Federal Courts Study Committee

Working Papers and Subcommittee Reports July 1, 1990

Volume I

Federal Courts Study Committee

Working Papers and Subcommittee Reports

June 1, 1990

The Report of the Federal Courts Study Committee was published on April 2, 1990 in one volume consisting of two parts. Part I contained an overview of the recommendations and Part II described the proposals in greater detail.

The following working papers and subcommittee[1] reports constitute Part III of the report. These materials were valued background materials which the Committee determined should be published for general consideration whether or not the Committee agreed with their substantive proposals. The Committee considered these materials as well as oral comments at 13 public hearings and many items of correspondence. Committee members also brought their own expertise to the debates on each and every issue.

In no event should the enclosed materials be construed as having been adopted by the Committee.

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1. To review the many issues before it, the Committee divided itself into three working subcommittees broadly described as: (1) role and relationships; (2) workload; and (3) administration, management, and structure.

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REPORT

TO THE

FEDERAL COURTS STUDY COMMITTEE

OF THE

SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS

AND THEIR RELATION TO THE STATES*

Members

Judge Richard A. Posner, Chairman

Congressman Robert W. Kastenmeier

Chief Justice Keith A. Callow

President Rex E. Lee

Reporter

Larry Kramer

March 12, 1990

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* Not every member of the subcommittee has agreed to all of the proposals or analysis contained in this Report, and the absence of dissent should not be understood to signify approval.

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Professor Rochelle Dreyfus	- Specialized adjudication
Kenneth Geller	- The Federal Tort Claims Act
Judge Patrick Higginbotham	- Reform of 42 U.S.C. §1997e
Professor Joseph Hoffman	- Habeas corpus reform: retroactivity
Professor Richard Levy	- Reform of the Social Security Act disability claims process
Professor Thomas Mengler	- Pendent jurisdiction
Professor Lauren Robel	- Judicial adaptations to caseload growth
Charles Rothfeld	- Abstention and removal
Professor Daniel Shaviro	- Reform of civil tax jurisdiction
Professor Steven Steinglass	- Removal and 42 U.S.C. §1983
Professor Charles Weisselberg	- Habeas corpus reform: evidentiary hearings
Russell Wheeler	- Historical/statistical description of federal courts
Professor Richard Wilkins	- Abstention and pendent jurisdiction
Professor Diane Wood	- Reform of the anti-injunction act
Professor Lawrence Yackle	- Habeas corpus reform: successive petitions

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REPORT OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATIONSHIP TO THE STATES

Three observations suffice to describe developments in judicial administration during the last quarter century. First, many knowledgeable observers predicted that the growing caseload would soon cause the federal judicial system to collapse unless significant reforms were enacted. Second, virtually none of their far-reaching proposals was adopted by Congress, which instead added more judges and made other incremental changes. Third, the federal courts are still functioning, still processing cases, and most citizens still hold these courts in high esteem.

Does this mean that there is nothing to worry about after all? Or have we been asking the wrong questions? Grant that the caseload is growing -- that much is by now a matter for judicial notice. Grant also that this will not produce an obvious, discontinuous breakdown in the operation of the federal courts. What are the implications of caseload growth for the federal courts, and what should Congress do about them? Congress established the Federal Courts Study Committee to address these questions and "to develop a long-range plan for the future of the Federal Judiciary." Congress took this step because it too believes that the constantly growing federal docket poses a threat to the quality and usefulness of the federal courts. But rather than begin from this premise, we believe it is important to examine whether there is a problem.

After a short description of the history and organization of these courts, Part I examines the growth and development of the federal docket to determine whether there is a caseload "crisis." This examination has two parts. First, we provide a quantitative description of the size and nature of the caseload. Second, we examine anecdotal and other survey data to determine how growth in the federal docket has affected the quality of justice that federal courts provide.

Our analysis suggests that terms like "crisis" overstate the problem. The federal system is basically sound and with proper adjustments can continue to function well for the foreseeable future. Nonetheless, the courts are presently taxed almost to the limit, and future growth seems likely. Congress must prepare the federal courts for their third century by adjusting the current allocation of jurisdiction and by establishing structures to cope with future developments. These ideas are developed in Parts II-IV of the Report.

PART I

THE FEDERAL COURTS IN THE AMERICAN GOVERNMENTAL SYSTEM: HISTORY, CURRENT STATUS, AND THE NEED FOR REFORM

A. The Evolution of the Federal Court System.

This section traces changes in the organization, personnel, and jurisdiction of the federal courts since their establishment in 1789.[1] Consideration of caseload, including the caseload

growth that has occurred in the last quarter-century, is postponed to the next section, and many historical details, ably treated in other studies of the federal courts, are omitted altogether.[2]

1. Structure and Organization of the Federal Courts.

Article III of the Constitution and the first Judiciary Act between them created three different types of federal courts -- district courts, circuit courts, and the Supreme Court -- staffed by two types of judges -- district judges and Supreme Court justices. The district courts were trial courts and were manned by district judges, sitting alone. The Supreme Court was mainly (today it is almost exclusively) an appellate court, composed of justices sitting en banc rather than in separate panels. The circuit courts were manned by panels of three consisting of one district judge and two Supreme Court justices. Although the circuit courts had some appellate responsibilities in relation to the district courts, they were mainly trial courts themselves.

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1. Much of the material in this Part of the Report is drawn from R. Posner, The Federal Courts: Crisis and Reform chs. 1-4 (1985), copyright © 1985 by the President and Fellows of Harvard College, reprinted and modified with the author's permission.

2. The classic study remains Felix Frankfurter and James M. Landis, The Business of the Supreme Court: A Study of the Federal Judicial System(1927). Two serviceable and up-to-date summaries of the evolution of the federal court system, by a law professor and a political scientist, respectively, are Charles Alan Wright, The Law of Federal Courts, ch. 1 (4th ed. 1983), and John R. Schmidhauser, Judges and Justices: The Federal Appellate Judiciary (1979).

Appeals could come to the Supreme Court not only from the district and circuit courts, but from state supreme courts if a question of federal law was involved. Appeal in all cases was a matter of right. Apart from Supreme Court review of state court decisions, then, the federal court system as first created would have been a two-tier system had it not been for the circuit courts.

The circuit courts were a problem from the start, primarily because of the hardships to the Supreme Court justices of having to "ride circuit" at a time when transportation was very slow. Improvements in transportation were outdistanced by increases in the size of the country and, more important, by increases in the Supreme Court's own workload which could not be matched by increasing the number of Supreme Court justices proportionally. As a result, even when the amount of circuit riding was curtailed after the Civil War, the Supreme Court proved unable to discharge its responsibilities as virtually the only appellate court in the federal system. Various stopgaps were attempted until 1891, when Congress enacted the Evarts Act creating the courts of appeals (initially -- and somewhat confusingly because there were still circuit courts -- called "circuit courts of appeals").[3] The creation of the courts of appeals greatly expanded the capacity

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3. Act of March 3, 1891, chap. 517, 26 Stat. 826. The members of the federal courts of appeals are still called "circuit judges," a title that in the federal system goes back to a time before there were courts of appeals, when as one of the stopgap measures to relieve the burdens of circuit riding on the Supreme Court justices, Congress created a circuit judge in each circuit to help man the circuit courts.

of the federal system to review trial judges for error and could have been accompanied by the abolition of the circuit courts and the conversion of the Supreme Court's obligatory review jurisdiction to a discretionary one. Instead, the circuit courts lingered on until 1911, and while the conversion of the Supreme Court's review jurisdiction began in 1891, the Court's appellate jurisdiction did not become predominantly discretionary until 1925, and became completely discretionary only last year. In addition, the idea of trial panels did not die with the circuit courts; it survived in the three-judge district court (generally composed of two district judges and one circuit judge) with right of direct appeal to the Supreme Court. Formerly common, three-judge district courts are now limited to reapportionment cases.

The basic organizing principle of the federal court system has always been regional, and increases in caseload have been accommodated partly by increasing the number of geographic units into which the system is divided. Originally each state was a single federal district; today many states are divided into several districts -- as many as four -- and there are 94 districts in all. Originally there were 3 circuits; when the circuit courts of appeals were created in 1891 there were 9; there are now 13, though one of these (the Federal Circuit) has nationwide jurisdiction over particular subject-matters. There is nothing inevitable about organizing courts along regional lines, and the cost of transportation, which was once a big factor in regionalization, is now a small one. The alternative to regionalization is specialization: a federal court could have

jurisdiction over all cases of a particular type in the nation rather than jurisdiction over all cases, of whatever type, in a region. This model is used in many foreign nations but infrequently in the United States.

The earliest specialized federal court was the Court of Claims, established before the Civil War to hear money claims against the federal government. Four major specialized courts were created in this century. The first was the Court of Customs Appeals, which as its name implies had jurisdiction over appeals in cases arising under the customs laws. The second was the Commerce Court, which was given jurisdiction to review orders of the Interstate Commerce Commission other than orders for the payment of money. Controversial from the outset, this court was abolished three years after it was created.[4] The Court of Patent Appeals was created next, to decide appeals from determinations of patent validity by the Commissioner of Patents. It was later merged with the Court of Customs Appeals to form the Court of Customs and Patent Appeals, and finally in 1982 was merged with the appellate division of the Court of Claims to form the United States Court of Appeals for the Federal Circuit. As well as succeeding to the jurisdiction of these former courts, the new court was given exclusive jurisdiction of appeals from decisions of the district courts dealing with patent validity and infringement and a few other matters. Finally, there is the Temporary Emergency Court of Appeals, which despite its name has

4. See Frankfurter and Landis, supra note 2, at 153-174.

survived for two decades; this court is staffed by regular circuit judges serving on a part-time basis to decide appeals in certain energy-regulation cases.

There is also the Tax Court, which differs from these other courts in that it is not established under Article III of the Constitution. Article III defines not only the judicial power of the United States but who may exercise it: judges who have lifetime tenure and whose salary cannot be reduced. There are thousands of non-Article III federal judges -- administrative law judges and other adjudicative officers of federal administrative agencies, bankruptcy judges, military judges, and federal magistrates, as well as the judges of Article I courts explicitly so called, such as the Tax Court. Indeed, one of the most important developments in the history of the federal courts has been the progressive shift of the judicial function from Article III judges to Article I judges, particularly in the administrative agencies. (The only retrograde movement has been the diminution in the number of Article I territorial courts as the territories achieved statehood.)

This shift has altered the responsibilities of the federal courts. Federal district courts now function as review courts for many federal administrative decisions; and not only do the courts of appeals exercise a second tier of judicial review by reviewing the district courts' administrative-review decision, but many administrative decisions are reviewable directly in the courts of appeals. Thus, the federal judicial pyramid is asymmetrical: just as the Supreme Court reviews decisions of

state supreme courts as well as of federal courts of appeals, so the courts of appeals review decisions of federal administrative agencies (and Article I courts such as the Tax Court) as well as of federal district courts. Bankruptcy judges and federal magistrates, finally, occupy a dual role: as independent adjudicators whose decisions are reviewed by the district courts (and often directly by the courts of appeals), and as adjuncts to the district courts in the broad sense in which special masters, law clerks, staff attorneys, and externs are all judicial adjuncts.

The organization of the federal courts is rigidly hierarchical in the sense that each court can nullify any decision appealed to it from a court in a lower tier. In another sense it is extremely loose-knit. Judges have no authority to appoint or remove other Article III judges or to reassign them to another district or circuit, although the Judicial Councils have some de facto power over judicial tenures. A more important exception to the principle that judges do not control the tenures of other judges is that once a judge takes senior status, usually at age 65 or 70, his continued service is essentially at the pleasure of the judges in active service on his court.

As shown in Table I, Article III judges are a diminishing proportion of the total employees of the federal court system. This trend began well before 1960 and seems to have accelerated decisively sometime between 1970 and 1975 with a further dramatic drop in the mid-1980s. Neither increases in the number of judges nor increases in their salaries can explain the recent, very

rapid increases in the federal judicial budget; only the addition of non-Article III personnel can. Judges' salaries and fringe benefits were 20% of the federal judicial budget in 1960, but only 9% in 1980.[5] Since 1960 the total number of judges has doubled, but the total number of judicial employees has increased sixfold. And several "off budget" items should be noted. Many federal judges employ externs, who are law students working part-time for course credit given by their schools. This practice was unknown 30 years ago. Some district judges request private practitioners to represent indigent civil litigants without pay; these lawyers function partly as judicial adjuncts, helping the judge to winnow out frivolous cases. This too was unknown 30 years ago. Finally, though we know of no statistics on the question, the use of special masters appears to have grown; these are private practitioners, appointed by the judge but paid for by the parties, who assist the judge in ruling on discovery motions, in calculating damages, and sometimes in deciding liability or complicated remedial questions. Thus, the growth in the budget and employment of the federal courts, while striking, actually understates the full extent of the expansion of the federal court system.

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5. Wolf Heydebrand and Carroll Seron, The Double Bind of the Capitalist Judicial System, 9 Int'l of Sociology of Law 407, 418 (1981) (table 2).

Table 1: Personnel and budget of the federal courts, 1925-1988[6]

Year	Total employees	Number of Article III judges	Percentage of Article III judges	Budget: Current dollars (mill.)	Budget: 1983 dollars (mill.)
1925	1,284	179	13.9	14	81
1930	1,517	200	13.2	15	90
1935	1,620	189	11.7	15	108
1940	2,171	256	11.8	11	78
1945	2,253	261	11.6	14	78
1950	2,836	289	10.2	24	100
1955	3,259	321	9.8	32	119
1960	3,200	322	10.1	50	169
1965	4,478	394	8.8	76	241
1970	5,346	507	9.5	126	324
1975	7,619	506	6.6	313	582
1980	10,075	626	6.2	606	736
1982	10,587	642	6.1	749	775
1983	11,046	651	5.9	823	823
1984	11,755	653	5.6	925	889
1987	19,352	696	3.6	1318	1160
1988	20,743	699	3.4	1395	XXXX

The administrative hierarchy of the federal courts consists principally of the Chief Justice, the Judicial Conference of the United States (consisting of the Chief Justice, the chief judges of the courts of appeals, and some district judges), the chief judges of the circuits and districts, the circuit Judicial Councils (composed of the circuit judges and some district judges), the Administrative Office of the United States Courts, and the professional administrators of the courts of appeals (circuit executives). The fact that the Chief Justice of the United States, a nonelected official with life tenure, is also

6. Source: Appendices to Budgets of the United States for the years listed; Annual Reports of the Director of the Administrative Office of the United States Courts. The figures for the number of judges do not include senior judges.

the administrative head of the entire federal court system guarantees the federal judiciary a substantial measure of independence from the other branches of federal government.

2. Evolution of Federal Jurisdiction.

Article III set the limits of the judicial power of the United States but left to Congress the task of defining the actual jurisdiction of the federal courts within those limits. The first Judiciary Act created lower federal courts but did not grant them an extensive jurisdiction. The district courts were given jurisdiction mainly in admiralty and criminal cases and the circuit courts mainly in diversity cases. Neither type of court was given general jurisdiction over cases arising under federal law ("federal-question" cases); that was not to come until 1875. The Supreme Court was given appellate jurisdiction over the decisions of the district and circuit courts, with the exception -- a surprising one in view of later developments -- of criminal judgments, and also appellate jurisdiction over state court decisions interpreting federal law. The fact that the district and circuit courts were not given general federal-question jurisdiction assured that state courts would frequently be called upon to interpret and apply federal law. The first Judiciary Act also established the practice, which persists to this day in diversity cases, of fixing a minimum amount in controversy for a plaintiff wanting to litigate in federal court ($500, raised in steps to $50,000 in 1988).

Some features of the pattern of jurisdiction created by the

first Judiciary Act are easier to explain that others. Admiralty jurisdiction and jurisdiction over disputes between citizens and foreigners seems to have been designed to promote the foreign commerce of the United States by assuring foreigners access to national courts, which were perceived to be more uniform and expert and less xenophobic and parochial.[7] The rest of the diversity jurisdiction is explicable in similar terms, as designed to foster interstate commerce and thereby strengthen the union. There is debate over whether this particular grant of jurisdiction was motivated by fear of bias againsts out-of-state citizens or by fear that less professional, pro-debtor state courts would discourage the flow of credit across state lines.[8]

The fact that the lower federal courts were not given jurisdiction over federal-question cases suggests that the framers of the first Judiciary Act were not much concerned that state courts might be prejudiced against persons asserting federal claims.[9] It may be that the new American government was thought too weak to invite the antagonism of state courts, or perhaps there were just so few federal rights that their

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7. See 25 Papers of Alexander Hamilton 477-479 (Harold C. Syrett ed. 1977). See also 1 Julius Goebel, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antedecents and Beginnings to 1801, at xvii (1971).

8. See H. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928); J. Frank, Historical Bases of the Federal Judicial System, 13 L. & Contemp. Probs. 3 (1948).

9. The framers of the first Judiciary Act provided for federal crimes to be tried in federal courts. This is explained by the traditional refusal of the courts of one sovereign to enforce the penal laws of another.

beneficiaries were not numerous enough to have the political muscle to get their own tribunals for the vindication of such rights. Alternatively, this may have been a concession to the anti-federalists, who feared a strong federal judiciary and opposed the creation of any lower federal courts.

Conspicuous in the first Judiciary Act is an evident parsimoniousness in the creation of federal jurisdiction. The jurisdiction conferred was about the minimum one can imagine that would have allowed the federal judiciary to play the role envisioned for it in the Constitution; and the amount-in-controversy requirement assured that the federal courts would not resolve petty disputes even within the limited area of their jurisdiction. No doubt this parsimony was for the most part simply a reflection of the temper of the times, which believed in limited government and above all in limited national government. The creation of lower federal courts was controversial, which is why Article III merely authorized Congress to create them. But there may also have been a sense -- there are hints of it in Hamilton's Federalist Paper No. 78 -- that the proper performance of the constitutional role of the federal judiciary required that it be kept small. The more judges there are, the less responsibly they can be expected to exercise their power. Increases in size lessen the control of reviewing courts, which must either review more opinions, grow themselves and become more fragmented, or both. Moreover, adding judges weakens the informal contraints that come from familiarity and collegiality. Finally, as a result of Article III's

provisions relating to tenure and pay, political pressure for judicial excesses short of impeachable offenses must be visited on the entire judiciary and not just on the errant judge.

Several developments before the Civil War completed the pattern of federal jurisdiction sketched in the first Judiciary Act. The first was the assumption by the Supreme Court of the power to declare state and federal legislation and executive acts unconstitutional,[10] coupled with the assertion of the principle of flexible interpretation of the Constitution.[11] The idea of a justiciable constitution, flexibly interpreted, marked a breathtaking expansion in judicial power over English and colonial antecedents, and an expansion that by its nature was bound to grow; for with every passing year the Constitution receded further into history, making it more difficult to reconstruct the intended meaning of the constitutional text and progressively freeing the judges to imbue it with their own values.

Holding this power in check was the insistence by Chief Justice Marshall and his brethren on taking seriously the Constitution's limitation of federal judicial power to the decision of actual cases or controversies, and thus on refusing to issue advisory opinions[12] or to resolve even the most

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10. See Marbury v. Madison, 1 U.S. (1 Cranch) 137 (1803); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

11. Epitomized in Chief Justice Marshall's statement in M'Culloch: "it must never be forgotten that it is a constitution we are expounding." 17 U.S. at 407 (emphasis in original).

12. See Wright, supra note 2, at 57-58.

momentous constitutional issues unless necessary to resolve a lawsuit properly before the court. The framers of the Constitution had considered and rejected a proposal to create a Council of Revision to pass on not only the constitutionality but the wisdom of federal laws before they were enacted.[13] The Supreme Court in the John Marshall era complied with the framers' desire both to confine the federal courts to the mode of proceeding that had become customary in the English courts of the eighteenth century and to require the federal courts to make a distinction between the constitutionality and the wisdom of the actions of the other branches of government.

In Swift v. Tyson,[14] the Supreme Court expanded federal judicial power in diversity cases by holding that the law applicable in diversity case dealing with rights under a bill of exchange was general common law. Swift interpreted the Rules of Decision Act (a part of the first Judiciary Act),[15] which provided that federal courts should apply the laws of the states unless otherwise directed by Congress or the Constitution, to refer only to statutes -- thus freeing federal courts to make their own interpretations of the common law.[16] For almost a

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13. See 1 Records of the Federal Convention 73, 77, 78 (Max Farrand rev. ed. 1937); Gordon S. Wood, The Creation of the American Republic 1776-1787, at 552 (1969).

14. 41 U.S. (16 Pet.) 1 (1842).

15. Section 34 of the Act of September 24, 1789, chap. 20, 1 Stat. 92, currently codified as 28 U.S.C. § 1652.

16. There has been considerable debate about whether this interpretation was contrary to the intentions of the framers of the Rules of Decision Act. Until recently, the conventional wisdom held that an explicit reference to decisional law in the

century following Swift the federal courts developed general common law principles to govern virtually all diversity cases in the absence of applicable state statutes. This encouraged forum shopping and set the federal courts up in competition with the state courts. We need not determine whether this development was motivated by a desire to protect interstate businesses from populist legal doctrines made by elected state judges, to foster enterprise by bringing about greater uniformity of legal obligation for those businesses, to set an example that might encourage greater uniformity of American common law, or -- as the Court's opinion suggests -- by the belief that common law decisions are "mere evidence" of a body of general law equally accessible to federal and to state judges and not emanations of the sovereign will of the state.

The Civil War led to profound changes in the jurisdiction of the federal courts by fundamentally changing the relationship between the federal government and the states. Before the Civil War, virtually the only activity of the lower federal courts in relation to the states was to adjudicate diversity cases, and the only activity of the Supreme Court in relation to the states was to invalidate state laws that were in conflict with federal laws

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original draft of the Act was deleted in order to simplify rather than to change the meaning of the act. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923). More recent scholarship suggests that Swift actually restated settled law, which distinguished between local decisional law and general common law. See William Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513 (1984).

or that impaired the obligations of contracts. The Fourteenth Amendment, adopted in 1868, forbade the states (among other things) to deprive persons of life, liberty, or property without due process of law, or to deny persons the equal protection of the laws. Congress passed a series of civil rights acts creating criminal and tort remedies for violations of the Fourteenth Amendment. A notable example of the tort remedies was §1 of the Force Act of 1871, recodified as 42 U.S.C. § 1983, which is of immense importance to the work of the federal courts today. Also of great importance today is the Habeas Corpus Act of 1867 (now 28 U.S.C. §§ 2241 et seq.), which extended federal habeas corpus to persons in state custody. Perhaps the most important example of the changing relationship between the federal government and the states, however, was the conferral of general federal-question jurisdiction on the federal courts in 1875.[17]

The full implications of these changes were not felt for another century, and indeed the Fourteenth Amendment had little impact of any sort until the 1890's. But beginning then the federal courts became extremely active in limiting the power of the states to regulate commercial conduct, finding in the due process clause a constitutional commitment to liberty of contract or laissez-faire. This era, typified by the famous decision in Lochner v. New York[18] invalidating a state maximum-hours law, ended abruptly in the late 1930s with a change in the Supreme

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17. Act of March 3, 1875, chap. 137, 18 Stat. 470.

18. 198 U.S. 45 (1905).

Court's membership. But this did not end the federal courts' activities in enforcing the Fourteenth Amendment. Rather, there was simply a change from protecting economic liberty to protecting other concepts of liberty -- what we now call civil liberties and civil rights. From the equal protection clause came the idea of equal rights for blacks, and later (in somewhat diluted form) for women, aliens, children born out of wedlock, and other groups. From the Bill of Rights (read into the due process clause of the Fourteenth Amendment), came the idea that the states could not interfere with freedom of speech or religion, must accord criminal defendants elaborate procedural rights, must provide humane prison conditions, must allow abortions, and so on. From the concept of due process itself came the idea that the state must grant a hearing to anyone whose entitlement it wants to take away.

The list of rights protected by the Fourteenth Amendment has grown steadily over the last 50 years to the point where that amendment is today the direct or indirect source of much of the federal courts' business. The two most important procedural vehicles for enforcing Fourteenth Amendment rights in federal courts have already been mentioned: §1 of the Force Act of 1871, which created damage remedies for violations of federal rights by state officers; and the Habeas Corpus Act of 1867, which has been interpreted to allow prisoners to challenge the constitutionality of their state convictions by civil proceedings in federal court.

It is plain enough why Congress wanted persons claiming that their rights under the Fourteenth Amendment had been violated to

be able to sue in federal courts: the state was often the de facto defendant, and its courts were thought unlikely to be sympathetic to the plaintiff. It is only a little less obvious why Congress decided for the first time in 1875 that anyone with a financially significant federal cause of action should be allowed to sue in federal court. The Civil War had both revealed and exacerbated deep sectional tensions, and it could no longer be assumed that state courts would be sympathetic to assertions of federal right whoever the defendant was. The Civil War also ushered in the era, which continues today, of active federal government. As Congress passed more and more laws, displacing more and more state law, it could no longer be assumed that state courts in any part of the country would always be sympathetic to assertions of federal rights. On both grounds -- sectional tension and growth of federal power -- it was no longer feasible to leave exclusive enforcement of federal rights to the state courts. Moreover, lawmakers of the time believed that giving federal courts jurisdiction over federal law would increase the quality and uniformity of that law's interpretation and application even with concurrent state court jurisdiction.[19]

Once general federal-question jurisdiction was in place, the expansion of federal regulation guaranteed a steady increase in the business of the federal courts. Indeed, it was this increase in the federal question caseload of the lower federal courts that

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19. In its Study of the Division of Jurisdiction Between State and Federal Courts 164-68 (1969), the American Law Institute concluded that this has been the effect of general federal-question jurisdiction.

exposed the lack of appellate capacity in the federal judicial system and led to the Evarts Act to restructure the federal courts. This, in turn, speeded the changeover in the federal courts' caseload from a predominance of diversity cases to federal question cases, and from common law litigation to review of agency action or adjudication of rights conferred by federal statutes. By the late 1930s, the docket of the federal courts had begun to assume its characteristic modern shape. For example, of the opinions of the Seventh Circuit between 1892 and 1911, 56% were diversity cases, 22% patent cases, 7% bankruptcy cases, 4% criminal cases, and 1% review of administrative action.[20] In the period 1932-1941, diversity cases accounted for only 19% of the opinions and patent cases 10%, while criminal cases had risen to 9%, tax and administrative agency cases accounted for 32%, and bankruptcies (not surprisingly in the depression era) for 18%.[21] These patterns are broadly consistent with those from a similar study of several other federal courts of appeals.[22] As the next section illustrates, the pattern in the later period generally resembles the present distribution of cases.

