimportant cases filed in the Court over a period of years gradually generated an awareness of these societal changes and of the consequent need for constitutional reinterpretation. As a result, recent construction of the due process clauses requires government to afford notice and hearing before terminating "statutory entitlements" or repossessing goods.

Another example may be seen in the area of criminal procedure. The Sixth Amendment's guarantee of the "Assistance of Counsel for his defense" is in terms applicable "in all criminal prosecutions." Are police interrogations or preliminary hearings part of the "criminal prosecution" for the purposes of this guarantee? The Court has held that they are in light of the serious abuses revealed in cases that reached our docket.

As Mr. Gressman has said, if the study group's proposal to circumscribe severely the Court's choice of issues were adopted, "The Supreme Court, by not even being aware of more than thirty-two hundred cases on its docket, would be isolated from many nuances and trends of legal change throughout the land." The point is that the evolution of constitutional doctrine is not merely a matter of hearing arguments and writing opinions in cases granted plenary review. The screening function is an inseparable part of the whole responsibility; to turn over seven eighths of that task to

a National Court of Appeals is to rend a seamless web.

I expect that only a justice of the Court can know how inseparably intertwined are all the Court's functions and how arduous and long is the process of developing the sensitivity to constitutional adjudication that marks his role. One enters a new and wholly unfamiliar world when he joins the Supreme Court of the United States, and this is as true of a justice who comes from a federal court of appeals as it is of a justice, like me, who came from a state supreme court. I say categorically that no prior experience, including prior judicial experience, prepares one for the work of the Supreme Court. I have sat with six colleagues appointed from federal courts of appeals and can confirm from my own experience how very right Mr. Justice Frankfurter was when he said ". . . even justices who have come to the Court from a longish and conspicuously competent tenure on the lower federal courts do not find the demands of the new task familiar."

Justices Must Grapple with Complex Problems

The initial confrontation on the United States Supreme Court with the astounding differences in function and character of role and the necessity for learning entirely new criteria for decisions can be a traumatic experience for the neophyte. How much more traumatic and difficult must be the task of the National Court of Appeals composed of rotating circuit judges required to do major Supreme Court work without ever being afforded the slightest glimpse of the whole picture of a justice's function.

It is not only that constitutional principles evolve over long periods and that one must know the history of each before he feels competent to grapple with their application in new contexts never envisioned by the framers, but it is also that he must acquire an understanding of the extraordinarily complex factors that enter into the distribution of judicial power between state and federal courts and other problems of our federalism. The screening function is an indispensable and inseparable part of this entire process, and it cannot be curtailed without grave risk of impairing the very core of the extraordinary function of the Supreme Court.

Will Public Confidence Be Impaired?

The study group rejected a suggestion that the Court form a smaller senior staff to perform the screening function and recommend dispositions to the Court. The stated reason given was that "If . . . the scheme were to operate 'successfully,' so that in practice staff recommendations were accepted in a large number of cases as a matter of course and an acknowledged gap were thus to be opened between function and responsibility in the denial of certiorari and the dismissal of appeals, then we fear that public confidence in the Court would be impaired." One must ask, if delegation of the screening function to a staff empowered only to recommend dispositions threatens impairment of public confidence in the Court, is there not an incomparably greater threat in a delegation of that function to seven courts of appeals judges empowered finally to shut off the Supreme Court from access to seven eighths of its own docket?

For as two members of the study group, Professors Freund and Bickel, have reminded us, when Justice Brandeis was asked how he explained the great prestige of the Court, he replied, "Because we do our own work."

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SUPREME COURT DENIAL OF CITIZEN ACCESS TO FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTIONS: THE RECORD OF THE BURGER COURT

A Statement of the Board of Governors of the

SOCIETY OF AMERICAN LAW TEACHERS

Prepared by

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FOREWORD

The Society of American Law Teachers is a membership organization of approximately 500 individual law teachers from well over 100 schools. It is interested in questions concerning the capacity of the legal profession, as a public profession, to serve societal needs, and in the relation between legal education and the quality and availability of legal representation, including matters of professional responsibility and greater equality of access to the legal profession and to legal representation.

Central to these concerns is the capacity of the judicial system to provide a forum in which serious claims of unconstitutional conduct by government officials, or violations of other legal rights by public or private officials, can be impartially examined and, where found meritorious, be remedied. An important legal and public debate is in process on the proper uses of our courts, particularly the federal courts. Many legitimate claims on limited time and resources are being made. However, few would challenge the contention that a first priority for federal court jurisdiction should be the enforcement of constitutional rights and of major federal statutory programs not committed to other forums for enforcement.

To know what should be done, however, it is important to be aware of what is being done. Many have asserted that during the

past several years the Supreme Court has become increasingly inhospitable to the invocation of federal jurisdiction by private citizens as a means of challenging private and public misconduct, constitutional or otherwise; this assertion has been contradicted by others. The Board of Governors of SALT asked two of its members, Professors Carole E. Goldberg and Herman Schwartz, of UCLA and Buffalo Law Schools, respectively, to look at the actual record of decisions. The statement which follows, seeking to do that, has been adopted by the Board of Governors. Its conclusion is:

> Although the pattern is not uniform, it is clear enough: The Supreme Court is making it harder and harder to get a federal court to vindicate federal constitutional and other rights. In some cases, prior decisions have been overruled, either explicitly or silently; in other contexts, restrictive implications in prior cases have been taken up and expanded; in still other situations, new approaches developed by the lower courts have been repudiated .... That there is indeed a pattern, and that it is more than accidental, seems clear from the scope and pervasiveness of the phenomenon.*

*We thus find that the judicial record supports the judgment made by others, including the Council for Public Interest Law, formed by the American Bar Association and others, which concluded as follows:

> A substantial number of important cases involving aggrieved parties prepared to litigate issues on the merits have been dismissed by the federal courts on technical grounds under new, shifting, and progressively more stringent procedural rulings. In consequence, many citizens, including minorities, the poor, and the victims of official abuses, have been left without judicial remedies. As the courts have turned from the substance of justice to the niceties of pleading, citizens have found greater cause for dissatisfaction with the administration of justice.

It should be borne in mind that we are not here speaking of such much-controverted issues as whether the rights of criminal defendants should be expanded or contracted, or whether the scope of the Fourteenth Amendment's protection of "liberty" should apply to such actions as injurious intra-prison transfers of prisoners or unjustified defamation of a citizen by public officials. When a court denies standing or jurisdiction, it prevents a complainant from obtaining a hearing, even though the claim of unconstitutional or other unlawful conduct is meritorious. So: none of the many citizen and private groups in or near Rochester, New York, were able to get a federal court even to hear their claim that restrictive zoning patterns in suburban areas violated fundamental law; poor and near-poor people throughout the country, unable to obtain needed hospital services because of lack of ability to pay and claiming that the Internal Revenue Service had unlawfully encouraged private hospitals to restrict free services to indigents, were turned away from federal court, not on the ground that their claim lacked merit but because the Court ruled that it should not be heard at all. Similarly, without openly abandoning the constitutional rule requiring state courts to refrain from the use of unconstitutionally obtained evidence in criminal proceedings, the Supreme Court severely restricted the ability of individuals claiming noncompliance with that rule to obtain a federal hearing.

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As lawyers and teachers, we are aware that competing values are at stake, and that each decision or group of decisions may reasonably be defended by many. However, it is important to recall that the value so frequently subordinated in the decisions described below is a fundamental prerequisite to the reality of the rule of law: the capacity of an individual citizen to call to account a governmental or powerful private person for actions claimed to be unlawful.

IV

STATEMENT

The most valuable contribution of the "Warren Court" may turn out to be, not its specific decisions in particular areas, but its efforts to make the federal courts more available and responsive to the claims of those wronged by governmental and powerful private misconduct. Racial and ethnic minorities, women, victims of consumer fraud, poor people, victims of legislative malapportionment, environmentalists, prisoners, mental patients, victims of governmental irregularities -- all of these interests have rarely had a forum in which to press their interests, or adequate legal representation. Most, if not all, of them saw the federal courts as just another part of a generally indifferent and unresponsive governmental apparatus. The Warren Court changed that. It embraced the notion that the federal courts can be and ought to be protectors of rights guaranteed by the Constitution and laws of the United States, and its actions facilitated the development of a vigorous and skillful public interest bar.

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Chief Justice Warren E. Burger has long recognized this development, and has deplored it. As long ago as July 1971, he cautioned young people that they should become lawyers in order to accomplish change through the courts, because "that is not the route by which basic changes in a country like ours should be made." N.Y. Times, July 4, 1971, p. 1, col. 5 at p. 20, col. 1. And in recent years, a new majority of the Court has made sure that, in Chief Justice Burger's words, these lawyers will face "some disappointments" in their efforts. Although the pattern is not uniform, it is clear enough: The Supreme Court is making it harder and harder to get a federal court to vindicate a broad range of federal constitutional and other legal rights. In some cases, prior decisions have been overruled, either explicitly or silently; in other contexts, restrictive implications in prior cases have been taken up and expanded; in still other situations, new approaches developed by the lower courts have been repudiated.

That there is indeed a pattern, and that it is more than accidental, seems clear from the scope and pervasiveness of the phenomenon. Class actions, standing to sue, federal review of constitutional claims in state criminal and civil proceedings, attorneys' fees, the power of the federal court to fashion

meaningful remedies -- in these and other contexts, the Supreme Court has sharply restricted the federal courts' power to protect basic rights. Instead, protection of these rights has been relegated to the state courts, few of which have shown themselves responsive.

The cases can be usefully, though roughly, categorized as follows:

1. Those curtailing access of certain persons or groups to federal court actions -- these include the decisions on standing and class actions.

2. Those requiring great deference to state court proceedings -- these include restrictions on federal court injunctions against state actions and forfeiture of the right to federal habeas corpus review of state court convictions based on deprivation of constitutional rights.

3. Those denying the lower courts the power to fashion appropriate remedies for constitutional violations, including the grant of attorneys' fees, as well as other decisions cutting back on a federal court's power to redress or prevent harms by state officials.

I. Restrictions on Capacity to Sue in The Federal Courts

No matter how clear government or private misconduct may be, federal law sets certain threshhold requirements before a

person or group may challenge those actions in a federal court; the cost of litigation imposes additional burdens. In both these respects, the Supreme Court has made it more difficult to bring such a challenge in federal court.

A. Standing

In recent years, the Burger Court has revived the requirement of standing as a major obstacle to litigation in federal court. Contrary to Warren Court decisions as well as to some of its own earlier precedents, the Burger Court has made it difficult for plaintiffs to demonstrate that they have satisfied the requirement of "injury in fact," which is implied from the Constitutional limitation of federal-court jurisdiction to "cases and controversies." Furthermore, the Burger Court has interpreted more narrowly certain non-constitutional ("prudential") standing doctrines -- such as the rules limiting assertion of another's rights, and those demanding some indication that plaintiff was designed to be protected by laws he or she relies on.

1. The Burger Court's reluctance to find the existence of "injury in fact" is exemplified by two recent cases, Warth v. Seldin, 422 U.S. 490 (1975) and Simon v. Eastern Kentucky Welfare Rights Organization, 96 S. Ct. 1917 (1975). Warth at-

tempted to challenge the exclusionary single-family and low density zoning ordinances of Penfield, N.Y. (a suburb of Rochester) on the ground that they unconstitutionally screened out lower-income and minority residents. Although the plaintiffs included low- and moderate-income residents of Rochester who alleged that they desired to live in Penfield, a home builders association, and a non-profit corporation concerned with housing shortages for lower-income people in the area, a 5-4 majority of the Supreme Court denied all the plaintiffs standing. The Court asserted that plaintiffs had failed to demonstrate "injury in fact" because they could not point to any particular housing project (which they could have afforded) that would actually have been built but for Penfield's ordinances, and indicated that its standing requirement could have been satisfied only if a developer of a low or moderate income housing project had actually applied to Penfield unsuccessfully for permission to build. For the plaintiffs, that requirement meant they would have to find a developer willing to invest the tens of thousands of dollars necessary to produce project plans, just to bring a constitutional challenge. It should be noted that the majority's insistence on specific causal relationships between Penfield's

ordinances and the plaintiffs' housing plight occurred at the pleading stage, when federal procedural requirements usually are liberal.

2. Similarly, in Simon v. Eastern Kentucky Welfare Rights Organization, the Burger Court majority denied standing at the pleading stage to low-income individuals unable to afford hospital services, who sought to challenge favorable tax treatment granted by the Internal Revenue Service to certain private hospitals. The claim was that an administrative ruling, eliminating a requirement that non-profit hospitals serve indigents to the extent of their financial ability, violated the Internal Revenue Code and encouraged hospitals to deny services to indigents. The Court found insufficient allegations of "injury in fact," because plaintiffs could not demonstrate that, if the ruling were changed to require more extensive services to indigents, the hospitals would choose to provide these services rather than abandon their favorable tax treatment. Since plaintiffs obviously could not gain access to such information in the absence of the discovery that litigation makes possible, they were effectively foreclosed from raising their legal claim in federal court.

By contrast, in an earlier case, United States v. SCRAP, 412 U.S. 669 (1973), plaintiff environmentalists succeeded -- 5-3, with Justice Powell not participating, and Justices Burger,

White and Rehnquist dissenting -- in establishing standing to challenge an increase in railroad rates, simply by alleging that the increase would affect environmental quality by increasing use of nonrecyclable commodities. The causal relationship between the rate increase and these consequences did not have to be demonstrated with particularity at the pleading stage.

3. A similar double standard on the part of the Court is found in cases concerning the "prudential" standing rule that limits a plaintiff's ability to assert the rights of another person. In Warth, supra, taxpayer citizens of Rochester were denied standing to assert the rights of low- and moderate-income individuals unable to find housing in Penfield. The taxpayers' claim was that Penfield's exclusionary policies imposed extra costs of services on Rochester citizens. The Court insisted that nothing interfered with the low and moderate income individuals asserting their own rights, and that the taxpayers' rights were not being violated indirectly. If the Court had found to the contrary on either of these points, it could have triggered an exception to the general rule prohibiting plaintiffs from asserting the rights of others.

4. By contrast, in Singleton v. Wulff, 96 S. Ct. 2868 (1976), a 5-4 majority of the Court granted standing to doctors

to challenge the constitutionality of a state law denying payment of Medicaid benefits to patients who underwent certain abortions. The Court allowed them not only to assert their own rights, but (with Justices Burger, Stewart, Powell and Rehnquist in dissent) permitted them to sue on behalf of the women whose exercise of the right to an abortion was hindered. For this latter ruling, the Court relied on the physicians' relationship to their patients; however, it is uncertain from the Court's opinion what makes this relationship special for purposes of standing doctrine. It appears not unlikely that the it was the sympathy of several Justices with the particular groups of people bringing suit, and with their substantive claims, that kept the restrictive standing views of the minority from carrying the day.

5. The Burger Court also has revived a prudential standing doctrine that precludes individuals from suing when the harm they have suffered is not peculiar to them, but rather is shared by citizens in general. According to this doctrine, courts may not examine and review what appear to be flagrant abuses of government power so long as everyone in the country is harmed equally. Reasoning backwards, the Court infers from the fact that the harm is undifferentiated that the government action in question is outside the scope of judicial review.

Thus, for example, in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1973), a six-Justice majority denied standing to citizens and taxpayers to challenge the military reserve membership of members of Congress. Plaintiffs relied on Art. I, §6, cl. 2 of the Constitution, which provides that "no Person holding any Office under the United States, shall be a member of either House during his Continuation in Office," and claimed that the reserve officer/Congressmen would be compromised in fulfilling both sets of duties. And in United States v. Richardson, 418 U.S. 166 (1974), a 5-4 majority denied a federal taxpayer standing to challenge the provision of the Central Intelligence Agency Act that permits withholding the C.I.A. budget from public scrutiny. He relied on the constitutional provision requiring a regular statement and account of expenditures of federal moneys, and claimed he could not make sense of the overall federal budget or intelligently exercise his franchise without information about the C.I.A. In either case, it would be difficult to find someone who had a more particular interest in suing than his or her interest as taxpayer or citizen. Hence, denying citizen and taxpayer standing was tantamount to making it impossible to secure judicial review of the claim of unconstitutional governmental action.

By contrast, in Flast v. Cohen, 392 U.S. 83 (1968), the

Warren Court allowed standing to taxpayers to challenge certain federal expenditures that benefited parochial schools. The plaintiff taxpayers were not harmed by the expenditures in some manner specific to them. While the Warren Court did insist on some "logical nexus" between the plaintiffs' status as taxpayers and the Constitutional clause they relied on for their claim (in Flast, the First Amendment's "establishment of religion" clause), this requirement was relatively easy to satisfy in Flast. By contrast, in Schlesinger and Richardson, the Burger Court applied this requirement as a major obstacle to bringing suit. It seems, for example, that the constitutional provision at issue in Richardson is much more directly related to the protection of taxpayers than the prohibition on establishment of religion involved in Flast.

B. Class Actions

In many cases of business or governmental abuse, harm to any individual person is too small to make it financially feasible for that person to sue, whether in federal court or anywhere else. This can be true for excessive utility rates, consumer frauds, harm from pollution, harm from antitrust violations and the like. Class actions have been developed partly in order to facilitate the banding together of people with similar claims. In many cases, a wrongdoer will escape liability completely if no

class action is possible, thus defeating both the deterrent and compensatory purposes of many federal and state statutes.

1. In a series of decisions beginning in 1969 with Snyder v. Harris, 394 U.S. 332, but going far beyond that in the last three years, the Court has set up almost insuperable barriers to the maintenance of class actions by a large number of people with small claims. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), a purchaser of odd lots of stock on the New York Stock Exchange sued two brokerage firms under the antitrust laws for monopolizing the business and charging excessive fees. The suit was on behalf of a class, consisting of himself and some six million others. The District Court found that some 2-1/4 million members of the class could be identified, and that it would cost $225,000 to notify them individually. The District Court therefore devised a scheme, which would have cost only $21,750, providing for notice by publication in the Wall Street Journal and other newspapers, and individual notice to over 7,000 key individuals and groups. The Court also ruled that 90% of this cost should be borne by the defendants since it had found, after a hearing, that they were "more than likely" guilty of having violated the antitrust laws, and that the plaintiffs would prevail.

In a 6-3 decision, the Supreme Court ruled that personal

notification of all the 2.25 million people had to be made by the plaintiff, and that he had to bear the entire cost. The decision effectively killed class actions where a great number of people have been wronged, but none to a sufficiently great extent to justify a person's spending a small fortune in notifying all the others of the action.

2. Federal statutes often restrict federal court jurisdiction to cases where the amount in controversy exceeds $10,000, presumably to avoid committing the federal court's time to minor disputes. Sometimes, few or none of the complainants individually have suffered that much damage. In 1969, the Supreme Court ruled that where none of the plaintiffs individually claimed more than $10,000, it was insufficient that their claims totaled more than $10,000 in the aggregate. Snyder v. Harris. Four years later, the Burger Court went far beyond Snyder to limit class actions for jurisdictional amount reasons. In Zahn v. Int'l Paper Co., 414 U.S. 291 (1973), 200 lakefront owners sued the International Paper Co. for polluting Lake Champlain in Vermont. This time, four of the plaintiffs did have claims of more than $10,000 and the matter obviously involved a very substantial sum. Completely ignoring a long line of cases allowing "ancillary jurisdiction," which would have allowed all those with claims of less

than $10,000 to join their claims with those plaintiffs whose claims were in the requisite amount, the same 6-3 majority as in Eisen insisted that each class member have the jurisdictional amount and refused to allow a class action, probably leaving those with smaller claims without a viable and inexpensive federal remedy.

3. This past term, the Court extended its restrictive approach to ancillary or "pendent" jurisdiction in public interest cases to another context. In Aldinger v. Howard, 96 S. Ct. 2413 (1976), a school teacher was dismissed from her job without a hearing, though her work was considered "excellent," because she was allegedly living with a man. She brought a federal civil rights action against the County Treasurer and sought to include in her suit a state-law claim against the County itself on a theory of pendent jurisdiction; although the Civil Rights Act has been construed as not permitting suits against governmental agencies, but only against individual officials, state law apparently allowed a suit against the County. Her purpose, of course, was to resolve everything in one proceeding and thereby avoid the expense and duplication of two separate suits in federal and state courts. Although the Supreme Court has allowed the parties to add state claims to federal suits when they grow

out of a "common nucleus of operative fact," UMW v. Gibbs, 383 U.S. 715 (1966), a 6-3 majority of the Supreme Court forced the plaintiff in that case to split her suit and relegated her to a separate state court proceeding for the suit against the County.

II. The Expansion of "Comity" and "Federalism"

In the name of comity and federalism, the Burger Court has steadily reduced the federal courts' ability to protect constitutional rights in civil and criminal matters by forcing the federal tribunals to defer more and more broadly to state court adjudication. The movement has been reflected primarily in two areas: federal court injunctions against state criminal and civil proceedings which threaten constitutional rights, and state prisoners' rights to federal habeas corpus.

A. Comity and Injunctions Against State Proceedings

Decisions of the Burger Court have severely restricted individuals' ability to sue in federal court to protect their federal rights against invasions by state officers. These denials of federal jurisdiction have occurred in the name of "comity" -- that is, deference to the adequacy of state court proceedings to protect federal rights. Thus federal courts have refused to entertain suits for injunctions or declaratory judgments with respect to certain state court proceedings, even where plaintiffs claim that

subjecting them to the state court proceedings will itself chill the exercise of federally protected rights.

1. This trend was set in motion as long ago as the 1971 decision in Younger v. Harris, 401 U.S. 37. In Younger, plaintiff sued to enjoin enforcement of the California Criminal Syndicalism Act, under which he was being prosecuted, for distributing leaflets advocating change in industrial ownership through political action. He claimed that his prosecution under the Act, as well as the very existence of the Act, inhibited him in his exercise of his First Amendment rights of free speech and press. An 8-1 majority of the Supreme Court found that the alleged overbreadth of the statute and its chilling effect on First Amendment rights were not circumstances so compelling as to warrant federal intervention to stop the state criminal proceeding. The Court found that in the absence of a showing that the prosecutions were in bad faith or intended to harass, Harris had to present his federal claims to the state criminal courts, and rely on the slim possibility of Supreme Court review or a much-delayed federal habeas corpus petition for any federal hearing. The Court apparently believed that deference to state court proceedings was more important than the discouragement of speech that might follow were individuals required to undergo a state trial before obtaining a federal hearing.

2. At first, the Burger Court seemed to take a narrow view of Younger. Its unanimous decision in Steffel v. Thompson, 415 U.S. 452 (1974), permitted federal courts to issue declaratory judgments (but not injunctions) with respect to the constitutionality of imminently threatened, though not yet pending, state criminal prosecutions. If a plaintiff were sufficiently skillful to provoke the State into providing him with a "ripe" case, without provoking them so much they went too far in commencing proceedings against him, he could obtain a federal hearing. However, in Hicks v. Miranda, 422 U.S. 332 (1975), the Court, by a 5-4 majority, held that a federal proceeding, properly brought under the terms of Steffel, could be placed beyond federal jurisdiction by a state criminal prosecution commenced after the federal suit was filed. Thus in Hicks the plaintiff movie theather owners had not been indicted at the time they sued to enjoin enforcement of the state anti-obscenity laws on First Amendment grounds. Two of their employees at the theater had been arrested, and several reels of their film had been seized before the federal suit was filed. The Court found that, because the state indictments were issued against the federal plaintiffs soon after commencement of their federal suit, the comity considerations of Younger v. Harris were applicable, and federal jurisdiction was inappropriate. The obvious consequence of this decision is to encourage state court prosecutions in response to the filing of a federal action.

3. Although Younger was premised on the importance of state criminal proceedings, the Burger Court extended its approach to certain civil proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). There plaintiff had leased a movie theater, and the state had brought a civil action under its obscenity laws to "abate" the showing of obscene movies in that theater. After the final abatement order had been entered, plaintiff sued in federal court, alleging the obscenity statute was unconstitutional and seeking an injunction against future abatement proceedings. A 6-3 Court majority rejected the contention that deference to state civil proceedings should be less extensive than deference to state criminal proceedings. Plaintiff had argued that more safeguards existed against the initiation of criminal proceedings, and that ultimate federal consideration was available (through the writ of habeas corpus) only in state criminal proceedings.

These Burger Court precedents sharply restrict the remedies made possible by the Warren Court decision in Dombrowski v. Pfister, 380 U.S. 479 (1965). Plaintiffs in Dombrowski sued in federal court to enjoin pending and threatened prosecution against them under the Louisiana Subversive Activities and Communist Control Law. Plaintiffs had been subjected to repeated arrests, their offices had been raided, and their papers had been seized. The

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claim was that the law was overbroad, and that the prosecutions under it chilled expression protected under the First Amendment. Emphasizing the primary role of the federal courts in vindicating federal rights, as well as the importance of protecting speech in particular, the Court upheld federal jurisdiction. The Burger Court's contrary emphasis on respect for state court proceedings will probably render dissidents much less able to challenge the constitutionality of state legislation.

B. Habeas Corpus

The Burger Court's most vigorous effort to weaken federal-court protections for constitutional rights has come in the criminal area. This effort has involved not only a whittling down of the substance of the various First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights, but also the denial of a federal forum to remedy violations of those rights which remain, no matter how egregious or clear the violation.

Three cases decided in the last months of this past term show this tendency: Francis v. Henderson, 96 S. Ct. 1708 (1976); Stone v. Powell, 96 S. Ct. 3037 (1976); and Estelle v. Williams,

1. In Francis v. Henderson, a 17-year old black youth was indicted in the early 1960's by a Louisiana grand jury for felony murder. Two months later, the State appointed -- without compensation -- a lawyer in failing health, with little recent criminal

law experience. He did almost nothing to prepare for the defense and, among other things, failed to challenge the racial composition of the grand jury. The trial took one day, and the defendant was convicted and sentenced to life imprisonment; his accomplices pled guilty and received 8-year prison terms. A federal district court later found that Blacks had indeed been unconstitutionally excluded from the grand jury.

In Fay v. Noia, 372 U.S. 391 (1963), the Warren Court had ruled that a person convicted in a state court could bring a habeas corpus proceeding in federal court to challenge a violation of his constitutional rights in the state prosecution, unless the prisoner himself had "deliberately sought to subvert or evade the orderly adjudication of his federal defense in the state court . . . A choice made by counsel, not participated in by the petitioner, does not automatically bar relief." 372 U.S. at 433-34, 438-39. Nevertheless, in Francis v. Henderson, a 6-2 majority of the Supreme Court ruled that a state prisoner could be permanently denied a federal forum for his constitutional claim of a racially biased grand jury -- even though, as in Francis, the claim was valid -- if his lawyer had neglected to raise it at the time required by state procedure; Fay v. Noia was not even discussed. Thus, because a federal constitutional claim was never

heard in State court, it was barred from federal court.

2. In Stone v. Powell, a federal court hearing was denied because the constitutional claim was heard in state court. A 6-3 majority of the Supreme Court eliminated federal habeas corpus review of a claim that a state court conviction was based on illegally seized evidence so long as a state court had determined that the search was legal. In Stone, a seizure was made pursuant to an arrest under a vagrancy statute found unconstitutional. The result of the decision is that, except for the very few instances in which the Supreme Court reviews a state criminal case on direct review, the federal courts are ousted from examining state criminal convictions based on unconstitutional searches and seizures. The Court explicitly based its decision on hostility to the exclusionary rule, but as the dissenters pointed out, Congress in the habeas corpus statute did not give the federal courts the power to refuse to redress violations of a person's constitutional rights simply because the Court disapproves of a particular remedy for the violation. The logic of the majority opinion justifies a fear that other rights will soon be excluded from federal habeas corpus protection where the Court is unhappy with either the scope of the right or the remedy for its violation.

3. The Court took a somewhat more circuitous route to

curtail federal court jurisdiction in Estelle v. Williams. In a Texas criminal prosecution, a defendant claimed he was forced to stand trial in prison garb, held by the Court to be in violation of the Constitution. Because the prisoner failed to make a timely objection, the Court denied him the right to take his case to a federal habeas corpus court, ruling that he was therefore not compelled to wear prison garb, thus transforming a procedural rule about how and when to make an objection into a defeat of the claim on the merits. Here again, the Court ignored Fay v. Noia's stringent standards for determining when a procedural mistake results in a forfeiture of the right to raise a valid federal constitutional claim on habeas corpus.

III. Federal Court Power to Remedy Unlawful Governmental Conduct

In a miscellaneous variety of decisions, the Supreme Court has stripped the federal courts of power to create effective and practicable remedies and in some cases, even to consider certain kinds of wrongs.

1. Rizzo v. Goode, 96 S. Ct. 598 (1976); the federal district court found that public officials in Philadelphia had steadily refused to do anything to stop a pattern of police misconduct in gross violation of the rights of black people in Philadelphia in particular, and of Philadelphians in general. With the assent

of the Philadelphia Police Department, and with the approval of the Commonwealth of Pennsylvania and many others, the Court ordered the Police Department to put into effect a complaint procedure which, incidentally, fell quite a bit short of what the plaintiffs had requested. In a 6-3 decision, the Supreme Court ruled that the federal court had no power to issue such a ruling where the attack was only on the officials' failure to control their subordinates, ignoring a long line of cases and the clear legislative history of the Civil Rights Act, 42 U.S.C. §1983 which makes it clear that the Act reaches situations where, "by reason of . . . neglect" constitutional rights may be denied.

2. As the class action cases show, financial barriers to litigation can be as effective as legal restrictions. As federal and foundation funds for public interest litigation have dried up, many federal courts have invoked their equity power over costs to grant attorneys' fees to the winners at the expense of the losers. Although this is not common in American law, some statutes authorize such awards in public interest cases, and there were several lines of cases that support the courts' use of their equity power in this manner. As Justice Frankfurter noted in 1939, "allowance of [attorneys'] costs in appropriate situations is part of the historic equity jurisdiction of the federal courts."

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939). In reliance on this authority, numerous federal courts have awarded attorneys' fees to the prevailing parties in public-interest litigation on the theory that those parties were serving as "private attorneys-general", performing a valuable function in supplementing the inevitably limited efforts of public officials in protecting the public interest. In a 5-2 decision last year, the Supreme Court put a stop to this trend and ruled that federal courts had no power to award such fees. It explicitly disapproved the decisions of almost every federal court of appeals, refused to find that the precedents for attorneys' fees were applicable, and set aside an award to attorneys for environmentalists who had challenged construction of the Alaska oil pipeline. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). The result was to threaten to make public interest groups financially unable to undertake complex and expensive litigation, and Congress has already enacted a statute allowing for attorney's fees in many "public interest" cases.

3. The Burger Court has closed the federal courts to plaintiffs seeking damages from state officers, at least where the relief sought is so sizable that its cost almost certainly will be borne by the state treasury. In Edelman v. Jordan, 415 U.S. 651 (1974), a 5-4 majority of the Court invoked the Eleventh Amendment

to deny welfare recipients the right to sue in federal court to recover unlawfully withheld benefits. Defendants were enjoined from carrying on practices involving the withholding of benefits in circumstances held to violate provisions of the federal Social Security Act as well as the equal protection and due process clauses of the Fourteenth Amendment, but the injured plaintiffs were not permitted to sue to recover the back benefits they had been unlawfully denied.

This holding refused to apply earlier precedents upholding injunctive remedies against state officers that surely would cost the state large sums of money, such as Goldberg v. Kelly, 397 U.S. 254 (1970), requiring hearings before termination of welfare benefits to recipients. Edelman refused to treat Congress' enactment of 42 U.S.C. §1983, pursuant to its power to enforce the Fourteenth Amendment, or the Social Security Act provisions on which the statutory claim was based, as an action superceding the Eleventh Amendment where retroactive monetary relief was involved. As to §1983, much earlier, the Court had found that its authorization of injunctive suits against state officers superceded the Eleventh Amendment, Ex parte Young, 209 U.S. 123 (1908), and the Burger Court has recently held that Congressional legislation, adopted pursuant to its Fourteenth

Amendment enforcement powers, does supercede Eleventh Amendment restrictions if it specifically authorizes recovery of money damages against state entities. Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976), upholding back pay award under 1972 Amendments to Title VII of Civil Rights Act of 1964. As for the Social Security Act, the Court refused to find that the State had waived immunity by participating in the federal welfare program, which requires state conformity with federal law as a condition of eligibility for federal subsidies. The Burger Court's refusal to find a waiver under these circumstances contrasts with the Warren Court's holding in Parden v. Terminal R. Co., 377 U.S. 184 (1964), finding a waiver of immunity from suit under the Federal Employers Liability Act when the state continued operating a railroad after passage of the Act. In Edelman, the Court minimized the plaintiffs' need for the back benefits which had been unlawfully denied them, terming them a "windfall," and, again, hostility to the merits of the claim may have played a part in the restrictiveness of the decision.

October 1976

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ADDRESS DELIVERED AT THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (APRIL 7–9, 1976)

THE PRIORITY OF HUMAN RIGHTS IN COURT REFORM

by

THE HONORABLE A. LEON HIGGINBOTHAM, JR.*
Judge, United States District Court
Philadelphia, Pennsylvania

We must be forever mindful that when Roscoe Pound spoke here in 1906 he was primarily concerned about assuring justice and improving its quality for all of our citizens. He was not interested in any band-aid or cosmetic process which would mask the wounds of injustice that degraded the judicial system. To use his term, he felt that one must probe the "*causes*" of the dissatisfaction and, to the extent possible, eliminate the wounds while preserving the positive strengths of our judicial body.

I have been asked to analyze the "* * * appropriate criteria for determining the kinds of disputes which should concern the courts, no doubt placing some emphasis on constitutional issues and questions of human rights." To analyze human rights in the judicial process, one must understand the history

* While I accept total responsibility for all views expressed here, I wish to note that in many respects this paper has been jointly authored through the able assistance of my law clerk, Thomas M. Gannon, S.J., whose contribution I am pleased to acknowledge.

of the specific eras in which rights evolve. One must be careful not to assume that solutions proposed in 1906, even by such a thoughtful observer as Dean Pound, will be entirely adequate to meet the challenges, storms and aspirations of a nation which has reached its bicentennial birthday.

I do not believe that this stance is unfaithful to the spirit of that eminent scholar whose address is the inspiration for our own deliberations. While we have already heard and undoubtedly will hear many entirely appropriate suggestions about how we might avoid litigation, in his own time Pound took issue with what he called "the stock saying that litigation ought to be discouraged." As he phrased it, "in discouraging litigation we encourage wrongdoing * * * of all people in the world we ought to have been those most solicitous for the rights of the poor, no matter how petty the causes in which they are to be vindicated." [1]

Pound was bemoaning the tendency to discourage litigation rather than to create new forums for it, such as municipal courts, or small claims courts, because "with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed." [2]

Some rights, however, must be asserted through traditional litigation processes. We can learn something about this from one of Dean Pound's colleagues and contemporaries, Moorfield Storey, Boston advocate, and former American Bar Association President. In 1911, he devoted a lecture series at Yale Law School to *The Reform of Legal Procedure,* in which he bemoaned "the congestion of the docket, the fact that cases are brought faster than they can be tried, and the inevitable accumulation of work." [3] Storey's "first remedy" was legislation to remove some of the causes of litigation, and he advocated especially workmen's compensation systems. Yet Storey knew that there were some rights that had to be secured in the courts, and that is why he acted as counsel for the N.A.A.C.P., an organization he helped found,[4] in three momentous cases in the Supreme

[1] R. Pound, The Spirit of The Common Law (1921) at 134.

[2] R. Pound, supra at 132.

[3] M. Storey, The Reform of Legal Procedure (1912) at 50.

[4] Moorfield Storey was the first president of the NAACP. For its history, see L. Hughes, Fight for Freedom: The Story of the NAACP (Berkeley Ed. 1962).

Court—cases that surely spawned more litigation. The cases were *Guinn v. U. S.*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), outlawing the "grandfather clause," *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), invalidating a Louisville housing segregation ordinance, and *Moore v. Dempsey,* 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923), asserting the right to federal habeas corpus from a state trial conducted in the passion of racism.

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I think that Chief Justice Burger, one of the moving forces behind this meeting, was quite realistic when, in his address to the American Bar Association two months ago, he said, "It would be a mistake to create great expectations about this conference that cannot be fulfilled in the short term." But the Chief Justice also said, "we are determined that the monumental dimensions of the task and the improbability of immediate results should not keep us from undertaking the inquiry." I agree wholeheartedly. We ought to begin the inquiry, for I am no opponent of judicial reform. Early in my career on the bench, I had the privilege of assisting the then Chief Judge, now Senior Judge, Thomas Clary in moving the District Court for the Eastern District of Pennsylvania from a master calendar system to an individual calendar system, a change that has materially increased the efficiency of our court and has drastically reduced the average disposition time for cases filed there. Even now, I fear that I weary my colleagues in the Eastern District with memos suggesting ways in which we might deal more expeditiously with the business of our court. Much can be accomplished by procedural changes, systems analysis and incorporation of sophisticated management techniques.[5]

Yet in putting Roscoe Pound and the era in which he spoke in adequate perspective, we must be mindful of the possibility that too intense a focus on form can obscure our perception of

[5] I have developed these views in "Effective Use of Modern Technology," in JUSTICE IN THE STATES: ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY (W. Swindler, Ed.) 140 (1971) and "The Trial Backlog and Computer Analysis," 44 F.R.D. 104 (1968).