Three more developments should be mentioned to complete this

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20. Rayman Solomon, The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R., 1984 A.B.F. Res. J. 285, 301.

21. Solomon, supra note 20, at 301.

22. See Lawrence Baum, Sheldon Goldman, and Austin Sarat, The Evolution of Litigation in the Federal Courts of Appeals, 1895-1975, 16 Law & Soc'y Rev. 291 (1981-1982).

thumbnail sketch of federal jurisdiction. First, by the end of the 19th century federal criminal convictions were appealable by the defendant, and such appeals now account for a significant part of the caseload of the courts of appeals and the Supreme Court. Second, the Erie decision in 1938 overruled Swift v. Tyson and held that federal courts in diversity actions must follow state decisional as well as statutory law.[23] This represents an important mark in the trend toward federal courts' devoting less of their institutional capital to state law issues and more to federal questions. Third, also in 1938, the Supreme Court promulgated rules of civil procedure for federal courts, pursuant to the Rules Enabling Act.[24] Until then, federal courts followed the rules of procedure of the state in which the federal court was located, except in equity and admiralty cases, where federal rules had been promulgated earlier. Somewhat paradoxically, while the promulgation of the federal rules and Erie both represent efforts to establish the federal courts as courts devoted primarily to the administration of federal law, there is a tension between the two. This is due partly to the fact that the difference between substance and procedure is difficult to determine in many cases, and partly to the fact that by suddenly making federal procedure sharply different from state procedure, the Federal Rules of Civil Procedure create new incentives to bring or remove a diversity case into federal

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23. Erie R.R. v. Tompkins, 304 U.S. 64 (1983).

24. Act of June 19, 1934, chap. 651, 48 Stat. 1064, currently codified as 28 U.S.C. § 2072.

court. In addition, the federal rules helped create a class of lawyers specializing in federal practice, facilitated the nationwide practice of federal law, and drove a wedge between state and federal courts. Many of these problems have diminished in recent years, however, as state procedural codes have increasingly followed the pattern of the federal rules.

Two conclusions emerge from this sketch of the evolution of the federal courts. First, there is no objectively "correct" role that the federal courts are supposed to serve. The framers left Congress the power to define a role for federal courts within the broad limits permitted by Article III. Over the years, Congress has redefined the federal courts -- both structurally and substantively -- in important ways. The 1789 federal court system, dominated by diversity and admiralty cases and with very little appellate review, scarcely resembles the federal courts today.

Second, while there is no objectively correct role that federal courts must play, there is a clearly discernable trend as to the role they will play -- namely, as expositors of federal law and protectors of federal rights. To some extent, this development is a natural product of the growth of federal law. But it is also a result of numerous reinforcing structural changes in the organization of the federal courts. From the grant of general federal-question jurisdiction to the Evarts Act to Erie and the adoption of the Federal Rules of Civil Procedure, there has been a steady development toward downplaying the role of federal courts as interpreters and appliers of state law. In

1789, the federal courts heard mostly diversity cases, with binding effect (after Swift) within the federal system, and the state courts adjudicated federal questions. These priorities have been reversed over time.

B. Caseload Growth in the Federal Courts.

In the previous section, the growth of the federal courts' caseload was reflected only indirectly -- in the creation of new federal courts, the increase in the number of federal judges and supporting personnel, the growth of the federal judicial budget, and other institutional responses to the growing demand for federal judicial services. This section focuses on the caseload itself, and particularly on the growth in federal judicial business that has taken place since about 1960.

1. Developments Prior to 1960.

The enormous increase in the population of the United States, and in the power and reach of the federal government after the Civil War, made it inevitable that the caseload of the federal courts would expand from its humble beginnings. Nonetheless, until roughly 1960 -- which as the last year of the Eisenhower Administration has seemed to many observers a watershed in the modern social and political history of the nation -- the rate of growth had been modest and easily accomodated by the creation of a three-tier system in the Evarts

Act. Between 1904, the first year for which statistics on the number of cases filed in the federal district courts are available, and 1960, the number of such cases rose from 33,376 to 89,112 -- an annual compound rate of increase of only 1.8%.[25] Although there are no statistics for total number of federal cases filed prior to 1904, we do know (from reports of the Attorney General issued after 1874) that the number of private civil cases filed in the federal courts was actually lower in 1904 than it had been in 1873.[26]

The caseload rose steeply during the 1920s and 1930s, when Prohibition led to a very substantial rise in the number of both criminal and U.S. civil (mainly forfeiture and penalty) case filings.[27] But the end of Prohibition led to an equally precipitous drop. In 1934, after the surge of Prohibition cases had abated, 70,111 civil and criminal cases were filed in the federal district courts; and between that year and 1960 the number of criminal cases actually fell, from 34,152 to 29,828. All of the growth in the period was in civil cases, which rose

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25. Apparently the figures include cases filed in the circuit courts, abolished in 1911. See 1974 Attorney General Ann. Rep. 5-6, 22-31. Unless otherwise indicated, all caseload statistics in this section for the federal district courts and courts of appeal are taken from or calculated from Annual Reports of the Attorney General of the United States (before 1940) and Annual Reports (normally published together with the annual proceedings of the Judicial Conference) of the Administrative Office (AO) of the United States Courts (1940 to the present). Specific sources are not separately indicated where they are easily found in the relevant report. Bankruptcy proceedings are omitted.

26. See 1 American Law Institute, A Study of the Business of the Federal Courts 107 (1934) [hereafter ALI, Federal Courts Study].

27. See 1 ALI, Federal Courts Study at 32-36; 2 id. at 37.

from 35,959 to 59,284 -- a compound annual rate of increase of 1.9%. For the whole docket (criminal as well as civil), the compound annual rate of increase between 1934 and 1960 was only 0.9%.

In 1891, the first year of the federal courts of appeals (or circuit courts of appeals, as they were called then), a total of 841 cases were filed in those courts. This number rose to 3,406 in 1934, representing a compound annual rate of increase of 4.8%. Between 1934 and 1960, however, the rate of growth slowed very markedly, to 0.5%, with only 3,889 cases filed in 1960.

Table 2 presents a snapshot of the caseloads of the district courts and the courts of appeals in 1960. The discrepancy between the total number of district court cases in the table and the number just given in the text (and the much smaller discrepancy for the courts of appeals) reflects the omission from the table of some 10,000 cases arising under the "local" jurisdiction of the federal courts. This refers to their judisdiction over matters ordinarily within the jurisdiction of state courts -- divorce, probate, most tort, property, and contract disputes, and most crimes -- in parts of the country that are not states, which by 1960 meant principally the District of Columbia. In 1970 a separate system of local courts was created for the District, and the local jurisdiction of the federal district courts in the District was abolished. Since this was a one-time change with no significance for the future, it would give a misleading impression of the caseload growth since 1967 to reflect the change in the table.

Table 2 shows that the jurisdiction of the district courts in 1960 was a little more than one-third criminal. Even if one adds to this figure postconviction proceedings by federal and state prisoners attacking their convictions, the figure is still well under 40%. A large component of the civil docket of the federal courts in 1960 still consisted of diversity cases -- more than 20% of the district courts' entire caseload. The picture was similar in the courts of appeals. Exclusive of administrative appeals, which were about 20% of the courts of appeals' docket,[28] criminal cases were about a third of the rest of the docket. But a much larger proportion of these cases were postconviction proceedings than direct appeals, for a very low appeal rate for federal convictions was balanced by a high appeal rate for postconviction proceedings. A quarter of the courts of appeals' docket (excluding administrative appeals) consisted of diversity cases.

Table 2: Case filing in lower federal courts, 1960

Type of case	District courts (%)		Courts of appeals (%)	
Criminal	28,137	(35.5)	623	(22.2)
Civil	51,063	(64.5)	2,188	(77.8)
U.S. Civil	20,840	(26.3)	788	(28.0)
Condemnation	1,009	(1.3)	30	(1.1)
FLSA	1,206	(1.5)	22	(1.0)
Contract	8,295	(10.5)	34	(1.2)

28. The number of administrative appeals reported here and for 1988, *infra* Table 3, may be misleading because the courts of appeals often consolidate separate filings to a single order for purposes of argument and opinion. The resulting case may be more complicates, but is probably less time consuming than if each challenge were heard separately.

Tax	1,545	(2.0)	155	(5.5)
Civil rights[29]	26	(0.0)	N.A.	
Postconviction	1,305	(1.6)	179	(6.4)
FTCA	1,253	(1.6)	50	(1.8)
Forfeiture and Penalty	2,371	(3.0)	12	(0.4)
Social Sec. Laws	537	(0.1)	N.A.	
Private	30,233	(38.2)	1,400	(49.8)
Diversity	17,048	(21.5)	740	(26.3)
Admirality	3,968	(5.0)	128	(4.6)
Antitrust	222	(0.3)	47	(1.7)
Civil rights	280	(0.4)	44	(1.6)
Intellectual Property	1,451	(1.8)	155	(5.5)
FELA	1,096	(1.4)	30	(1.1)
Postconviction	872	(1.1)	111	(3.9)
Jones Act	2,646	(3.3)	38	(1.4)
LMRA	322	(0.4)	64	(2.3)
RLA	68	(0.1)	13	(0.5)
Administrative appeals	--		737	
Other	--		217	
Total	79,200		3,765	

2. Present Caseload.

a. Increase in Filings.

Table 3 presents the comparable figures for case filings in 1988. The changes are dramatic: the number of cases filed in the district courts had more than tripled, roughly from 80,000 to 280,000 -- a 250% increase, compared with an increase of less than 30% in the preceding quarter-century. The compound annual rate of increase was 4.7% -- five times the annual rate in the preceding period. Contrary

29. This statistic was not reported for 1960; the figure is for 1961.

to popular impression, growth has been larger on the civil than on the criminal side of the calendar, even when "criminal" is defined to include postconviction proceedings and other prisoner petitions. The number of federal criminal prosecutions was only 58% greater in 1988 than it had been in 1960, and even when one adds to that the large number of federal (5,130) and especially state (33,709) prisoner postconviction proceedings, the increase in criminal cases, from 30,314 in 1960 to 83,424 in 1988 (175%) is much smaller than the increase in "pure" civil cases, from 48,886 to 245,380 (more than 400%).

Table 3: Case filings in lower federal courts, 1988

Type of Case	District courts	(%)	Courts of appeals	(%)
Criminal	**44,585**	**(15.7)**	**6,012**	**(16.0)**
Civil	239,634	(84.3)	26,674	(71.1)
U.S. Civil	69,076	(24.3)	6,210	(16.5)
Condemnation	487	(0.2)	20	(0.1)
FLSA	659	(0.2)	37	(0.1)
Contract	23,403	(8.2)	233	(0.6)
Tax	2,541	(0.9)	336	(0.9)
Civil Rights	2,357	(0.8)	786	(2.1)
Postconviction	5,130	(1.8)	1,962	(5.2)
FTCA	3,256	(1.1)	379	(1.0)
Forfeiture and Penalty	3,873	(1.4)	120	(0.3)
Social Security Laws	15,152	(5.3)	992	(2.6)
Private	169,934	(59.8)	20,464	(54.5)
Diversity	68,224	(24.0)	4,504	(12.0)
Admiralty	3,370	(1.2)	150	(0.4)
Antitrust	654	(0.2)	274	(0.7)
Civil Rights	16,966	(6.0)	3,931	(10.5)
Intellectual Property	6,016	(2.1)	301	(0.8)
FELA	2,443	(0.9)	91	(0.2)
Postconviction	33,709	(11.9)	7,291	(19.4)
Jones Act	2,413	(0.8)	243	(0.6)
LMRA	2,741	(1.0)	425	(1.1)
RLA	228	(0.1)	--	--
Administrative appeals	--		3,043	(8.1)
Other	--		1,795	(4.8)
Total	284,219		37,524	

To some extent, of course, this growth has been compensated for by a corresponding growth in the number of district judges (we discuss some implications of increasing the size of the federal courts in Part II). But even controlling for additional judges, the increase in filings has been dramatic. Table 4 illustrates changes in district court filings per judge since 1960:

Table 4: District Court Filings and Judgeships

Year	Judgeships	Filings	Filings/Judgeship	Percentage Increase Over		
				60	68	78
1960	248	79,200	319	*	*	*
1968	341	104,020	305	-4	*	*
1978	399	174,753	438	37	43	*
1988	575	284,219	494	55	62	13

To an even greater extent than the overall caseload increase, the growth in filings per judge is caused by an increase in civil cases. This can be seen by examining Table 5, which records the growth in civil and criminal filings per judge. There has been a decrease in the number of new criminal cases per judge, but because this decrease is more than compensated for by the large increase in civil case filings, there has been a 55% increase in the overall filings per judge.

Table 5:

District Court Civil Filings and Judgeships

Year	Judgeships	Filings	Filings/Judgeship	Percentage Increase Over		
				60	68	78
1960	248	51,063	206	*	*	*
1968	341	71,449	209	1.5	*	*
1978	399	138,770	347	68	66	*
1988	575	239,634	416	102	99	19

District Court Criminal Filings and Judgeships

Year	Judgeships	Filings	Filings/Judgeship	Percentage Increase Over		
				60	68	78
1960	248	28,137	113	*	*	*
1968	341	32,571	95	-16	*	*
1978	399	35,983	90	-20	-5	*
1988	575	44,585	77	-32	-20	-14

The increase in district court cases since 1960, dramatic as it has been, is dwarfed by the increase in court of appeals cases -- from 3,765 in 1960 to 37,524 in 1988. This is an increase of 897% (1040% if administrative appeals are excluded), compared to 250% for the district courts. The composition of cases has also changed more in the courts of appeals than in the district courts. Criminal cases, including postconviction cases, now account for 40% of the courts of appeals' docket (45% if we exclude administrative appeals), which means that criminal cases have grown faster in these courts than in the district courts. As a matter of fact, criminal cases have grown more than fifteenfold -- from 913 in 1960 to 15,463 in 1988. Diversity cases have shrunk to 12% of the docket, little more than the

number of civil rights cases (a category so small in 1960 that it was not separately recorded). The compound annual rate of increase for the whole court of appeals docket since 1960 has been 8.6%, compared to only one-half of 1% in the preceding 25 years.

As in the district courts, this growth has outpaced the increase in judges. In fact, the increase in filings per judge in the courts of appeals has been much greater than in the district courts. Table 6 indicates that, even accounting for growth in the size of the court, a court of appeals judge hears almost 340% more cases today than in 1960.

Table 6: Court of Appeals Filings and Judgeships

Year	Judgeships	Filings	Filings/Judgeship	Percentage Increase Over		
				60	68	78
1958	68	3,765	55	*	*	*
1968	97	9,116	93	69	*	*
1978	97	18,918	195	255	110	*
1988	156	37,524	240	336	158	23

It is, of course, potentially misleading to generalize from a comparison of only two widely separated years. In particular, any generalization is extremely sensitive to the choice of the first year. If we had started with 1934, the annual rates of growth would appear much lower. But, as Figures 1 and 2 illustrate, 1960 does identify a turning point for the federal court system. For decades before this transition year caseload growth had been moderate in the district courts (excluding Prohibition) and virtually nil in the courts of appeals; since then it has been consistently great in both.

Figure 1

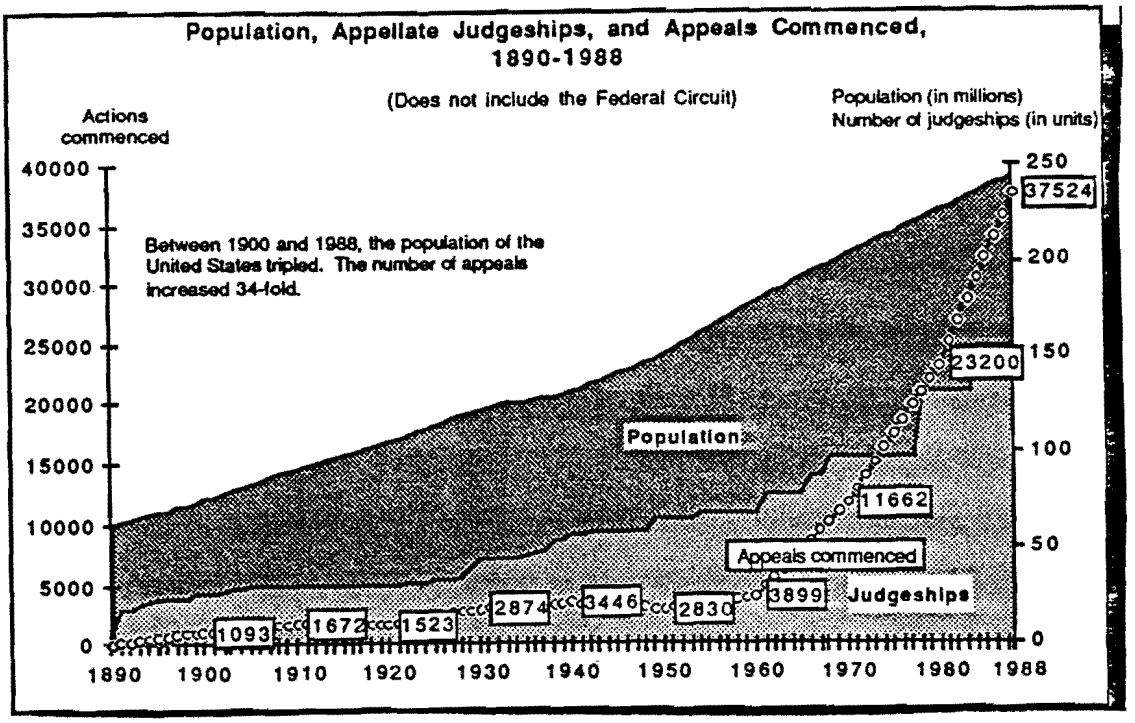
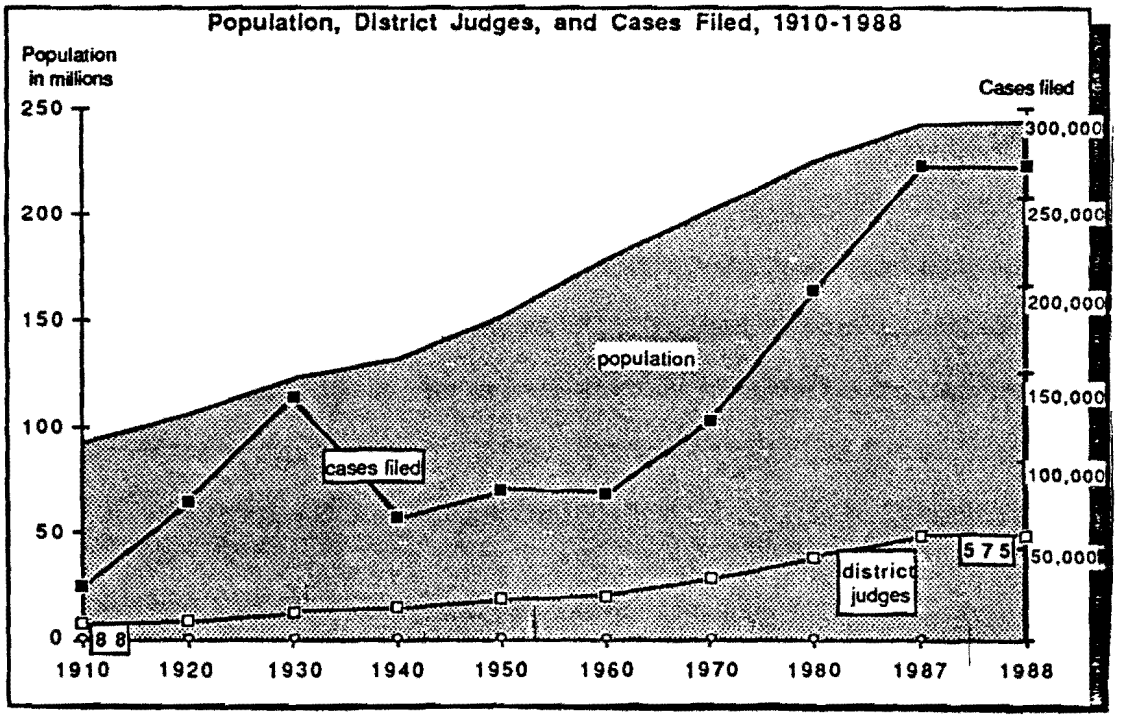


Figure 2



b. Measuring the Difficulty of Cases.

Figures on case filings cannot tell the whole story about workload. A case is not a standard measurement like a quart or a pound. If an increase in case filings is associated with a decrease in the difficulty of the average case, the figures on caseload growth will exaggerate the actual increase in the workload of the courts.

For the district courts, a somewhat better measure of workload may be the number of cases that go to trial, since these cases typically take the most time and effort. The problem with this measure is that district judges may and do respond to caseload pressures by making it more difficult for litigants to get a trial. For what it is worth, however, the increase in trials has been smaller than the increase in the number of cases filed -- 99% rather than 250%.[30] Moreover, the number of trials per judge actually declined by 14% -- from 40 trials per judge in 1960 (25 civil, 14 criminal) to 35 trials per judge in 1988 (22 civil, 13 criminal).[31]

On the other hand, if there is more pressure to dispose of cases before trial, the cases that run the gauntlet successfully and are tried are likely to be bigger cases than if trials are more freely allowed. This hypothesis is supported by the more than 50% increase in the average length of a trial over the period, from 2.2 to 3.4

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30. There were 10,003 trials in 1960 and 19,901 in 1988.

31. The common impression among judges and commentators is that the increasing burden of criminal trials is among the the biggest problems faced by the district courts. See infra notes X-X and accompanying text. This is not contrary to these statistics, for while there has been a decrease in the number of criminal trials, these trials have become longer and more complex.

days.[32] Furthermore, by putting these figures together with the figures on the number of trials, one can see that the number of trial days in the federal district courts has roughly tripled in the last 28 years. This figure appears less impressive once we recall that the number of judges has also increased. But while each district judge may conduct fewer trials than in 1960, the extra length of these trials has still increased the amount of time each judge spends in court by 35%.

Two other measures support the hypothesis that the workload of district court judges has indeed increased. First, an analysis of "weighted filings" suggests that the average district judge has more work today. Weighted filings reflect adjustments to raw filings that account for the relative amount of time required for different kinds of cases. The Administrative Office has reported the average weighted filings per district judge from the period 1962 to the present.[33] In 1962, for example, when unweighted case filings were 278 cases per judge, weighted case filings were only 242 per judge, reflecting the

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32. These figures were computed by taking the midpoint of brackets used by the Administrative Office to report differences in lengths of trials. For example, if the AO reports the number of trials lasting between 4 and 6 days, we assumed for purposes of making this calculation that each trial lasted 5 days. This may lead to some overestimation, since there are probably more trials at the lower end of each bracket than at the higher end. For trials lasting 20 days or more, the AO reports the length of each trial. There were 45 such trials in 1960, lasting an average of 29 days each, and 204 in 1988, lasting an average of 34 days each.

33. See 1980 Annual Report of the Director of the Administrative Office of the United States Courts 290-295. The weightings are based on a 1979 time study done by the Federal Judicial Center. The Federal Judicial Center is currently engaged in revising the case weights derived from the 1979 study, but early indications are that the 1979 figures are still generally reliable.

fact that many of the cases were relatively easy. In 1988, the weighted caseload per judge was 467 cases -- an increase of 93%. In other words, controlling for changes in both the number of judges and the difficulty of the cases filed, the average workload of a district court judge practically doubled between 1962 and 1988.

Another indication of workload is the number of cases pending at year's end. Growth in the number of pending cases suggests that -- despite the addition of new judges -- the court is having more trouble disposing of new filings. In 1960, the court terminated 91,693 cases and left 68,942 cases pending. The court's pending docket was therefore 75% as large as the number of cases it was able to terminate -- meaning that if no new cases were filed the court could have cleared its docket in nine months. In 1988, the district court terminated 280,868 cases and left 271,975 cases pending -- a nearly one-to-one ratio, meaning that -- despite the appointment in recent years of many new judges -- it would now take almost a full year for the district court to clear its calendar. Most of the increase in the backlog is in criminal cases, suggesting that these cases have become more difficult. While the ratio of pending civil cases to civil cases terminated has remained essentially unchanged since 1960,[34] in criminal cases the ratio has increased from one-to-four to approximately seven-to-ten.[35]

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34. In 1960, 61,829 cases were terminated and there were 61,251 pending civil cases at year's end (99%). In 1988, the 244,242 pending cases were matched by 238,753 terminations (102%).

35. In 1960, 7,691 criminal cases were pending as compared to 29,864 cases terminated (26%). In 1988, 27,733 cases were pending compared to 42,115 cases terminated (66%).

A comparable effort can be made to measure the actual workload, as distinct from raw caseload, of the court of appeals. Distinguishing between all terminations, on the one hand, and terminations either after oral argument or after the case is submitted to a panel of judges without oral argument, on the other, excludes cases that are settled or otherwise fall by the wayside between the filing of the appeal and its dismissal or other disposition. Like the number of trials in the district court, this measure isolates the cases that are likely to be most difficult and time consuming. Table 7 indicates that while there were 2,681 terminations after oral argument or submission in 1960, there were 19,178 such terminations in 1988. This is less dramatic than the 900% growth in the docket as a whole, but it is still an increase of more than 600%. Nor has this increase been offset by the addition of new judges. On the contrary, the number of cases per judge requiring decision has grown from approximately 40 cases in 1960 to 123 in 1988 -- an increase in each judge's workload of 211%.

Table 7: Terminations in Courts of Appeals (% reversing dist. ct.)[36]

Type of termination	1960		1988	
All terminations	3,713		35,888	
Terminations after hearing or submission	2,681	(24.5)	19,178	(14.2)
Criminal	441	(17.7)	3,493	(8.5)
U.S. civil	534	(24.9)	3,605	(15.0)
Private civil	1,198	(26.5)	9,689	(14.9)
Administrative appeals	361	(25.2)	1,241	(14.2)

36. These figures do not include original proceedings of which there were 56 in 1960 and 590 in 1988. Cases that were affirmed in part and reversed in part are treated as affirmances.

This adjustment removes cases that occupy essentially no time, but it does not measure whether the cases that do require oral argument or the submission of briefs are becoming easier. It seems likely, however, that a case in which the district court or administrative agency is reversed will be more difficult than one in which the court or agency is affirmed. The fraction of insubstantial appeals is bound to be larger in the affirmed than in the reversed category, and the appellate courts can rely more heavily on the trial court's analysis. Hence a change in the fraction of appeals decided in favor of the appellant is some index of the changing difficulty of the appellate caseload. The figures in Table 7, which show a dramatic fall in the reversal rate between 1960 and 1988, from 24.5 percent to 14.2%, thus imply that the average case on the appellate docket is becoming easier.

But even if one assumes unrealistically that no affirmance, even a partial affirmance, requires any judge time at all, the workload of the courts of appeals has still increased by more than 300%.[37] Once again, moreover, this increase is not matched by a corresponding increase in the number of judges: in 1960, each court of appeals judge participated in approximately 10 cases reversing the district court or agency from which an appeal was taken; by 1988, that number had grown to 17.5. Of course, since many affirmances also take time, the real increase in workload has obviously been greater.

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37. That is, 14.2% of the 19,178 terminations in 1988 is more than four times as great as 24.5% of the 2,681 terminations in 1960.

Perhaps a better measure of workload in the courts of appeals is the signed, published, majority opinion, since this is the method used to dispose of the more difficult appeals whether affirming or reversing. The published per curiam opinion and the unpublished (almost always per curiam) opinion are normally reserved for less difficult cases. Although the number of signed court of appeals opinions in 1960 is not a recorded figure, it has been estimated to be 1,972.[38] In 1988, the number (now recorded) was 7,226 -- an increase of 266%. This, of course, is smaller than the 600% increase for terminations after hearing or submission -- implying that a smaller percentage of such terminations was by signed opinion in 1988 than in 1960. The percentage was indeed smaller: 38% versus 74%. This could be because the cases were becoming easier to decide, but it is more likely that the judges simply did not have time to write more signed opinions than they did write. This conclusion is suggested by the fact that in 1960 the average number of signed opinions per court of appeals judge is estimated to have been only 31, while in 1988 it was 46.[39]

Finally, as with the district courts, an increase in the workload of the courts of appeals is suggested by an increase in the number of

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38. See William M. Landes and Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J. Law & Econ. 249, 300, 303 (1976).

39. The 1960 figure was obtained by dividing the estimate in Landes and Posner, supra note 38, at 303 (table B2), of the number of signed opinions in 1960 (1,972) by the number of active circuit judges that year (66). Landes and Posner provide alternative estimates of the number of signed opinions, but for the reasons explained on page 300 of the article, the one we have used here seems the most accurate.

pending cases relative to cases terminated. In 1960, the courts of appeals disposed of 3,713 cases and left 2,220 cases pending. In 1988, the courts of appeals disposed of 35,888 cases and left 27,644 cases pending. This reflects a growth in the proportion of cases pending to cases terminated from 60% to 77%. If no new cases were filed, in other words, it would take the courts an additional two months to clear their dockets.

C. Judicial Adaptations to Caseload Pressures.

It is difficult to know what to make of these statistics. They demonstrate a substantial increase in the workload of federal trial and especially federal appellate judges. But commentators have been pointing to the growing federal caseload and predicting that it would soon overwhelm the courts for more than 30 years. Since, as noted at the outset of this Report, the federal courts have continued to process their cases and appear generally to be doing a good job, one must be at least a little skeptical about the statistics. Perhaps judicial resources were formerly underutilized and are only now being used properly; perhaps they are still underutilized.

How can we determine whether caseload pressures do in fact threaten the quality of justice in a way that calls for significant reform? The central problem is that we have no objective measure of what the quality of justice "ought" to be -- either minimally or optimally. There is, however, a body of work exploring how judges have responded to the caseload growth and focusing especially on procedural innovations they have developed and ways in which they have

shifted their limited resources. This literature is a valuable source of information about how caseload pressures actually affect the operation of the federal courts, and, together with the statistical picture, it provides a basis for making judgments about the state of the federal courts. Furthermore, to gather additional information, we conducted our own survey of both district court and court of appeals judges, seeking their views on how well they perform and how they feel about their job. The results of this survey provide further data on the courts and important insight into the judges' attitudes about their work.

1. The District Courts.

The statistical analysis above suggests that while the increase in the workload of the federal trial judges has been less severe than that of the appeals judges, the trial judges must also deal with an ever increasing caseload. The effects are apparent from the judges' own reports and from the ways they have changed the traditional adjudicative process in response.

a. Judges' Perceptions of Caseload Growth.

We sent a questionnaire to all federal trial judges seeking their views on the present caseload and how it compares with previous years. The first part of the survey asked a series of specific questions about such matters as time for preparation, use of staff, and the like; 80% of the judges returned this portion. In addition,

46% of the judges provided written comments in response to an open-ended question about how caseload affects their working conditions and habits.[40] These comments provide a measure of insight into the judges' working lives.

There was some good news in the survey results. Few judges believe that they "never" or "almost never" have sufficient time to master the relevant issues in a case prior to trial (10%), to study difficult procedural issues before ruling (13%), or to keep informed of developments in their courts of appeals and in the Supreme Court (12%). But a significant number of judges report that it is becoming increasingly difficult to perform these tasks effectively. When asked to compare today's situation with the situation when they were appointed, 34% of the district court judges responded that it was "worse" or "much worse" in terms of the time available to master the issues before trial; 27% described it as "worse" or "much worse" with respect to the time available for study before issuing rulings; and 35% said it was "worse" or "much worse" with respect to their ability to stay informed of changes in the law. Judges who had been on the bench longer reported a greater decline in the time available to perform these tasks.

In other questions, only 23% of the judges responded that they "never" or "almost never" were forced to rely on their law clerks to do things they believe they should do themselves, while 35% said that they "often" or "usually" must rely on clerks to perform such tasks.

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40. The question stated: "Please provide any additional information concerning the effects -- if any -- of caseload pressure on how you do your work: have caseload pressures required you to change your work habits? If so, how?"

And 46% of the judges indicated that caseload pressures "often" or "usually" have an adverse effect on how they do their work, with an additional 39% indicating that such pressures "sometimes" affect their work adversely.

Taken together, these results suggest that most judges still believe they usually are able to perform their job adequately, but that caseload pressures are forcing them increasingly to rely on clerks and to give short shrift to certain aspects of their work. In addition, the written comments suggest that in order to maintain the quality of their work, the judges must labor under conditions they find quite unsatisfactory.

i. Hours.

Fully a third of the judges who wrote comments complained about the hours required to stay abreast of their calendar. Most reported that they routinely work 10-14 hour days and part of each weekend:

> "Up at 4:30 AM -- work at home until 7:00 AM -- arrive at office 8:30 -- leave for home 6:00 PM -- bed by 9:00 PM -- work virtually every Saturday and often part of Sunday. Much greater caseload pressure than in state trial court."

> "I usually work 12 hours a day during the week and 2-10 more hours on weekends, but I feel I am operating a triage chambers with little time to understand the issues before me as fully as I should before ruling."

> "I try to alleviate the tension between quality and quantity by working long hours -- routinely from 7:30 a.m. to 6:15 p.m. and part of every weekend. I still feel, however, that I cannot provide timely service and proper decisions to all who want and need them. This is demoralizing...."

Many judges reported having to work at night and expressed dismay at the cost to their personal lives. Exasperation and frustration from having to work constantly with an unmanageable caseload is palpable in some of the answers:

> "The work load is up and so is my blood pressure! The work gets done by taking less vacation, going to the theatre less, reading fewer novels, and seeing fewer friends.... My overall sense is of increased pressure and increased effort to maintain peace and calm. I fear the consequences affect my family as well as myself. Life is still under control, but we walk closer and closer to the edge!"
>
> "I am tired of working 12-14 hour a day -- the workload has affected my health...."
>
> "I find myself having to 'shoot from the hip' with greater frequency than 8-10 years ago. The hours are longer but I often wonder if they are not offset by the state of mental fatigue in which I more frequently find myself."
>
> "Seven nights a week; frequently working at home until 12 midnight and up again at 4 a.m.! It is intense and unreasonable.... Who is protecting our rights against unreasonable expectations of our resources?"

Many judges explicitly connected the hours they work to their perception that the quality of their work is eroding. Some reported making conscious trade-offs between hours and what they consider appropriate work practices:

> "I often work on orders and draft opinions while presiding over a trial. Now that I am an experienced trial judge I can 'get away with' this, but the alternative -- working nights and weekends -- is no longer acceptable to me. Sometimes I sign and send out orders that are not as well written as I would like...."
>
> "I find I am forced to choose between a full study of the issues presented and a prompt disposition of those issues. There is no way with the current

calendar to achieve both desired results. I work many hours longer each week than I did as a trial attorney just to avoid the total breakdown of my calendar...."

ii. Stress.

Many judges complained about the stress of managing a workload they perceive as unreasonable:

"Caseload pressure has a negative impact on bench behavior of judges. The degree of irritability increases in direct proportion to caseload pressure. This applies on the bench and off the bench."

"I am very much behind, cannot catch up, and I am frustrated and stressed because I cannot catch up. I have stacks and stacks of cases on my work table waiting for me to get to them, the trials and hearing are set and heard, but the paperwork waits."

"There are simply too many civil cases to push through the system, too many motions, and far, far too many criminal cases for any human being to be satisfied she is dispensing justice."

iii. Quality.

Forty-eight judges commented on how the caseload affects the quality of their work. The most frequent comments concerned lack of time to think about legal issues:

"I am unable to give each case the attention that I feel each case deserves. I have to proceed on a form of 'judicial triage' in which I devote more time to what I deem to be more 'serious' cases at the expense of paying slight attention to what on first impression appear 'less serious."

"I'm more superficial."

"Rarely do I have the time to read the cases cited in the trial briefs; only in very large or very complex

cases can I read more than one or two cited cases."

> "When I became a federal judge, I felt I was managing an operating theatre. Now I'm running an emergency room operation. No time to study or think or really talk over legal concepts with law clerks and other judges."

> "I have found that caseload pressure does affect every aspect of my work. I often do not give the time to significant issues that they deserve to understand their implications and to properly decide...."

One of the most frequently cited consequences of time pressure was what the judges apparently consider an undue need to rely on law clerks:

> "Fortunately I have been able to reduce my caseload. I still must rely on my law clerks and magistrates for much research and writing. I check everything that goes out, but my own research time is limited. I often wonder if I am reading a judge's opinion or his law clerk's...."

> "The biggest effect of caseload pressure is an increase in reliance on law clerks to get out rulings on motions. I have little time to spend on such pretrial matters myself...."

> "I have virtually no time to author my own opinions. I am too dependent upon law clerk work and input for resolution of pretrial motions."

iv. Causes.

The judges were cautious in identifying causes for the growing caseload pressure. Several mentioned that the number of complex cases and motions had increased. Many more commented about increases in the number of criminal cases, particularly drug cases:

"Increase in criminal trials has shut down my civil docket."

"I have an extremely heavy criminal docket -- keeps me on a treadmill -- I can manage it but it leaves the civil docket orphaned. I can only devote little snatches of time here and there to the civil docket -- very frustrating. I routinely work Saturdays, holidays, and past 6 p.m. every day but generally end up behind where I started."

"[T]he criminal docket drives everything I do. It also means that I am in trial or criminal hearings most of the time. I do not think that criminal cases are properly incorporated into the workload calculations.

b. Procedural Adaptations to the Caseload.

The volume of filings has led trial judges to look for ways to dispose of cases more quickly. On the criminal side, Congress has mandated speed in the Speedy Trial Act;[41] on the civil side, sheer numbers have caused judges to focus on speed.[42] Because most district court judges do not believe that litigants and their attorneys make efficent use of judicial resources,[43] the

41. See 18 U.S.C. §§3161-3174 (1976).

42. It is not clear that speeding the time to disposition is an effective response to caseload growth. Professors George Priest and Geoffrey Miller suggest that exactly the opposite may be true because disposing of cases more quickly simply encourages still more filings. The hypothesis is straightforward: if a court is slow in disposing of its cases, the effective stakes of litigation to the parties are reduced relative to a court with short delays. This eliminates the economic incentive to pursue litigation for potential litigants at the margin. As the court changes its practices to decrease delays, the effective stakes of litigation are increased. Cases at the margin of the old system become economically viable and are brought into the system until the former level of delay is restored. See Priest, Private Litigants and the Court Congestion Problem, 69 B.U.L. Rev. 527 (1989); Miller, Some Thoughts on the Equilibrium Hypothesis, 69 B.U.L. Rev. 561 (1989).

judges have developed techniques for rationing access to the court. Paradoxically, these resource saving devices require judges to become more involved at the pretrial stage, and it is thus debatable whether they in fact increase efficiency. In addition, the particular devices adopted raise questions about the fairness and the appearance of fairness of district court proceedings.

i. Case Management.

The most prominent response to concerns about the number of cases filed and the resultant costs has been for federal trial judges to become increasingly involved in "case management" during the pretrial phase.[44] This refers to a variety of techniques designed to narrow the issues for trial and increase pretrial terminations through settlement.[45] Managerial judging has received widespread support from the judiciary,[46] and is

43. This is the result of a Harris poll. L. Harris, Procedural Reform of the Civil Justice System 6 (1988).

44. See Costantino, "Judges as Case Managers," Trial 56-57 (March 1981); Peckham, The Federal Judge as a Case Manager: The New Role In Guiding A Case From Filing To Disposition, 69 Cal. L. Rev. 770, 771 (1981) [hereinafter Peckham, Case Manager]; Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253 (1985) [hereinafter Peckham, Cost of Litigation].

45. Peckham, Case Manager, supra note 44, at 772-73.

46. See authorities cited supra note 44; Schwarzer, Managing Civil Litigation: The Trial Judge's Role, 61 Judicature 401 (1978).

officially sanctioned in the 1983 amendments to Federal Rule of Civil Procedure 16 and in the Manual for Complex Litigation.

As described by Judge Robert Peckham, case management:

> entails two basic phases of pretrial planning. In the first phase, the pretrial activity is planned. The device the court uses in this phase is the status conference, at which the court and the parties identify issues and schedule a discovery cutoff date, pretrial motions, and the trial date, among other things. At the status conference, the trial judge can begin to introduce the possibility of settlement or any other alternative dispute resolution technique which might be suitable for the particular dispute. The second phase ... involves planning the trial itself. [T]he parties prepare pretrial statements and set out anticipated evidentiary objections in advance of trial.[47]

Active judicial involvement in the pretrial phase is a relatively recent phenomenon. This development was facilitated by the move to an individual calendar system under which judges are assigned complete responsibility for particular cases when they are filed.[48] Individual calendaring increases a judge's sense of control and responsibility for a case. More important, individual calendaring makes it possible to track each judge's disposition rates, and the resultant competition encourages judges to look for ways to improve their record.[49] Many courts facilitate this competition by issuing monthly "productivity"

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47. Peckham, Cost of Litigation, supra note 44, at 253-54 n.3.

48. Peckham, Cost of Litigation, supra note 44, at 257. Under the master calendar system, judges were not assigned responsibility for a case until the day of trial. Id; S. Flanders, Case Management and Court Management in the United States District Courts 13 (1977).

49. See Flanders, supra note 48, at 14 ("[i]f one purpose of the individual calendar system is to foster a spirit of competition with respect to disposition rates, it obviously has succeeded.")

reports on the number of cases pending, filed, and terminated by each judge.

Although the specific techniques employed by managerial judges vary widely,[50] they share certain well-defined goals: limiting the scope of discovery, narrowing the disputed issues with an eye towards eliminating as many as possible before trial, and -- most important -- encouraging settlement. We consider briefly some of the techniques used to achieve each of these goals.

Discovery is designed to "permit parties to develop fully their respective positions with relevant information and data, thereby increasing the likelihood of just outcomes."[51] But many judges believe that the parties frequently abuse discovery and that caseload pressures require them to take a firm hand in controlling it to keep down costs and expedite resolution of the case.[52]

The simplest way to limit discovery is to set explicit limits on the use of discovery devices and on the time available for discovery.[53] Scheduling orders -- now required in the

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50. Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306, 309 (1986).

51. Peckham, Cost of Litigation, supra note 44, at 256.

52. Peckham, Cost of Litigation, supra note 44, at 256; L. Harris, supra note 43, at 6. There is, in fact, little hard evidence to support the belief that discovery abuse is rampant.

53. See C. Seron, The Use of Standard Pretrial Procedures: An Assessment of Local Rule 235 of the Northern District of Georgia (1986); N. Weeks, District Court Implementation of Amended Federal Civil Rule 16: A Report on New Local Rules (1984).

majority of cases under Federal Rule of Civil Procedure 16(b) -- limit the amount of time for investigation and discovery with an eye toward saving time and money and narrowing the issues. Such orders force attorneys to make early predictions about which theories they can profitably pursue, and, if badly done, may substantially prejudice one of the parties. The enthusiasm of management advocates for scheduling orders is based on the assumption that judges can avoid such problems by familiarizing themselves with the facts and legal theories of a case.[54]

While control of the discovery process may simplify the proceedings, judges have also employed a variety of other tools to winnow the substantive issues. Some judges set firm and early trial dates to force attorneys to "establish proper priorities rather than pursue all potential arguments."[55] Many judges are more direct -- using pretrial conferences to "persuade" the parties to "dispose of the many immaterial or uncontested issues that arise at the outset of a typical lawsuit."[56] Forcing the parties to narrow the issues for trial reduces trial time by eliminating peripheral issues and focusing the issues that remain. In addition, case management advocates say that the process of narrowing the issues leads to the disposition of more cases through pretrial motions for summary judgment or judgment on the pleadings.

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54. Peckham, Cost of Litigation, supra note 44, at 262-68.

55. Peckham, Cost of Litigation, supra note 44, at 297 n.13.

56. Peckham, Case Manager, supra note 44, at 772, 786.

The central claim of the case management movement is that it encourages settlement.[57] Advocates of managerial judging claim that early and active judicial involvement ultimately saves court time by disposing of cases that would otherwise go to trial. Thus, the techniques described above of limiting discovery and forcing parties to narrow the issues are concerned at least indirectly with fostering settlement. But case management advocates also envision a direct role for the judge in actively encouraging the parties to settle. This role is now given official sanction in Federal Rule of Civil Procedure 16, which makes "the possibility of settlement" one of the topics that may be discussed at pretrial conferences.[58]

Although judicial methods of encouraging settlement vary widely -- one study described 71 different procedures a judge might employ[59] -- most judges agree that doing this effectively requires the judge to obtain a detailed knowledge of the parties' contentions, the facts in dispute, and the legal theories involved. Obtaining this knowledge may require the judge to meet with each side separately.[60] The judge can then use his

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57. Peckham, Case Manager, supra note 44, at 773; Schwarzer, supra note 46; H. Will, R. Merhige & A. Rubin, The Role of the Judge in the Settlement Process (1977).

58. Fed. R. Civ. Proc. 16(c)(7).

59. Schiller & Wall, Judicial Settlement Techniques, 5 Am. J. Trial Advoc. 39 (1981).

60. D. Marie Provine, Settlement Strategies for Federal District Judges 26 (Fed. Jud. Cent. 1986); Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. Chi. L. Rev. 337 (1986) (describing Judge Weinstein's meetings with lawyers in Agent Orange suit).

knowledge to "provide information needed to provoke a settlement. This usually involves throwing cold water' on the case, a reference to the fact that the information the judge imparts tends to inspire doubts about one's chances of prevailing at reasonable expense and within a reasonable time frame, or prevailing at all."[61]

The trend toward increasing judicial case management has been severely criticized. Many critics challenge the empirical claim that managerial judging increases efficiency and reduces costs.[62] Supporters of case management rely primarily on a 1977 study by the Federal Judicial Center that early judicial involvement speeds case termination.[63] What is missing, however, is evidence that judicial management is cost-effective.[64] As one

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61. Provine, supra note 60, at 25. Among the techniques Provine mentions for doing this are: "(1) Pointing out general problems of proof; (2) Reminding counsel that the case could go either way; (3) Discussing the probable length of the trial, the costs each party can expect to incur if the case goes to trial; (4) Emphasizing that 'skilled lawyers don't let unskilled jurors decide their fate'; (5) Asking defendants to outline their defenses; (6) Sharing their own views of the case and of defendant's exposure to liability based on recent jury verdicts in similar cases; (7) Asking parties for 'offers of proof' to expose weaknesses in their cases." For a case study of such techniques, see Schuck, supra note 60.

62. See, e.g., Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 417-24 (1982).

63. Flanders, supra note 48. Several other studies have reached the same conclusion. See, e.g., ABA Action Comm'n to Reduce Court Costs and Delay, Attacking Litigation Costs and Delay (1984).

64. Marie Provine evaluated four studies assessing the impact of judicial involvement in settlement and concluded that the evidence of whether "judicial energies devoted to settlement conferences pay off in terms of greater numbers of settlements or earlier settlements that demand less traditional pretrial processing" is inconclusive. Provine, supra note 60, at 38-40.

critic has noted, "the judge's time is the most expensive resource in the courthouse," and case-management requires relatively intense judicial involvement.[65] Because most cases are resolved without trial anyway,[66] judges may spend time managing cases that would have settled without the judge, and the result may be a net waste of judicial resources.[67] Furthermore, as noted above, shortening the time it takes to dispose of cases may simply increase the number of marginal cases filed.[68]

The focus on speed tells us nothing about the quality of the dispositions. We know very little, for instance, about whether the results in settled and adjudicated cases are comparable, and we have no measure with which to make such comparisons.[69] There is, to be sure, a persuasive argument in the law and economics literature, but also solidly grounded in common sense, that

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65. Resnik, supra note 61, at 423. Judge Peckham believes that critics, especially Professor Resnik, overestimate the amount of time judges actually spend on case management. Peckham, Cost of Litigation, supra note 44, at 267. He estimates that judges could "easily conduct all status conferences for a full caseload in one day per month." Id.

66. The vast majority of cases that are filed in the federal courts are terminated without trial. In 1988, only 5% of civil cases in the federal district courts were terminated "during or after trial." See 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-4. Provine notes that nearly a third of the cases are disposed of before even an answer is filed, with no action by a judge or magistrate. Provine, supra note 60, at 17.

67. See Galanter, The Quality of Settlements, 1988 J. Dispute Res. 56, 73.

68. See supra note 42.

69. Galanter, supra note 67, at 59-62.

resolving cases through settlement is superior to adjudication because it enables both sides to maximize their desired ends from litigating while minimizing the costs.[70] On this view, trials result from a breakdown in bargaining caused by excessive second-guessing by one party or a lack of information that keeps the parties from reaching comparable valuations of costs and benefits. But the validity of this model depends on unimpeded arms-length bargaining between the parties. The superiority of negotiated settlements becomes questionable when the judge enters the negotiations with his or her own agenda of docket clearing and distorts the bargaining process by threatening to impose additional costs on a party reluctant to agree to terms the judge thinks fair.

A second problem with case management is that it threatens both the fairness and the appearance of fairness of the judicial process. Judge Peckham maintains that case management poses no greater threat to the trial process than any of the pretrial motions to dismiss that have long been available:

> Admittedly, in limiting the scope of discovery, setting schedules, and narrowing issues, the [judge] restricts somewhat the attorneys' freedom to pursue their actions in an unfettered fashion and eliminates entirely some theories or lines of inquiry. Motions to dismiss some claims or for partial summary judgment similarly may result in the drastic alteration of the contours of litigation, yet we do not question the legitimacy of judges'deciding such motions.[71]

But while case management is in some sense a substitute for

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70. See F. Easterbrook, Judging and Contract in Consent Judgments, 1987 U. Chi. Legal Forum 19.

71. Peckham, Litigation Costs, supra note 44, at 262.

motions to dismiss or for partial summary judgment, there are significant differences. Most important, unlike motions to dismiss or for summary judgment, pretrial management decisions are made without any procedural safeguards. There are no standards for making these "managerial" decisions, the judge is not required to provide a "reasoned justification," and there is no appellate review.[72] Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed. This, in turn, promotes arbitrariness. One study asked judges to describe how they would manage a hypothetical case. The responses revealed dramatic differences in the way that different judges would have handled the same case:

> Based on her intuition that a case had little merit, one judge would have required thousands of plaintifffs to file individual, verified complaints -- a move that would have made it all but impossible for the plaintiffs' lawyer to pursue the case. On the other hand, another trial judge confronting exactly the same hypothetical case would have ordered defendants to create a multi-million dollar settlement fund.[73]

Furthermore, in managing cases, "judges frequently work beyond the public view [and] off the record...."[74] Case management presupposes a great deal of pretrial contact between the judge and the parties or their attorneys, and many judges

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72. Elliot, supra note 50, at 311; Resnik, supra note 61, at 378, 426.

73. Elliott, supra note 50, at 317. Other studies involving simulated negotiations have produced similar wide variations in results. See Galanter, supra note X, at 76-78.