Fortunately, court management personnel are coming to realize that courts need not only managerial principles but also need to know how to apply those principles in the courts' special milieu. See, for example, E. Friesen, E. Gallas & N. Gallas, MANAGING THE COURTS (1971), and consult the JUSTICE SYSTEM JOURNAL, published by the Fellows of the Institute for Court Management. See also R. Wheeler and H. Whitcomb, PERSPECTIVES ON JUDICIAL ADMINISTRATION: TEXTS AND READINGS (forthcoming, 1977).

matters of substance—"human rights," for instance. I know that when I speak of concern for human rights, many may respond: "But who opposes the judicial protection of human rights?" In the abstract, of course, no one does. In practice, however, it is often another story. Suppose, for example, that someone had sponsored a conference similar to this one on the 25th anniversary of Pound's address. If such a conference had been held in 1931, some of us here today would have been excluded from membership in one of the sponsoring organizations.[6] Yet such a conference in 1931 would undoubtedly have been composed of honorable persons who would have bristled with indignation at any suggestion that they were not concerned about human rights. We know now that 1931 was not the millenium. Neither, I submit, is 1976. There are still, and perhaps always will be, issues outstanding on the human rights agenda. We neglect them at our peril. Thus, I disagree with those who may ultimately feel that my entire analysis is only the creation of a "straw man," followed closely by its systematic destruction. That is not my intention. What I hope to do is point out some dangers on the road to reform, dangers that if ignored could cause, not progress, but retrogression. The engineer who stresses the dangers that menace a rocket's crew, even

[6] "[D]iscrimination against Negro lawyers by the American Bar Association * * * led to the formation of the colored National Bar Association. In 1943 the American Bar Association elected a Negro, Justice James S. Watson of New York, the first to be admitted since 1912 when three Negroes, who were not known to be Negroes, were accepted. The same year the Federal Bar Association of New York, New Jersey, and Connecticut opened its membership to Negro attorneys and condemned the 'undemocratic attitude and policy' of the American Bar Association for discriminating against Negro members. In the actual practice of law so great are the limitations in the South that the majority of Negro lawyers have settled in the North." M. Davie, NEGROES IN AMERICAN SOCIETY 118 (1949).

The late Judge Raymond Pace Alexander spoke in 1941 in behalf of the necessity of a black bar association—the National Bar Association—as follows:

> Just so long as we are compelled to recognize racial attitudes in America, and the positive refusal to admit the Negro lawyer to membership in the Bar Associations of the South or even to permit them to use the libraries, just so long as the Negro lawyer is restricted in his membership in local Bar Associations in the North, and particularly, so long as the American Bar Association for all practical purposes refuses to admit Negroes to membership, then so long must there be an organization such as the National Bar Association. Certainly all of us shall welcome the day when racial animosities and class lines shall be so obliterated that separate Bar Associations, other separate professional associations as well as separate schools will be anachronisms.

Alexander, "The National Bar Association—Its Aims and Purposes," 1 Nat'l B.J. 2 (1941). See also Reflections, 1 BALSA REPORTS 8 (1973) (reprint of excerpts from Judge Alexander's speech). Cf. J. Auerbach, Unequal Justice (1975).

though their ship has not yet left its launch pad, is not opposed to landing on the moon. But unless those dangers are recognized, the ultimate landing may not be worth the sacrifices endured during the journey.

The quest for meaningful improvements in the way we settle disputes can be an intellectually challenging and perhaps even fascinating adventure—and a priority of the first order—especially for those of us who are required by our calling to plunge ourselves daily into the minutiae of the law. Yet our goal cannot be merely a "reform" that seeks to ease the courts' caseloads. For what does it profit us if, in making things easier for ourselves, we make things more difficult for others? What does it profit us if, in shifting our burdens to other agencies and institutions, we make impossible the burdens on those who must deal with those agencies and institutions? What does it profit us if, in putting our own judicial houses in order, we have no room in them for those who have relied and must continue to rely on the hospitality of the courts for the vindication of their rights? What does it profit us if, by wielding a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure justice? I do not contend that this will happen. Certainly, it need not. But I do say that we must be aware of the temptation to proceed as though the judicial process involved only parties, not people. If judicial reform benefits only judges, then it isn't worth pursuing. If it holds out only progress for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America. It is worth pursuing only if it helps to secure those constitutional and statutory rights which, because they should be enjoyed by all our citizens, have made our democracy, despite its faults and failures, a significant model for the world.

The reformers whose contributions we prize today—Pound and Storey, for example—set their attack on inefficient courts and legal institutions within a broader vision of the needs of an America recently traumatized by industrialization, by waves of helpless immigrants and by a pervasive hostility to the rights of large classes of citizens. They realized that courts had to be reformed and new institutions of dispute settlement created in order to remedy the injustices—great and small—that pervaded American society at the turn of the century.

Our starting points must be a review of the era of the early 1900's and a careful appraisal of the quality of justice *then* available to the mass of our citizens—particularly the black, the

weak, the poor, the consumer, and the laborer—that configuration of persons which, in 1906, might have been termed "powerless." We have to make those assessments so that in our quest for reform we do not unwittingly turn the clock back to the diminution of rights which persisted then. We must never forget that in part the increased judicial workloads and more complex judicial problems of the last several decades have been often the unavoidable concomitants of a long-overdue expansion of many substantive rights.

Roscoe Pound spoke here just three years after the Wright Brothers had taken their maiden flight at Kitty Hawk; he spoke at a time when the population of the country was predominantly rural; he was describing a world which knew neither the atomic bomb nor the benefits of harnessing nuclear energy. Sulfa drugs, penicillin, and antibiotics were undreamt of marvels. In reality, he spoke to a nation where the rights of the powerless were not the predominant concerns of either the legal process or the legal profession. There were no major governmental agencies to protect the consumer,[7] the aged, the pensioner, the investor, or the workingman.

In 1900, all expenditures of the federal government amounted to less than half a billion dollars. The Department of Justice spent 1.3 percent of that sum, less than seven million dollars. By 1975, total federal expenditures had increased seven-hundred fold, to approximately 325 billion dollars. In 1975, the Justice Department's expenditures alone exceeded two billion dollars, four times the total sum expended by every branch of the federal government in 1900. In the light of this massive expansion of government and its functions,[8] we should not be surprised that the business of the courts has increased, for they are called on to monitor the pervasive relationships between government and citizens that this expansion has created.

II

If we are to place the era of which Pound spoke in proper perspective, if we are to see its true relationship to the challenges

[7] The Interstate Commerce Commission was already functioning, of course, but its primary task seems to have been the regulation of railroad rates. The principal consumer-oriented federal agencies—the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Drug Administration come immediately to mind—did not yet exist.

[8] It should be noted that funding for the federal courts has not kept pace with the increase in expenditures for the rest of the federal government. In 1900, the cost of the courts was one-half of one percent of the over-all federal budget. In 1975, total expenditures for the federal judiciary had declined to about one-thirteenth of one percent of the entire federal budget.

we face today, we must analyze how the courts, and sometimes society at large, dealt with fundamental issues of human rights. As we look back to 70 years ago, and compare that time with our own, George Santayana's celebrated comment on the uses of history becomes particularly relevant: "Those who cannot remember the past are condemned to repeat it." [9] A focus on six groups of individuals will shed some light on our inquiry:

> racial minorities, women, the voter, working people, the victims of crime, and victims of court insensitivity.

I submit that over the past 70 years, the greatest legacy of our legal and judicial institutions has been their role in helping to secure the rights of these people, to see to it that they received the justice that is the due of every person in this country. I submit moreover that our greatest obligation in preparing for the next 70 years and beyond is to protect that legacy and to make its principles the basis on which we fashion new methods of dispute settlement and develop new procedures within the courts.

Race and the Legal Process

While I recognize that extraordinary progress has been made since Pound spoke, and without intending to offend anyone, it is appropriate that we focus on race relations as they existed in 1906—a time when blacks had been residents in this country for almost three centuries, though mostly as slaves.[10] Every

[9] G. Santayana, The Life of Reason (1905) at 284.

[10] I have written in greater detail on the early practices in Higginbotham, "Racism and the Early American Legal Process, 1619–1896," 407 ANNALS 1 (1973); "Race, Racism and American Law," 122 *University of Pennsylvania Law Review*, 1044 (1974); "To the Scale and Standing of Men," *Journal of Negro History*, Vol. LX, No. 3, July, 1975; "The Impact of the Declaration of Independence," *The Crisis*, November, 1975. For general background see R. Bardolph, *The Civil Rights Record* (1970); D. A. Bell, *Race, Racism and American Law* (1973) 1975 Supp.; M. F. Berry, *Black Resistance/White Law* (1971); J. Blassingame, *Black New Orleans* (1973); J. Blassingame, *The Slave Community* (1972); S. Elkins, *Slavery* (1959); P. S. Foner, *The Voice of Black America*, Vol. I and II (1975); J. H. Franklin, *From Slavery to Freedom* (4th Ed. 1974); G. Fredrickson, *The Black Image in the White Mind* (1971); L. Green, *The Negro in Colonial New England* (1942); W. Jordan, *White Over Black* (1968); G. Myrdal, *An American Dilemma* (1944); B. Quarles, *The Negro in the Making of America* (rev.ed.1969); K. Stampp, *The Peculiar Institution* (1956); C. Woodson & C. Wesley, *The Negro in Our History* (11th ed. 1966); C. V. Woodward, *Origins of the New South* (1951); C. V. Woodward, *The Strange Career of Jim Crow* (3rd ed. 1974). For the best bibliography, see A. Hornsby, *The Black Almanac* 169 (1972). For an anthology, see *Civil Rights and the American Negro* (A. Blaustein & R. Zangrando eds. 1968). The United States Commission on Civil Rights in 1961 filed a series of key documents, Vols. 1 through 5, on voting, education, employment, hous-

presidential commission [11] and almost every Supreme Court opinion [12] dealing with racial matters have noted the fact that in

ing, justice. A classic report which should be particularly pertinent to lawyers is the United States Commission on Civil Rights, 1965, *A Report on Equal Protection in the South.* See particularly pages 182–188, the separate statement of Commissioner Erwin N. Griswold. A superb analysis can be found in the ANNALS, *Blacks and the Law*, May, 1973; note particularly the article of Judge William H. Hastie, "Toward an Equalitarian Legal Order, 1930–1950," at 18.

[11] The first commission on civil rights appointed by any president was established by Harry Truman, pursuant to Executive Order 9808. In 1947, the President's Committee on Civil Rights filed a report, "To Secure These Rights," which stated:

"Our American heritage of freedom and equality has given us prestige among the nations of the world and a strong feeling of national pride at home. There is much reason for that pride. But pride is no substitute for steady and honest performance, and the record shows that at varying times in American history the gulf between ideals and practice has been wide. We have had human slavery. We have had religious persecution. We have had mob rule. We still have their ideological remnants in the unwarrantable 'pride and prejudice' of some of our people and practices. From our work as a Committee, we have learned much that has shocked us, and much that has made us feel ashamed. But we have seen nothing to shake our conviction that the civil rights of the American people—all of them—can be strengthened quickly and effectively by the normal processes of democratic, constitutional government. That strengthening, we believe, will make our daily life more and more consonant with the spirit of the American heritage of freedom. But it will require as much courage, as much imagination, as much perseverance as anything which we have ever done together. The members of this Committee reaffirm their faith in the American heritage and in its promise." Id. at 9–10. See also Report of the National Advisory Commission on Civil Disorders (Washington, D. C., U. S. Government Printing Office, 1968); National Commission on the Causes and Prevention of Violence, Final Report, "To Establish Justice, To Ensure Domestic Tranquility," xxi, 8, 10, 13–15 (1969); 1 National Commission on the Causes and Prevention of Violence, Staff Report, "Violence in America: Historical and Comparative Perspectives," 38–41 (1968). Cf. Milton S. Eisenhower, The President is Calling 2–4 and Ch. 23 (1974).

[12] *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 10 L.Ed. 1060 (1842); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857); *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); *Berea College v. Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908); *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906); *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903); *Baldwin v. Franks*, 120 U.S. 678, 7 S.Ct. 656, 32 L.Ed. 766 (1887); *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883); *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876); *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563 (1876); *United States v. Powell*, 151 F. 648 (C.C.N.D. Ala.1907), aff'd per curiam, 212 U.S. 564, 29 S.Ct. 690, 53 L.Ed. 653 (1909). The following cases indicate the past problem of racial injustice and efforts to eliminate it:

(1) *Voting. South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (implementation of 1965 voting rights act); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935); *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Anderson v. Martin*, 375 U.S. 399, 84 S.Ct.

this country there has often been racial injustice for blacks. Three incidents are sufficient to highlight that human rights issue. They explain why, when the pendulum of recognition of the aspirations of black Americans began to swing in the 1950's, it had to swing as far as it did.

When in 1896 in *Plessy v. Ferguson* [13] the United States Supreme Court sanctioned a strange doctrine [14] that, among the multitude of peoples, ethnicities and groups in this country, blacks (and basically only blacks) could be isolated by the state in human affairs, Justice John Harlan dissented eloquently on the grounds that "the common government of all [should] not

454, 11 L.Ed.2d 430 (1964); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L. Ed. 984 (1932); cf. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (one man-one vote); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). See also Burke Marshall, Federalism and Civil Rights (1964).

(2) *Education. Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Cumming v. County Board of Education*, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262 (1899).

(3) *Housing. Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L. Ed. 149 (1917); *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926); *Richmond v. Deans*, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128 (1930); *Harmon v. Tyler*, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831 (1927); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

(4) *Employment. Franks v. Bowman Transportation Co., Inc.*, 96 S.Ct. 1251, 44 U.S.L.W. 4356 (U.S., March 24, 1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Steele v. Louisville & N. R. R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

(5) *Public Accommodations. Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

(6) *Prohibition of racial violence. Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971); *United States v. Johnson*, 390 U.S. 563, 88 S. Ct. 1231, 20 L.Ed.2d 132 (1968); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

[13] 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

[14] The Justices of the Supreme Court were not alone in their blindness to the realities of racism. Charles Warren's authoritative *The Supreme Court in United States History*, published in 1922, does not even mention *Plessy v. Ferguson*.

permit the seeds of race hate to be planted under the sanction of law." [15] But soon after that sanctioning of racist law one state was spending ten times as much for the education of each white child as it was for the education of each black child, and many were spending twice to three times as much for the education of each white child.[16]

The racial disparity and discrimination that existed in education was sanctioned by the legal process in almost every other area that today would be categorized as a human right—in housing, employment, voting, and personal relations.

The ultimate irony of the decade in which Pound spoke is perhaps best exemplified by *Berea College v. Kentucky*,[17] when the Supreme Court in 1908 upheld the validity of a 1904 Kentucky statute which prohibited a private college from teaching white and Negro pupils in the same institution. Berea College was established in the Kentucky mountains in 1854 by a small band of Christians who began their charter with the words, "God hath made of one blood all nations that dwell upon the face of the earth." After the Civil War it admitted students without racial discrimination, and by 1904 it had 174 Negro and 753 white students. It was a private institution supported by those who subscribed to its religious tenets, and it neither sought nor received any state aid or assistance. Yet the Supreme Court held that a state could prohibit any *private* institution from promoting the cause of Christ through integrated education. What a tragic ruling! A nation loudly pronounces its faith in freedom of religion, yet sanctions a state's denial of the day to day application of religious concepts if practiced in an integrated religious setting. Justice Harlan wrote another eloquent dissent in *Berea College;* tragically, Justice Holmes, for all his prescience and ability, concurred in the majority's repressive opinion.

The human rights level of this country in that decade was strikingly illustrated when a most moderate colored leader, Booker T. Washington, had an informal lunch with President Theodore Roosevelt.[18]

[15] 163 U.S. at 560, 16 S.Ct. 1138, 41 L.Ed. 256.

[16] D. A. Bell, supra at 452; Higginbotham, 122 U. of Pa.L.Rev. at 1060-61.

[17] 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908).

[18] See generally G. SINKLER, THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT (1972). Even the false rumor that a black had been present at an official White House function was sufficient to drive President Cleveland to frenzy, and thus he responded: "It so happens that I have never in my official posi-

The Memphis Scimitar said,

> "The most damnable outrage which has ever been perpetrated by any citizen of the United States was committed yesterday by the President, when he invited a nigger to dine with him at the White House." [19]

Senator Benjamin Tillman of South Carolina said:

> "Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places." [20]

Georgia's governor was sure that "no Southerner can respect any white man who would eat with a Negro." [21]

The sequellae of judicial obliviousness and legal antagonism to the human rights of blacks is perhaps most dramatically exemplified by the response which a United States Senator, who was also a lawyer, gave to the 1944 suggestion of Dr. Studebaker, of the U. S. Office of Education, that the colleges and universities of the South should open their doors for the matriculation of Negro students. Senator Theodore Bilbo gave his "full and complete endorsement" to the Jackson (Mississippi) Daily News' editorial comment that the Washington officials should "go straight to hell." He emphasized that:

> [The editor] is right when he says that the South won't do it and that not in this generation and never in the future while Anglo-Saxon blood flows in our veins will the people of the South open the doors of their colleges and universities for Negro students. I repeat that [the editor] is right. We will tell our Negro-loving Yankee friends to go straight to hell.[22]

He concluded by stressing that:

> History clearly shows that the white race is the custodian of the gospel of Jesus Christ and that the white man is entrusted with the spreading of that gospel.

tion, either when sleeping, waking, alive or dead, on my head or my heels, dined, lunched, supped, or invited to a wedding reception, any colored man, woman, or child." G. Sinkler, supra at 270.

[19] L. Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (Meridian ed. 1967) at 206–07.

[20] Id. at 207.

[21] Id.

[22] The Development of Segregationist Thought 139 (I. Newby ed. 1968) (quoting 90 Cong.Rec. A1799 (1944)).

* * * * * * * * *

> We people of the South must draw the color line tighter and tighter, and any white man or woman who dares to cross that color line should be promptly and forever ostracized. No compromise on this great question should be tolerated, no matter who the guilty parties are, whether in the church, in public office, or in the private walks of life. Ostracize them if they cross the color line and treat them as a Negro or as his equal should be treated. * * *
>
> * * * * * * * * *
>
> [I]t is imperative that we face squarely and frankly the conditions which confront us. We must not sit idly by, but we must ever be on guard to protect the southern ideals, customs, and traditions that we love and believe in so firmly and completely. There are some issues that we may differ upon, but on racial integrity, white supremacy, and love for the Southland we will stand together until we pass on to another world.[23]

Thus, during World War II, almost 50 years after *Plessy* and almost 40 years after Pound's address, while thousands of black soldiers were dying on battlefields throughout the world to seek victory for democracy against Hitler's Aryanism, the mold of racism was still firm at home, to such an extent that neither civil rights legislation nor anti-lynching laws could be enacted.

Other defenders of Jim Crow[24] spoke in voices less shrill than Bilbo's, but their hatred and their racism were just as intense. Instead of linking, as Bilbo did, the gospel of Jesus Christ with white supremacy, his successors used more sophisticated terms like "interposition" and "nullification" and demonstrated a willingness to sit in school house doors forever to assure segregation forever.