74. Resnik, supra note 61, at 378.

meet with the parties individually in order to encourage settlement.[75] Even if not ex parte, such contacts may compromise the judge's impartiality by generating biases; exposing the judge to untested information, the effects of which can only be partially undone by later correction; and making judges feel that they have a stake in the outcome of the case.[76]

The non-public nature of the pretrial management process also raises concerns about coercion. Judicial pressure -- implicit and, unfortunately, sometimes explicit -- to accept the judge's conceptions of the proper amount of discovery or fair settlement value may be difficult to resist. This is true not only because of the absence of review, but also because many lawyers will feel pressure to maintain a good relationship with a judge who has so much unreviewable power and before whom the attorney may appear again.

We do not mean to suggest that all judges commit such abuses or that all forms of case management are undesirable. On the contrary, given existing caseloads, case management may produce the best judicial system we can realistically expect. The movement behind case management rests on the reasonable premise

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75. Resnik, supra note 61, at 425; see, e.g., Schuck, supra note 60 (noting that Judge Weinstein used separate meetings with the attorneys for each side to mold a settlement in the Agent Orange case).

76. Resnik, supra note 61, at 430. Recognizing the problems inherent in having a judge conduct settlement negotiations in a case he might try, some districts prohibit judges who participate in settlement negotiations from presiding at trial absent the parties' consent. See, e.g., Cal. Civil Rules Code §240-1 at 685 (1985).

that in a world of procedural scarcity, choices must be made about what judicial resources will be made available to which litigants. But the techniques of case management are a poor way to make these resource allocation decisions, for these techniques are too easily abused. Therefore, to the extent that case management is necessitated by caseload pressures, such abuses must be counted as a cost of the caseload growth. If the only way judges can manage their docket is to abandon public adjudication for a form of unregulated, semi-coercive mediation, we may need to reduce the docket or risk sacrificing the long-term goodwill of the federal judiciary.

ii. Alternative Dispute Resolution.

Becoming involved in the pretrial phase is not the only way in which district judges have attempted to handle their caseload. Trial judges have also encouraged the parties to resort to various methods of what has come to be known as "Alternative Dispute Resolution" (ADR). ADR encompasses a wide range of alternatives -- including arbitration, mediation, summary jury trials, and "mini" trials -- the distinguishing feature of which is the use of non-judges to promote settlement. While ADR has long been of interest to academics, its widespread use in the courts is a recent phenomenon and clearly a response to increasing caseload.

Arbitration. A number of federal district courts have long sponsored arbitration programs, and Congress recently authorized

up to twenty districts to experiment with court-annexed arbitration.[77] Half of these courts are authorized to require arbitration as a prerequisite for trial, while the other half is limited to offering voluntary arbitration.[78] Our discussion focuses primarily on the older arbitration programs, since these are the primary source of available data.[79]

Most existing federal arbitration programs automatically divert certain classes of cases to arbitration as a precondition to trial. The cases are defined by local rules, which generally limit the program to suits for damages below a particular amount.[80] After a relatively short period for discovery, the

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77. See 28 U.S.C. §§651-658; Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, 102 Stat. 4659.

78. The purpose is to generate data with which to judge the value of arbitration; the Federal Judicial Center is charged with evaluating the results. See Pub. L. 100-702, §903(b). In addition, Duke University has been conducting court-annexed arbitration for the Middle District of North Carolina through the Center for Private Adjudication, and an evaluation of the Center's work is nearing completion. A status report on that program after two years found no "strong effect in favor of [speedier terminations] through arbitration." The report also found that arbitration hearings took substantial time, averaging 8 hours, but that the data did not permit any conclusions about whether arbitration decreased the costs of litigation. These findings were only tentative. See Lind, Draft Status Report to the Court: Current Findings of Research in the Program for Court-Annexed Arbitration in the Middle District of North Carolina (Oct. 1987), reprinted in Court Reform and Access to Justice Act, 1988: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 100th Cong., 1st and 2d Sess. 1458, 1460 (1988).

79. These programs are described in E. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Fed. Jud. Cent. 1983); Provine, supra note 60, at 44-51.

80. This dollar ceiling is now fixed by legislation. 28 U.S.C. §652(a)(1)(B) allows courts in which arbitration is compulsory to order arbitration in any civil action for damages of less than $100,000, except that courts that were already using ceilings of

case is heard by one to three attorneys serving as arbitrators. Although the proceedings are adversarial, they are less formal than adjudication and generally do not last long.[81] The lawyers may present witnesses and documentary evidence. The arbitrators substitute for the judge and are supposed to assess liability under prevailing legal principles. Most local rules require the arbitrators to render a decision within 10 to 20 days. This decision is final unless one of the parties demands a trial de novo within 30 days.[82] The parties may always demand a trial, but if they do not improve on the arbitral award the arbitrator's fees are taxed as costs.[83]

Mediation. Twenty-nine districts offer or require some form of court-sponsored mediation. Mediation is a species of informal arbitration that typically involves a settlement conference conducted by neutral attorneys.[84] The primary difference between mediation and arbitration is in the nature of the evaluation: "Whereas arbitration procedures are designed to examine the merits of a controversy as a court would, in terms of liability and damages, mediation ... tends to be more flexible. It can be used as a mechanism for affixing a settlement value to a case, or

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$150,000 may continue to do so.

81. Provine, supra note 60, at 106. A study conducted by the Federal Judicial Center found that the hearings averaged from 1 to 3 hours. Lind & Shapard, supra note 79, at 53.

82. 28 U.S.C. §654.

83. 28 U.S.C. §655(d).

84. Provine, supra note 60, at 51-57.

for litigation planning, or as a forum for exploring a broad range of settlement alternatives...."[85]

Some courts, like the Eastern and Western Districts of Michigan, use mediation programs to provide litigants with an inexpensive, neutral third-party evaluation of their claims.[86] These programs are mediation "in name only" since "little effort is made to negotiate differences between parties."[87] The evaluation becomes a final award unless rejected by one side, and as with court-annexed arbitration, a party risks a penalty in going to trial -- here, payment of the other side's costs incurred in preparing for trial.[88] Other districts employ more negotiation-oriented mediation programs. The Northern District of California, for example, requires the parties to accompany their lawyers to conferences, and uses these conferences to "prob[e] strengths and weaknesses in the contentions of the parties, suggest[] possible stipulations to reduce the scope of the dispute, and urg[e] economy in discovery and motion practice."[89] This program is explicitly designed to contain costs, and the lawyer-hosted conference is held early in the case in order "to move cases more quickly ... into a posture conducive to settlement."[90]

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85. Provine, supra note 60, at 57.

86. Provine, supra note 60, at 54.

87. Provine, supra note 60, at 54.

88. This penalty is rarely imposed in practice. Provine, supra note 60, at 55.

89. Provine, supra note 60, at 55.

Summary Jury Trial. As its name suggests, the summary jury trial is a trial before a jury, drawn from the regular venire, in which the attorneys summarize the evidence they would present at an ordinary trial and make their arguments. The jurors then deliberate, and render an advisory verdict.[91] While this verdict is not binding, the procedure is compulsory in many courts.

Summary jury trial encourages settlement by giving the parties an actual jury's appraisal of their case. In addition, it encourages settlement indirectly by adding significantly to the cost of pursuing the litigation: lawyers must devote substantial time to preparing for the summary trial, which may lead to some settlements before the summary trial occurs and certainly discourages those who go through the procedure from retrying their case before an actual jury.[92]

"Mini" trials. As described by one commentator:

> the minitrial has no fixed or certain form. The only essential characteristics are a summary presentation of the case before the key decision makers for either side, with a third party present to facilitate this process, and the opportunity for the decision makers to retire together privately after the presentation to discuss settlement.[93]

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90. Peckham, Cost of Litigation, supra note 44, at 276.

91. The jurors usually are not told that their verdict is advisory until after they finish deliberating, the theory being that this device will successfully encourage settlements only if it is realistic, and the jurors may not take the job seriously if they know their verdict is only advisory. Judge Posner has questioned this practice, emphasizing the questionable authority of courts to compel juror service in aid of settlement and the possible consequences of deceiving jurors on the public's belief in the legitimacy of the trial process. Posner, Summary Jury Trials, 53 U. Chi. L. Rev. 366, 385-87 (1986).

92. Provine, supra note 60, at 71.

The minitrial is ordinarily a private, voluntary proceeding that federal courts have only recently begun to incorporate into their arsenal of devices to encourage settlement. The "core concept" of the minitrial is "presenting the dispute to the parties themselves and allowing them a chance to discuss what they have seen and heard."[94] Its aim is to "reconvert a lawyer's dispute back into a businessman's problem by removing many of the legalistic, collateral issues in a case."[95] Its use in the federal courts is presently limited, but several judges have helped arrange or presided over minitrials,[96] and one federal judge is on record as having said that the "potential for the use of mini-trials within the judicial system in appropriate cases [generally high-stakes commercial litigation] is enormous."[97]

ADR enthusiasts claim that ADR reduces court congestion by diverting cases from the trial calendar, thereby saving judicial resources, without imposing significant costs. There is, however, little empirical evidence to support these claims,[98] and a number of commentators have argued persuasively that ADR may

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93. Provine, supra note 60, at 77.

94. Provine, supra note 60, at 77.

95. Peckham, Cost of Litigation, supra note 44, at 272.

96. Provine, supra note 60, at 78.

97. Peckham, Cost of Litigation, supra note 44, at 271.

98. See, e.g., Gallagher, The Transformation of Justice: Hofrichter's Neighborhood and Harrington's Shadow Justice, 13 Law & Social Inquiry 133, 134 (1988)(collecting studies); Posner, supra note 91, at 382.

actually invite more litigation by raising the effective stakes of litigating and by depriving potential litigants of authoritative decisions.[99] There is similarly little support for the claim that ADR is less costly, and in the case of mandatory ADR, like the compulsory arbitration and mediation programs, the claim is counter-intuitive: because such a large percentage of cases will end without trial anyway, subjecting many of these cases to compulsory procedures may entail an overinvestment of resources.

On the other hand, it seems quite likely that ADR encourages settlement. Court-sponsored settlement mechanisms increase the cost of trial by imposing an additional layer of procedures that demand attorney time and further expenditures and delay. In other words, ADR itself is an additional transaction cost that must be figured into the cost of litigation, and increasing the costs of litigating undoubtedly produces more settlements.[100]

The question is whether this is an advantage. Imposing additional procedural barriers that facilitate settlement by making it too expensive to get to trial is not likely to enhance the reputation of the federal courts as a place to seek justice. Not that ADR is an unqualified evil or an irrational solution to the heavy caseload. But, as with case management, if

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99. See Posner, supra note 91, at 388; Priest, supra note 42; Miller, supra note 42.

100. Of course, ADR undoubtedly helps facilitate some settlements by showing the parties the sense of settling their dispute. In most cases, however, the parties have adequate incentives to pursue good faith negotiations, and the efficiency of additional court ordered mechanisms is questionable.

the courts can cope with their caseload only by making trials more difficult to obtain, then it may be time to search for ways to reduce the caseload.

The effects of the procedural changes wrought by case management and ADR may be subtle. They may not be felt in every case. But this does not mean that they are not cause for concern, for we must also consider their possible long-term effects on the public's perception of the fairness of the federal judiciary. The cumulation of many small doubts can be devastating.

iii. Use of Parajudicial Personnel.

Another way to ease workload pressures is to delegate work to others, and district judges utilize a variety of parajudicial personnel, including law clerks, magistrates, special masters interns and externs. But while persons in these positions have legitimate functions to perform, their proliferation raises two concerns.

First, are judges being forced by caseload pressures to delegate too many of their judicial responsibilities to employees? While we have no objective measure of how much is too much, the survey responses indicate that the judges themselves believe they are forced to rely on others too much. Since the most common form of delegation is to have law clerks draft opinions, this is an important concern.[101]

Second, are there patterns in the work being delegated that

are cause for concern? For example, in 1979 Congress expanded the jurisdiction of magistrates in order to "improve access to the federal courts."[102] Studies of magistrates' duties in the trial courts suggest that they are used chiefly to process social security and prisoners' cases,[103] giving rise to charges that these cases are treated as intrinsically unworthy.[104] Lawyers see magistrates as specialists in these areas, and have generally reacted favorably to this specialization.[105] But the specialized use of magistrates may have consequences for litigants, who might wonder why their cases are unworthy of the attention of the judge.

2. The Courts of Appeals.

The judges of the courts of appeals have responded to

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101. The concerns raised by allowing clerks to write opinions are discussed at length in the section on the courts of appeals, *infra* notes 107-123 and accompanying text.

102. Federal Magistrates Act of 1979, 93 Stat. 643, amending 28 U.S.C. §§604, 631, 633-36, 1915(b), 18 U.S.C. §3401.

103. C. Seron, *The Roles of Magistrates: Nine Case Studies* 83-92 (1985) [hereinafter Seron, *Nine Case Studies*]; C. Seron, *The Roles of Magistrates in Federal District Courts* 16 (1983). *See also Civil Case Backlogs in Federal District Courts: Hearings before the Subcomm. on Courts, Senate Judiciary Comm.*, 98th Congress, 1st and 2d Sess. 116 (1983 and 1984)(statement of David Bagwell).

104. *See, e.g., The State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciart*, 95th Congress, 1st Sess 106 (1977)(statement of Rep. Kastenmeir); *id.* at 123 (statement of Burt Neuborne).

105. Seron, *Nine Case Studies*, *supra* note 103, at 91-92.

increases in their caseload in two ways. First, the judges ration the time spent learning about the cases by limiting or eliminating oral argument and by relying more on staff attorneys and law clerks to provide information. Second, the judges ration the time needed to dispose of the cases by holding fewer and shorter conferences, deciding cases without opinions or with summary orders not intended for publication, and delegating research and opinion-writing to clerks and staff. These strategies have provoked a great deal of criticism from academics, lawyers, and even some judges.[106] We describe these developments and the criticisms they have elicited below.

In addition, to get a better sense of developments in the courts of appeals, we also surveyed the federal appellate judges, including the senior judges. We received responses from 74% of the active judges and 58% of the senior judges. Because the judges' perceptions sometimes diverge from those of their critics in interesting ways, these responses are integrated into the discussion of appellate responses to the caseload growth.

a. The Growth of the Appellate Bureaucracy.

Because the number of appellate judges has not kept pace with caseload growth,[107] the courts of appeals have begun

106. See Richman & Reynolds, Appellate Justice Bureaucracy and Scholarship, 21 U. Mich. J. Law Reform 623, 624-25 (1988)(collecting articles).

107. Problems with making the courts of appeals larger are discussed infra in Part II. The judges were divided on the question of whether to appoint more judges. Our survey asked,

increasingly to rely on law clerks and staff attorneys. Court of appeals judges may now hire three law clerks, except for chief judges, who may hire four. In addition, under guidelines adopted by the Judicial Conference, the courts of appeals are authorized to hire as many staff attorneys as there are active judges in the circuit.[108] In fact, this number has been exceeded in all but two circuits.[109]

i. The Work of Law Clerks and Staff Attorneys.

"[i]f you could choose between adding judges to your court as the caseload grows and not adding judges (notwithstanding the growth in caseload), what would you do?" The responses were:

response	%(number)
I would add judges	52.23 (82)
I would resist adding judges, even if my own share of the caseload increases significantly	33.12 (52)
I would resist adding judges, even if the backlog increases	10.83 (17)
No response	3.82 (6)

We regard this 44% opposition as especially significant given that the question did not offer any alternatives to ease workload pressures.

108. Report of the Proceedings of the Judicial Conference of the United States 69 (1981); Office of Planning and Evaluation, Survey of the Staff Attorneys' Offices of the United States Courts of Appeals 3-4 (1989) [hereinafter Staff Attorneys Offices]. At the beginning of 1989, there were 162 staff attorneys in the courts of appeals. Id. at 6.

109. In every circuit but the Eleventh and the District of Columbia, the courts have supplemented their central staff resources either by some judges donating one or more of their law clerk positions to the staff attorneys' office or by hiring attorneys to fill positions in the clerk's office. Staff Attorneys Offices, supra note 108, at 7-8.

The position of law clerk was created so that judges could hire recent law school graduates who would bring fresh insights and provide a sounding board for the judge's ideas. Their proliferation, dubbed the "rise of the law clerk" by Judge Posner, gives rise to several concerns, most relating to the fact that clerks rather than judges are drafting opinions.[110] Opinions written by clerks are longer and more opaque and provide less useful information than opinions written by judges.[111] Clerks tend to reinvent the law in each case, often unknowingly making changes that generate unnecessary confusion and uncertainty. In addition, opinions known to be authored by clerks rather than judges may (and perhaps should) be viewed as less authoritative than those written by judges.[112]

Staff attorneys' offices vary widely in size and in function. Some offices, such as the one in the Ninth Circuit, are so large that they have specialized divisions.[113] Other

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110. R. Posner, The Federal Courts: Crisis and Reform 102 (1985).

111. R. Posner, supra note 110, at 103-11.

112. Vining, Justice, Bureaucracy, and Legal Method, 80 Mich. L. Rev. 248, 253 (1981)

113. "The Ninth Circuit office has two motions units: a criminal unit, composed of a supervisor and three or four line attorneys, which handled motions associated with direct criminal appeals, habeas corpus petitions brought by state or federal prisoners, prisoner civil rights cases and recalcitrant witness appeals; and, a civil motions unit, composed of a supervisor and seven to eight line attorneys, which processed all other motions. There were three research divisions each with a division chief and four to five line attorneys. The attorneys in the reseach divisions prepared memoranda on the merits of the appeal for presentation to the panel. In addition, the Ninth

offices assign specialized functions to particular attorneys.[114] In most circuits, staff attorneys screen cases for oral argument.[115] In some circuits, staff attorneys also draft memorandum opinions in cases decided without argument.[116]

The use of staff attorneys to screen cases and draft opinions has engendered surprisingly intense criticism.[117] Staff attorneys, the critics note, do not work consistently with any particular judge. Lacking intimate and consistent contact, they have a less focused sense of responsibility for the decisions they make and "are unable to acquire enough of [any] individual judge's outlook and values to function as his alter ego in the drafting process."[118] Other critics suggest that shifting work

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Circuit's staff attorneys' office had assigned three attorneys to hold pre-briefing and pre-argument conferences on all fully-counseled civil appeals." Staff Attorney Offices, supra note 108, at 13-14.

114. For example, several circuits have attorneys handle substantive motions filed in connection with appeals. Staff Attorney Offices, supra note 108, at 14.

115. Each circuit had slightly different procedures. In some circuits, the staff attorneys recommend both whether there should be oral argument and if so how long that argument should be. See J. Cecil and D. Stienstra, Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals, 12-16 (1985)(hereinafter Deciding Cases I).

116. See Deciding Cases I, supra note 115, at 12-16 (eight circuits allow staff attorneys to participate in drafting opinions).

117. See, e.g., McCree, Bureaucratic Justice -- An Early Warning, 129 Pa. L. Rev. 777, 787 (1981)(growth of central staff "cancerous"); Fiss, Bureaucratization of the Judiciary, 92 Yale L.J. 1442, 1467 (1983)(recommending abolition of staff attorney positions).

118. Richman & Reynolds, supra note 106, at 629.

to staff attorneys has a negative effect on judges. For example, one commentator has argued that allowing staff attorneys to screen cases "tends to insulate judges from the ebb and flow of the law and the full impact of the grievances presented."[119] More important, cases selected by staff attorneys for decision without oral argument are automatically placed on a different decision track where they receive limited attention from judges. "Thus, the most damning critique of central staff screening is that it creates the possibility that the real decision-makers will not be a group of publicly chosen and accountable judges, but rather a group of legal bureaucrats unknown to the bar and the public."[120] For this reason, the Commission on Revision of the Federal Court Appellate System recommended that central staff attorneys not be given responsibility for screening cases for disposition without oral argument.[121]

ii. Judges Perceptions of the Appellate Bureaucracy.

We asked appellate judges a number of questions about the work they delegate to clerks and central staff. Because there

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119. Fiss, supra note 117, at 1467.

120. Richman & Reynolds, supra note 106, at 629.

121. See Commission on the Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 53-54 (1975) [hereinafter Revision Commission].

are no objective definitions of what kind of work should or should not be delegated, we posed questions designed to make the judges define the proper boundaries of delegation. Thus, judges were asked how frequently they must rely on law clerks to do things "that [the judges] believe [they] should do themselves." Judges who responded that they were forced to rely on their clerks were then asked to describe the work they were forced to delegate. The responses are reported in Tables 8 and 9:

Table 8: Reliance on Clerks to Do Work Judges Believe They Should Do Themselves.

response	%(number)
Never:	11.46% (18)
Almost Never:	23.57% (37)
Sometimes:	31.85% (50)
Often:	25.11% (41)
Usually:	5.73% (9)
No response	1.27% (2)

Table 9: Descriptions of Work Judges Delegate to Law Clerks.

type of work	number[122]
Drafting opinions:	62
Research:	57
Reviewing the record:	44
Reviewing petitions for rehearing:	5
Reading briefs:	4
Cite Checking:	6
Motions:	2
Bench memos/review of bench memos:	2
Editing:	2
Work on time-sensitive cases (extraordinary writs death penalty):	2
Reading court's opinions:	2
Reading cases to prepare for argument:	2
Reading court's unpublished opinions:	1

122. 113 judges responded with written comments.

As Table 8 indicates, 63% of respondents rely on their clerks to do at least some work they believe they should do themselves, and 30% do so "often" or "usually." Fortunately, many of the judges took the opportunity to describe the work they delegate. The variety of responses in Table 9 suggests that judges have different beliefs about what kind of work is essential. Some judges are apparently uncomfortable relying on their law clerks even for so trivial a task as citechecking. But three particular tasks were mentioned most frequently, and excessive delegation of these is indeed problematic, since they represent the core of responsible appellate decisionmaking: opinion drafting, research, and reading the trial or administrative record.

Responses to other questions confirmed the important role of clerks in drafting opinions. In response to a question about opinion writing, for example, only 9% of the judges report that they prepare first drafts in all cases. A substantial majority of 73% admit preparing first drafts in only some cases, and 13% of the judges said that they never prepare first drafts. In light of considerable anecdotal evidence, we suspect that many judges may have been less than completely candid and that these figures understate the full extent to which appellate judges rely on clerks for opinion drafting.

Many judges blamed the need to delegate opinion writing to clerks on caseload pressures:

"In this circuit, a judge has to turn out 150

opinions a year to stay current. It is not possible to do that without excessive reliance on the law clerks."

"Keeping current with the docket has to be a high priority for any judge. I am unable to keep my work current if I read the records and do the writing and take time for thinking in those cases where it is needed. I spend time moving mail with little decisions (protecting the law clerks from being interrupted) and editing the work of clerks."

Many of the judges also complained about having to rely on clerks' interpretations of precedents in making and supporting their decisions. Several judges described the delegated work as "research essential to a conclusion," and judges frequently mentioned having to rely on law clerks to read the trial or administrative record:

"Sometimes I rely on a law clerk's reading of cases when I am pressed."

"I am now forced to rely on my clerks for record examination and for research I would prefer to conduct myself. In the past I would draft all written materials. I now find that I am obliged to 'plug in' memoranda or research that the clerks conducted."

"I use my clerks for reading and summarizing precedents that I must rely on without always having time to read the cases myself."

As the results in Tables 10-12 suggest, judges are less troubled by the role of staff attorneys than by their reliance on law clerks. Only 5% of respondents believe they "often" or "usually" rely on central staff to do work they should do themselves, although almost 20% depend on staff to draft opinions in non-argued cases.

Table 10: Reliance on Staff Attorneys to Do Work Judges Believe

They Should Do Themselves.

response	%(number)
Never:	8.28 (13)
Almost Never:	47.13 (74)
Sometimes:	33.76 (53)
Often:	4.46 (7)
Usually:	.64 (1)
No Response:	5.73 (9)

Table 11: Descriptions of Work Judges Delegate to Staff Attorneys.

type of work	number[123]
Reading/checking record:	19
Drafting opinions/orders:	18
Motions:	13
Research:	11
Pro se and prisoner petitions	8
Administrative:	4
Jurisdictional issues:	4
Screening:	3
Bench Memos:	3
"Case development work":	1

Table 12: Descriptions of How Judges Handle Non-Argued Cases.

In non-argued cases:	% (number)
I rely on the staff draft opinion greatly:	19.75 (31)
I almost always go through the record and law thoroughly myself:	27.39 (43)
I sometimes go through the record and law thoroughly myself:	30.57 (48)
My law clerks usually go through the record and law for me:	12.74 (20)
No response:	9.55 (15)

b. Oral Argument.

123. 61 judges responded with written comments.

In 1975, the Commission on the Revision of the Federal Court Appellate System recommended allowing appellate courts to limit oral argument, with a cautionary note against the "too ready ... denial of the opportunity orally to present a litigant's cause."[124] Federal Rule of Appellate Procedure 34(a) gives the courts of appeals this authority in certain classes of cases,[125] and these courts have used this rule to great effect. As Table 13 illustrates, only half of the courts of appeals hear argument in as many as half of the cases they decide on the merits. Moreover, oral arguments are not only less frequent, they are also shorter. Some courts routinely grant less than fifteen minutes of argument per side.[126]

Table 13: Cases Disposed of Without Argument (1986).[127]

Court	Number Appeals	Number Without Argument	Percent Without Argument
All	18,199	8,306	46%
D.C.	707	309	44

124. Revision Commission, supra note 121, at 46-48.

125. Rule 34(a) provides that "oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues have been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be signficantly aided by oral argument."

126. P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 16-17 (1976).

127. From: J. Cecil & D. Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeals 20 (1987)(hereinafter Deciding Cases II). The figures are limited to cases decided on the merits.