I have cited these instances because they are a part of America's history. I recognize that some former proponents of segregation are now semi-devotees of civil rights for all. Much progress

[23] Id. 143–145 (quoting 90 Cong.Rec. A1801 (1944)).

[24] See C. V. Woodward, The Strange Career of Jim Crow (3rd rev.ed.1974) at 7:
"The origin of the term 'Jim Crow' applied to Negroes is lost in obscurity. Thomas D. Rice wrote a song and dance called 'Jim Crow' in 1832, and the term had become an adjective by 1838. The first example of 'Jim Crow Law' listed by the *Dictionary of American English* is dated 1904." Jim Crow laws sanctioned "a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons and asylums, and ultimately to funeral homes, morgues, and cemeteries." Id.

has been made, and today's challenges span all regions and sectors of our country. I do not mention this earlier era to antagonize, but rather to reemphasize that today's complexities owe their existence in significant part to the legal process of yesterday, which was often inadequate and uncommitted to assuring equal justice for all.

What I have said about blacks as an example applies with much the same force to other segments of the population which seven decades ago were powerless.

The Status of Women

Some persons question the appropriateness of courts adjudicating whether girls can play Little League baseball or whether women should be assigned police patrol work or whether females should be admitted to all-male educational institutions. They urge that these troublesome disputes be kept out of court, for "after all, men are men and women are women. God made them that way. Why should the courts get involved?" More often than not, such short-sighted concerns for judicial tranquillity and uncluttered courts fail to recognize the dehumanization which the bench, the professional bar associations, the law schools and even the legal profession as a whole sanctioned or tolerated for so long. They fail to recognize as well that while there is an essential place for non-judicial forums in resolving disputes, the cutting edge of the move to remedy the results of this dehumanization must have a sharp judicial component.

Is it without significance that when Roscoe Pound spoke, women could not be admitted to the esteemed law school whose dean he later became, and that it took almost a half century after Pound's 1906 speech for Harvard Law School to reach that stage of enlightenment where it deemed women worthy to enter the portals of the law school which produced Justices Story, Holmes, Brandeis, Frankfurter, Brennan and Blackmun [25] ?

The sad fact is that in 1906 the appearance of women attorneys in the courts was almost as rare as astronauts landing on the moon. Their second-class status even in our profession was sanctioned by the courts and the entire legal process. The United States Supreme Court in decades past has sanctioned patent deprivations of opportunity for women. Thus Myra Bradwell was denied admission to the bar of the State of Illinois in 1872

[25] Of course, law schools such as Yale, Michigan, and the University of Pennsylvania admitted women as law students decades earlier, and their alumnae have made many profound contributions to improving the legal process.

solely because she was a woman. Except for Chief Justice Chase, all of the Justices felt that the denial of her admission to the bar did not violate her federal constitutional rights. Justice Bradley felt compelled to add a concurring opinion:

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. * * * The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. State of Illinois, 16 Wall. 130, 83 U.S. 442, 446, 21 L. Ed. 442 (1873).

In 1906 women did not have a federal constitutional right to vote, and many were precluded even from serving on juries.

There has been progress. In 1872, the Justices of the Supreme Court considered women "naturally timid," "delicate," and "evidently unfit" for many of the occupations of civil life. In 1974, the Court categorized past deprivations of women as either "overt discrimination" or "the socialization process of a male-dominated culture." [26] If we are serious about lowering the barriers which previously confronted women, necessarily the courts' backlogs

[26] *Kahn v. Shevin*, 416 U.S. 351, 353, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

and burdens will be steadily increased and court reform must be cognizant of this fact.

Voting: A Fundamental Right

As I have said, when Roscoe Pound spoke, women did not enjoy a federal constitutional right to vote. Not until 1920 did the Nineteenth Amendment remove that particular badge of inferiority from approximately one-half the nation's adult population.

The franchise was restricted in other ways, too. I have already discussed some of the grievances of black Americans in the early decades of this century. The deprivation of voting rights was often another. Theoretically, the Fifteenth Amendment had secured the right of suffrage to black Americans. In many parts of the country, however, they were practically disenfranchised—through literacy tests, poll taxes, grandfather clauses [27] and the like. Though there was some erosion of the obstacles to the exercise by blacks of their Fifteenth Amendment rights,[28] those obstacles remained substantially intact in many areas until the passage and enforcement of the Voting Rights Act of 1965 [29] at last allowed black victims of voting discrimination some voice in the determination of their own political destiny.

Moreover, in 1906, the apportionment of several state legislatures had already taken the form that would endure, with steadily increasing imbalances in voting power, until the "one-person, one-vote" decisions of the 1960's.[30] These latter decisions, as we all know, transformed the political face of the nation,[31] but not without severe criticism by some who thought

[27] The grandfather clauses, at least, were struck down by the Supreme Court within a decade of Pound's address. *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915).

[28] See, e. g., *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); and *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1924).

[29] 42 U.S.C. §§ 1973 et seq.

[30] See e. g., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (Alabama); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (Tennessee).

[31] For example, the combined impact of the reapportionment decisions and the Voting Rights Act of 1965 significantly increased the number of black elected officials in seven southern states. See U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After (Jan. 1975), reproduced in D. Bell, supra (1975 Supp.) at 2:

"There is no available estimate of the number of black elected officials in the seven States before passage of the Voting Rights Act. Certainly it was a small number, well under 100 black officials. By February 1968, 156 blacks

the judiciary was intervening in an area beyond its competence. Justice Frankfurter, dissenting in *Baker v. Carr, supra,* said the case was "unfit for federal judicial action," and termed the decision itself "a massive repudiation of the experience of our whole past." [32] The second Justice Harlan, dissenting in *Reynolds v. Sims, supra,* argued that it and other reapportionment decisions "give support to a current mistaken view * * * that every major social ill in this country can find its cure in some constitutional 'principle,' and that this court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements." [33] I agree with the suggestion that the Constitution is not a panacea for every social ill. The dissenters were certainly right when they warned that judicial review of state reapportionment plans would be fraught with difficulty. Nevertheless, I cannot accept their conclusion, for it leads to judicial paralysis in matters involving critical rights. Chief Justice Warren's majority opinion in *Reynolds* announced a principle that no conference on judicial reform can afford to ignore: "a denial of constitutionally protected rights demands judicial protection." [34] In spite of the problems inherent in complying with the mandate of the reapportionment decisions, it is incontestable that these decisions were responsible for a fundamentally more equitable redistribution of political power in our country, one that was long overdue. Our democracy and our people are the beneficiaries.

had been elected to various offices in the seven States. This total included 14 State legislators, 81 county officials, and 61 municipal officials. * * *

"More recent statistics show greater progress in electing black officials. By April 1974, the total number of black elected officials in the seven States had increased to 963. This total included 1 Member of the United States Congress, 36 State legislators, 429 county officials, and 497 municipal officials. * * *

"In all of the covered Southern States there are now some blacks in the State legislature and in at least some counties of each State there are blacks on county governing boards. Although the number of offices held by blacks is rather small in comparison to the total number of offices in these States, the rapid increase in the number of black elected officials is one of the most significant changes in political life in the seven States since passage of the Voting Rights Act."

32 369 U.S. at 266, 330, 82 S.Ct. 691, 7 L.Ed.2d 663.

33 377 U.S. at 624–25, 84 S.Ct. 1362, 12 L.Ed.2d 506.

34 377 U.S. at 566, 84 S.Ct. 1362, 12 L.Ed.2d 506.

The Situation of Working People

Sixty years ago, Roscoe Pound was witnessing the breakdown of the common law system, a system which for its efficient functioning relied primarily on the initiative of individuals, who were expected to look out for themselves and to vindicate their own rights. As Pound put it in his 1906 address:

> In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Public suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interest, common-law methods of relief have failed." [35]

The courts of that time, however, were still trying to apply common-law concepts to the social and economic problems of the "modern industrial society" that Pound saw emerging. The effort was not universally acclaimed, leading Pound to say that "[a]t the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation." In fact, he concluded, "the courts have been put in a false position of doing nothing and obstructing everything." [36]

A few familiar examples will illustrate the obstructionism that, in Pound's view, courts were compelled to indulge in because of their fidelity to obsolete common-law concepts. In *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), the Supreme Court invalidated a New York maximum hours law because it interfered with the freedom of bakers to enter into contracts with their employers. In *Adair v. United States,* 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908), the court held that Congress could not prohibit employers from discriminating against their workers for the union organizing activities of the latter. And in *Coppage v. Kansas,* 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), the Court ruled, again on hallowed "freedom

[35] Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 Am.L.Rev. 729, 737, 35 F.R.D. 273, 280 (hereinafter "Address").

[36] Address at 737–38, 35 F.R.D. 280, 281.

of contract" grounds, that a state could not outlaw "yellow dog" labor contracts. To the Court's credit, it did not strike down *every* social welfare measure presented to it. In *Muller v. Oregon*,[37] it upheld a maximum hours law for women, though on grounds that some women might find offensive today.

Lochner, Adair, and *Coppage* were not the end of the story, of course. Eventually, all were expressly overruled as the Supreme Court itself adjusted to emerging social and economic realities.[38]

I am well aware that some believe that the impotence the workingman experienced in the early decades of this century has been replaced by the omnipotence of organized labor today.

I will not join that debate; rather, I wish to emphasize that many of the gains and successes of workingmen and/or organized labor today are directly attributable to rights which have been recognized or expanded by the courts of previous generations. Thus, are we to now say that the system which has made the courts accessible to and supportive of the workingman should not now be involved in striking a balance for other groups which have not had full entry into the system?

Victims of Crime

In his 1906 address, Pound did not identify or discuss as a major problem any dissatisfaction with the criminal justice system. He apparently felt no need to focus on that system for that specific audience.[39] This conference, of course, has such a focus, a much needed one, and we will, I am sure, hear a good deal about it tomorrow, from some of the remaining speakers. But I submit that it is too narrow a focus unless it embraces the *victim* of crime as well as the person whom the system calls the perpetrator. Of course, we should be concerned about the Fourth, Fifth and Sixth Amendment rights of the criminal defendant, but we should also be concerned about the fundamental civil right of the ordinary citizen to be secure in his or her per-

[37] 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908).

[38] See *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1917), overruling *Lochner; Phelps Dodge Corp. v. N. L. R. B.*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), overruling *Adair;* and *Lincoln Fed. Labor Union v. Northwestern Iron & Met. Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212 (1949), overruling *Coppage.*

[39] Even the most casual perusal of Pound's other writings reveals his own continuing advocacy of reform of the criminal justice system as well. See, e. g., Pound, "Do We Need a Philosophy of Law?," 5 Colum.L.Rev. 339, 347 (1905); R. Pound and F. Frankfurter eds., Criminal Justice in Cleveland (1922); and R. Pound, Criminal Justice in America (1930).

son and property. Of course, we ought to be concerned about the humaneness of our prison systems, but we ought also to be concerned about the humaneness of our urban environments and the safety of our streets. When the streets are not safe, when every citizen carries an extra burden of fear, his environment is not humane. Of course, a criminal defendant has a right to bail, but we should not allow unlimited delays in trial which prolong bail indefinitely. Of course, a defendant has a right to the effective assistance of counsel, but that should not mean that he may postpone trial indefinitely while waiting for a specific counsel of his choice. Please do not mistake my meaning. I am not suggesting that the guarantees of the Bill of Rights be suspended. But I do submit that while criminal defendants have a constitutional right to a speedy trial, society at large also has a vital stake in the prompt disposition of criminal charges against a defendant. Securing the prompt disposition of such charges must be a top priority in any reform of the judicial process. While progress is being made under statutes designed to assure defendants a "speedy and fair trial," much remains to be done. There will be problems in the transition. It will not be easy. Courts may have to assume more burdens, but it is difficult, if not impossible, to justify why individuals should be out on bail on serious crimes for months and sometimes years before final trial disposition.

In the context of this conference, the courts bear a heavy reponsibility to organize themselves for the fair but expeditious processing of criminal cases. To a major extent the disposition of serious crimes is not a function which can be delegated to agencies other than the courts. Thus, in terms of our concern for human rights, we must work simultaneously on improving the processes of the criminal justice system for both the victims and the defendants and on preserving the court's capacity to deal with other fundamental human rights as well.

Victims of Court Insensitivity

There is another point which deserves to be stressed in any discussion about reform of the criminal and civil justice systems. We have to be concerned about innocent victims of the justice system itself, about those who are not part of the courthouse bureaucracy. Go into the courts in most urban communities and you will often observe either outrageous insensitivity to, or woeful systems planning for, witnesses who respond to subpoenas. It is not unheard of for a witness to appear eleven or twelve times as a case is continued again and again, either because the

court cannot reach it or because some counsel is not available. In civil cases, parties sometimes wait five years for an adjudication of their rights. Court personnel sometimes treat citizens with a curtness that some of the less enlightened prison wardens would not display to the convicted felons in their custody. In this context of insensitivity to, and of non-support for, the participants in the litigation process, we have to ask whether some of the sacred rights we espouse are really designed for justice and the benefit of the parties and the public, or do these processes exist more for the basic convenience of judges and lawyers. It is not clear to me whether some of the many continuances that are granted by the courts are caused by a desire to let every person have his own counsel, or, instead, are these delays unintentional placations of the bar which permit some lawyers, who have more clients and cases than they can now adequately handle, to increase their backlog so that the date of ultimate trial is indefinitely postponed. It is not at all clear to me whether an oligopoly is now developing within the bar whereby the entire judicial system is designed, or at least has been modified, to accommodate the schedules of the busiest and most successful lawyers rather than to function within reasonable time frames for the prompt and fair disposition of their clients' cases.

Permit me to mention just one well-documented instance that reveals how the judicial system, and even judges, can be insensitive to the dignity of the citizens who are caught up in the legal process. A black woman was testifying in her own behalf in a habeas corpus proceeding. "The state solicitor persisted in addressing all Negro witnesses by their first names" [40] and when he addressed the petitioner as Mary, she refused to answer, insisting that the prosecutor address her as "Miss Hamilton." The trial judge directed her to answer, but again she refused. The trial judge then cited her for contempt. On appeal, the highest court in the state affirmed, because the record showed that the witness's name was "Mary Hamilton," not "Miss Mary Hamilton." Happily, the Supreme Court of the United States granted certiorari and summarily reversed the judgment of contempt. *Hamilton v. Alabama,* 376 U.S. 650, 84 S.Ct. 982, 11 L. Ed.2d 979 (1964), *rev'g* 275 Ala. 574, 156 So.2d 926 (1963). Some might say that this case exemplifies an unjustifiable waste of legal talent and judicial effort in order to determine whether the appellation "Miss" should be used in cross-examination. I disagree. At the core of this case was a person begging that a

[40] Petitioner's Brief for Certiorari at 4, *Hamilton v. Alabama,* 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964).

system which is supposed to dispense justice treat her with dignity and the kind of sensitivity that courts automatically accord to persons of power and prestige.[40a]

III

In View of Our History, Are Courts Functioning Beyond Their Competence in the Human Rights Area, and What Are the Alternatives?

While I have stressed that we should be particularly cautious about any reforms which may cause a diminution of basic and fundamental human rights, I am no opponent of good order. I have supported every judicial reform measure that promised to contribute to the orderly functioning of our courts without sacrificing the rights of our citizens. I submit, however, that order is not an absolute. It cannot be, for human affairs, and especially the affairs that come before us in the judicial process, are often inherently disorderly. In some cases, passions not only run deep, they erupt into violence.

I have in mind not just the felony dockets of local criminal courts, but also landmark human rights decisions where the Supreme Court of the United States rejected arguments that such cases were, for a variety of technical reasons, not the proper business of the federal courts.

In *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), for example, a black man who had been charged with the theft of a tire was beaten to death by the sheriff of Baker County, Georgia, and two other law enforcement officers. In *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), police officers of a Northern city had broken into the petitioners' home, routed them from bed, and forced them to stand naked in the living room while they ransacked every room in the house. In the background of *United States v. Price,* 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), was the murder of three civil rights workers, Michael Schwerner, James Chaney and Andrew Goodman. *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), involved a group of black citizens who, while driving along a highway in Mississippi, were mistaken by whites for civil rights workers. They were forced to stop, ordered out of their vehicle, and beaten with iron clubs.

[40a] It should be noted that significant changes have been made in the Alabama court system under the leadership of Chief Justice Howell Heflin. A recurrence of the *Hamilton* case is unlikely. See Peirce, "Alabama's State Courts: A Model for the Nation," *Washington Post,* May 12, 1975, at A25.

Should these matters have been in the federal courts? I think so, for if the Supreme Court had not been willing to expand an overly narrow construction of the federal civil rights acts, where would these particular victims, and others like them, have gotten justice?

A basic reason for the necessity of having the courts available to vindicate the rights of our citizens is that other institutions in our society, institutions designed to either vindicate or protect those rights, have either failed to do so or have broken down completely. We should never be complacent about the accomplishments of the judicial system. I certainly am not, and I believe that one of the profound contributions this conference can make to the nation is to shatter any illusions we might entertain about living in the best of all possible judicial worlds. Nevertheless, I am convinced that the courts, when their achievements and their efficiency are compared with those of other institutions in our society, have not been abysmal failures. The short and simple reason for the assumption by the courts of tasks that are allegedly "beyond their competence" is the failure of supposedly competent institutions to perform those tasks effectively or with adequate protection of the rights of the clients of those institutions. I agree that in the best of all possible judicial worlds, judges should not be asked to run railroads or to function as school superintendents or to serve as chief executive officers of state prison systems. But if supposedly competent businessmen so manage a railroad that it collapses into bankruptcy, or if supposedly professional educators countenance or are powerless to deal with *de jure* segregation in the school systems they are charged to administer, or supposedly competent corrections personnel preside over a prison system that is riddled with constitutional violations, then judges have no choice but to intervene. The courts, I submit, are not reaching out for these responsibilities; they come to the courts by default. And so long as other institutions in society default on *their* responsibilities, the court will have what I consider an absolutely necessary role to play in the vindication of individual and collective rights.

It was Alexis de Toqueville who first said that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." [41] In his 1906 address Dean Pound said much the same thing: "the subjects which our constitutional polity commits to the courts are largely matters

[41] A. de Toqueville, I Democracy in America (P. Bradley ed. 1945) at 290.

of economics, politics, and sociology, upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation." [42] We may not agree with Roscoe Pound that great matters of economics, politics, and sociology are always tried as incidents of private litigation," but they are surely "made into legal questions." The fate of the New Deal, largely a matter of economics, remained uncertain until the decision of the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). The people's right of access, through a grand jury, to information in the control of the executive branch of government, a political issue of the utmost seriousness, was a matter of speculation until the Supreme Court enforced a subpoena on the President in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The destiny of black people in America, a matter of sociology as well as of justice, was unclear until the Supreme Court found segregated schooling inherently unequal in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and its progeny. There is, of course, no guarantee that even a definite pronouncement by the courts will put to rest all dispute over an issue of public policy. Witness the continuing controversy over abortion.