1st	565	201	36
2nd	1,214	230	19
3rd	1,284	717	56
4th	1,743	874	50
5th	2,092	1,330	64
6th	1,793	723	40
7th	1,236	391	32
8th	1,314	660	50
9th	2,636	976	37
10th	1,179	644	55
11th	2,436	1,251	51

Table 14 breaks these figures down further, describing changes in the frequency of oral argument over time and in different kinds of cases.

Table 14: Changes over Time and by Type of Case in Percent of Cases Decided Without Argument[128]

Type of Appeal	1978	1981	1984	1986
All	33%	29%	36%	46%
All Civil	35	32	38	49
Contract Actions	29	25	28	31
Antitrust/Securities	10	13	16	23
Civil Rights	31	30	36	44
Prisoner Petitions	56	54	64	77
Social Security	61	44	50	60

As Table 14 illustrates, argument rates vary considerably over time and across subject-matter. Appeals in some areas, like antitrust or securities law, are almost always argued. By contrast, challenges to INS orders and social security determinations are heard orally less than half the time.[129]

128. From: Deciding Appeals II, supra note 127, at 26.

Prisoner petitions, always among the cases least likely to be heard orally, have grown increasingly unpopular over the last decade.

The number of appeals in which argument is heard also varies by court. For example, one study found that in the First, Fourth, Sixth, and Tenth Circuits a much lower percentage of criminal appeals than civil appeals are decided without argument, while in the Third, Fifth, and Eleventh Circuits a high percentage of both civil and criminal appeals are disposed of without argument.[130]

Cases that are not argued are affirmed at a greater rate and are much less likely to be decided with a published opinion than cases in which the court hears oral argument.[131]

i. The Value of Oral Argument.

The most important function of oral argument is to inform

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129. The pattern of oral argument in social security cases is noteworthy in that it reflects substantive developments in the field. As discussed in our recommendations for the Social Security Disability Claims process, there was a struggle between the Social Security Administration and the federal courts in the early 1980s, and in this period the courts of appeals heard oral argument in a much larger percentage of these cases. By 1986, the controversy had been largely resolved, and the percentage of social security cases heard orally resumed its former level.

130. See Deciding Cases II, supra note 127.

131. See Deciding Cases II, supra note 127, at 30. The Third Circuit, whose judges do not rely on staff attorneys to screen cases for oral argument had the highest affirmance rate of nonargued appeals (91%) and the greatest difference between nonargued and argued cases (30%).

judges about the issues, and especially about the facts, in the cases before them. But judges "also rely on oral argument to demonstrate to the parties that the members of a panel have attended to the issues raised on appeal, to permit interaction with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court's responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other's views."[132] The absence of oral argument reduces the judges' involvement in a case, makes judges less visible to litigants, and generally decreases the accountability of the appellate process. When a case is not argued, the judges are less likely to meet to discuss the case together.[133]

In practice, certain categories of cases are much less likely to be heard on appeal. Screening programs typically target social security and prisoner petitions as suitable for decision without argument.[134] The choice of these cases may be perfectly rational, but as with the similar selectivity in the

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132. Deciding Cases I, supra note 115, at 160.

133. Judges are sensitive to these concerns and different courts have adopted various methods of dealing with the problem of conferencing nonargued cases. See Deciding Cases I, supra note 115, at 33-37.

134. In the Fifth Circuit, for instance, staff attorneys responsible for the initial determination whether to recommend argument routinely screen prisoner cases with and without counsel, §2255 cases with and without counsel, civil cases in which the United States is appellee (e.g., federal tort claims act cases, bankruptcy cases, and [federal] agency cases other than tax cases), civil rights cases other than Title VII cases, and Social Security cases. Deciding Cases I, supra note 115, at 23.

use of case management and ADR in the district courts, this seemingly rational strategy may pose long-term risks to the courts. This is particularly true in that the same classes of cases are also singled out in the trial courts, possibly reinforcing these litigants' sense of not getting a fair hearing.

ii. Judges' Perceptions of Oral Argument.

While most judges find oral argument helpful, they disagree with critics who say it is being denied in too many cases. The judges who responded to our survey are generally satisfied with the practice in their courts, notwithstanding (or perhaps because of) variations in practice from court to court. Moreover, the judges believe that they almost always afford argument in cases that need it:

Table 15: Frequency of Cases Decided Without Oral Argument That Could Benefit From It.

response	% (number)
Never	45.86 (72)
Almost Never	33.12 (52)
Sometimes	16.56 (26)
Often	3.82 (6)
Usually	0.00 (0)
No response	.64 (1)

Table 16: Judges' Impressions of Oral Argument.

a. In my court, oral argument is often:	%(number)
too short	7.01 (11)
about right	79.62 (125)

too long	12.10	(19)
no response	.64	(1)

b. I find oral argument:

	%(number)	
very helpful	28.03	(44)
often helpful	59.24	(93)
rarely helpful	11.46	(18)
no response	1.27	(2)

c. Published Opinions.

Every federal appellate court has adopted rules limiting the publication of opinions, and as Table 17 illustrates only four circuits publish even half their decisions on the merits.[135] Limiting publication is entirely a response to caseload, and was instituted on the ground that a significant amount of time could be saved if the court limits itself to a short statement suitable for the parties without having to prepare a careful exposition of the law. In fact, preparing opinions for publication is time consuming, and one study concluded that of the efficiency related devices adopted by appeals courts, limited publication has been the most effective.[136]

Table 17: Publication of Appellate Decisions (1985-1987).[137]

135. See also D. Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals 40 (Fed. Jud. Cent. 1985).

136. Marvell & Moody, The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output, 21 Mich. J. Law Ref. 415 (1988)

137. Figures include only cases decided on the merits.

Circuit	Decisions	Number Unpublished	Percent Unpublished
All			
1985	16,130	9,522	59.0
1986	17,643	10,526	59.7
1987	17,955	10,957	61.0
First			
1985	561	224	39.9
1986	549	217	39.5
1987	636	240	37.7
Second			
1985	1,248	715	57.3
1986	1,185	672	56.7
1987	1,182	623	52.7
Third			
1985	1,372	940	68.5
1986	1,264	888	70.3
1987	1,177	819	69.6
Fourth			
1985	1,535	1,191	77.6
1986	1,728	1,340	77.5
1987	1,675	1,343	80.2
Fifth			
1985	1,976	1,091	55.2
1986	2,000	1,086	54.3
1987	2,123	1,223	57.6
Sixth			
1985	1,756	1,242	70.7
1986	1.758	1,292	73.5
1987	2,177	1,689	77.6
Seventh			
1985	1,130	545	48.2
1986	1,216	442	36.3
1987	1,114	381	34.2
Eighth			

1985	1,263	423	34.2
1986	1,274	623	48.9
1987	1,366	694	50.8
Ninth			
1985	2,087	1,315	63.0
1986	2,529	1,545	61.1
1987	2,473	1,492	60.3
Tenth			
1985	909	555	61.1
1986	1,076	637	59.2
1987	1,142	702	61.5
Eleventh			
1985	1,832	1,076	58.7
1986	2,379	1,406	59.1
1987	1,966	1,175	59.8
D.C.			
1985	488	205	42.0
1986	685	386	56.4
1987	924	576	62.3

The idea that not all decisions require a published opinion reflects the belief that appellate opinions serve essentially two functions: to resolve particular disputes between litigants and to clarify or redefine the law in some manner.[138] A short opinion that informs the parties of the outcome is therefore sufficient in cases that involve only the routine application of

138. Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573, 579 (1981); Reynolds & Richman, The Non-Precedential Precedent: Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978) [hereinafter Reynolds & Richman, Non-Precedential Precedent]; Leflar, Some Observations Concerning Judicial Opinions, 61 Colum.L. Rev.. 810 (1961); Advisory Council on Appellate Justice, Standards for Publication of Judicial Opinions 2-3 (1975).

settled doctrine. Of course appellate opinions serve a variety of other purposes, such as supervising the lower courts and providing a mechanism for observers to keep track of how well an agency is administering a statute. But limited publication plans subordinate these interests on the assumption that there is less need to publish opinions that serve no lawmaking function.[139]

Limited publication does not mean no opinion at all. An opinion is still written in every case, but time is saved because the judge can write a less elaborate, less careful opinion. For this reason, the courts try to discourage lawyers from using these opinions by circumscribing their distribution and saying that they cannot be cited.[140] This ban on citation is intended to make these less carefully drafted, unpublished opinions "disappear from the landscape, leaving no precedential trace behind."[141]

i. The Values of Publication.

The most frequent criticism of the limited publication plans

139. Most publication plans allow publication when a case that serves no lawmaking function is particularly newsworthy. See, e.g., D.C. Cir. Rule 14(b)(7).

140. In most circuits, the unpublished opinions are distributed only to the parties and the lower court judge whose decision was reviewed. Stienstra, supra note 135, at 21. In only six circuits are they circulated to the other judges on the court of appeals. Id. at 20.

141. See Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals 87 Mich. L. Rev. 946.

is that they reduce judicial accountability. The giving of reasons for the exercise of judicial power is the quintessential feature of the appellate process. Yet one study of unpublished opinions found that "in nine of the eleven circuits, at least twenty percent of the unpublished opinions failed to satisfy a very undemanding definition of minimum standards; in three circuits, sixty percent of the opinions failed to satisfy minimum standards."[142] In these circuits, the unpublished opinions often did not give parties any reasons for the outcome in their appeal.

Nonpublication makes it difficult to evaluate judges' work; indeed, it makes their work largely invisible. As such, it is especially troublesome in cases that are decided without the benefit of oral argument either.[143] In these cases, the parties can have little assurance that the judges gave their arguments fair consideration. In addition, nonpublication often conceals intra-court disagreements that may be quite important to other parties. Some courts, for example, frequently fail to publish reversals of lower court decisions or decisions in which there are concurrences or dissents.[144] Consequently, unpublished

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142. Reynolds & Richman, Appellate Justice, supra note 106, at 634.

143. In 1984, for example, the Third Circuit decided 52% of its cases without either oral argument or a published opinion.

144. According to data published by the Administrative Office, in 1984 the Third Circuit did not publish 25% of the cases in which the court below was reversed, and 25% of the cases in which there was a dissent; the Fourth Circuit left 35.7% of its reversals unpublished; and the Sixth Circuit left 41.1 % of its reversals and 21.2% of its dissents unpublished. The Seventh Circuit, by contrast, published all but 7 opinions in which a concurrence or a dissent was written.

opinions may mask significant disagreements in a court, making it more difficult for lawyers to discern trends that could be quite important in advising clients.[145]

The increase in unpublished opinions has also created a body of what two commentators called "nonprecedential precedent."[146] The Commission on the Revision of the Federal Courts expressed concern when it recommended limited publication that this might benefit litigants who appear frequently before a court and who might therefore be more familiar with that court's unpublished opinions.[147] For example, the federal government is always a party in certain cases and always receives the court's unpublished decisions in those cases. The courts sought to counter this problem by adopting limits on the citation of unpublished opinions, but a study of government lawyers found that these no-citation rules have not prevented the government from taking advantage of its superior access.[148] The government (and presumably other recurrent litigants) is still able to use these opinions to make tactical decisions, frame arguments, and decide which is the strongest case in which to take an appeal. In addition, government lawyers review unpublished opinions with

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145. See Robel, supra note 141, at 948-55 (discussing Ninth Circuits unpublished opinions).

146. See Richman & Reynolds, Non-Precedential Precedent, supra note 138.

147. See, e.g., 2 Hearings Before the Comm'n. on Revision of the Federal Court Appellate System, 94th Cong. 2d Sess. 1072 (1975)(testimony of Robert Stern). See generally Robel, supra note 141, at 945-946.

148. Robel, supra note 141, at 955-959.

an eye toward making motions to have favorable ones published. Since these motions are routinely granted, the government is able to get a significant leg-up in future litigation.[149]

Finally, like limited oral argument, limited publication does not affect all litigants equally. As shown in Table 18, some categories of appeals -- particularly those involving aliens, prisoners, and social security claimants -- are decided by published opinions only infrequently. Combining publication figures with figures for oral argument underscores the "second-class" citizenship of these cases in the judicial process,[150] an inference that is further reinforced by the fact that these are the cases most frequently singled out for special treatment in the district court.

Table 18: Terminations by Subject Matter (1984).

	Published Argued	Unpublished Argued	Published Nonargued	Unpublished Nonargued
NLRB	57%	32%	2%	9%
LMRA	37%	30%	13%	20%
ERISA	57%	24%	2%	17%
INS	11%	29%	5%	55%
Securities	56%	28%	2%	14%
Antitrust	71%	19%	3%	7%

149. Robel, supra note 141, at 958. This study found that in 1982, the Seventh Circuit published thirty previously-unpublished opinions, 73% of which were favorable to the government.

150. See also Songer, Smith & Sheehan, Nonpublication in the Eleventh Circuit: An Empirical Analysis 16 Fla. St. U. L. Rev. 963, 980-984 (1989)

Employment Discrimination	39%	30%	5%	26%
Social Security	17%	30%	5%	48%
Habeas Corpus	29%	20%	8%	43%
Prisoner Civil Rights	17%	10%	6%	68%

ii. Judges Perceptions of the Publication Rules.

As Tables 19 and 20 suggest, federal appellate judges tend to believe that they spend appropriate amounts of time working on opinions and that they publish the most appropriate ones.

Table 19: Frequency With Which Opinions for Publication Are Not But Should Be Written.

response	% (number)
Never	20.38 (32)
Almost Never	37.58 (59)
Sometimes	29.30 (46)
Often	10.19 (16)
Usually	1.91 (3)
No response	.64 (1)

Table 20: Sufficiency of Time to Draft Opinions.

response	% (number)
Always:	21.02% (33)
Often:	43.95% (69)
Almost never:	27.39% (43)
Never:	3.82 (6)
No response:	3.82 (6)

d. Effect of Caseload on Job Satisfaction.

As noted above, while court of appeals judges are uncomfortable with the extent to which they rely on law clerks, they seem generally to believe that they give their cases adequate attention.[151] Yet 81% of the judges still report that their workload is either "heavy" or "overwhelming."

As with the district court judges, we asked appellate judges to "provide any additional information concerning the effects -- if any -- of caseload pressures on how [they] do [their] work." Fully half of the responding judges took the opportunity to describe the effects of caseload on their work habits and their lives. Like the district judges, most respondents report that they cope with the increasing caseload by working longer and harder. Practically every judge who wrote mentioned increased hours:

> "I find myself working virtually 'around the clock.'"
>
> "As the caseload has increased, I find that I do not have sufficient time to delve as deeply into the issues and to research the issues as deeply as I did in the past. Although my preparation for argument is the same, it remains the same at a sacrifice of time that I would spend on other activities. As a consequence, there is no time that I am free from brief reading or opinion writing. Court work has intruded on what passes for vacation time and it has become impossible to be away from a telephone or from communications with chambers for any period."

151. In other survey questions, 75% of the judges said that they have sufficient time to prepare for oral argument, and only 16% said that "rarely or never" are they able to prepare or review a bench memo before oral argument.

"Done properly, the work is overwhelming. The only way that I can do my work properly is to work nights and weekends. As long as one has the vigor, stamina and good health, it can be done. Eventually, this schedule is bound to take its toll."

"It is necessary to work longer hours than one should realistically expect to work in order to maintain quality. There is no weekend that is free of office work. Files must accompany me even on brief vacations."

"My work hours have increased to occupy substantially all of my available time. I would not today accept an appointment to this court if I knew the workload -- but I have too much invested to get out."

Many of the judges described the effect of long hours on their families, their personal lives, and their mental health:

"My typical day begins at 5:30 a.m. including weekends when I get most of my writing done. I feel I am becoming narrowly focused and less of a generally knowledgable individual, and consequently in many ways less competent as a judge. I try to keep up friendships and have done so only because my friends are tolerant of my neglect. There is so little time for the pleasures of family and outside activities. I feel guilty when I do take any time off -- like Sunday afternoon."

"Effects include anxiety, impatience, less time for relaxation, tension, working evenings and weekends at home."

"I calculated I spent 299 days on judicial work last year. Since I took about two and one-half weeks of vacation, it will be seen that I worked on Saturdays more than half the time and on at least 15 or 16 Sundays. This is entirely too much for me and it is especially difficult for the younger judges who have the responsibility of families with small children. This known factor has caused one very able trial judge to indicate he no longer wished to seek the vacancy that will occur when I seek senior status."

Judges also frequently reported a lack of satisfaction with their work:

"[Caseload pressures] cause me to do more editing and less originating of draft opinions. This does not mean abandonment of judgment to law clerks, but decreases my enjoyment, because the drafting of an opinion from scratch gives me greater enjoyment. By the same token, there is less time for reflective reading -- inside and outside the law. Instead, more and more time is spent on administrative matters, committee work, conferences. All of this diminishes the joy of judging."

"Caseload pressures greatly reduce one's sense of satisfaction with the job. I feel dirty at the end of the day, having made many decisions without time for proper reflection and analysis."

Judges referred repeatedly to the lack of time for reflection. Several judges noted that one effect of the increase in caseload is a change in the collective sense of what constitutes "appropriate" attention to a case:

"Volume tends to cut down the time for thoughtful consideration of a case. Most cases receive sufficient consideration, but as volume rises, our sense of what is the appropriate time for deliberation about a case is altered, and we accept a faster pace."

"There seems to be a complete lack of comprehension of the sheer volume of the work on the part of our newer-appointed judge.... The result has been the development of some short-circuiting of personal study which would not have been considered appropriate under preexisting standards established by the judges of our court when I first came on it. The sharing or division of research and prehearing memoranda by more than one judge often means that conflicting perspectives are not presented and judges unduly rely upon the work of one clerk. This is dangerous when, as often now occurs, some of the judges do not themselves read the parties' briefs but rely solely upon summaries prepared by a clerk, sometimes not their own.... It is very difficult to criticize [other judges] when they are already spending such an inordinate amount of time at their work."

In response to a question about job satisfaction, only 12

judges replied that they found the job more satisfying than when they were first appointed. Sixty-three found the job less satisfying. If offered the position again, 57% said that they would "give the matter careful thought" and 9% said they would decline the offer. Only 30% said they would "jump at the opportunity."

D. Conclusion.

The picture that emerges from this overview suggests that claims of a caseload "crisis" may be exaggerated but that the federal courts are severely strained. By every available measure, the caseload in both the district courts and the courts of appeals has increased precipitously in the past 30 years. Moreover, despite regular increases in the number of judges, both the amount and the difficulty of each judge's workload has grown nearly as fast. And while we are reluctant to make predictions about the likely future course of the federal docket, growth has been continuous since approximately 1960 and we see no reason to expect a sudden abatement.

The evidence suggests that this growth has significantly affected the work of the federal courts. For instance, we take very seriously the judges' complaints about the hours and stress and difficulty of finding time to do the job well. It is, of course, tempting to dismiss these complaints as self-aggrandizing, but their vehemence and pervasiveness suggests that more is involved, as does the surprisingly large number of judges

who indicated that they might not accept the nomination if it were offered again. The perception that being a judge is desirable is important to attract qualified candidates, particularly in light of the financial sacrifice most lawyers make by leaving practice to become judges. Few experienced attorneys will eagerly seek a large pay cut in order to work more hours under conditions that make it impossible for them to do work they are satisfied with. Moreover, the kind of pressures described by the judges must surely affect the quality of their work -- consider the references in some of the survey responses to operating "a triage chambers" or "an emergency room." Judges' attitudes about their jobs affect how they treat the parties before them. The more judges feel rushed, the more they resent having to deal with cases they regard as frivolous, the more they look for ways to limit access to the courts in order to reduce their dockets, the greater the likelihood that parties are treated unjustly and the greater the risk to the reputation and good-will of the federal courts.[152]

There are other measurable effects, many of which have been highlighted in the discussion above. Procedural innovations like case management and ADR in the trial courts, fewer and shorter oral arguments and unpublished opinions in the courts of appeals, and greater reliance on staff to do substantive legal work in

152. Our position is not that these problems are presently widespread, but rather that they exist and will become worse if the conditions under which judges work do not change. Moreover the signs are clear enough that we do not believe that Congress should wait for this to happen.

both, are not salutory developments. Granted these adaptations may make sense in the short run to allocate limited judicial resources in the face of a persistently growing demand. But no one would seriously argue that it is good to have clerks and staff attorneys read the records, do the legal research, and draft the opinions, just as no one would seriously argue that it is good to force the parties to settle against their will or to decide their appeals without oral argument or a reasonably thorough explanation.[153] On the contrary, the fact that caseload growth has made such responses reasonable suggests that something should be done to reduce the pressure. Hence, while radical reform to stave off the collapse of the judicial system is not needed, less radical but still significant changes may be necessary to avoid the slide toward bureaucratization and preserve the qualities that make the federal judiciary special.

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153. The various resource-saving devices described above all tend systematically to disfavor certain classes of cases -- most notably social security cases and prisoner petitions -- and we are concerned that the cumulative effects may be unfair in these cases. At the same time, as discussed in Part IV, the targeted cases generally are frivolous more often than other cases, and at least with respect to social security cases make inefficient use of judicial resources by casting trial judges in an appellate role. Consequently, the proposals below do not necessarily provide these claimants with a traditional Article III forum. Instead, they seek either to winnow out more of the frivolous cases or to provide an alternative forum that is better that the forum currently afforded.

PART II

DEFINING THE ROLE OF THE FEDERAL COURTS

A. The Size of the Federal Courts.

At first blush, the solution to caseload growth in the federal courts appears obvious: if the present judiciary has too much work, appoint more judges. This would, among other things, eliminate the need for a Committee such as this, since Congress need only determine how many additional bodies it will take to handle the cases. In the past, adding judges has been Congress's favorite response to caseload pressures,[1] and the number of federal judges has increased precipitously in recent years (although, as noted in Part I, judges constitute a decreasing proportion of the judiciary as a whole). In 1960, there were 321 federal judges. By 1970 that number had grown to 479; by 1980 there were 626; and there are now 699 judges filling 743 authorized judgeships in the district courts and the courts of appeals. To be sure, even with these appointments growth in the

1. In 1961, Congress added 10 judgeships to the courts of appeals and 69 to the district courts. Act of May 19, 1961, Pub. L. 87-36, 75 Stat. 80. In 1966, Congress added 6 more appellate judges and 32 more trial judges. Act of March 18, 1966, Pub. L. 89-372, 80 Stat. 75. In 1968, Congress created 13 new judgeships for the courts of appeals. Act of June 18, 1968, Pub. L. 90-347, 82 Stat. 183. Then, in 1978, Congress significantly increased the number of judges, creating 35 new positions on the courts of appeals and 117 new positions on the district courts. Act of Oct. 20, 1978, Pub. L. 95-486, 92 Stat. 1632. Finally, after incremental additions in 1982 and 1983, Congress added another 24 court of appeals judges and 57 district court judges in 1984. Act of July 10, 1984, Pub. L. 98-353, 98 Stat. 346.

federal judiciary has not kept pace with growth in its caseload, but Congress surely could appoint enough judges to keep pace with inflation in the number of cases filed.

The question is whether this would be a sensible strategy or whether Congress should examine alternative solutions? This is not a new question. Debate over how large to make the federal bench is as old as the first Judiciary Act,[2] and many of the arguments are familiar. The basic argument against expansion is that as the bench becomes larger its quality diminishes. The high quality of the men and women who have served as federal judges is one of the distinguishing features of the federal courts. Of course, the nation generally has high expectations for its judges, but these expectations are especially warranted at the federal level. Federal judges decide more cases of widespread public importance than state judges, and they wield considerably more power. In addition, the constitutional provisions for life tenure and salary protection insulate federal judges from direct political control. These protections make it all the more important to select the most qualified persons to serve.

Increasing the size of the federal bench threatens the quality of the judiciary in several ways. First, it strains the effectiveness of the appointments process. The public attention given to the limited number of federal judgeships helps ensure

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2. See Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. Chi. L. Rev. 761, 764 (1989).

that the President and Senate maintain high standards. At present, on average, approximately 7% of the full complement of 750 federal judges is appointed each year. Thus, even if the size of the federal bench is not increased, more than 50 nominations will be made this year -- several each week once we exclude periods when the Senate is not in session. The amount of scrutiny to which these candidates are subjected necessarily decreases as the number of nominees being reviewed grows larger. Yet, notwithstanding a few controversial recent appointments, most nominees for federal judgeships already receive rather little scrutiny. As the number of federal judges passes 1,000 and heads toward 2,000, the selection and confirmation process must inevitably be conducted more like a routine bureaucratic matter -- increasing the likelihood that unqualified candidates will be nominated and confirmed.

Second, "inflation of the number of [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."[3] The federal courts were much smaller when Justice Frankfurter made this declaration, yet their currency still remains valuable. Nonetheless there must come a point when an increase in the number of judges makes judging less prestigious, and as Judge Friendly has observed, "[p]restige is a

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3. Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954)(Frankfurter, J., concurring). See also Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 515 (1928)("Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions.")

very important factor in attracting highly qualified men to the federal bench from much more lucrative pursuits."[4] It is not (and never has been) politically feasible to pay the most qualified candidates anywhere near what they can make in private practice.[5] The prestige of being a federal judge is thus an important form of non-pecuniary compensation that enables the government to attract highly qualified individuals. Since adding to the ranks of judges dilutes their individual influence and status -- making them still more "underpaid" -- the quality of the bench must be expected to decline.

Third, unlike their counterparts of earlier decades, today's federal judges participate in an elaborate administrative structure that includes responsibilities to their courts, to judicial councils, and to committees of the Judicial Conference.[6] As each court grows in size, "there is a more than corresponding increase in the amount of administrative work."[7] This makes it more difficult to keep up with one's docket and further diminishes the attractiveness of becoming a federal judge.

Fourth, more judges means more opinions expressing different views, which creates uncertainty in the law and encourages still

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4. Henry J. Friendly, Federal Jurisdiction: A General View 29-30 (1973).