Nevertheless, I still submit that our constitutional polity could barely function at all if the courts were not available to vindicate the rights of our citizens and thus define the limits of public and private action within that polity.

We are all familiar with the famed Footnote Four of Chief Justice Stone's opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Even though it deals with the standard to be employed in reviewing legislative enactments and even though it suggests more than it proclaims, that footnote has rightly been read as a manifesto of judicial sensitivity to the rights of those who are powerless to vindicate their rights. Since the *Carolene Products* decision, the courts have done much to redeem the promise of Footnote Four, and I suggest that we can fruitfully apply its teaching in this conference as well. We will be dealing, of course, with proposals for reform of dispute resolution and for the reform of judicial administration, not legislative enactments. Some have suggested that a "judicial impact" statement be prepared before statutes creating new legal rights are enacted, so

[42] Address at 740.

judicial resources can be provided to protect them. I suggest, by the same token, that we prepare, at least mentally, another kind of impact statement, one that weighs the effect of the reforms that might be proposed to us on what Foootnote Four termed "discrete and insular minorities," and subject those reforms that might work to the disadvantage of the poor, the weak, and the powerless to what Chief Justice Stone would call "a more searching judicial inquiry."

You may have noticed that I have not defined what I mean by the term "human rights." The omission is deliberate. I doubt that, even if I tried, I could formulate a definition of "human rights" that would adequately differentiate my perception of fundamental "human rights" from the multitude of varied interests that, at one time or another, have been called "human rights." [43] I do think we ought to be concerned about what has been rightly termed a trivialization of the Constitution. For instance, some would argue, though I would not, that a high school football player has an absolute "human right" to wear long hair, regardless of his team's regulations or his coach's notion of discipline. Others would argue, though I would not, that prisoners have an absolute "human right" to snacks between meals. Cases involving these issues, I submit, seek the vindication of rights that are merely asserted, not real. Such cases, I am afraid, misuse a noble instrument, designed for a noble purpose, the protection of fundamental rights.

I should also point out that I do not include in the concept of "fundamental" human rights the interests that are at stake in automobile negligence cases, or longshoremen's suits, or medical malpractice actions. I am confident that we can develop means by which justice could be assured in these areas of tort law without the courts playing a central role and without destroying the fabric of our society. In all candor, I often wonder whether the

[43] See McDougal, Lasswell and Chen, "The Protection of Respect and Human Rights: Freedom of Choice and World Public Order," 22 Am.U.L.Rev. 919 (1975). See also McDougal, Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies, 14 Va.J.Int'l L. 387 (1974); McDougal, Lasswell & Chen, Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, 63 Am.J. Int'l L. 237, 264–69 (1969); Universal Declaration of Human Rights, adopted Dec. 10, 1948, G. A. Res. 217, U. N. Doc. A/810 at 71 (1948). A collection of the more important global human rights prescriptions is conveniently offered in United Nations, Human Rights: A Compilation of International Instruments of the United Nations, U. N. Doc. ST/HR/1 (1973). Other useful collections include: Basic Documents on Human Rights (I. Brownlie ed. 1971); Basic Documents on International Protection of Human Rights (L. Sohn & T. Buergenthal eds. 1973).

loudest protests against no-fault auto insurance and against the removal of negligence cases from the courts stem from concern about the plight of accident victims or whether they originate in a concern about possible diminution of what are sometimes phenomenal windfalls in the form of counsel fees.

I believe that the victims of defective products, medical malpractice and automobile negligence can often receive greater protection in alternate systems of dispute resolution than they can in the courts. During my twelve years' experience on the bench, I have seen far many more specious claims and frivolous defenses in personal injury cases than I have in civil rights cases. If we are going to apply a scalpel to our dockets, let us begin with these cases, which could be handled with fairness and greater efficiency in other forums.

I believe, however, that in the universe of human rights, the constellation of rights that I have discussed today are grouped at or near the center. I refer, of course, to the right to be free from racial or sexual discrimination, the right to vote, the right to basic protection from overpowering forces of the industrial age, the right to be secure in one's person and property, and the right to be treated with courtesy and consideration by a system that purports to be one of justice, not merely of law. If my references to astronomy lead some of you to think that I am too far out, let me also say that I believe that there is a hierarchy of human rights, and that the rights I have discussed cluster at or near the top of that hierarchy. Finally, I believe that all of us can agree that the rights I have discussed are indeed fundamental "human rights."

Conclusion

As I close, I hope that I have not gone too far. I know that I have resurrected some grievances that are 70 years old, and whose roots lie even further back in American history. I know that I have spoken stridently about them, and stridency is always susceptible of misunderstanding. I did not come here intending to offend anyone, but perhaps I have. Perhaps I have spoken too stridently for 1976, perhaps too stridently in light of the genuine progress this nation has made in the past 70 years, perhaps too stridently in the overall perspective of this country's history. But the grievances that I have mentioned were, and continue to be, harsh and discordant experiences in the lives of the victims, and their harshness has been caused in part by an insensitive legal and judicial process.

As I said at the outset, I wish this conference well. I hope it is successful. But I also hope that the fruits of its success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this—the weak, the poor, the powerless—those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just. We have enough victims in our society. In so many instances, they are victims of the conduct of others that violates the law. Let us not forget them. Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.

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THE ROLE OF THE JUDICIARY WITH RESPECT TO THE OTHER BRANCHES OF GOVERNMENT

The Honorable Frank M. Johnson, Jr.
John A. Sibley Lectureships in Law

School of Law, University of Georgia, February 17, 1977, 3:00 p.m.

"Of all the tyrannies that afflict mankind, that of the Judiciary is the most insidious, the most intolerable, the most dangerous."[1] That statement was not made by the President of the John Birch Society or by the Grand Dragon of the K.K.K. -- but was the New York Tribune's editorial response to the decision of Chief Justice Taney of the Supreme Court of the United States, sitting as a Circuit Judge, in 1861 that affirmed the right to habeas corpus.

This 1861 criticism of the federal judiciary was nothing new. It had erupted from time to time since shortly after the adoption of the Constitution when the Supreme Court rendered the decision of Marbury v. Madison,[2] in which case Chief Justice Marshall announced the court's power to pass on the constitutionality of congressional enactments. The Marbury decision was severely critized by President Jefferson, other prominent politicians and the press. But these attacks upon the judicial branch were mild when compared with the furor that arose after the decision of McCulloch v. Maryland[3] in 1819.

The first attacks on the McCulloch decision were made in a series of newspaper essays signed by "Amphictyon." The Amphictyon Essays have traditionally been ascribed to Spencer Roane, Chief Justice of Virginia's highest appellate court.[4/] These essays attacked the United States Supreme Court, claiming the court was usurping control over certain areas of American Life. Amphictyon felt control of those areas of life should remain the sole responsibility of the state legislatures, stating that if the McCulloch decision were allowed to stand:

> the powers of the [federal court] would be enlarged so much by the force of implication as to sweep off every vestige of power from the state governments . . .[T]o counteract that irresistible tendency [of the federal judiciary] to enlarge their own dominion, the vigilance of the people and the state government should be constantly exerted.[5/]

Amphictyon then asked why the federal courts should

> grasp at powers not necessary for carrying into effect their acknowledged powers? Why should they trench upon those interior measures which are reserved by the states for their own regulation and control? Why

> should they so eagerly, year after year, session after session encroach on states rights and make one encroachment a precedent for another? Or why should they assume even doubtful powers, when they are vested with so many undoubted powers perfectly adequate for all their legitimate purposes? 6/

Chief Justice John Marshall worried about Amphictyon's attack on the court's decision and expressed his concern to Associate Justice Bushrod Washington,

> the storm that has been for some time threatening the judges has at length burst on their heads and a most furious hurricane it is . . . I believe the design be to injure the judges and impair the Constitution. I have therefore thought of answering these essays . . . 7/

Chief Justice Marshall answered in a series of essays under the pen name, "A Friend to the Union," and refuted the charges made by Amphictyon. Additionally, Marshall asserted that the judiciary was

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subject to vicious attacks because

> the judges . . . [are] separated from the people by the tenure of office, by age, and by the nature of their duties . . . . They have no sops to give; and every coffeehouse furnishes a Cerberus, hoping some reward for that watchfulness which his bark proclaims; and restrained by no apprehension that any can be stimulated by personal considerations to expose the injustice of his attacks.[8/]

As a result of the "Friend to the Union" essay, Spencer Roane felt forced to personally lead the attack against the federal judiciary. Roane, in his "Hampden" essays, bitterly attacked the Supreme Court and the principles enunciated in McCulloch. Roane contended that judicial power historically has:

> only invaded the constitution in the worst of times, and then, always, on the side of arbitrary power . . . [T]his opinion of the court insofar as it outgoes the actual case depending before it, and so far as it

> established a general and abstract doctrine, was entirely extrajudicial and without authority . . . . The crisis [which this case created] is one which portends destruction to the liberties of the American people.[9]

Roane then concluded

> it is not denied but that the judiciary of this country is in the daily habit of far outgoing that of any other. It often puts its veto upon the acts of the immediate representatives of the people. It in fact assumes legislative powers, by repealing laws which a legislature have enacted . . . . It claims the right in effect to change the government. . . .
>
> [T]he supreme court has, without authority, and in the teeth of great principles, created itself the exclusive judge in this controversy.[10]

The Richmond Enquirer joined "Hampden's" expression of fear, stating

> We solemnly believe the opinion of the supreme court in the case of the bank to

> be fraught with alarming consequences, the federal constitution to be misinterpreted, and the rights of the states and the people to be threatened with danger.[11]

During the past two decades federal judges have again come under attack by politicians and various special interest groups. Members of Congress have attempted to limit federal court jurisdiction in the civil and human rights areas. State legislatures have called for a constitutional convention to nullify the results reached in Baker v. Carr.[12]

I submit to you that the attacks now being made are not based upon any new concepts or theories, but are in substance the same as those that have been made since the adoption of the Constitution. Furthermore, I would suggest that in many instances the individuals and groups making the most vocal attacks against the courts are those who have forced the courts to take positive action in the first place.

The renewal of the criticism is prompted by the fact that the past several decades have been extremely active and dynamic ones for the federal judiciary in the area of constitutional law. The general citizenry,

demonstrating a new awareness of rights or increasingly affected by government controls and dependent upon government programs and services, has looked more and more to the federal courts for the guarantee of rights or for protection against unconstitutional conduct on the part of the states' and federal executive and legislative branches. The organized Bar has, in the finest tradition of the legal profession, repeatedly called upon the federal courts to extend and to expand to all groups and persons in our society the freedoms and protections afforded by the Constitution. True to its constitutional imperative, the federal judiciary has responded cautiously but unwaveringly, adjudicating and upholding the rights of, among many others, black persons and women to equal educational and employment opportunities[13/]; the involuntarily committed mentally ill to minimum care and treatment[14/]; and incarcerated offenders to a safe and decent environment.[15/]

Involving, as they do, judicial review of legislative and executive action and resolution of oft-times complex and controversial

issues, it is not surprising that these constitutional adjudications have generated much discussion and debate among both lawyers and laymen. While the discussion among lay persons, especially among members of the executive and legislative branches of government, has been more graphic and glandular and perhaps, therefore, more entertaining, it is a more serious and scholarly debate, recently rekindled among lawyers and legal commentators, which I have selected as the subject of my lecture here today. This debate, both sides of which have merit, centers on the proper role and function of the federal judiciary with respect to the other branches of government.

The power of the federal judiciary to review and to decide matters involving the legislative and executive branches of government is circumscribed by two basic constitutional doctrines. The first, the doctrine of separation of powers, reflects the deeply held belief of our founding fathers that the powers of government should be separate and distinct, with the executive, the legislative, and the judicial departments being independent and coordinate branches of government. It is this doctrine

which is responsible, in great part, for the creation and maintenance of the federal courts as courts of only limited jurisdiction.

The second doctrine, which also reflects the founding fathers' distrust of centralized government, is commonly referred to as "Our Federalism." This doctrine, incorporated in the Tenth Amendment to the Constitution, restricts the power of the federal courts to intervene in the functions and affairs of the states and their political subdivisions.

In deference to these constitutional doctrines, the federal courts have traditionally been reluctant to intervene in the affairs and activities of the other branches of government. Such self-imposed restraints as the "case and controversy" doctrine, the "political question" doctrine, and the abstention doctrine attest to the judiciary's recognition of and respect for these venerable principles.

Yet, these doctrines serve only to restrain, not to interdict, the exercise of judicial power. The authors of the Constitution never intended for these or any other doctrines to render impotent the power of the federal judiciary to restrain unconstitutional action on the part of governmental institutions. Had they, in fact, desired to insulate

governmental conduct from judicial scrutiny, the founding fathers would have adopted a constitution modeled after the Articles of Confederation, which document vested all judicial authority in the legislative branch of government.16/

Instead, the founding fathers prudently and discerningly perceived that the survival of our republican form of government depended on the supremacy of the Constitution and that maintaining the supremacy of the Constitution depended, in turn, on a strong and independent judiciary, possessing the power and the authority to resolve disputes of a constitutional nature between the states, between the states and the national government, and, most importantly, between individuals and governmental institutions. These crucial features of our form of government are embraced in Article VI, Section 2, of the Constitution, which establishes the Constitution as the supreme law of the land; and in Article III, Section 2, of the Constitution, which extends to the federal courts jurisdiction over all cases arising under our Constitution and laws.

In granting to the federal judiciary the power to decide cases arising under our Constitution and laws, the framers of the Constitution

fully recognized that the exercise of such power would inevitably thrust the courts into the political arena. In fact, as the writings of the founding fathers illustrate, this grant of power was, in effect, a mandate to the federal courts to check and to restrain any infringement by the legislative and executive branches on the supremacy of the Constitution. James Madison, in cautioning his colleagues that the protections afforded by the Bill of Rights would be hollow without a judiciary to uphold them, referred to the federal judiciary as "an impenetrable bulwark against every assumption of power in the legislative or executive; [the courts] will be naturally led to resist every encroachment upon [the Bill of] rights."[17/]

Thus, the judiciary's role as defender of the Bill of Rights and its occasional intrusion in the affairs of the legislative and executive branches of government result not from an arrogation of power but from compliance with a constitutional mandate. Those who criticize the federal courts for this occasional intrusion fail to recognize that, in the words of the French historian, Alexis de Tocqueville:

> The American Judge is brought into the political arena independent of his own will. He only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interest of the parties and he cannot refuse to decide it without abdicating the duties of his post.[18/]

Nor did the founding fathers fail to recognize that the exercise of this power by the judiciary would, at times, create strains and tensions between the federal courts and the executive and legislative branches at the national level and between these courts and the various governmental institutions at the state and local levels. It was their sound and reasoned judgment, however, that the need to maintain the supremacy and integrity of the Constitution far outweighed any disadvantages resulting from this grant of power. The wisdom and correctness of this decision, attested to by the ability of our nation to survive each constitutional crisis which has arisen and by the strength and stability of our form of government over the past 200 years, is reflected in this observation by de Tocqueville:

> The peace, the prosperity and the very existence of the Union, are invested in

> the hands of the . . . judges. Without their active co-operation the constitution would be a dead letter: the executive appeals to them for assistance against the encroachments of the legislative powers; the legislature demands their protection from the designs of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against the interests of private citizens . . . 19/

And, it should be added, the interests of private citizens against government.

With the framers of the Constitution thus having clearly bestowed upon the federal courts the power to review and to decide cases arising under our Constitution and laws, the issue arises "how and under what circumstances should this power be exercised?"

The function of the judiciary is "to find the law and pronounce it." This now classic statement by Blackstone is often quoted by those who perceive the role of the judge as primarily a passive one. Easier to quote, however, than apply, Blackstone's model has provided little

guidance to the federal courts with respect to adjudicating cases arising under the Constitution.

Blackstone's model necessarily assumes that the law which the judge is to "find and pronounce" is clear and well-defined. Yet, the rights and freedoms enumerated in the Constitution are expressed in only the most broad and general terms. Speaking about the role of the judge in deciding constitutional questions, Judge Learned Hand observed "[t]he words he [Judge] must construe are empty vessels into which he can pour nearly anything at will."[20/] Is the Sixth Amendment right to a public trial absolute; or may the government impose limitations on this right, and, if so, when and to what degree?[21/] Does a prohibition of the use of birth control devices violate the First Amendment, or the Fifth Amendment, or the Ninth Amendment?[22/] While each person is entitled to due process of law, exactly how much process is each person due? These examples suffice to show that the Constitution, consisting of just 5,000 words, only roughly defines the contours of the rights and powers contained therein.

Nor is Blackstone's prototype of the totally objective and passive judge a realistic or necessarily desirable one. While no judge should ignore binding precedent or decide a case on personal whim or predilection, there is both a propriety and inevitability of a personal element present in the decision of disputed constitutional issues. As Justice Cardozo acknowledged, "[w]e may try to see things as objectively as possible, yet we still see them through our own eyes."[23/]

That Blackstone's model is neither a satisfactory nor a viable one that has, in fact, been more honored in its breach than in its observance, is tellingly shown by the inability of even its most vocal and ardent judicial supporters to apply the doctrine with any consistency. Justice Brandeis, while expressing doubt whether the due process clause should have been extended to the protection of civil liberties, fathered the "right to privacy."[24/] Justice Black, while criticizing his associates in Griswold v. Connecticut,[25/] for establishing a right not expressly provided for in the Constitution, could and did author an opinion requiring the states to appoint free counsel to indigents though

at the time of the adoption of the Constitution there was no such requirement.[26/]

In his dissent in Baker v. Carr,[27/] Justice Frankfurter presented this eloquent defense of the doctrine of judicial restraint:

> [T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power . . . . In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.[28/]

Yet, just several years before, Justice Frankfurter authored an opinion invalidating the conviction of a narcotics dealer because the conduct of the police, in pumping morphine capsules from the man's stomach, was, in his opinion, "conduct that shocks the conscience" of the court.[29/] This ruling evoked from Justice Black the statement that Justice Frankfurter was more likely to rule on his notion of right and wrong than he was, for he [Justice Frankfurter] claims "the right to knock down anything

under that due process clause that 'shocks the judicial conscience.'" [30]

Nor can Justice Frankfurter's strong effort to bring about a unanimous decision in Brown v. Board of Education, [31] a decision which has had the most profound impact on our society of any court ruling this century, be squared with a philosophy of judicial restraint. The following excerpt written by Justice Frankfurter during the Court's deliberations in Brown v. Board of Education, is, in fact, a compelling endorsement for the judicial activist position:

> But the equality of laws enshrined in a constitution which was "made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and many tongues," (citation omitted), is not a fixed formula defined with finality at a particular time. It does not reflect, as a congealed summary, the social arrangements and beliefs of a particular epoch. Law must respond to transformation of views. . . . The effect of changes in men's feelings for what is right and

> just is equally relevant in determining whether a discrimination denies the equal protection of the laws.[32]

These tests and models are, therefore, somewhat illusory. They are premised on a number of faulty and unwarranted assumptions about the Constitution, about judges, and about the judicial process, itself. The Constitution is not an inert and lifeless body of law from which legal consequences automatically flow. To the contrary, it is dynamic and living, requiring constant reexamination and reevaluation. As the Supreme Court's decisions in Dred Scott,[33] Plessy v. Ferguson,[34] and Brown v. Board of Education[35] make clear, the doctrine of stare decisis may be totally inappropriate with regard to decisions based upon constitutional questions. The true strength of the Constitution lies in its flexibility, its ability to change, to grow, and to respond to the special needs and demands of our society at a particular time.

Thus, any doctrinal approach to interpreting the Constitution, at whichever extreme, is both inappropriate and unworkable. Adjudication of constitutional issues requires an openness of mind and a willingness

to decide the issues solely on the particular facts and circumstances involved, not with any preconceived notion or philosophy regarding the outcome of the case. While a refusal to show proper deference to and respect for the acts and decisions of the coordinate branches of government is judicial intrusion and is, therefore, improper, a blind and unyielding deference to legislative and executive action is judicial abdication and is equally to be condemned.

The role of the federal courts in deciding constitutional questions is and always has been an activist one. It is not a role which has been usurped by the judiciary, however, but is one which is inextricably intertwined with its duty to interpret the Constitution. The federal courts have never acted directly on the states or assumed jurisdiction of mere political issues, but in cases involving individual rights and liberties, these courts are compelled to construe the law in order to determine such rights and liabilities. As Chief Justice Marshall so eloquently expressed, in responding to Congressional attempts to take away the Supreme Court's power to review state supreme court decisions

involving constitutional issues,

> As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.[36/]

In describing the role of the federal judiciary in deciding constitutional issues, I ascribe no particular political or social philosophy to the word "activist." Justice Sutherland, a staunch conservative on the Court, was no more nor no less "activist" in striking down social legislation and upholding governmental regulation of First Amendment rights than Justice Black was in upholding social legislation and invalidating state regulation of First Amendment rights. The "activism" I refer to is measured not by the end result but by how and under what circumstances result is achieved.

Once having decided the issues, the court must then concern itself with the second and final phase of the adjudicatory process -- the formulation and entry of an appropriate decree. If the evidence fails to disclose a constitutional violation, or if the evidence discloses a constitutional violation which can effectively be remedied by an award of

damages or the issuance of a prohibitory injunction, the court's role is a limited one terminating upon entry of the decree. If the constitutional or statutory violation is one, however, which can be adequately remedied only by the issuance of a decree providing for affirmative, ongoing relief, the court's involvement is necessarily enlarged and prolonged.

The federal judiciary finds itself today being increasingly called upon to fashion and to render this latter type of decree, that is, one of an ongoing, remedial relief. This trend, I assure you, results not from the judiciary's masochistic yearning for hard work, but from several relatively recent developments in the law.

The most significant procedural change has been the adoption and promulgation by Congress and the courts of liberalized standing and joinder requirements. Under code pleading, for example, litigation involved but two individuals or at least two competing interests, diametrically opposed, with the winner taking all. Today, however, there are often competing, if not conflicting, interests among members of the same class, among different classes, and among parties and intervenors. This has made the task of formulating appropriate relief an increasingly complex and difficult one.

A significant development in the substantive area has been the shift in subject matter from business and economic issues to social issues. During the latter part of the Nineteenth Century and the first half of this century, the major focus in the area of constitutional law was on the power of Congress and the states to enact statutes regulating and restricting private businesses and property. The constitutional theory most frequently advanced was substantive due process. Since only property rights were at stake, an award of damages to compensate the litigant for any economic loss and the issuance of a prohibitory injunction to restrain the operation of the statute provided the litigant with all the relief to which he was entitled.

During the past several decades, however, there have been in our society a growing awareness of and concern for the rights and freedoms of the individual. This awareness and this concern are reflected in the steady shift in emphasis in constitutional litigation from property rights to individual rights. Congress has enacted social welfare statutes in such areas as education, voting, consumer protection,

and environmental protection. Speaking through these enactments, Congress has made clear its desire that freedom, justice, and equality become a reality to and for all Americans. In many instances the responsibility for seeing that this salutary goal is accomplished lies with the federal judiciary.

The traditional forms of relief -- an award of damages and the issuance of a prohibitory injunction -- while adequate to remedy most constitutional violations of a business or economic nature, are but ingredients in remedying constitutional and statutory violations of a personal and social nature. The prisoner, who lives in constant fear for his life and safety because of inadequate staffing and overcrowded conditions, will not have his rights protected merely by an award of damages for the past injury sustained by him. If we, as judges, have learned anything from Brown v. Board of Education and its progeny, it is that prohibitory relief alone affords but a hollow protection to the basic and fundamental rights of citizens to equal protection of the law.

Once a constitutional deprivation has been shown, it becomes the duty of the court to render a decree which will as far as possible eliminate the effects of the past deprivations as well as bar like deprivations in the future. Because of the complexity and nature of the constitutional rights and issues involved, the traditional forms of relief have proven totally inadequate. The courts have been left with two alternatives. They could throw up their hands in frustration and claim that, although the litigants have established a violation of constitutional or statutory rights, the courts have no satisfactory relief to grant them. This would, in addition to constituting judicial abdication, make a mockery of the Bill of Rights. Utilizing their equitable powers, the federal courts have pursued the only reasonable and constitutionally acceptable alternative -- fashioning relief to fit the necessities of the particular case.

With the acknowledgment that they are professionally trained in the law, not in penology, medicine, or education, the federal courts have approached these areas cautiously and hesitatingly. Further recognizing that many of the issues they are being asked to decide

call for sensitive social and political policy judgments, the courts have shown great deference to those charged with making these judgments and have intervened only when a constitutional or statutory violation has clearly and convincingly been established.

Nor have the courts attempted to enter these often murky and uncharted waters without navigational aids. In addition to evidence from experts, the parties, intervenors, and amici are invited to submit their recommendations and suggestions, usually in the form of proposed plans. This process, in addition to minimizing the need for judicial resolution of many of the remedial issues, increases the likelihood of voluntary compliance by the parties with the decree eventually adopted and entered by the court. The courts have also turned to outside sources for advice and assistance. Biracial committees are, for example, now routinely provided for in school desegregation decisions in the Fifth Circuit.[37/] In addition to putting forward their own remedial suggestions, these outside groups can and do play an invaluable role in implementing and, if necessary, monitoring the decree.

So that I might hopefully illustrate why these comprehensive remedial decrees are often necessary and how they are shaped and fashioned, I would like briefly to go over with you the case of Wyatt v. Stickney,[38/] decided by me several years ago. Let me caution that this is not used as a perfect model, but it has been reviewed and approved by the United States Circuit Court of Appeals for the Fifth Circuit.

Wyatt v. Stickney was a class action lawsuit filed on behalf of all patients involuntarily confined at Bryce Hospital, Alabama's largest mental hospital, to determine whether and to what extent they were constitutionally entitled to minimum standards of care and treatment. Patients at Searcy Hospital in South Alabama and residents at the Partlow State School and Hospital for the retarded were subsequently added as plaintiffs.

Resolution of these important constitutional issues necessitated a detailed and thorough examination of the state's entire mental health and retardation treatment and habilitation program. Because of the

nature and scope of this inquiry, and with my admittedly having little expertise in mental health and mental retardation areas, I solicited and was given assistance and advice from a number of outside sources. The United States of America, acting through the Department of Justice, the American Civil Liberties Union, and the National Mental Health Law Project were each allowed to intervene with full rights of a party. The leading experts in the country were called by the parties to testify and make recommendations.

The evidence presented at trial showed that Bryce Hospital, built in the 1850's, was grossly overcrowded, housing over 5,000 patients. Of these 5,000 persons ostensibly committed to Bryce Hospital for treatment of mental illness about 1,600 -- or approximately one-third -- were geriatrics neither in need of nor receiving any treatment for mental illness. Another 1,000 or more of those confined at Bryce Hospital were mentally retarded rather than mentally ill. To serve these 5,000 patients, there was a totally inadequate staff, only a small percentage of whom were professionally trained. There were only three medical doctors with psychiatric training, one Ph.D. psychologist, and two social workers having master's degrees in social work. The

evidence indicated that the general living conditions and lack of individualized treatment programs were as intolerable and deplorable as the state's ranking of 50th among the states in per-patient expenditures would suggest. By way of example, less than fifty cents was spent per patient each day for food.

The evidence concerning Partlow State School and Hospital (for the retarded) was, if anything, even more dramatic than the evidence relating to the mental hospitals. According to the testimony of the Associate Commissioner for Mental Retardation for the Alabama Department of Mental Health, Partlow was 60 percent overcrowded; he also testified that at least 300 residents could be discharged immediately, although the school had not undertaken to do so, and that 70 percent of the residents should never have been committed at all. The conclusion that there was no opportunity for habilitation for its residents was inescapable.

As I have previously emphasized here today, courts should not intervene in the affairs and activities of the coordinate branches of government without a clear showing of a constitutional violation. I submit to each of you that, in Wyatt, such a showing was made. As

I held at that time:

> There can be no legal (or moral) justification for the State of Alabama's failing to afford treatment - and adequate treatment from a medical standpoint - to the several thousand patients who have been civilly committed to Bryce's for treatment purposes. To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process. 39/

Having found a constitutional violation, it then became necessary for me to formulate and render an appropriate decree. Clearly, monetary relief was not an appropriate remedy, nor would the mere issuance of an injunctive order restraining future constitutional violations suffice. The only constitutionally acceptable way to remedy the conditions existing in the state's mental health and mental

retardation facilities was to issue a comprehensive remedial order.

The first stage was the submission by the parties and amici of proposed plans for bringing up the system to constitutional standards. It was only after two deadlines had passed during which acceptable progress had not been forthcoming that the Court, itself, relying upon the proposals submitted, set forth the minimal constitutional standards of care, treatment and habilitation for which the case of Wyatt v. Stickney is generally known.

Since the decree was one of an ongoing nature, human rights panels, comprised of individuals from all walks of life, were created to assist in implementing and monitoring the decree at each of the institutions. These panels, acting solely in an advisory capacity, have been of immeasurable assistance to both the various institutions and myself.

I should like to state that the conditions, while still not perfect, have improved dramatically in each of the institutions. The population at each facility has been reduced by approximately fifty percent, while staff has at least doubled at most institutions. A not-altogether-unexpected benefit resulting from the public exposure given the problem

has been a substantial increase in legislative appropriations for the state's mental health system.

I would again observe that, in an ideal society, all of these judgments and decisions should be made, in the first instance, by those to whom we have entrusted these responsibilities. It must be emphasized, however, that, when governmental institutions fail to make these judgments and decisions in a manner which comports with the Constitution, the federal courts have a duty to remedy the violation.

In summary, it is my firm belief that the judicial activism which has generated so much criticism is, in most instances, not activism at all. Courts do not relish making such hard decisions and certainly do not encourage litigation on social or political problems. But, I repeat, the federal judiciary in this country has the paramount and the continuing duty to uphold the law. When a "case or controversy" is properly presented, the court may not shirk its sworn responsibility to uphold the Constitution and laws of the United States. The courts are bound to take jurisdiction and decide the issues -- even though those decisions result in criticism. The basic strength of the federal judiciary

has been -- and continues to be -- its independence from political or social pressures, its ability to rise above the influence of popular clamor.

And, finally, I submit that history has shown, with few exceptions, that decisions of the federal judiciary over a period of time have become accepted and revered as monuments memorializing the strength and stability of this nation.

It is a pleasure to have been asked to deliver the Sibley Lecture at this fine law school, and to share with you some of my thoughts on the duties and responsibilities confronting the judiciary.

NOTES

1. 2 C. Warren, The Supreme Court in United States History 370 (1932).

2. 5 U.S. (1 Cranch) 87 (1803).

3. 17 U.S. (3 Wheat.) 159 (1819).

4. Despite this traditional attribution to Spencer Roane, recent scholarship suggests that the Amphictyon Essays were authored by Thomas Ritchie. See G. Gunther, John Marshall's Defense of McCulloch v. Maryland (1969).

5. Amphictyon Essays, Part II, Richmond Enquirer, April 2, 1819.

6. Id.

7. Letter to Bushrod Washington, June 17, 1819.

8. A Friend to the Union Essays, Part I, Philadelphia Union, April 24, 1819.

9. Hampden Essays, Part I, Richmond Enquirer, June 11, 1819.

10. Hampden Essays, Part IV, Richmond Enquirer, June 22, 1819.

11. Richmond Enquirer, June 11, 1819.

12. 369 U.S. 186 (1962).

13. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brown v. Board of Education, 347 U.S. 483 (1954); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969).

14. See Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

15. See Pugh v. Locke, 406 F.Supp. 318 (M.D. Ala. 1976) (appeal pending).

16. Articles of Confederation, Art. IX (1777).

17. Madison's address to the U.S. House of Representatives, June 8, 1789. L. Levy, The Supreme Court Under Earl Warren (1972).

18. 1 De Tocqueville, Democracy in America 106 (1841).

19. Id. at 160.

20. L. Levy, The Supreme Court Under Earl Warren 9 (1972).

21. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); In re Oliver, 333 U.S. 257 (1948).

22. See Griswold v. Connecticut, 381 U.S. 479 (1965).

23. L. Levy, The Supreme Court Under Earl Warren 10 (1972).

24. See Warren and Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890).

25. 381 U.S. 479 (1965).

26. See Gideon v. Wainwright, 372 U.S. 335 (1963).

27. 369 U.S. 186.

28. Id. at 270.

29. Rochin v. California, 342 U.S. 165 (1952).

30. H. Black, Jr., My Father: A Remembrance 236 (1975).

31. 347 U.S. 383 (1954).

32. R. Kluger, Simple Justice 685 (1976).

33. Dred Scott v. Sandford, 60 U.S. 393 (1856).

34. 163 U.S. 537 (1896).

35. 347 U.S. 383 (1954).

36. Fisher v. Cockerell, 30 U.S. (5 Pet.) 159, 167 (1831).

37. See Calhoun v. Cook, 362 F.Supp. 1249 (N.D. Ga. 1973), aff'd, 522 F.2d 717 (5th Cir. 1975).

38. 325 F.Supp. 781; 344 F.Supp. 373 (1972); 344 F.Supp. 387 (M.D. Ala. 1972), modified on appeal, 503 F.2d 1305 (5th Cir. 1974).

39. 355 F.Supp. at 785.

ADDRESS

BY

THE HONORABLE WADE H. McCREE, JR.
SOLICITOR GENERAL OF THE UNITED STATES

BEFORE

THE 1977 LAW ALUMNI

SATURDAY, APRIL 30, 1977
1977 LAW ALUMNI REUNION BANQUET
GEORGETOWN UNIVERSITY LAW CENTER
WASHINGTON, D.C.

I should like to share with you some of my concerns about the direction in which our society is moving to react to the crisis in our courts caused by the "litigation explosion" resulting from the expanding role of government and the increase in population that increases the occurrence of disputes.

As lawyers, regardless of the manner in which we employ our training, we must all be concerned with the maintenance of quality in our courts. Whether his work involves litigation at the trial or appellate level, office counselling and the drafting of agreements and other instruments, or the conduct of institutional affairs, an important concern of every lawyer must be, How would a court resolve a dispute about an issue presented by a client's affairs should it be asked to determine it.

Our history has witnessed an expansion of popular control over the structure and functioning of our society and its institutions. We have vastly increased the number of statutes and regulations at all levels of government and have brought more and more areas of activity under public oversight. And when natural persons or other legal entities have been unable to agree, either among themselves or with the government, about the proper application of these rules, the inevitable result has been an increased recourse to the courts.

For example, in 1966, the year I was appointed to the Sixth Circuit, 651 appeals were docketed, and 325 were decided, after either a hearing, or submission on the briefs. In 1976, the last year during which I heard oral arguments, 1628 cases were filed and 769 were decided after hearing or submission. But our court increased in size by only two judges, from seven to nine, during that period.

Fortunately, Congress is now considering omnibus bills that would relieve some of the court burden by increasing the number of judges. Although the increase will be expensive, the expense is more than justified because the quality of disposition in some courts has begun to be threatened by the overload.

But the courts cannot continue to expand indefinitely. Increased court size may detract from the quality of justice in several ways. First, it increases the likelihood of inconsistent dispositions. Second, it decreases the collegiality of the court. Collegiality is not only likely to improve the quality of decisionmaking directly; it also makes the position more attractive to the best qualified professionals. And third, pursuant to a judicial Gresham's law, the more judges there are, the lower is likely to be the average quality of the bench, and the less attractive (if only because less prestigious)

Although an increase in the number of judges may mean that an individual judge need decide fewer cases, it may also result in an increased workload for each judge, because there will be more opinions from more judges to be read. The increased number of judges, of course, may also induce more litigation if persons who now resolve their disputes in other ways rush to take advantage of the lightened dockets.

Another measure that has been adopted over the past few decades, and that alleviates the congestion problem at least in some areas, is the utilization of specialized tribunals such as the Tax Court, the National Labor Relations Board, and the Administrative Law Judges in many specialized areas. Nevertheless, courts of general jurisdiction have been preserved so far because of a societal policy decision that I believe to be sound: that is, that decisions are more likely to be just if made by persons who are not limited by a narrow view of the controversy. Although appellate review can compensate for the narrowing effect, because of limiting standards it cannot be as effective as trial ab initio by a generalist.

Less formal dispute resolution mechanisms have been the subject of substantial attention recently. For example, the A.B.A. will sponsor late next month a National Conference of Small Dispute Resolution. More troubling,

the Pound Conference and its Follow-Up Committee have suggested that compulsory arbitration procedures might prove beneficial by relieving the federal courts of "relatively small claims which arise under federal statutes such as the Truth-In-Lending Act." A suggestion from such a prestigious assemblage of legal professionals will be taken seriously. But the proposal troubles me in several respects.

First, I am not certain that arbitration will retain its advantages of privacy, speed and informality when it is removed from the contractual context, such as commercial and labor arbitration. If there are to be mandated procedures, including the application of rules of evidence, and other safeguards imposed by statute, rule or constitutional considerations of due process, will arbitration remain cheap and effective?

And if the mandated arbitration does not embrace the procedural rules that courts have instituted in order to promote results that accurately and justly enforce policies underlying the statutes and the common law, there will be a significant sacrifice of accuracy.

How, then, are we to decide which federal policies ought to be administered less accurately?

Unfortunately, "relatively small claims" have been singled out for compulsory arbitration. Poor and powerless people are unlikely to have large claims against each other, and although they may have small claims against each other, those claims are rarely litigated in federal court. When rich and powerful institutions have small dollar amount claims against each other, they are likely to use alternative methods of dispute resolution (whether adjudication or self-help), not the courts.