5. See Richard A. Posner, The Federal Courts: Crisis and Reform 42 (1983).

6. See Newman, supra note 2, at 766.

7. Friendly, supra note 4, at 30.

more litigation. Increasing the size of the judiciary may thus actually be counterproductive. This problem is especially serious in the courts of appeals. We depend on these courts to render final decisions on most legal issues. District court judges face little pressure to follow the rulings of other judges in the same district, and none at all to follow the rulings of judges in other districts.[8] The judicial system encourages percolation of issues at the district level and relies on the courts of appeals to settle matters. Most questions must end there, because the Supreme Court's appellate capacity is limited. Consider the Court's inability to keep up with circuit splits, and imagine how much worse things would be if the Court also had to worry about conflicts at the district court level.

Our judicial system lodges primary responsibility for settling most questions of law in the courts of appeals, reflecting a conscious administrative decision to tolerate some conflict among circuits in exchange for uniformity within circuits. But as the courts of appeals become larger, intracircuit uniformity is increasingly difficult to maintain. Each new judge increases geometrically the number of different panels that may hear a case: the D.C. Circuit's 12 judges may be combined into 220 panels; the Ninth Circuit's 28 judges into 3,276. More panels means more uncertainty about how the court is likely to rule in any particular case, encouraging more appeals and making intracircuit conflicts more likely. At the same time,

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8. See Colby v. J.C. Penney Co., 811 F.2d 1119, 1124 (7th Cir. 1987).

as the court grows, it becomes more difficult both to hear cases en banc and to obtain a majority in cases that are heard by the whole court. Before long, even en banc procedures no longer ensure uniformity. Pressure then grows to divide the circuit into several smaller circuits. But every such decision increases the likelihood of splits between circuits and thus shifts the pressure of maintaining uniformity to the Supreme Court.

Problems of size and maintaining intracircuit uniformity have already led to the division of the Fifth Circuit and may soon do the same in the Ninth Circuit. Few believe that we will be better off if we create more courts of appeals as large as the Ninth Circuit. But if caseload pressures are to be relieved by appointing more judges, the only alternative to giant courts of appeals is additional courts of appeals -- an uninviting prospect that places more responsibility on the court least able to decide more cases, the Supreme Court.

Fifth, a properly functioning federal bench depends on familiarity and collegiality among the judges. These qualities are particularly important in the courts of appeals, which sit in panels and, as explained above, are responsible for maintaining uniformity and coherence in the law. Familiarity and collegiality are also important at the district court level, since these qualities encourage judges to pay attention to one another's rulings and serve an important socializing function by restraining the idiosyncracies of individual judges. There is a culture among judges that reinforces their devotion to a common task. As the court becomes larger and more bureaucratic, this

sense dissipates and the general quality of justice declines. Furthermore, familiarity and collegiality give judges a sense of accountability for their work. On a small court, each judge is more aware of his or her contribution to the court's output and reputation. As the bench grows, judges are likely to feel less accountable for producing top-notch work.

Some commentators have noted that the district courts can be more easily expanded, since each judge works alone. We recognize that some of the problems discussed above are less acute in the district courts. But even if the district courts can be made larger, this is not a practical solution to the caseload problem. On the contrary, expanding the district courts without also finding a way to increase the output of the courts of appeals would only exacerbate the problems in these latter courts and in the Supreme Court.[9] Thus, unless Congress is prepared vastly to increase the power of individual trial judges to make unappealable rulings, any solution must encompass the courts of appeals as well as the district courts.[10]

At the same time, we should not be understood to say that the federal bench is now as large as it can be or that further growth spells the end of justice as we know it. Such predictions

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9. Friendly, supra note 4, at 31 (increasing the number of district judges "would prove utterly destructive to the courts of appeals and the Supreme Court.")

10. The driving force behind the most significant reorganization of the federal judicial system -- the Evarts Act in 1891 -- was a perception that limited appellate capacity made single district judges too powerful. See F. Frankfurter & J. Landis, The Business of the Supreme Court 79-81 (1928).

were made when the federal courts were only a fraction of their present size, yet most observers agree that these courts still do a generally good job. The scrutiny each candidate receives in the appointments process may be less intense than it once was, but the process still functions fairly well. And while the number of judges has grown substantially in recent years, there does not seem to have been substantial reduction in the prestige of being a federal judge. The absolute number of federal judges is still small -- particularly by comparison to other parts of the federal government -- and has actually declined as a fraction of the total number of lawyers.[11] Moreover, while judges resign more frequently today than in the past, the turnover rate among judges remains low compared to other professions.[12] Some of the other problems discussed above -- the increase in administrative chores, the difficulty of achieving uniformity within the circuits, the loss of collegiality -- are already being encountered, and as we have noted, it will not require large increases in the number of appellate judges to replicate the difficulties already being experienced in the Ninth Circuit. But we cannot say that any of these problems is so serious as to foreclose the option of adding additional judges at this time.

What we can say is that the risks are real. The fact that the problems described above have not yet been fully realized

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11. Posner, supra note 5, at 36.

12. Posner, supra note 5, at 39. The low turnover rate may also be explained by the fact that most judges are in their 50s when appointed and assume the bench with the expectation of finishing their careers there. Id.

does not make them illusory. The federal courts increasingly resemble executive and independent agencies, with a few poorly paid senior officials presiding over a bureaucracy. The convergence is not complete, but the spectre of bureaucracy increasingly haunts the judiciary. And unlike other senior government officials, federal judges are not expected to "cash in" on their government service by returning to the private sector.

We do not recommend that Congress put a moratorium on further increases in the size of the federal bench. But we do recommend that Congress try alternative solutions to the caseload problem before creating additional judgeships. Making the federal courts bigger is not likely to improve the quality of justice for anyone, although it may substantially alter the nature of the courts. Our view, reflected in the recommendations below, is that Congress can relieve caseload pressures while improving the quality of justice for claimants by shifting some cases to other tribunals, trimming back jurisdiction in areas where a federal forum is unnecessary or inappropriate, and altering the procedures by which some cases are handled.

B. The "Ideal" Scope of Federal Jurisdiction.

If caseload pressures are to be reduced without substantially increasing the number of judges, we must find ways to -- in Judge Friendly's words -- "avert the flood by lessening the flow."[13] This can be accomplished in part by increasing the

efficiency of the courts and by encouraging parties to settle or use alternative dispute resolution -- issues that are considered by the subcommittees on structure and workload. But any substantial reduction in caseload pressures must include a reduction in the number of cases being litigated in federal courts, and this means somehow redefining the scope of federal jurisdiction.

Our point of departure was to construct an ideal model of federal jurisdiction for Congress to use in allocating judicial resources, and in early meetings the Committee discussed the potential use of such a model for the next quarter century. After further consideration we have concluded that the Federal Courts Study Committee should not try to draft a detailed blueprint for the proper scope of federal jurisdiction. The common assumption that there is some objectively "correct" model of federal jurisdiction may actually misconceive the problem. There are objectively identifiable outer constitutional limits on federal jurisdiction -- the limits established in Article III, §2 of the Constitution. But these are extremely permissive, and no one contends that federal jurisdiction should extend this far.[14] Within the limits of Article III, however, the

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13. Henry J. Friendly, Averting the Flood by Lessening the Flow, 59 Cornell L. Rev. 634 (1974).

14. Diversity jurisdiction is limited at present by the complete diversity requirement of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), but complete diversity is not constitutionally required. See State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967). The potential reach of this jurisdiction is thus quite broad. Similarly, general federal question jurisdiction is presently limited by the well pleaded complaint rule of Louisville & N.R.R. v. Mottley, 211 U.S. 149

Constitution establishes no objectively "correct" role for the lower federal courts. Indeed, largely because they could not agree on what role the federal courts should play, the framers of the Constitution left such questions to Congress,[15] basically making the lower federal courts a resource to be used as Congress deems necessary.[16] But the decisions Congress makes in this regard reflect important value choices and have significant political consequences.

The first Judiciary Act, for example, represented a hard-fought compromise between federalists and anti-federalists who understood only too well the implications of federal jurisdiction for the development of substantive law and for the allocation of power within the federal government and between the federal government and the states.[17] Congress expanded federal

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(1908). This rule also is not constitutionally required, and Congress may extend federal jurisdiction to any case in which a federal question is an "ingredient," even if the federal issue arises by way of defense. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). Considering how broadly the Constitution and federal laws have been construed -- especially the open-ended due process clause -- federal jurisdiction could be asserted over an enormous number of cases.

15. See 4 Philip B. Kurland & Ralph Lerner, The Founder's Constitution 131-212 (1987); Frankfurter & Landis, supra note 10, at 6-11.

16. In saying this, we intimate no view about whether Congress can selectively limit the courts' jurisdiction because it fears the judiciary's position on a particular issue. Our discussion refers to the unquestioned power of Congress to create lower federal courts and vest them with less than the full jurisdiction authorized by Article III.

17. See generally Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).

jurisdiction after the Civil War because it recognized this as essential to the success of its plans for Reconstruction and for expansion of the national economy. The political implications of altering federal jurisdiction delayed until 1891 changes in the structure of the federal courts that everyone had recognized were necessary years earlier.[18] Any model identifying the "proper" role of the federal courts thus has inescapable and far-reaching substantive implications, and as a result an unavoidable political dimension. The Federal Court Study Committee is not a representative body and its membership does not reflect many of the relevant interests. Defining the role of the federal courts simply is not the kind of task that Congress can delegate to an outside body of experts; it is not a scientific inquiry.

Even if we could develop a model of federal jurisdiction, its usefulness would be short-lived. Political consensus with respect to the business of the federal courts is rare, and when it happens it does not last. The scope of federal jurisdiction evolves with the nation's substantive needs and goals, and the business of the federal government changes much too fast and often and is much too controversial for the federal docket to be stable. No one foresaw in the 1850s that federal courts would be needed to protect myriad new federal rights by the end of the 1860s. No one thought in the years before the 18th Amendment was ratified that a huge investment of federal judicial resources would be necessary to enforce Prohibition, just as no one foresaw

18. Frankfurter & Landis, supra note 10, at 85; supra Part I.

when the Amendment was ratified how short its life would be and how quickly this business would disappear. Of more recent vintage, we doubt that many people in the mid-1950s anticipated how important civil rights cases would become, and no one would have predicted as recently as last year that we would begin a "war on drugs" requiring a massive investment of federal judicial resources (just as no one can predict how long this demand will last). Our priorities as a nation change so fast that investing substantial time articulating a well defined model federal jurisdiction would be a waste.

It does not follow that the Committee has nothing useful to say about federal jurisdiction. Notwithstanding its unavoidable political dimension, there are some principles of federal jurisdiction on which there appears to be consensus, and by identifying these we can develop a minimal model of cases whose resolution in federal courts should be uncontroversial. As the discussion in Section C elaborates, the areas of agreement on federal jurisdiction turn out to be surprisingly large. In addition, we can use these principles to identify some priorities among cases that remain outside the minimal model. Identifying these may help Congress reach decisions about where to make cuts when federal jurisdiction is to be reduced.

Moreover, decisions respecting federal jurisdiction also have an objective component. Once a substantive goal and the need for a federal forum to accomplish that goal are identified, lawmakers must still address a variety of questions about how to structure federal jurisdiction. Congress may create an ordinary

cause of action and provide for it to be litigated in a court of general jurisdiction; Congress may create an administrative agency to enforce or to adjudicate individual claims; Congress may create specialized courts; or Congress may utilize some mix of these alternatives. In any particular context, some remedial structures may be better than others for both courts and claimants. Presently, Congress has no formalized structure to evaluate the alternatives and ensure that judicial resources are used efficiently within the parameters set by substantive law. As discussed in Part III, examples are abundant of laws that create dislocations in the courts not because of a political decision or compromise, but simply because no one thought about the issues carefully. One way to avoid the need for Committees such as this is to establish a mechanism that will ensure the optimal use of judicial resources to meet Congress's substantive goals.

Finally, just because we cannot create a detailed model of federal jurisdiction does not mean that we cannot make recommendations for curtailing or restructuring jurisdiction over some classes of cases. Even confining ourselves to what we believe are uncontroversial premises, there is much room for improvement. Thus, some recommendations follow from the principles and priorities identified in connection with our minimal model, such as the recommendation in Part IV that diversity jurisdiction be abolished. At first blush, this hardly seems like an apolitical position. However, while there are colorable arguments for having diversity jurisdiction, there is a

consensus (one not even the strongest advocates of diversity dispute) that cases based on state law have a weaker claim on federal judicial resources than federal questions. Having established that principle, Congress need only agree that there is a caseload problem and that solving this problem requires reducing the number of cases brought in federal courts. If some class of cases must go, it is clear that diversity cases should be first -- especially if one considers the amount of relief this offers compared to other possible reforms.

Other recommendations assume that federal jurisdiction is appropriate, but question how that jurisdiction is presently structured. One need not disagree with Congress's decision to provide a federal forum to see that federal resources are being used inefficiently. Restructuring federal jurisdiction -- whether by creating a specialized court, by channeling cases through an administrative remedy, or some other reform -- can reduce federal docket pressures while improving the quality of justice received by claimants. Many of the proposals in Part IV of this Report reflect this approach.

C. A Minimum Model of Federal Jurisdiction.

1. Functions Served By Federal Courts.

The federal judiciary currently performs six major functions. These overlap to a considerable degree, but clarity requires separate consideration of each.

a. Enforcing the United States Constitution.

Perhaps the least controversial area of federal jurisdiction is over certain constitutional claims, in particular those posing questions concerning the structure of the federal government. In recent years, for example, federal courts have resolved such separation of powers issues as the constitutionality of the Sentencing Commission,[19] the lawfulness of the legislative veto,[20] and the validity of a statute providing for an independent prosecutor to investigate allegations of executive misconduct.[21] It would be quite peculiar if these cases were decided by state courts: as an independent sovereign, the federal government is entitled to have its courts rule on how power should be distributed among its constituent elements.[22]

Similarly, there is widespread agreement that federal courts should decide questions of federalism. Although the argument is weaker since the states are also interested in these cases, the propriety of a federal forum derives from Article VI of the Constitution, which makes the federal government supreme over the states. One could push this argument to the conclusion that federal jurisdiction should be exclusive. But this is not

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19. Mistretta v. United States, 109 U.S. 647 (1989).

20. INS v. Chadha, 462 U.S. 219 (1983).

21. Morrison v. Olson, 108 U.S. 2597 (1988).

22. See Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 505 (1974).

necessary as long as the Supreme Court can review state court decisions to ensure their compliance with the Constitution and laws of the United States.

Whether it is necessary for federal courts to decide cases involving individual liberties and equal protection is more controversial. There is a vigorous scholarly debate over whether state courts are equal to federal courts in their ability and willingness fairly to adjudicate federal constitutional claims.[23] Advocates of expansive federal jurisdiction argue that state courts cannot be trusted to safeguard federal rights.[24] Recounting the post-Civil War history of state court hostility to federal claims, these commentators urge that state courts are prejudiced against individual claimants asserting constitutional rights.[25] In addition, advocates of broad federal jurisdiction point to differences in the institutional characteristics of the two judicial systems.[26] Federal judges are insulated from direct

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23. See E. Chemerinsky, Federal Jurisdiction 29-32 (1989)[hereafter Chemerinsky, Federal Jurisdiction]; Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 U.C.L.A. L. Rev. 233 (1988)[hereafter Chemerinsky, Parity Reconsidered].

24. See, e.g., Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977)[hereafter Neuborne, The Myth of Parity]; Neuborne, Toward Procedural Parity in Constitutional Litigation, 22 Wm. & Mary L. Rev. 725 (1981)[hereafter Neuborne, Toward Procedural Parity].

25. Neuborne, The Myth of Parity, supra note 24, at 1124-1227; Neuborne, Toward Procedural Parity, supra note 24, at 727.

26. Neuborne, The Myth of Parity, supra note 24, at 1115-1130; Ziegler, Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine from a Modern Perspective, 19 U.C. Davis L. Rev. 31, 46-48 (1985); Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 677-685 (1982).

political control by constitutionally mandated tenure and salary protection, whereas forty-two states still have some form of judicial election.[27] Furthermore, federal courts are said to attract better judges because the federal government pays more and provides greater institutional support, and because being a federal judge is more prestigious.[28]

Other commentators maintain that state courts are equally able and willing to protect constitutional rights.[29] These commentators argue that the historical animosity between state and federal systems has disappeared, that state courts have improved, and that the differing institutional characteristics do not affect decisions.[30] These commentators reason that the fact that state and federal courts reach different results says nothing about which are better -- perhaps the results reached by state courts are correct and federal courts are prejudiced against state officials and biased in favor of individual claimants.[31] According to the commentators, because both systems offer equally acceptable processes, jurisdiction should not turn on an unfounded assumption that one is superior.

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27. See K. Lee, Courts and Judges 109-179 (1987).

28. See, e.g., R. Posner, supra note 5, at 144.

29. See, e.g., Solimine & Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hastings Const. L.Q. 213 (1983).

30. Solimine & Walker, supra note 29, at 224-225; Bator, The State Courts and Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981).

31. See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963).

Many doctrinal ebbs and flows in federal jurisdiction are directly attributable to the Supreme Court's view of the parity issue. For example, explicitly proceeding on the premise that expansive federal jurisdiction is often necessary to assure adequate protection of constitutional rights, the Warren Court increased the availability of habeas corpus for state prisoners,[32] expanded the scope of relief under 42 U.S.C. §1983,[33] limited the circumstances in which federal courts must abstain,[34] and minimized the preclusive effect of state court judgments in federal cases.[35] The Burger Court, in contrast, narrowed federal jurisdiction because it thought state courts equally capable of deciding constitutional claims. This confidence in state courts was reflected in restrictions on habeas corpus relief,[36] limitations on §1983 suits,[37] expansion of abstention doctrines,[38] and greater preclusive effect for state court decisions in federal proceedings.[39]

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32. See, e.g., Fay v. Noia, 372 U.S. 391 (1963).

33. See, e.g., Monroe v. Pape, 365 U.S. 167 (1961).

34. See, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965).

35. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

36. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976).

37. See, e.g., Parratt v. Taylor, 451 U.S. 527 (1981).

38. See, e.g., Younger v. Harris, 401 U.S. 37 (1971).

39. See, e.g., Allen v. McCurry, 449 U.S. 90 (1980).

The parity debate is ultimately unresolvable. Parity is an empirical question and we lack a meaningful standard by which to judge decisions in competing judicial systems.[40] Legislators, judges, and academics may make judgments about whether they believe the federal or state courts are superior, but supporters of expansive federal jurisdiction cannot "prove" that federal judges do a better job in constitutional litigation, any more than their opponents can demonstrate the contrary. Each side is left with its beliefs and no objective way to resolve the impasse.

It is not necessary to resolve it. No one contends that federal courts are an inappropriate forum in which to adjudicate federal constitutional claims. The parity debate may be relevant in resolving technical issues such as the precise scope of abstention or habeas corpus. It may also be relevant in considering whether federal jurisdiction should be exclusive. But no one disputes the propriety of federal jurisdiction over federal constitutional claims.

b. Protecting the Interests of the Federal Government as a Sovereign.

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40. See Chemerinsky, Parity Reconsidered, supra note 23, at 261-273. See also M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power, 3 (1980)("There are . . . no statistical data to support the assertion that federal courts are, on the whole, better equipped to guard federal interests than their state counterparts. Indeed it would be difficult to devise a system of measurement which could be used to answer the question empirically.")

A sovereign can always sue in its own courts. The first federal question jurisdiction -- the only such jurisdiction conferred by the Judiciary Act of 1789 -- was over prosecutions for violations of federal criminal laws. This was consistent with what was even then a longstanding principle that "the Courts of no country execute the penal laws of another."[41] Later, when Congress waived sovereign immunity on some civil claims against the federal government, it created a new federal tribunal -- the Court of Claims -- to hear them. And federal courts have always had jurisdiction over suits against federal officers arising out of their official duties.[42]

Federal jurisdiction to hear suits by and against the United States is uncontroversial. As a formal matter, this jurisdiction is explained as one of the traditional perogatives of sovereignty. A functional explanation is that the risk of mistreatment or the perception of mistreatment of federal governmental interests in state court is too great not to preserve at least the option for the federal government to bring or remove a lawsuit into its own courts.

Closely related is the question of jurisdiction over suits by or against foreign nations or their officials. The federal government is not directly interested as a party, but the same reasons that justify giving a federal forum to the federal government apply to foreign governments. Foreign policy is the

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41. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

42. See Friendly, supra note 4, at 9-10.

prerogative of the federal government, and it is important to the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. The federal government is responsible -- and is sometimes required by treaty -- to provide foreign nations with justice according to standards recognized in international law. Since the federal government will be held accountable for any denial of justice, it should be able to provide foreign governments with a forum whose procedures it establishes and controls. These same arguments further justify federal jurisdiction over suits involving foreign nationals who are not government officials.

Some scholars argue that these cases fall within a more general category of "protective jurisdiction." According to these scholars, if Congress can enact substantive law in a particular area, it can take the less drastic step of creating federal jurisdiction without creating federal substantive law.[43] The Supreme Court has neither approved not disapproved of this theory,[44] but other scholars have criticized it: what, they ask, is the federal law under which the case arises? The only

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43. See, e.g., Goldberg-Ambrose, The Protective Jurisdiction of the Federal Courts, 30 U.C.L.A. L. Rev. 343 (1985); Note, The Theory of Protective Jurisdiction, 57 N.Y.U. L. Rev. 933 (1982); Mishkin, The Federal 'Question' in the District Courts, 53 Colum. L. Rev. 157 (1953); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems 216 (1948).

44. See, e.g., Verlinden, B.V. v. Bank of Nigeria, 461 U.S. 480, 491 (1983); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 460 (1957) (Harlan, J., concurring in the result).

federal law is the law creating jurisdiction, but to say that a case arises under federal law whenever a federal statute confers jurisdiction is to destroy all limits on federal jurisdiction.[45] In any event, protective jurisdiction remains largely an academic concern for the moment.

c. Serving as an Umpire in Interstate Disputes.

Several provisions of Article III authorize federal jurisdiction over disputes between states and their citizens. Most notably, the Supreme Court has original jurisdiction over suits between two states. The justification for this provision seems plain enough: without a tribunal to resolve their differences, state governments might retaliate in ways that would threaten the cohesiveness of the union. No state court is likely to be viewed as sufficiently neutral, and the states might view resolution by an inferior federal court as an affront. The Supreme Court's original jurisdiction over suits between states is therefore exclusive.[46]

Jurisdiction over suits between citizens of different states is more controversial. The traditional explanation for this branch of federal jurisdiction is fear that state courts will favor their citizens over nonresidents.[47] Some 20th century

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45. See, e.g., D. Currie, Federal Jurisdiction 103 (2d ed. 1981).

46. 28 U.S.C. §1251.

47. See Frank, The Case for Diversity Jurisdiction, 16 Harv. J. Legis. 403, 406 (1979).

scholarship suggests that protecting creditors from pro-debtor state courts was an equally important concern.[48] Whatever its original justification, the continuing need for this jurisdiction has been a matter of lively debate since the turn of the century. Proponents of diversity argue that bias is still a problem and that federal jurisdiction is necessary because state courts are slower and less satisfactory than federal courts. Opponents of diversity respond that prejudice against nonresidents has been replaced by other prejudices that are more salient in today's world. If state courts provide slow or inadequate justice, they add, the cure is to improve these courts, not to select a favored class of litigants to receive the benefits of federal courts.

These arguments are addressed at length in Part IV. For the moment, we limit ourselves to a few observations that should be uncontroversial. First, this branch of federal jurisdiction, which in 1789 represented the most important business of the federal courts, has diminished in importance over the years. The process began with the creation of general federal question jurisdiction in 1875 and was accelerated by the Supreme Court's decision in Erie R.R. v. Tompkins and by the 20th century proliferation of substantive federal laws. The federal courts are devoting an ever-increasing proportion of their physical and intellectual resources to federal issues. Second, while other

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48. See, e.g., Friendly, The Historic Basis for Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928).

forms of jurisdiction have expanded throughout the 20th century, only diversity jurisdiction has been constricted -- by retaining and then increasing the amount-in-controversy requirement, by expanding corporate citizenship, by limiting removal to nonresident defendants. Third, and somewhat more arguable, if diversity jurisdiction had never existed in the past, Congress almost certainly would not create it today; the continuing viability of this jurisdiction thus rests to a considerable degree on its historical pedigree.

Judge Posner recently advanced a more sophisticated version of the argument for federal jurisdiction over interstate disputes, one that does not depend on proof of parochialism or outright hostility. He reasons that when "either the benefits or the costs of a governmental action are experienced outside the jurisdiction where the action is taken," federal jurisdiction may be necessary to prevent states from imposing costs on other states and to deal with free-rider problems.[49] Thus, in all contract and many tort cases, state courts are unlikely to discriminate against nonresidents because the nonresidents are economically linked with residents. But if the nonresident is a tort victim of a resident and the parties were strangers before the accident, there is a risk of cost-externalization by state courts. That risk is reduced in a federal court, which has a national perspective. Judge Posner adds that this reasoning also applies to federal/state issues, and he suggests that

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49. R. Posner, supra note 5, at 174-77.

externalities may explain why state court judges are less concerned with protecting some federal rights. Avoiding cost externalization may therefore justify federal jurisdiction over such matters as suits against the United States government, federal criminal prosecutions, and some admiralty cases.[50]

d. Assuring Uniform Interpretation and Application of Federal Law.

A large proportion of the federal docket consists of cases arising under federal statutes, and this category has expanded steadily over the years. Although federal jurisdiction to hear such cases hardly seems controversial today, it was a subject of heated debate throughout the 19th century -- the issue being whether general federal question jurisdiction would make the federal courts too powerful.[51] The primary reason for adding this jurisdiction in 1875 is said to have been the desire for uniformity in the interpretation and application of federal law.[52] The underlying idea seems to have been that because the Constitution, treaties, and statutes of the United States apply to the entire country, they should have essentially the same meaning in all parts of the country.

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50. R. Posner, supra note 5, at 175-178.