The cases, then, that would be affected by the proposal are likely to involve in many instances claims under federal statutes enacted to protect the poor and powerless against institutions that take advantage of them in the economic, social or political processes. And the policies underlying those statutes have been deemed sufficiently important to have induced the Congress to exempt actions to enforce them from the jurisdictional amount requirement of 28 U.S.C. § 1331.

Furthermore, poor and powerless people are likely to be less articulate and less sophisticated about conducting adjudicatory proceedings that their adversaries. The likely result, then, will be that the losses of accuracy in the enforcement of those federal statutes will consistently favor the very institutions against

which the statutes were designed to protect. The alternative would be to pay for attorneys for the indigent, to upgrade the quality (and also the cost) of the arbitrators, and generally to replicate the district courts and thus lose the intended advantages of arbitration.

And unlike their adversaries, poor and powerless people have no alternatives to the courts. They cannot effectively protect themselves in the social or economic arenas. Although they may have sympathizers in the political process, they do not have well-trained and well-paid lobbyists promoting their welfare. They must make do with what sympathy they can arouse. But an employee, or a dependent official, is far more reliable than a volunteer.

If time permitted, I would develop another concern. Let me identify it before I close. Another proposal to respond to the litigation explosion at the appellate level will radically change the traditional method of appellate adjudication. Some of our state appellate courts are experimenting with staff lawyer bureaus that prepare proposed dispositions for the courts to adopt. Of course, the danger inherent in this development is increased in the instance of appeals that are submitted without oral argument, and many courts are restricting or discouraging oral argument.

I know of no federal court that has adopted such a procedure, but I know some beleaguered judges who are discussing its pros and cons.

Some ways must be found to relieve the severe pressures on our federal -- and indeed our state -- judiciary. Change is the law of life, but we must scrutinize every proposal for the effect it will have on the quality, as well as the quantity, of justice, and upon access to the courts. We are the guardians of the Grail. Let us not shirk our responsibility.

(*k*)

Address by Mayor Kenneth Gibson, Newark, New Jersey, Law Day (May 1) 1977

Our age is characterized by an increasing public skepticism about the ability of our institutions to deal effectively with complex problems. Questions concerning the continuing viability of our nation's cities, the need to balance environmental concerns with those of national production and economic well-being, the disintegration of the American family, and the difficulties of maintaining the human rights and civil liberties of our citizens are all indicative of this skepticism. These problems, and the attendant denigration of the capacity of the people to solve problems, cry out for solutions. As the public's faith in our social and governmental institutions seems to have waned, the people, in increasing numbers, have looked to the courts for solutions and for justice.

The courts are now becoming victims of the same malaise. From the Supreme Court of the United States to local police and consumer courts, dockets are clogged and delays an accepted fact. The courts are being asked to decide issues which our other institutions cannot or will not resolve. The courts are becoming the forum for resolution of complex moral, philosophical, and political issues. Under this load, the courts are verging on paralysis. It can only be a matter of time before the public's confidence in the ability of the nation's judicial system to resolve these issues will become irreparably damaged. The crisis which would result from this loss of faith, essentially, the destruction of the rule of law and respect for the law, would be a devastating crisis. In difficult times, in times of turmoil, the people have looked to the courts as the ultimate arbiters of what is good and what is fair. In our most difficult times, respect for the law has been the single element which has held society together.

When we speak of "Partners in Justice," we must speak of building respect for our institutions. If nothing else, that respect can be manifested in cities throughout the nation—in citizen involvement, in citizen action on behalf of the family, the poor, the elderly, the disadvantaged, and all individuals. Most importantly, we must generate citizen involvement and support for the courts. In all of these areas, citizen participation consists of the infinite number of small acts that the people can contribute every day toward the betterment of ourselves and our institutions.

Only the commitment of the people can restore confidence in our institutions. The people, in practicing the art of the good and the fair, are the true ultimate arbiters. On this Law Day, 1977, we should dedicate ourselves to the betterment of our judicial system and our other institutions. We should pause and reflect on these words of Abraham Lincoln: "Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?"

(l)

ADDRESS BY VICE PRESIDENT WALTER F. MONDALE

SECOND JUDICIAL CIRCUIT CONFERENCE

BUCK HILL FALLS, PA., SEPTEMBER 10, 1977

Buck Hill Falls, Pa., Sept. 10.—Following is the text of an address prepared for delivery by Vice President Walter F. Mondale to the annual meeting of the Second Judicial Circuit Conference, held at the Buck Hill Inn here.

Our meeting tonight, and this conference, mean many things. It is a gathering of distinguished American jurists. It is an important contribution to the national debate on judicial reform. But perhaps, most importantly, this conference represents the triumph of an idea.

When our nation was founded, the belief that government exists to protect the rights of citizens and to establish justice was a revolutionary idea. It remains so today.

Alexander Hamilton put it plainly in the *Federalist Papers:*

> "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it can be obtained, or until liberty be lost in the pursuit."

We have survived for over 200 years as a free society, because, whatever our failings, the pursuit of justice of which Hamilton spoke has never ended. We have never allowed ourselves to become frozen into any permanent caste or class in America. We have never accepted the notion that there are two standards of justice for Americans. Despite the injustices suffered by many, the promise of justice has remained alive.

As federal judges, you have been on the cutting edge of the fight for social justice in our nation. In recent decades, your courtrooms have become the arena where black Americans and other minorities, the poor, women, and all those denied the full promise of America have come to claim their rightful place. These citizens and millions more continue to look to your courts for justice today.

That is why this conference on guaranteeing access to justice is so important. As federal judges, you understand perhaps better than anyone that the judicial crisis we face today is much more than an administrative problem.

The problems of overcrowded dockets; rising legal costs and mounting delays are not just a headache for judges. They threaten to close the courtroom door on the very people who need judicial relief the most—the poor and the weak, middle income citizens, minorities and the powerless. The procedural logjam clogging our courts excludes millions of citizens for whom justice in the courts is the only hope of overcoming generations of prejudice and neglect. The inability to obtani legal services leaves millions more with no access to justice at all.

The challenge we face could not be more urgent. The task we face could not be more clear. That great jurist Learned Hand could well have been addressing this conference when he wrote:

> "If we are to keep our democracy there must be one commandment: Thou shalt not ration justice."

The dimensions of the problem we face are familiar to every judge in this room. In the last 15 years, alone, the number of cases filed in federal district courts has nearly doubled. Those taken to courts of appeals has quadrupled. Delays of two, three and four years are not uncommon.

There are no villains in this story. Neither the Congress, the Executive or the Judicial Branch can be blamed for the crisis in our courts today.

Instead, the problems we face remind me of the predicament of the man in one of Griffin Bell's favorite stories who was taken before the court on charges of drunkenness and setting his bed on fire. The judge asked the man how he pleaded. The man replied, "Your honor, I'm guilty of the first charge. I was drunk. But I'm innocent of the second. The bed was on fire when I got into it."

At bottom, the problem is simply that history has caught up with us. We operate under a judicial structure largely unchanged from the one designed 200 years ago for a handful of new Americans in 13 small states on the eastern seaboard. We expect the same system, today, to meet the needs of 210 million very different kinds of people spread over 53 separate jurisdictions in the most modern and complex society ever seen on the face of the globe.

There's nothing to be gained by searching for scapegoats we must search for solutions.

This conference is an important step in the right direction. We must go on to tackle what Judge Kaufman calls the "twin demons" of cost and delay. We must reduce court congestion and overcrowded dockets.

But in all these efforts, it is important to keep in mind that our final goal is not simply to reduce caseloads or merely make our courts run more smoothly. Our goal is, and must be, to provide access to justice for all our people. Judicial reform—if it is to deserve our support—must preserve the courts, particularly the federal judiciary, as the forum where fundamental rights will be protected and the promise of equal justice under law will be redeemed.

The ABA Task Force on the administration of justice, which Griffin Bell chaired, stated that goal:

> "Neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern . . . The ultimate goal is to provide the fullest measure of justice for all."

We are fortunate that today the author of those words is the Attorney General of the United States. As a distinguished federal judge, Griffin Bell was one of the most respected leaders in our nation for progressive judicial reform. Today he has a few more resources at his command to continue the job. He has the full support of the President of the United States—and this entire Administration—to launch a far-reaching national effort to improve and upgrade our entire system of justice.

As one of his first acts, Judge Bell created a new Office for Improvements in the Administration of Justice—the first of its kind in the Justice Department. This office has a broad mandate to work with the federal judiciary, the Congress, the organized bar and the public. We want and need your ideas and support.

Under Judge Bell's leadership, this Administration is already moving forward on a wide variety of fronts:

To cut costs and delays and relieve overcrowded courtrooms.

To create new, imaginative alternatives for settling disputes.

To open up and our judicial system to those denied an effective voice.

And to give the poor and the disadvantaged the resources to protect their fundamental rights.

As a first step, we're backing a series of reforms to provide quicker and less expensive ways to settle many of the disputes that have been languishing in our courts for years.

One new piece of legislation backed by our Administration would authorize federal magistrates to decide civil cases and try misdemeanors if the court and the parties agreed. This reform—which has already passed the Senate—could reduce the yearly caseload in District Courts by as many as 16,000 cases.

We are developing new legislation to allow experiments in District Court with compulsory, non-binding arbitration in certain civil cases. In one state where arbitration is currently used, 95 percent of the cases have been settled before they have gone to trial.

Finally, we are making a long overdue effort to tackle the problem of diversity jurisdiction. Giving a citizen the right to sue someone from another state in federal court made sense at a time when rivalry between states and regions was sharp. Today it is the judicial equivalent of a dinosaur—a relic of a bygone age.

In 1976, nearly one in four federal cases was a diversity matter. That just doesn't make sense when so many burning public issues demand the court's attention. The Justice Department is backing a proposal to prohibit a plaintiff from filing a diversity suit in the state where he or she lives. If enacted it could reduce the number of diversity cases before the federal courts today by as much as half.

Second, we are looking beyond the courts to find new, alternative forums to deliver simple justice.

Shortly before the American revolution, Edmund Burke noted that more copies of Blackstone's Commentaries on The Law had been sold in the 13 colonies than in all of England. He concluded that Americans were a peculiarly litigious lot.

I'm a resident of Washington D.C, the lawyer's capital of the world. So I can't dispute that claim. If you want to hold a bar association meeting in Washington all you have to do is to stop the first hundred people you see on the street and go find yourself a tent.

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Put despite our reliance on lawyers and law in this country, the fact remains that courtrooms aren't necessarily the best place to settle disputes.

To many Americans, a court of law is still an awesome, strange, and, often frightening place. Family squabbles, friction between neighbors, minor commercial disagreements usually wind up in court—if they're settled at all—because there is no other place for them to go.

As our society gets larger, and more complex, and more and more bureaucratic, we sometimes forget that people need personal, community forums where they can settle differences simply, directly, and even, sometimes part as friends. One of the most exciting experiments in alternatives to the courtroom are Neighborhood Justice Centers supported by the Justice Department. These Centers will be run in, and by, the communities they serve. Neighborhood residents will be trained to mediate disputes, arbitrate differences, and reconcile parties. Only if the dispute can not be settled will the parties be referred to a court or government agency.

We expect to fund three Neighborhood Justice Centers for trial periods in Los Angeles, Atlanta and Kansas City. We are hopeful they will become models for the nation of a new kind of justice in action.

Each of the reforms I have mentioned will cut back on the caseload in federal courts. They will provide quicker, less expensive ways, to settle many disputes. Most important of all, these proposals will free the time and resources of federal judges for the awesome responsibility the founders of our nation placed in your hands as the ultimate guardians of constitutional rights.

But clearing court dockets and freeing judges' time is only half the battle. We must make sure that those in need of justice receive their day in court. For many citizens today, technical barriers increasingly bar the federal courthouse door. Millions of poor and middle income Americans simply can not afford to go inside.

Access to federal court is often the only way the individual consumer, the taxpayer and the ordinary citizen can effectively challenge the massive power of a modern corporation or the far-reaching power of government itself. Closing the courthouse door leaves then no other place to go.

President Carter and this administration are committed to opening up the judicial system to those in need of its support. In his recent consumer message the President asked the Congress to give citizens broader standing to sue government agencies, to give the federal courts more authority to reimburse legal fees, and to expand opportunities for filing class action suits.

Nothing is more destructive to a sense of justice than the widespread belief that it is much more risky for an ordinary citizen to take $5 from one person at the point of a gun than it is for a corporation to take $5 each from a million customers at the point of a pen. Consumer class actions are one of the few ways a nation of individual consumers can defend itself against fraud and deceit in the marketplace today.

The Justice Department is working closely with the Office of Consumer Affairs to develop workable procedures to insure that class actions will be used responsibly. But we believe giving citizens access to justice must include this important tool.

Finally, this administration is committed to the principle that no American should suffer injustice because the price of justice is too high.

For all too many impoverished Americans, the promise of justice remains just that, a promise. For the 16 million poor citizens who have no access to federal legal services, it is a promise waiting to be fulfilled.

The justice these Americans are seeking is rarely the stuff of which headlines are made, it will not often be carved in stone on our courtroom walls.

It is the justice sought by:

A 13-year-old girl in Maine whose teeth were so poor she could not eat who was denied treatment she deserved under Medicaid.

A 16-year-old mentally retarded child living with her disabled grandmother who was illegally denied entrance to school.

An elderly New York couple living on Social Security charged four times the going rate by a fraudulant home improvement scheme.

Or a 64-year-old Mexican-American from California given a legal runaround for four years by a lumber company which hoped he would die before they had to pay him his pension.

For these and thousands of other clients of the Legal Services Corporation, access to counsel has meant more than a vindication of their legal rights. It has meant a vindication of their humanity, a vindication of their dignity and a vindicaton of their rights to be somethng more than a victim, the fate too often reserved for the poor.

I was a sponsor of the original legal services program in the Senate. Like many of you, I fought for the establishment of the Legal Services Corporation. President Carter and I are deeply committed to this vital program. We supported a major increase of $50 million for legal services this year. With the additional support of the Congress, and the help of state and local bars, the Legal Services Corporation is well on its way toward reaching its goal of guaranteeing some access to legal help for every impoverished American by 1979.

Much more remains to be done to ensure access to justice, not only for the poor, but for millions of middle income and working families for whom an extended legal battle is the expense they cannot bear.

All of us in the Bar, in the executive, the Judiciary, and the Congress must continue to search for ways to deliver justice to all Americans at a price all Americans will be able to afford.

The reforms I have mentioned tonight are important steps forward. But they alone will not do the job. As Justice Cardozo has written:

> "The process of justice is never finished, but reproduces itself, generation after generation, in ever-changing forms. Today, as in the past, it calls for the bravest and the best."

We can reform our judicial system, and we must. But in the end, the success or failure of our efforts will depend not on a system, but on the men and women who uphold it. It will depend, more than anything else, on you.

For millions of Americans in recent years a courageous federal judiciary has been their last, best hope for justice. You remain their last, best hope today.

In the years to come, we pledge our commitment and our support for your efforts. I am confident that working together, the promise of justice in America will continue to be redeemed.

The Federal Government and the State Courts

(By Daniel J. Meador*)

THE ROBERT HOUGHWOUT JACKSON LECTURE BEFORE THE NATIONAL COLLEGE OF THE STATE JUDICIARY[1]

To be asked to participate in the Robert H. Jackson Lecture series is a distinct privilege for any lawyer. Justice Jackson was one of the eminent lawyers and judges of our day. He provides an enduring model of professional competence and integrity. Among his many qualities I think most often of his analytical mind and his mastery of the English language. I saw Justice Jackson only twice. In September 1954, shortly after I had arrived to clerk for Justice Hugo Black, he dropped by to chat. A couple of weeks later, I passed him in the corridors of the Supreme Court when he was on the way to a Court conference. Five days later he was dead. The law clerks for all the justices sat together at his funeral in the National Cathedral in Washington. Seventeen years later, almost to the week, I was again at a funeral in National Cathedral, this time for Justice Black. In my memory's eye, these two strong-minded men are linked in this curious way. They had a genuine respect for each other, despite all of the controversy that swirled about them at one time.

It is also a privilege to participate in this Lecture series because it gives me an opportunity to visit the National College of the State Judiciary. Nothing more clearly symbolizes the new era in the American judiciary than does the flourishing activity in judicial education especially as embodied in this institution. Twenty years ago this was unknown. It is now clearly an idea whose time has come. There is a substantial rising interest in formal educational programs for judges at all levels of the judiciary, state and federal. This is one of the most promising signs that the American courts, while beset with troubles of many sorts, are alive and thriving, with the promise of continued vitality. All of you are to be congratulated on participating in this essential aspect of a career on the bench today.

Out of a wide range of subjects which we could usefully discuss, I have chosen to talk about the federal government and the state courts. This is a subject in which you and I presently have a mutual interest, and it is a subject which raises provocative questions about the future shape of American government. Trends are afoot which could lead us to quite a different governmental arrangement from that which we have known in our own time and indeed from the beginning of our constitutional government.

This subject can be put into perspective by starting with a brief review of history. Then we can survey the contemporary scene, underscoring the changes which have come about in the mid-20th century and noting the significant trends. Finally, I shall attempt to peer through the mist of the fuure and suggest some possibilities which may lie ahead.

In many respects the evolution of the state courts' relationship to the federal government is part of the general evolution of government in this country. Most discussions of that subject, however, focus on executive and legislative powers. Little attention has been given specifically to the peculiar relationships of the state judicial systems and the federal government as a whole. It is hardly a secret that the state courts today occupy a radically altered position in relationship to the federal government than that which they occupied originally and for well over a century after the formation of the federal union. But the full dimensions and the ramifications of the changes may not be widely understood. It is my belief that we are in a transition period which could lead to a judicial structure quite different from the original state-federal design.

We begin with some elementary observations. When the members of the Constitutional Convention convened in Philadelphia in 1787, courts already existed in the thirteen newly independent states. Each of the states was an autonomous entity. Each had its own courts, with a structure and a jurisprudence largely inherited from England, though heavily infused with North American frontier customs and conditions. At that time, each state was like England itself, in that each had a unitary government and unitary set of courts. There was no federal overlay or dual governmental structure such as that brought into being by the work of those men in Philadelphia.

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*Assistant Attorney General of the United States.

[1] The views expressed here are those of the lecturer and do not necessarily represent the position of the Department of Justice or of the Attorney General.

The adoption of the Constitution and the passage of the Judiciary Act of 1789 set the stage for all that has followed. The Constitution created a dual sovereignty throughout the United States. Alongside of, or on top of, the state courts, a federal judicial system was erected. But for many decades the position of the state judiciaries was not altered very much. In the beginning, the trial courts of the new federal system were given very little jurisdiction that impinged in any way upon the state courts.