51. See Frankfurter & Landis, supra note 10, at 65-69.

52. See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 826 (1986)(Brennan, J., dissenting)(citing authorities).

Where the desire for uniformity is especially strong, federal jurisdiction is often made exclusive. Federal courts thus have exclusive jurisdiction in copyright and patent cases, in admiralty and maritime cases, and in bankruptcy cases. In the admiralty area, exclusive federal jurisdiction is also justified by the potential international and foreign relations implications of many admiralty cases and by the difficulty of determining the applicable law in cases of injury on the high seas.

In most other areas, federal jurisdiction is concurrent with that of the states, which seems to undercut the argument about uniformity. Indeed, even when federal jurisdiction is exclusive, the Supreme Court's limited appellate supervision means that most issues are settled in one of 13 independent courts of appeals -- again suggesting that the uniformity rationale may be overstated. But it would be wrong to place too much emphasis on these seeming departures from a goal of uniformity; they are best understood as concessions to practicality. As noted above, general federal question jurisdiction was controversial in the 19th century because it threatened a dramatic shift of power away the states. Expediency may thus explain the original decision to make federal question jurisdiction concurrent (though the likelihood of federal dominance was facilitated by the provisions for removal). Today, concurrent jurisdiction over federal questions may simply be a workload necessity, for while we lack precise statistics, a significant number of federal issues are heard by state courts.[53] Similarly, reliance on the courts of appeals to settle most questions represents a compromise between

the desire for uniformity and the enormous appellate workload of the federal system.

Nor is it true that resolving issues in independent courts of appeals and having concurrent state jurisdiction completely undercuts the goal of uniformity. For while these arrangements surely prevent the attainment of absolute uniformity, experience indicates that the availability of a federal forum significantly advances that goal. This, in fact, was the conclusion of the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts.[54]

Finally, jurisdiction over federal questions is sometimes justified on the ground that it improves the quality of adjudication, by in effect making federal courts into federal law specialists. The American Law Institute explained that because federal-question cases constitute the basic grist of federal tribunals, "[t]he federal courts have acquired a considerable expertness in the interpretation and application of federal law."[55] As a result, the federal courts are comparatively more skilled than state courts at interpreting and applying federal law, and are more likely to divine Congress' intent in enacting legislation.[56]

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53. Precise statistics are unavailable, but a LEXIS search of just those state cases citing the United States Code in 1989 turned up almost 2000 cases, and a random search of 200 of these revealed that over 40% involved the resolution of federal claims.

54. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 164-68 (1969)[hereafter ALI Study].

55. ALI Study, supra note 54, at 164-65.

e. Developing Federal Common Law.

Observers have long recognized that rather than eliminate federal common law, Erie merely shifted the focus to a more appropriate sphere. That is, while Erie commands deference to state law where there is no unique federal substantive interest, it led to what Grant Gilmore has described as a "federalizing principle" by which federal statutes are often read to generate a common law penumbra of their own.[57] This new federal common law has become increasingly important over the years, particularly in areas such as labor law, antitrust law and, more recently, ERISA law.[58]

In some areas, federal common law has been developed to protect the interests of the United States government.[59] In Boyle v. United Technologies Corp., for example, the Supreme Court held that federal common law should determine the liability of a defense contractor to the federal government because the

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56. ALI Study, supra note 54, at 165; M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 71 (1980); Currie, Federal Courts 160 (3d ed. 1982).

57. See Grant Gilmore, The Ages of American Law 93-95 (1977); Henry Friendly, Benchmarks 185-195 (1967).

58. For a discussion of federal common law, see Chemerinsky, Federal Jurisdiction, supra note 23, at 293-322; Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881 (1986); Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1 (1985).

59. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447 (1942).

unique federal interest in obtaining equipment for the military might be impaired by applying state tort law.[60] In other instances, federal courts have found it necessary to create federal common law to fulfill congressional intent. The most prominent example is the Court's conclusion that §301 of the Labor Management Relations Act, which confers jurisdiction over actions for breach of a collective bargaining agreement, authorizes federal courts to create federal contract law.[61] The Court recently found a similar grant of common lawmaking power in ERISA.[62] This is statutory interpretation in only the most formal sense. In reality, the Court engages in traditional common law adjudication, except that its exercise of this power is to some extent directed by the broad purposes underlying the particular statute or federal interest.

Fashioning federal common law is a task that the federal judiciary is uniquely able to perform. Indeed, while jurisdiction need not be exclusive, it is hard to imagine a federal common law without federal courts to develop it. Most federal common law resembles or is closely related to state common law, and it is asking a lot of state judges to develop a uniquely federal common law that differs from the common law of their state, without a body of federal precedent to consult. The

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60. 107 S.Ct. 2029 (1987).

61. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

62. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

situation is similar to that faced by a judge in one state called upon to apply another state's common law. If courts in the latter state lacked jurisdiction to decide common law cases and instead left it to courts in other states to do it for them, the forum would almost certainly wind up applying its own common law rules -- after all, they have already found these to be the most sensible rules.[63] Thus, in areas governed by federal common law, federal jurisdiction is necessary to generate a body of precedent with the unique federal perspective that gives this law its distinctive tone and content.[64]

f. Hearing appeals.

In some instances, federal courts perform an appellate function, reviewing decisions of other adjudicatory bodies. The most prominent example is judicial review of decisions of federal administrative agencies. Less obviously, federal courts perform an essentially appellate function in reviewing petitions for writs of habeas corpus from state prisoners.[65] Federal

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63. This conclusion is supported by experience in choice of law cases. In states that give the court discretion to choose among competing laws, there has been a pronounced tendency to apply forum law. See, e.g., Michael E. Solimine, An Economic and Empirical Analysis of Choice of Law, 24 Ga. L. Rev. (1989); Robert A. Sedler, Across State Lines 44-45 (1989).

64. Consider the preference for arbitration that is central to the federal common law under §301 of the Labor Management Relations Act. When first developed, this principle was at odds with the law in most states respecting arbitration. Without federal courts to articulate and develop this principle, the course of labor law would likely have been quite different.

65. See Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247

jurisdiction in these cases follows from the determination that a remedy is desirable. In the case of review of administrative agencies, there is a particularly strong need for uniformity (hence jurisdiction in this area is invariably exclusive) as well as Supremacy Clause concerns.[66] In the case of habeas corpus, the rationale for a federal remedy is distrust of state courts; it therefore makes little sense to create a duplicative habeas corpus scheme without giving federal courts jurisdiction to apply it.

2. A Minimal Model and Some Priorities for Federal Jurisdiction.

Of the functions described above, which, if any, must be performed by federal courts? And among the remaining, non-essential functions, are there some with a higher priority and a stronger claim on the time of federal judges?

Before turning to these questions, we offer two caveats. First, we do not as yet make any assumptions about the nature of the forum in which federal jurisdiction should be vested. It is common to conflate questions of federal jurisdiction with questions of the jurisdiction of the federal courts of general jurisdiction, since these courts have traditionally handled most

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(1988).

66. Any constitutional requirements for judicial review of agency adjudication, see, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), could be satisfied by review in state courts.

of the business of the federal judiciary. However, while there may be strong reasons to rely primarily on these courts, federal jurisdiction can also be exercised by specialized tribunals of limited jurisdiction or (within limits imposed by the due process clause) by tribunals with non-traditional procedures. Our discussion at this juncture is limited to the need for some sort of federal tribunal, and we defer discussion of the form of this tribunal to Part IV.

Second, at least with respect to claims that are creatures of federal law, Congress can diminish the federal caseload in two ways: by repealing the substantive right, or by repealing the provision for federal jurisdiction to adjudicate it (and leaving this task to state courts).[67] A number of outside parties have urged the Committee to recommend that Congress repeal laws they deemed unimportant -- the most frequently mentioned example being the Federal Odometer Act. But while docket pressures would obviously be eased if there were less law and fewer rights, we do not believe that Congress created the Federal Courts Study Committee to advise it about substantive priorities. Moreover, the few laws whose repeal would not be controversial (and they are few indeed) account for a minuscule portion of the federal docket. To make this strategy effective, we would have to recommend repealing laws that affect substantial numbers of people and around which substantial interests have coalesced.[68]

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67. Limiting federal jurisdiction can be done either by removing certain classes of cases from the federal docket altogether or by giving federal courts some discretion in hearing cases. See Newman, supra note 2, at 770-76.

There may come a time when caseload pressures in the federal courts are such that the only solution is to repeal substantive laws. But that time has not yet arrived, and we believe that Congress can solve any current problems without repealing substantive rights if it restructures the way these rights are adjudicated. Consequently -- with one exception[69] -- the discussion of priorities below, and the recommendations that follow in Parts III and IV, assume that reform is to take place within the existing contours of substantive law.

Federal courts are necessary to perform at least four of the functions described above. First, there should be a federal forum to hear cases involving questions of separation of powers and possibly also questions of federalism. Second, there should be federal jurisdiction over cases brought by or against the United States, including suits against government officials arising out of the performance of their duties. Third, there should be federal jurisdiction to hear cases brought by or against foreign governments. Fourth, there should be federal jurisdiction to decide disputes between state governments.

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68. This point is virtually a matter of definition: to make a noticeable impact on the docket, a law would have to account for a substantial amount of litigation. But the more litigation there is, the more likely it is that there are powerful interests in retaining the status quo.

69. The exception is for the personal injury action created for railway employees in the Federal Employers' Liability Act and extended to seamen in the Jones Act. As developed more fully in Part IV, these laws were created in the early years of this century to fill a gap in tort law. That gap has since been filled by state and federal workers' compensation programs. In our view, claimants may be better off by replacing this vestigial federal cause of action with a workers' compensation remedy.

While it would be necessary to create federal courts to hear these four classes of cases, there are several other areas in which, if there is any judicial jurisdiction at all, it should include federal jurisdiction. Most important, this includes areas in which Congress wants courts to fashion federal common law. As explained above, federal jurisdiction in such cases need not be exclusive, but the proper development of federal common law requires a body of federal court precedent. In addition, federal jurisdiction is necessary in those areas where federal courts presently review other adjudicatory bodies -- review of federal administrative agencies and habeas corpus petitions from state prisoners. With respect to the former, some judicial review is constitutionally required, and it seems inconceivable that Congress would subject federal agencies to review in the state courts -- not only because of supremacy concerns,[70] but also to ensure the coherence and uniformity of federal regulation. As we discuss more fully in Part IV, subjecting agencies to review in 12 independent courts of appeals already complicates the administrative process by subjecting agencies to conflicting commands from different courts; these problems would be greatly exacerbated if federal agencies were subject to review in 50 state courts. With respect to habeas corpus, because this remedy is justified as necessary to prevent mistakes in the state courts, the decision to provide a remedy is indistinguishable from the question of jurisdiction. There is, to be sure, a

70. Review of agency actions could, in fact, be included within the category of suits in which the United States is a party.

vigorous debate over whether this remedy is necessary or should be restricted, but for present purposes the point is simply that if there is to be federal habeas corpus relief -- whatever its scope -- federal courts should have jurisdiction to grant it.

Finally, we would include the admiralty jurisdiction within the "mandatory" jurisdiction of the federal courts. The law in this area is federal common law; at least the Supreme Court held so in 1917, in Southern Pacific Co. v. Jensen.[71] Whether the Court would affirm that holding today is, however, questionable -- and for reasons that make the federal common law argument somewhat weaker in this context. The holding that admiralty law cannot be delegated to the states is less the reflection of a unique federal substantive interest than recognition that uniformity in this area is particularly desirable. While this is certainly an argument in favor of federal jurisdiction, it is weaker than the usual argument for federal jurisdiction to develop federal common law: that the national perspective of federal courts is necessary to differentiate federal from state common law. In the case of admiralty, the states have little common law of their own, and this law would be made by reference to a substantial body of existing federal and international precedent. Hence, while the Supreme Court might be called upon to serve a more active role in resolving conflicts, this is one area in which state courts might be able to develop the law without help from the lower federal courts.

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71. 244 U.S. 205 (1917).

Nonetheless, we believe that it is necessary to have federal jurisdiction over admiralty cases. First, the need for uniformity in this area is particularly strong, and without federal jurisdiction the law in the states would inevitably begin to differentiate. Second, many admiralty cases involve foreign flag ships or foreign seamen and thus raise the concerns discussed in connection with cases involving foreign sovereigns. The distinguishing feature of maritime law is that a ship's owner may, through the venerable fiction that the ship is the wrongdoer, be sued in any port where the ship calls. This is a useful device for making shipowners answerable for wrongdoing in courts convenient for their victims, but as a modest quid pro quo for having to defend themselves in courts all over the world, shipowners have from time immemorial demanded access to the national courts of the countries at which their ships call.[72] Third, the law of admiralty is a subspecialty, with its own complex substantive and procedural rules. Having possessed this jurisdiction since 1789, the federal courts have considerable expertise and experience with it.

Several categories of cases remain outside this minimum federal jurisdiction: cases involving foreign nationals, cases involving individual constitutional rights, cases arising under federal statutes, and diversity cases. These are, of course, important categories -- the latter two accounting for at least two-thirds of the district courts' docket and half of the docket

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72. R. Posner, supra note 5, at 178.

of the courts of appeals.[73] Nonetheless, the area in which federal jurisdiction seems essential turns out to be surprisingly large.

What can we say with respect to cases in which federal jurisdiction is permissive? Many commentators assume that the proper way to classify these cases is by "social importance," retaining federal jurisdiction over those cases with the greatest social consequences. Such an approach cuts across categories, leaving a mix of constitutional claims, federal statutory claims, and diversity cases. But even assuming that we have an accurate way to measure social consequences, it is not clear that this is how federal jurisdiction should be allocated. In our view, it makes more sense to think about reserving federal judicial resources for those cases in which there is a particular need for a federal as opposed to a state forum.

On this approach the first two categories -- cases involving foreign citizens and individual constitutional rights -- have a high priority in the jurisdiction of the federal courts. Cases brought by or against foreign nationals raise many of the concerns associated with suits against foreign governments or their officials. To be sure, the risk of an international incident or of interference with foreign policy is reduced when the party is a private foreign citizen. Nonetheless, the risk remains. Moreover, many of the federal government's obligations under international law run to foreign nationals as well as to

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73. See, e.g., 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-1A, C-1, C-2.

foreign governments and their officials.[74] If there is an incident, the federal government is responsible; it thus wants to afford foreign citizens the option of bringing or removing their lawsuits into courts whose procedures it controls. For these reasons, the State Department advocates retaining federal jurisdiction over cases involving aliens.[75]

The argument for federal jurisdiction over cases involving constitutional claims is less one of logic than of consensus. In truth, there is no particular reason that a federal forum is necessary in these cases -- particularly once the importance of the parity debate is discounted. Nonetheless, enforcement of the United States Constitution has come to be closely associated with the federal courts, and today most observers consider it one of their core functions. Indeed, the importance of a federal forum for federal constitutional claims is one of the few issues about which there appears to be virtually unanimous consensus. It need not be so; it has not always been so. But for now at least, these cases have a relatively high priority in the jurisdiction of the federal courts.

This leaves the two largest categories -- nonconstitutional federal question cases and diversity cases. The fact that these categories are so large and diffuse makes discussing them

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74. See ALI Study, supra note 54, at 108.

75. Diversity of Citizenship Jurisdiction, 1982: Hearings on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Comm. on the Judiciary, 97th Cong., 2d Sess. 336-37 (1982)(letter from State Department dated August 9, 1982).

difficult. If we had to treat these categories as monoliths and choose between them, it seems obvious that federal question cases would have a higher priority. The entire history of the federal courts since the first Judiciary Act has reflected the growth in importance of federal questions relative to diversity cases. Moreover, the federal government is naturally more concerned with the interpretation and application of its own laws than it is with the laws of the states -- particularly since, after Erie, federal decisions in diversity cases have no formal precedential effect.

But we need not treat these categories as monoliths, and that makes the question of priorities somewhat harder. It is possible to have federal jurisdiction over some federal questions and some diversity cases while leaving other federal questions to be heard exclusively in state courts. There is precedent in the old amount-in-controversy requirement that formerly limited general federal question jurisdiction and still limits federal jurisdiction over a few federal questions.[76] Alternatively, a number of diversity proponents argue that Congress could make room for some diversity cases in the federal courts by limiting or repealing some federal laws.[77] As noted above, we do not address this latter possibility other than to note that the

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76. See, e.g., 28 U.S.C. §1337 (limiting federal jurisdiction over actions under 49 U.S.C. §11707 to actions for more than $10,000).

77. See, e.g., Charles L. Brieant, Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet, N.Y. St. B. J. 20 (July 1989).

examples cited account for too small a portion of the federal docket to provide much relief.

While it is possible to shift some federal questions out of the federal courts, this solution has several problems. First, how should Congress decide which federal questions must be heard in federal courts and which can safely be left to the states? One solution is to utilize Judge Posner's analysis of cost-externalization. Some federal laws provide benefits and impose burdens that are wholly internal to each state, while others create externalities in other states. If Judge Posner is correct, a federal forum serves a more important purpose in the latter cases. But the results of this analysis may contradict many common assumptions about when a federal forum is desirable, and are thus likely to be highly controversial. For example, Judge Posner's analysis suggests leaving most civil rights cases to state courts, since the costs and benefits of these cases tend to be internalized, while leaving most economic regulation in the federal courts. Alternatively, it may be possible to make more ad-hoc judgments about which federal cases must be heard in state courts, though any such decisions are likely to be controversial.

In any event, there is a second problem with relying on a strategy of state court enforcement of federal laws. The federal government already imposes a substantial burden on the states by requiring them to hear federal question cases concurrently with federal courts. Given this burden, and the constraints of federalism generally, it is inappropriate for Congress to enact a substantive law and require the states to devote judicial

resources to administering it without also making federal resources available. Again, this still leaves the option of repealing selected federal laws. But aside from that, we believe that federal questions should have a higher priority than diversity cases.

Finally, it is possible to articulate some priorities among diversity cases. A federal forum is most necessary, for example, if procedural limitations in the states limit the ability of state courts to provide full relief, as in some interpleader or complex multiparty cases. Second, the likelihood of discrimination against nonresidents is greater in some cases than others,[78] and it makes sense to give a higher priority to these cases. One simple line to draw in this regard is between cases brought by resident and nonresident plaintiffs.

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78. R. Posner, supra note 5, at 174-77.

PART III

PLANNING FOR THE NEEDS OF THE JUDICIARY: AN OFFICE OF JUDICIAL IMPACT ASSESSMENT

As noted in Part II, the business of the federal courts changes continually with the nation's changing substantive priorities, and the federal caseload shifts constantly as new laws are adopted and old laws are repealed or rediscovered. Such changes affect the federal courts in different ways. For example, growth in diversity cases increases the workload of the district courts more than growth in social security cases, because diversity cases go to trial more often. A rise in the number of criminal cases creates more problems for the courts of appeals than an identical rise in the number of civil cases, because the former have a higher rate of appeal.

To forecast growth in the federal caseload, then, one must be able to predict changes in the nation's substantive goals -- a hazardous enterprise. It is difficult to predict any but the grossest social, economic, political, or demographic trends more than a few years in advance. It is even harder to predict what kinds of laws are likely to emerge and how these laws will affect the federal courts. Such difficulties frustrate long term planning for the federal judiciary, making it irresponsible to offer solutions purporting to look more than a few years ahead. We can make recommendations to alleviate today's problems; indeed, we make a number of such recommendations in Part IV. But new laws will be enacted, unforeseen problems will arise, and before long a new accommodation of goals will be required.

If we cannot offer a long range plan for the federal courts, we can improve ongoing planning for how judicial resources are used. There is presently no formal mechanism in Congress to ensure that judicial resources are utilized efficiently. The closest things we now have are the Offices of the Legislative Counsel in both Houses of Congress and the Office of the Law Revision Counsel in the House of Representatives. But these are not planning bodies; the former merely provide drafting services, while the latter supervises the codification process. As a result, there is little systematic consideration given to the impact of new legislation on the federal courts.

The absence of an agency capable of, and responsible for, evaluating the impact of proposed laws on the judiciary occasionally leads to spectacular failures, such as the National Childhood Vaccine Injury Act of 1986. Congress included a provision in that Act requiring courts to determine claimants' eligibility for compensation due to illness or death resulting from vaccination. Congress did not, however, provide additional judicial resources to handle the resulting flood of cases for the simple reason that no one thought about it. It took more than a year to secure legislative relief.

Most inefficiencies in the use of judicial resources are less dramatic: Congress may unthinkingly vest concurrent jurisdiction in several courts, thereby creating forum shopping opportunities that generate conflicting decisions and additional litigation; or Congress may make an agency's decisions reviewable in both the district courts and the courts of appeals when a

single tier of Article III review would suffice. The consequences of such decisions are seldom striking enough to elicit the same response as the Vaccine Injury Act. Yet the cumulative effect of these incremental inefficiences may be great, needlessly exacerbating federal caseload problems.

There are offices with some planning responsibilities in both the executive and judicial branches: the Office of Legislative Affairs in the Department of Justice and the Office of Legislative and Public Affairs in the Administrative Office of the United States Courts. But these offices lack the resources and expertise to conduct the kind of analysis we believe is necessary. Neither the executive nor the judicial bureaucracy has the time or the inclination routinely to review legislation, forecast likely caseload, and consider alternative forms of adjudication. What assistance these offices provide tends instead to be sporadic and impressionistic when what is needed is systematic, technical, and comprehensive. Moreover, precisely because these agencies are not part of Congress, they have only a limited ability to demand attention and are often treated more like lobbies than helpmates.

We therefore recommend that Congress establish a support agency within the legislative branch -- tentatively called the Office of Judicial Impact Assessment (OJIA) -- in order to facilitate Congress's ability to make efficient use of judicial resources. This is not a new idea. Justice (then Chief Judge) Cardozo proposed creating a "Ministry of Justice" to increase judicial efficiency in 1921, attributing the idea to earlier

writings by Roscoe Pound and Jeremy Bentham.[1] Cardozo's proposal spawned a movement that led to the establishment in most states of judicial conferences and in many states of law revision commissions. The former are typically responsible for running the state's judicial bureaucracy and for updating its rules of procedure and evidence. The latter more closely approximate the kind of entity we propose to create for the federal courts: state law revision commissions are usually responsible for examining laws and judicial decisions and making recommendations for reform to the legislature.

Experience with these law revision commissions has been mixed, but several states -- particularly New York and California -- have had considerable success. The New York Law Revision Commission was responsible for the state's adoption of the Uniform Commercial Code, while the California commission produced an evidence code that has been the basis for practically all subsequent reform in the field. In addition to such large projects, moreover, both the New York and California Law Revision Commissions have offered many less prominent but still useful recommendations. Indeed, through 1984, 163 of 185 recommendations made by the California Law Revision Commission had been adopted in whole or in part by the state's legislature.[2] These successes have led other commentators --

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1. Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113-114 (1921)(citing Pound; Juristic Problems of National Progress, 22 Am. J. Soc. 729, 731 (1917); IX Bentham, Works 597-612).

2. 1984 Annual Report of the California Law Revision Commission at 29-44.

including the Department of Justice Committee on Revision of the Federal Judicial System, the American Bar Association, judges, legislators, and academics[3] -- to recommend creating a law revision commission for the federal government, and the proposal below builds on these recommendations. Our focus, however, is on inefficiencies in the deployment of federal judicial resources. Thus, while the typical state law revision commission may propose any kind of substantive reform, our proposal is limited to consideration of how federal jurisdiction should be structured.

A. The Functions of the OJIA.

Because there are several causes for inefficient use of judicial resources, the proposed agency must undertake several tasks. These are discussed below.

1. Reviewing Proposed Legislation.

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3. See, e.g., Report of the Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts 16-17 (1977)(the Bork Report); Report of the Committee on the Judiciary to the American Bar Association 13-14 (1986); Ruth Bader Ginsburg, A Plea for Legislative Review, 60 Cal. L. Rev. 995 (1987); A Bill to Establish an Intercircuit Panel, and for Other Purposes: Hearings on S. 704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 36 (1985)(letter from Justice John Paul Stevens); Henry J. Friendly, The Gap in Lawmaking -- Judges Who Can't and Legislators Who Won't, in Benchmarks 41, 58-64 (1967); Proceedings of the 49th Judicial Conference of the District of Columbia Circuit, 124 F.R.D. 241, 312-36 (1988)[hereinafter D.C. Circuit Proceedings]; Judges and Legislators: Toward Institutional Comity (Robert A. Katzman ed. 1988).

The primary function of the OJIA should be to assist the committees of Congress in preparing legislation. Sometimes Congress deliberately leaves certain aspects of a law unclear, perhaps as a political compromise or because certain issues that could not be resolved were not important enough to prevent passage of the legislation. As noted above, however, there are many cases of inadvertent oversight, and the OJIA could help to avoid these. For example, unclear substantive provisions foster excessive litigation that could often be avoided by a preliminary review of legislation with an eye toward administration in the courts. In addition, Congress often fails to specify such matters as who can sue, what the proper limitations period is, whether state law is preempted, what types of relief are available, and other "housekeeping" matters. Thus, still more problems could be avoided by creating a legislative "checklist" and making sure that the relevant congressional committees consider the items listed. The OJIA could be responsible for generating and refining this checklist, as well as for reviewing legislation to see whether the various items are included.[4] (Of

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4. Such a checklist might include the following items:

(1) Does the legislation provide an appropriate limitations period?
(2) Is there a private cause of action?
(3) Is state law preempted, and if so, to what extent?
(4) Are the key terms of the legislation adequately defined?
(5) Does the legislation have a severability clause?
(6) Would the proposed legislation conflict with other federal laws, and if so, are these other laws wholly or partially repealed?
(7) Is federal jurisdiction exclusive, and if not, can actions brought in state court be removed?
(8) What kinds of relief may the courts provide?

course, Congress could adopt an internal rule requiring legislation to include the items specified on such a checklist even without a new agency.)