Perhaps the most important element of change at the trial level was the shift of admiralty jurisdiction from the state courts over to the new federal district courts. The Supreme Court was given jurisdiction to review state court judgments, but this power was exercised only scantily for many years. In the first decade of its existence, the Supreme Court reviewed only seven state court decisions, and for the next several decades it reviewed about an average of one state judgment a year. The state judges, by virtue of the Federal Supremacy clause, were compelled to apply federal law whenever it came into play, but federal law was so skimpy in the early decades that this posed little or no added burden on the state judges. There was, of course, no remote hint from the beginning and throughout the 19th century of any federal funding for the state judiciaries. Any suggestion along that line would likely have been thought of as subversive or revolutionary or the product of a deranged mind.

Thus, in an oversimplified way, it might be said that for nearly a century after the creation of the federal union the only impingement of the federal government on the state courts was the occasional review by the U.S. Supreme Court of a State Supreme Court decision. Otherwise, the state courts went their way largely unaffected by the coexistence of the federal government.

The situation began to change—and the seeds for radical alteration were planted—in the wake of that water shed disaster in American history, the War Between the States and Reconstruction. The state judiciaries were directly affected by the great upsurge of national sentiment and increasing assertions of federal authority which occurred during that era. A major development was the opening of the federal trial courts to some business which had always been handled exclusively by the state courts. For example, in the late 1860's Congress broadened removal to the federal courts of diversity of citizenship cases. And, in that same period, Congress for the first time provided writs of habeas corpus for persons detained under state authority. Most significant of all was the adoption of the Fourteenth Amendment in 1868, imposing directly upon the states, as a matter of federal law, the constraints of due process and equal protection. The immediate effect of these measures was not great, but in the long run they have served to channel to the federal district courts a large volume of litigation which would otherwise have been confined to the state courts, subject only to the possibility of U.S. Supreme Court review of the final state judgment.

More was yet to come. In 1875, Congress enacted, for the first time, a general provision authorizing federal trial courts to entertain suits arising under federal law. It is anomalous that up until that time there had been no general federal question jurisdiction in the federal trial courts. The 1875 provision has had enormous consequences on the business of both the state and federal courts. Since that time, plaintiffs with claims based on federal law have been able to initiate actions in the federal courts, rather than in the state courts, and they have done so in vastly increasing numbers in recent decades.

This 1875 jurisdictional grant combined with the Fourteenth Amendment to produce the 1908 Supreme Court's decision in *ex parte Young*. That decision held that federal courts could enjoin state officials from conduct in violation of the Constitution. It worked an enormous shift of authority. In effect, it put the federal district courts in the business of supervising the constitutionality of state official activity. A federal trial court with authority to hear evidence, decide facts, and issue injunctions is armed with a powerful device, one far more potent than U.S. Supreme Court review of a final state supreme court judgment. Constitutional questions which would previously have been decided initially by the state courts are thus channeled instead through the federal system. Not only has this given the federal courts a vastly enhanced amount of business, but it has also shifted ultimate authority over many important economic and social questions into the hands of the federal judiciary.

It was not until the middle of this century that the full fruits of the 1867 habeas corpus statute materialized. That statute, combined with the Fourteenth Amendment, has now been interpreted by the Supreme Court to permit federal

district courts to review state criminal cases in a pervasive way. Any federal Constitutional issue concerning the state criminal process can now be asserted in the federal trial courts following an otherwise final state court conviction. The range of those issues has also been broadened considerably through the Supreme Court's expanded construction of the Fourteenth Amendment, as applied to the state criminal process. Here again is a major reallocation of state-federal authority, about as large as that worked by *ex parte Young*. The federal judiciary has acquired vastly enhanced powers to supervise the state courts in criminal cases.

The last major development I wish to cite is the blossoming of Section 1983. Between 1875 and 1939, there were only 19 reported cases brought in the federal courts under this statute. Last year alone, however, 7,752 were filed in the federal courts. In effect, this statute, as presently construed, converts many state tort and property cases into Constitutional cases thereby opening the way for their litigation in the federal district courts.

These sketchy highlights from our history are enough to underscore a huge growth in federal judicial business, much of which has been diverted from the state courts. These highlights also show a greatly enhanced federal judicial power over all aspects of state activity. The growth and relative power of the federal judiciary is consistent with the general pattern of growth of federal power in other areas over the last hundred years, and particularly in the middle decades of the 20th century.

There have been only two developments inconsistent with this pattern. One was the Supreme Court's decision in 1938 in *Erie R.R.* v. *Tompkins*, holding that state decisional law was to be as binding on federal judges as state statutory law. This meant that in diversity of citizenship cases federal courts were no longer to exercise an independent, creative common law function in formulating decisional rules. The *Erie* decision reallocated power to the state courts; it made the state courts the authoritative expositors of state common law. Federal judges were to follow them in diversity cases, which after all involve essentially state law questions. This holding deprived the federal judges of a large power of creative development of common law doctrine, and shifted responsibility for that back into the state courts.

Diversity jurisdiction itself is the subject of the other development which promises to shift back to the state courts a large amount of business. Bills are now pending in Congress to restrict that jurisdiction in one degree or another and it is likely that this Congress will enact a bill which will limit federal diversity jurisdiction at least to some extent. If so, a significant number of cases will be reallocated to the state courts. However, in no single state will the volume be huge. The Conference of Chief Justices, at their annual meeting last August, adopted a resolution stating that the state courts are prepared and willing to assume whatever increased volume of business results from the restriction of federal diversity jurisdiction.

But even assuming a restriction of federal diversity jurisdiction and considering the *Erie* decision, we are still left with a substantial net gain in federal judicial business and power, compared to the situation which existed a century ago. The state courts, nevertheless, remain with large and ever growing volumes of business. Our system is still structured on the basic premise that the state courts are the primary forums for deciding the controversies which arise in the great mass of day-to-day dealings among citizens. Contract, tort, property, domestic relations, and criminal law matters are all still dealt with largely by the state courts. In sheer volume, the totality of federal court business is enormously greater than the totality of federal court business. Moreover, in numbers of judges, the state court systems far exceed the federal system.

Thus far we have been speaking largely of a net growth of federal jurisdiction. But this does not reveal the full dimensions of the present relationship between the federal and the state courts. At the same time that federal judicial power has increased, the state and federal court systems are drawing closer together. There are now more points of contact between the state and federal court systems. There is also growing uniformity in the law being applied by both and in the rules of procedures being used.

Some forty states have adopted rules of civil procedure which are virtually identical to the Federal Rules of Civil Procedure. Greater uniformity in the law of evidence may likewise follow the adoption of the Federal Rules of Evidence.

Some of the growing uniformity in the law being applied by both systems is the result of decisions under the Fourteenth Amendment. In criminal cases, for example, there has developed a closer relationship between federal and state law enforcement procedures and both state and federal courts decide a large number of identical due process and equal protection questions. Another example is diversity cases, in which federal courts are deciding issues of law identical to those being decided in the state courts. FELA cases may be brought in both state and federal courts so that both systems decide those matters. Litigation involving the legality of state official action takes place in both systems.

In addition, there is growing uniformity of the law among the states. Largely as a result of the work of the National Conference of Commissioners on Uniform State Laws, much state law has been revised resulting in a higher degree of nationwide uniformity. And the American Law Institute continues its work on the restatements thereby encouraging uniformity in development of the common law.

It is fair to say that the courts of the nation, state and federal, are today deciding more legal questions in common than ever before. Also, there is greater possibility now for federal judicial involvement in matters which formerly would have been the exclusive province of the state courts.

There are other developments pulling the systems closer together. The Conference of Chief Justices more and more concerns itself with federal matters and federal-state relationships. This body also serves to pull together the judiciaries of all the states. The state and federal judges in 40 states have formed judicial councils which facilitate continuing contact and dialogue between the two systems at the state level. Also, recognizing an identity of many of their concerns, the appellate judges of the federal courts have joined state appellate judges in a single, voluntary association within the American Bar Association. It has been suggested that state and federal trial judges do the same. The National College of the State Judiciary is a growing and effective force for homogenizing the state judges nationwide.

Another significant development in this unfolding saga of our dual court systems is the creation of a national center for each. In December 1967, the Federal Judicial Center was established followed in 1972 by the National Center for State Courts. These two central, national Centers have many interests in common and they have collaborated on a variety of projects and activities. The existence of these Centers makes it possible for the federal and state judiciaries to interrelate in ways that would not have been possible without them and increasing collaboration is predictable. Moreover, like the Conference of Chief Justices and the National College of the State Judiciary, the National Center for State Courts serves in a new way to unify the 50 state court systems.

The accretion of federal jurisdiction, the growing dominance of the federal judiciary and the drawing together of the two systems are reminiscent of developments in England centuries ago. After the Normans arrived and established the seeds of a central national government, there arose in England for the first time some central, national courts—Common Pleas, King's Bench, and the Exchequer. But at the beginning and for many, many years, these courts had very limited jurisdiction. The great bulk of everyday dispute settlement rested in the local courts of various sorts—county courts, federal courts, and others. Gradually, however, as the centuries passed, the jurisdiction of the central courts increased. By various procedural inventions and fictions they drew unto themselves an ever increasing amount of judicial business which previously had been in the hands of the local courts. Ultimately, the local courts were eclipsed, and the central courts became all embracing in their authority.

Whether the trends which we observe in this country will lead to such a result is one of the fascinating questions to ponder. There are some parallels. For example, one of the instruments used in England by the central royal courts to gather jurisdiction was the writ of habeas corpus. Through that writ, cases could be taken from the local tribunals over into the central courts. As noted above, it is largely through the habeas corpus writ that we have developed what has been characterized as the federalization of the state criminal process. The superimposing of Constitutional doctrine on state tort and property law, through Section 1983 actions, also has some parallels in the English historical development. Of Course, in this country, the state courts represents a much more firmly established and deeply entrenched system than did the local courts in England. Moreover, the federal-state division of authority is much more sharply etched in our system than was the national-local authority in England.

Returning now to the contemporary scene in the United States, I have not yet mentioned the most radical and novel development of all. This is the rise of federal funding for the state judiciaries. There was, of course, no federal funding whatsoever for state courts at the beginning of the American Union or for the next century and three quarters. The first significant step in this direction came with the creation of the Law Enforcement Assistance Administration in 1968. This federal agency was created to assist the states in what was intended to be a massive war on crime. Funds were to be provided to bolster the criminal justice capabilities of the states. While no one previously had specifically considered the courts to be part of the criminal justice system, they quickly came to be so perceived. LEAA money began to be channeled to the state courts, directly and indirectly. At first a trickle, it has grown to sizable sums. Grants to state courts in 1969 from LEAA amounted to $2.5 million; in 1976 the annual figure was $140 million. To date a total of $715 million has been channeled through LEAA to the state judiciaries. Such financing is openly advocated. State judges are appearing before Congressional committees urging federal funding for the state courts. Indeed, the prospect of any diminution in the present level of funding is viewed with dismay by judges and court administrators in many states. Strenuous lobbying and public relation efforts are mounted to ensure that federal funding continues to flow and to increase. Along with this, of course, goes the demand for safeguards around the independence of the state judiciaries. On this federal funding question, there has seldom been a more dramatic turnabout. It was only a few years ago that many voices could be heard resisting any federal money for the state judiciaries. Faced with stringent state budgets, however, the lure of the federal dollar has become irrestible.

The National Center for State Courts has also provided a focal point for federal funding and attention. Since its creation the Center has been largely funded by federal grants from LEAA. And today many people are urging that the Center and its activities be funded by a direct appropriation from Congress. The Attorney General has endorsed this idea, and it is not far-fetched to believe that such arrangements may come about. With direct federal funding going to the State Court Center, it is not a great additional step to contemplate federal funding going directly and expressly to the state courts themselves, rather than indirectly through LEAA. Indeed, this is being urged now.

Unquestionably, federal appropriations are serving to bring the state and federal court systems together in new ways. The federal government is investing over $30 million a year through LEAA in justice research directed primarily at matters of state concern. There is wide agreement that federal funding for justice research should continue, but that it should be broadened to include civil as well as criminal justice matters, state and federal. The newly created Federal Justice Research Fund is a move in that direction. That Fund, administered by the Department of Justice, is to be used to support research in all aspects of the justice system, wtihout the LEAA-type of restrictions. Consideration is being giving to creating a new federal structure to administer justice research funds. Whether such a structure would be modeled on the National Institute of Justice, as recommended by the American Bar Association or be contained within the Department of Justice or elsewhere, is as yet undecided.

Federal funds to improve and support state courts are increasingly viewed as a necessity because state courts are chronically underfinanced by their own legislatures. In a recent letter to the Attorney General, commenting on the proposed restructuring of LEAA, the National Center for State Courts endorsed the position of the Conference of Chief Justices, that federal funding should continue for The National College of the State Judiciary, for the National Center for State Courts and for the state judiciaries themselves. In encouraging such funding the Center and the Conference offer warnings and admonitions that federal money must be supplied to the state courts with few or no strings because of the nature of the recipient institutions. The Conference says, for example, "there is a proper federal role in improving the justice system but it must be performed in a manner that respects the identity and independence of state courts." While those are laudible sentiments, similar admonitions have preceded federal funding in other areas of American life. But inevitably, federal regulation tends to follow federal money at least where the money flows in sub-

stantial amounts over a period of time. The bureaucratic grip of the federal government, through HEW, on the colleges and the universities of this country rests entirely upon the flow of federal money to those institutions, sometimes in relatively small amounts to each. It is not clear that the state courts will be in any stronger position to resist the federal power that follows federal money than the institutions of higher education which, like the state courts, make legitimate and historically well-grounded claims to independence.

Only a modest imagination is needed to foresee the development of federal standards for state courts in order for them to be eligible for federal appropriations. And, of course, once such standards are promulgated, some arrangements must be provided to determine whether they have been met. While this need not in theory impair the independence of state judicial decisions, the appearance of such impairment will be unavoidable. Any similar kind of overseeing of the federal courts by Congress or the Executive would almost certainly be thought unconstitutional. It would be strange indeed for the state judiciaries to be subject to greater federal authority than are the federal courts. Yet that prospect is not far-fetched and may indeed already be happening under present funding arrangements.

The federal Executive Branch has in fact entered the picture in a new and potentially significant way. We have a new Attorney General who has espoused the view that the Department of Justice should increasingly exercise a national leadership role in justice at all levels. He has advocated that the Department take the initiative in creating a "national policy on justice" by bringing together local, state and federal groups to collaborate and develop policies to improve the quality of justice and the courts at all levels. To promote this view, since taking office in January 1977, he has met with groups of state Chief Justices, Governors, state attorneys general, representatives of the National Center for State Courts, and others concerned with justice at the state and local levels. He has established a new office within the Justice Department called the Office for Improvements in the Administration of Justice to develop proposals which will affect state as well as federal courts.

For example, this Office, with LEAA funding, is establishing experimental Neighborhood Justice Centers in three cities with the announced objective of establishing more if these are successful. The disputes which will come to these Centers would otherwise go to state tribunals if they went to court at all. Thus, the Department of Justice seems to be assuming something of the role of a ministry of justice with nationwide, rather than strictly federal, concerns.

There is no doubt at all that we have reached a point now where a jurisdictional and financial interrelationship exists between the state and federal courts and between the state courts and the federal government that was unknown and uncontemplated a century ago.

This situation and its implications for the future require that we rethink the structure of the entire American judiciary. It is possible that the combined effect of all the developments noted here will lead us along the route of the English experience. A plausible argument can be made that the trends point toward the emergence of a unitary, national system of courts. The growth of federal judicial power, the increasing uniformity in legal rules, the blending of functions, and the necessity of federal funding for state courts all could be read to suggest that eventuality. Yet there are substantial practical and Constitutional reasons for believing that that will not happen and that, instead, some other arrangement will emerge.

One possibility would be a quasi-merger of the federal judiciary with the state court systems. Machinery could be developed within the federal judicial branch to administer federal monetary support for the state courts and to integrate those courts more closely with the federal system. This might be done in ways which would not threaten the independence of the state courts, as would federal executive or legislative supervision, but yet would bring about a smoother meshing of the judiciary nationwide. For example, the Administrative Office of the U.S. Courts, which already administers Congressional appropriations for the federal judiciary, could also serve to administer Congressional appropriations for the state judiciaries.

Another possibility, apart from funding considerations, lies in the reallocation of judicial business between the systems. Duplicating and overlapping jurisdictions could be substantially reduced, and the federal appellate structure could be rearranged so as to integrate state and federal business in a more efficient

way. The pending reduction or abolition of diversity jurisdiction is a move in that direction. Another idea along this line is the routing of all state criminal cases, which contain federal issues, to the U.S. Courts of Appeals, thereby bypassing federal trial court review.

Still other ideas may be gleaned from the judicial organizations of other federalisms. In Australia and Canada, for example, all state court decisions are reviewable by a federal tribunal which is empowered to decide, with binding force, all legal questions, state and federal. In the Federal Republic of Germany, there are no federal trial courts at all; the same, with rare exceptions, is true in Australia. The courts of first instance in both countries are provided by the states, and cases flow into a federal forum only at the appellate level.

While these arrangements in other countries may be suggestive, it is unlikely that any one of them furnishes an exact model which would be feasible in the United States. We have our own long-standing Constitutional arrangements and legal habits and customs which are likely to lead us to a uniquely American scheme.

The one thing that does seem clear from the conditions described here is that we are in a time of transition. I think it is important for all of us to recognize that. Actions taken or not taken over the next few years will definitely have an impact on the eventual design of the judicial processes in our country. We can, by steps we take or positions we advocate, either have a hand in shaping the direction of events, or events will control us. It seems preferable to me to try to address our situation rationally, and make an effort to design structures best suited to our society and to the conditions of the late 20th century. Otherwise, we will simply drift into new arrangements which may or may not be desirable.

There are serious values and interests which must be accommodated in any American solution. There are, for example, values in decentralization; but there are also values to be served by a more efficient integration nationwide of our judicial systems. Above all, there is the enormous value to our society of the unique role of the judges, state and federal. Whatever we do, through all the restructuring, reorganizing, financing and streamlining, we must not impair that essential role: the deciding of controversies under law. The courts must be the place where citizens can go to have their disputes with each other or with the ever more intrusive other branches of the government decided by detached, disinterested judges, applying evenhandedly the laws and principles that govern us all. All other functions of government can be performed by other agencies.

As trial judges in the state courts, you are in the front line of the legal system. You are in an excellent position to contribute ideas to the development of new structural and procedural arrangements. The National College of the State Judiciary can also play an important part in this development. If the best minds of the legal order can be put on this problem, we may emerge from this time of transition into a far better judicial system than we have yet had.

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[This index has been prepared by staff of the Committee on the Judiciary, U.S. House of Representatives. It is divided into two parts (subject and case), and does not cover the appendixes. It is designed as a tool to be used in studying the hearings and not, especially for the serious student, as a substitute for a detailed examination of the entire proceedings.]

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