More important, it is often possible to predict what kind of cases will arise under proposed legislation and to structure federal jurisdiction accordingly. Making such predictions is complex and technical, however, and it requires both expertise and experience. One may obtain a sense of just how complicated caseload forecasting can be from a 1975 study by the Federal Judicial Center: using 158 social, political, economic, and demographic indicators, the study constructs several extraordinarly complex models for forecasting caseload growth.[5] These models were especially complicated because the study was attempting to forecast overall caseload growth. Fewer factors and simpler models would be adequate to make estimates for particular pieces of legislation, which are narrower in scope. Nonetheless, the process of forecasting caseloads is technical and requires a kind of specialization and expertise that is currently lacking in the legislative process.

The potential benefits of such forecasting are enormous. Consider, for example, the adjudication of employment

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Where relevant, the checklist might also include questions regarding retroactivity, the definition of mens rea for criminal sanctions, the power of the federal courts to enjoin inconsistent state court proceedings under 28 U.S.C. §2283, and the need to exhaust state or administrative remedies.

5. Goldman, Hooper & Mahaffey, Caseload Forecasting Models for Federal District Courts, 5 J. Leg. Stud. 201 (1976).

discrimination disputes under Title VII of the Civil Rights Act of 1964, discussed in detail in an appendix to this Report prepared by Professor John Donohue of Northwestern University. Professor Donohue describes how the typical Title VII case has shifted over the years: whereas in the early years most Title VII suits challenged hiring policies based on allegations of an unlawful "pattern and practice," more recently the typical claim has been an individual claim for wrongful discharge. This shift may be explained by the very success of the statute: as more protected workers enter the workforce, more opportunities arise for acts that may be challenged as discriminatory. Moreover, because a single hiring action may create employment opportunities for many workers, the growth in individual disparate treatment claims has been geometric relative to hiring actions. Cases challenging hiring practices outnumbered termination cases by 50% in 1966; by 1985, the ratio was reversed by more than 6 to 1. Finally, and not surprisingly, the ebb and flow of Title VII cases is closely correlated to the unemployment rate, since the ease of finding replacement work directly affects incentives to sue.

All these factors were available for analysis when Title VII was enacted. And had Congress considered them, it might have structured litigation under the new law differently. For example, rather than have all actions brought in federal court, Congress might have given the Equal Employment Opportunity Commission power to adjudicate individual wrongful discharge claims, perhaps using the adjudication of similar claims by the

National Labor Relations Board as a model. The federal courts would still have been available to decide cases with broad implications for employment practices, but the agency could have decided the simpler disputes between an employee alleging that his discharge was invidiously motivated and an employer claiming that the discharge was for other reasons. Such an allocation of authority might have prevented the influx of Title VII cases into the federal courts, where today they are generally thought to represent a significant part of the caseload problem, without any sacrifice in the law's efficacy. Of course, had Congress decided to vest the EEOC with adjudicatory powers, Congress would have had to staff and finance the agency differently at the outset. At the time, unfortunately, there was no one to undertake the analysis we have undertaken only in hindsight.

It is easy to cite similar examples where an ounce of this sort of prevention could have prevented the need for a pound of cure. The discussions in Part IV of the tax courts and the social security disability claims process reveal problems due largely to poor planning that might have been avoided had Congress given more careful consideration to judicial administration. Once a law is enacted, however, it becomes difficult to change the structure of jurisdiction, for those who benefit from an existing system can usually prevent reform until problems reach the crisis level. (For example, given the size and shape of the Title VII, we recommend strengthening the EEOC to adjudicate disparate treatment claims. But given the various interests that have vested over the past 25 years and the

institutional history of the EEOC, such legislation will undoubtedly prove difficult to enact.) We therefore propose to establish the OJIA so that some of these problems can be avoided by better planning prior to enactment. The agency would act in a support capacity, performing the necessary technical evaluations of projected caseload and making recommendations concerning the most efficient way for Congress to structure federal jurisdiction. In this way, judicial resources might be used to better advantage, reducing future caseload problems.

2. Reviewing Decisions by the Courts and Executive.

Not every problem in the judicial system results from action taken (or not taken) when laws are enacted. Interpretations by other branches often alter legislation in ways that have profound consequences for the federal courts. By recognizing an implied private cause of action, for example, the courts may unexpectedly distort the anticipated level of enforcement and increase the volume of cases. Similar consequences follow from judicial decisions expanding liability under statutes that were formerly read narrowly. Take the Supreme Court's decision in Monroe v. Pape,[6] which interpreted 42 U.S.C. §1983 to impose liability for deprivations of constitutional rights by state officers even if the officers' actions were not authorized or were forbidden by state law. Prior to Monroe, litigation under §1983 was

6. 365 U.S. 167 (1961).

infrequent; one commentator reports that only 19 cases were reported in the U.S.C.A. annotations during the statute's first 65 years.[7] Since Monroe, §1983 litigation has grown at a spectacular rate, and cases brought under this statute constitute a sizeable portion of today's federal docket.[8]

Judicial interpretations are not the only source of new problems for the federal courts. Changes in executive policy may have equally dramatic effects. The number of cases brought by social security disability claimants rose dramatically in the early 1980s as a result of policies instituted by the Social Security Administration. Intended to reduce the welfare roles, these new policies instead created an enormous number of claims challenging SSA's determinations. This influx of cases did not abate until the mid-1980s, when SSA altered some of its policies and Congress adopted legislation overruling others. Another example of executive action with dramatic consequences for the federal caseload is the so-called "War on Drugs" recently declared by the President. Because criminal cases take more time (particularly trial time) than civil cases, and because the Speedy Trial Act mandates processing criminal cases quickly, the anticipated increase in prosecutions from this effort will impede civil litigation. According to some judges, their time will soon

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7. Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486, 1486 n.4 (1969).

8. See 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-1. But see Eisenberg & Schwab, The Reality of Constitutional Tort Litigation 72 Cornell L. Rev. 101 (1987)(detailed analysis of cases in one district suggests that AO data are highly inflated).

be spent exclusively on criminal matters.

These illustrations are well known, and Congress hardly needs a new agency to inform it of such problems. But these are just illustrations: the vast majority of decisions that affect the federal caseload are less newsworthy and receive no publicity or fanfare. This does not mean that these decisions do not create real problems, and the cumulative effects of many small problems can be devastating. At present, there is no one responsible for reviewing decisions of the courts and executive branch for their impact on judicial administration. One might expect this task to be performed by congressional staff, but these personnel have too many other responsibilities to stay current on every decision by every court or administrator on issues within their purview. Thus, an informal study by one commentator found that while congressional staffers tend to be aware of major Supreme Court decisions, they have little knowledge of other decisions.[9]

As a result, most judicial or executive decisions go unnoticed until the problems they create have become manifest. By then, various interest groups have invariably acquired a stake in preserving the new status quo, and it becomes difficult to make changes. Accordingly, a second function of the OJIA could be to review decisions of the other branches and apprise Congress of those with significant implications for judicial operations. By identifying a problem quickly and routing it to the

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9. See D.C. Circuit Proceedings, supra note 3, at 323-24.

appropriate committee in Congress, it may be easier to take corrective action.

3. Improving Communications Between the Branches.

A third issue concerns communication between Congress and the other branches. Even a fully budgeted, fully staffed OJIA will miss some problems that arise in the course of administering federal law. These problems are not likely to be overlooked by those who live with them. The judges and executive branch officials responsible for day-to-day administration are thus an invaluable source of information about how to improve the judicial system. Yet communication between the branches on such matters is sporadic and unsatisfactory. Justice Cardozo wrote in 1921 that

> The means of rescue are near for the worker in the mine [referring to the courts]. Little will the means avail unless lines of communication are established between the miner and his rescuer. We must have a courier who will carry the tidings of distress to those who are there to save when the signals reach their ears. To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product.[10]

This statement remains true nearly 70 years later. One constantly hears judges and executives complain that they cannot communicate their problems to Congress.[11] This concern was

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10. Cardozo, supra note 1, at 113.

11. See, e.g., the essays by Frank Coffin, Robert Kastenmeier and Michael Remington, Roger Davidson and Hans Linde in Judges and Legislators, supra note X; D.C. Proceedings, supra note X, at 321, 324, 326, 333-36; Friendly, supra note X.

voiced frequently in the unsolicited letters and comments we received from judges and lawyers. Their complaint was not that doors in Congress are closed, but rather that they do not know whom to contact. Note also that the complaint about not knowing whom to contact did not include problems like budget or staffing or controversial issues like habeas corpus in capital cases. Rather, the gap in communication concerns less prominent issues, especially technical statutory issues. On these matters, judges and executive branch officials are apparently unsure whom to inform and so tend to say nothing.

A third function of the OJIA could thus be to facilitate communication between Congress and the other branches by acting as a liason. If a judge renders a decision he or she believes requires a legislative response, or if an executive official comes across a problem that Congress ought to clarify, the judge or official could contact the OJIA, which would be responsible for referring the matter to the appropriate committee in Congress.

B. The Structure of the OJIA.

While there is little disagreement that these functions are desirable, one may legitimately ask whether they require a new agency. Why not utilize the Office of Legislative Affairs and the Office of Legislative and Public Affairs already existing in the executive and judicial branches (with additional funding if

necessary)? One problem is that the functions we envision for the OJIA are largely new. Neither of these entities engages in the kind of caseload predicting or review of decisions described above, and they are not staffed by persons with the training or experience necessary to generate and evaluate the data. This is not to denigrate the work done in these offices. What they do is important, and it is done well. But it is nothing like what we envision for the OJIA. Congress cannot simply expand existing bodies, however, because these do not provide a foundation upon which to build the kind of technical, support organization we are proposing.

Moreover, the three functions described above are interrelated, and it is important to consolidate them in a single entity. Over time, the new agency will gain experience that improve the quality of its recommendations. This learning process will be aided immeasurably if the persons responsible for forecasting future growth are also responsible for reviewing how courts respond in practice and for processing complaints. Consolidating the various judicial planning tasks in a single office will thus enhance the quality of the assistance Congress receives.

Most important, we believe that to be successful any new judicial planning mechanism must be located within the legislature. Congress is more likely to heed recommendations from an entity within the legislature than from the other branches. Furthermore, placing the new agency within the legislature should produce closer working relationships and

greater trust between its staff and Congress, thereby lending credibility to the agency's work. Experience with state law revision commissions also suggests that such bodies should be located in the legislative branch. This, for example, may be one factor distinguishing the successful commissions in New York and California from unsuccessful commissions in many other states.

A variety of subsidiary questions remain to be answered: how should the new agency be staffed? Who should be its head, and how should he or she be appointed? Should staff serve at the pleasure of the legislature or be removable only for cause? We defer many of these questions and address only the most salient ones.

First, the staff must be composed of persons with expertise in the functions to be performed. Caseload forecasting requires training in economics, social science, or statistics in order properly to identify and analyze the social, political, economic, or demographic factors relevant to a particular piece of legislation. The agency's reviewing function, of course, requires lawyers who can read opinions and understand their implications for future cases.

Second, while Congress obviously must oversee the OJIA, its members should not participate directly in the agency's work and should not be responsible for day-to-day operations. The sensitive nature of the OJIA's assignment makes it susceptible to political forces that may want either to control or to impede its conclusions. Such problems cannot be avoided altogether, but they can be minimized by establishing the OJIA as an independent,

technical support group. Here again experience with state law revision commissions is informative. In states where members of the legislature were actively involved in the work of the commission, little of value was accomplished. Successes were realized in states where the law revision commission was located within the legislature but not staffed by legislators. For the same reasons, the staff should be removable only for cause.

PART IV

ALLEVIATING CURRENT PROBLEMS: SUGGESTIONS FOR REFORM

We concluded in Part I that the federal courts are severely strained by their present caseload and that something must be done to ease this pressure. Because establishing an agency to improve ongoing judicial planning does not address this problem, further reform is needed to reduce the federal docket. This Part of our Report therefore contains recommendations for relieving existing caseload pressures. These two steps actually go hand in hand. Taken together, we are proposing first to have Congress adopt reforms to reduce the existing caseload, and then to establish a mechanism that will ensure more efficient use of judicial resources if and when caseload pressures begin to mount again.

An easy way to reduce the federal caseload would be for Congress to repeal some laws: fewer laws and fewer rights would quickly translate into fewer lawsuits. The difficulties and disadvantages of such an approach, however, are too obvious to require elaboration. A more feasible option is to shift the adjudication of some disputes to specialized tribunals of limited jurisdiction, since such courts may offer economies of scale and other advantages that reduce the overall volume of litigation. Another option is to encourage or require the resolution of some disputes in administrative proceedings. Both of these options are explored in the proposals below.

There is also the question of allocating jurisdiction between the state and federal courts, and this Part of the Report deals with several issues pertinent to defining the domains of these two judicial systems. In addition to its importance for the size of the docket, the allocation of authority between state and federal courts is a matter of considerable political and symbolic importance.

A final note: there are myriad areas for productive reform of the federal courts, and our choice of issues is by no means exhaustive. Limitations of time and space made it imperative to choose among these issues, and we have selected the ones we thought were most important. Further study would be fruitful, however, and this would presumably fall within the purview of the OJIA. In a sense, then, the proposals in this Part of our Report are also illustrative of the work one could expect this agency to do if it were established.

A. Specialized Adjudication.

Our present judicial system consists mainly of courts of general jurisdiction. There are, however, important pockets of specialization, including the Federal Circuit, the Tax Court, and some of the administrative agencies established by Congress during the past century. The question whether to expand the use of specialized tribunals is controversial. We have a long tradition of reliance on generalist judges, and many commentators firmly believe that these judges possess a broad perspective that

specialized judges lack. On the other hand, specialization may improve adjudication in technical or complex fields and may reduce the caseload through economies of scale and greater certainty in the law.

In our view, it would be a mistake at this time to abandon our courts of general jurisdiction for a system of specialized courts. There are, however, many areas in which specialization is appropriate, and there may yet come a time when changes in the size and nature of the federal docket require greater reliance on specialization. Accordingly, we have devoted considerable time and effort to this issue.

This portion of the Report begins with a general essay discussing the advantages and disadvantages of specialized adjudication. Our purpose is to isolate and identify factors for deciding when and why specialization is appropriate. We then appy these factors to a number of specific problems and either reject (the proposal for a Court of Administrative Appeals) or endorse (the Tax Court and the Court of Disability Claims) the use of specialized adjudication. In addition, we suggest reforms to expand the already specialized bankruptcy courts. Taken together, these proposals should reduce the federal docket while improving administration of the law and providing claimants with a better quality of justice. Adopting these proposals may also provide data about specialization that will be useful if and when the time comes for wider use of specialized courts.

1. <u>When Is Specialization Appropriate?</u>

As noted above, many commentators have suggested that Congress can provide for the nation's adjudication needs by establishing specialized courts with limited jurisdiction over particular areas.[1] Many of the arguments in favor of such courts are familiar. First, creating specialized courts of limited jurisdiction might provide substantial relief to the courts of general jurisdiction, giving them more time to consider the cases that remain. This might not even require removing a large number of cases from the generalist courts if the transferred cases are complex and occupy a disproportionate share of the generalist judges' time.

A second benefit of specialization is that concentrating similar cases into a single tribunal will increase the uniformity, consistency, and predictability of the law in the areas of concentration. Greater consistency offers greater guidance to potential litigants, in turn reducing the likelihood of litigation in the first place. Furthermore, channeling all cases in a field into a single tribunal should entirely eliminate disputes on forum selection and choice of law.

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1. See generally, American Bar Ass'n Standing Comm. on Federal Judicial Improvements, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth (1989)[hereinafter ABA Study]; Meador, An Appellate Court Dilemma and a Solution Through Subject Matter Organization, 16 U. Mich. J.L. Reform 471 (1983); P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal (1976); Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F.R.D. 195 (1975).

Third, the judges of a specialized court would either be chosen for their special expertise in handling issues on that court's docket or would quickly acquire experience, and the court would have enough work in the particular field to justify employing technical assistants. If, as common experience suggests, experts are better than laymen at dealing with matters in their areas of expertise, the specialized judiciary should be able to handle cases more efficiently, reducing the number of judge-hours required to decide any given number of cases and handing down decisions more rapidly.

Most important, the court's expertise should enable it to craft better opinions, particularly in fields where a small number of cases are now thinly distributed among many regional courts. In such areas, generalist judges may lack the motivation, the experience and the time to develop an understanding of the law. They decide the occasional case they see with little familiarity of policy and receive limited feedback on how well they did. A specialized court's sustained involvement with a field thus facilitates better decisionmaking. Such a court is in a better position to understand when to sacrifice accuracy (the "right" result in every case) for the ease with which bright-line rules can be applied, and how to draw the fine distinctions necessary when accuracy is more important than administrative convenience. Such a court would also have the opportunity to see how its rules work in practice and to await the most appropriate vehicles for changing them. Absolute responsibility over an entire corpus of

law should be exciting, for it provides a unique opportunity to oversee the development of a coherent body of doctrine, whose elements are carefully chosen to mesh effectively.

Given these advantages, one must ask why the federal system has not made more use of specialized courts. Part of the answer may be that there were not many federal cases in the nation's early years, so that courts empowered to hear the entire federal docket were more efficient than courts whose jurisdiction was limited to particular subject matter areas.[2] It may not have been until the 1960's that the caseload of the federal courts was large enough to make a widespread move towards specialization worth considering.

In part, however, the answer lies in the fact that there are also disadvantages to specialization -- disadvantages that are as easy to list as the benefits.[3] Not surprisingly, the problems with specialization track the advantages. For example, removing a field from the purview of courts of general jurisdiction is a benefit from the standpoint of those courts' dockets, but it also means that the thinking of generalists no longer contributes to the field's development. Cross-pollination among legal theories

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2. See, e.g., F. Frankfurter and J. Landis, The Business of the United States Supreme Court 530 (1927).

3. See generally, R. Posner, The Federal Courts: Crisis and Reform (1985); Posner, Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function, 56 S. Cal. L. Rev. 756 (1983); Cavers, Law and Science: Some Points of Confrontation, in Law and the Social Role of Science 5 (H. Jones ed. 1966); Rifkind, A Special Court for Patent Litigation? The Danger of a Specialized Judiciary, 37 A.B.A. J. 425 (1951).

is a significant source of change in law, since important patterns of reasoning that emerge naturally in one field often have meaningful applications to other areas.[4] In addition, the legal system generally promotes the like treatment of like issues even when they arise in different contexts.

Similarly, while the concentration of cases in a specialized court might stabilize the law, it also makes this tribunal more vulnerable to politicization. When issues in a field are considered by independent courts all over the country, interest groups have limited incentive and ability to influence the direction of the law by controlling the court that expounds it. In the context of litigated cases, it is difficult to believe that any interest group's arguments will persuade a large number of independent decisionmakers unless they have real merit. And it is extremely difficult for an interest group to capture the law by influencing the appointment process when the judge sits on a court of general jurisdiction. The resources of the group must be spread over the entire judiciary, and its efforts encounter interference from organizations concerned with other issues on the court's agenda.

The risk of capture by an interest group is much greater, however, with a specialized court. The interest group will find it easier to influence appointments to a specialized bench that

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4. See, e.g., R. Posner, Economic Analysis of Law (2d ed. 1977)(demonstrating expansion of economic analysis from antitrust law to other fields); Weiss, Sociobiology and the Law: The Biology of Altruism in the Courtroom of the Future, 85 Mich. L. Rev. 1041 (1987)(use of sociobiology in trusts and estates as well as other areas).

bears solely, and only, the responsibility for deciding the issues with which an interest group is concerned. And even if the appointment process remained untainted, capture may occur through the court's continuous contact with the bar that practices before it. Commentators suggest that repeat players have an advantage over one-time litigants even in courts of general jurisdiction.[5] This problem would be exacerbated on a specialized bench, where repeaters would know the judges on the bench and the eccentricities of the court's rules and specialized law, and be well-positioned to find suitable vehicles for changes in the law they desire.

Even the fact that specialized courts significantly shorten the process of adjudication may sometimes be a disadvantage. Percolation of ideas is less likely to occur if a specialized court has exclusive, or near exclusive, jurisdiction over its field. Even if some cases in a field remained in the courts of general jurisdiction, these courts tend to defer to the expertise of the special court. If conflicts fail to develop, Supreme Court review of the specialized bench will be infrequent. As a result, pronouncements of the specialized court establish new law right away, and with a fairly high degree of finality. And while this is generally beneficial, it creates a greater risk of error and exacerbates the consequences of mistakes that do occur, since only the laborious process of legislative correction is available as a check.

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5. See, e.g., Galanter, Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change, 9 L. & Soc. Rev. 95 (1974).

In addition, the court's expertise may come at the expense of an isolation that jeopardizes its ability to shape the law. Because of the repetitive nature of the docket, appointments to a specialized bench might not be as highly prized as other federal judgeships. With the same bad pay as other federal judges but less prestige, it may be harder to attract the truly talented. To be sure, practitioners and law professors also specialize, but the repetitive nature of the adjudicative function may make specialization of subject-matter more boring to judges than it is to lawyers or scholars.[6]

Moreover, isolation poses still other risks. As noted above, by embracing a particular policy, a specialized court will generally settle an issue nationwide. But the special court's enthusiasm for a new mode of thinking is less likely to be tempered by consideration of cases where that reasoning is inappropriate. And since the court is less engaged in the kind of judicial dialogue that occurs when several courts consider the same issues, its judges would have less opportunity to learn from how their work is received by the remainder of the judiciary.

Nor is it necessarily true that specialization will always lead to reduced demand for judicial resources. Although more stable, better crafted law offers its consumers greater guidance, the court's success could also attract new business, for parties might decide to litigate cases that would otherwise have been resolved by extra-judicial means. And while certain kinds of

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6. R. Posner, The Federal Courts, supra note 3, at 150.

secondary litigation would disappear, specialization could open new sources of contention. The court may need to create "boundary law": criteria for determining when a case is within its jurisdiction. Appeals from such decisions and transfers between specialized and regional courts would add to the burden on the system as a whole. Moreover, additional refinements in the specialty court's procedures may be necessary or desirable. For example, each court (or Congress) might be tempted to adopt pleading, discovery or trial rules that function particularly well within the specialized field.

These arguments for and against specialization are well rehearsed. Unfortunately, most debates over specialization make these arguments in contexts that provide little information about whether they are in fact valid. Some discussions are abstract and argue that specialization is either generally good or generally bad. Other discussions relate to specific proposals, but make little effort to relate the arguments to other contexts. The questions that need to be addressed, however, are: when does specialization make sense, and how should Congress go about fashioning a specialized court in any particular context? The first step in answering these questions is to examine the federal judiciary's past experiences with specialization to determine whether there are specific criteria for deciding when and why specialization is appropriate.[7]

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7. Experience in the states and in foreign countries would also shed light on the costs and benefits of specialization. Unfortunately, experience in these jurisdictions cannot easily be tranferred to the federal context because these courts work in a different legal environment. In states, for example, uniformity

Several conclusions emerge from this examination. First, that specialization is neither always good nor always bad, but may be beneficial in certain situations. Second, that there are useful criteria with which to identify these situations. Third, that these criteria may also be used in order to determine how to structure a specialized court so that, in the particular context, we may maximize the benefits of specialization while minimizing its disadvantages. Other sections of this Report apply these criteria and recommend establishing specialized courts in particular areas. This general discussion should make it easier to evaluate the various arguments for and against these recommendations as well as providing a useful framework for future lawmaking.

a. Past Experience With Specialized Adjudication

As noted above, Congress has never pursued a systematic strategy of specialized adjudication. Congress has, however, experimented with the idea in a variety of formats. Since theoretical considerations point in so many directions, and because past experience is often cited selectively in the debate over specialization,[8] it is helpful to examine past and current

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is less of an issue and the right to an interlocutory appeal makes boundary disputes less costly. In civil law countries, judges receive special training and play a significantly different role in the adjudicatory process.

8. See, e.g., ABA Study, supra note 1, at 44 (dissenting statement).

experience with the strategy before attempting to identify criteria for deciding when specialization will work. This section describes the jurisdiction and structure of past and present courts whose jurisdiction turns on the subject matter of the case.[9] Our discussion is basically chronological, but follows the evolution of each court over time before considering later created courts.

We acknowledge at the outset the difficulty of evaluating the work product of a specialized tribunal without an intimate knowledge of the law that tribunal interprets and applies. And even if one feels comfortable evaluating the court's work, it is still difficult to decide whether any observed improvement (or deterioration) occurred because of the court's expertise, experience, and deep appreciation of the issues at stake, or because the court was captured by special interests or succumbed to one of the other problems outlined above. Success is in the eye of the beholder. If one believes that a special interest group has the correct policy, then the fact that the group has successfully controlled the court may be a benefit or may simply

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9. This excludes courts such as the United States Court of Military Appeals and the Choctaw and Chickasaw Citizenship Court, whose jurisdiction is determined by the identity of the litigants, and territorial courts, such as the local courts of the District of Columbia, whose jurisdiction is defined geographically. Also excluded is the Court of Appeals for the District of Columbia Circuit, which has specialized adjudicatory authority in several areas. The D.C. Circuit's unique jurisdiction is created through specialized venue provisions, and the court behaves more like an ordinary regional court than a specialized tribunal. Finally, we have not studied multidistrict litigation panels, since these are more in the nature of specialized procedures than specialized courts.

reflect the specialized court's astuteness in discharging its responsibilities.

The evaluation problem makes it difficult to use past experience to predict how specialization will work in the future. It does not, however, make analysis of past experience useless. If scholars, practitioners, legislators and litigants are generally pleased with a specialized court, that court was "successful" in an important sense regardless of the evaluation of any particular expert. By the same token, if these groups distrust a court, then no matter how expert, uniform, or stable the law it creates, specialization will not be a productive direction in which to move the judiciary. Our analysis therefore focuses largely on public perceptions of how well these courts performed.

i. The Court of Claims.

Created in 1855, the Court of Claims was Congress's earliest experiment with subject-matter specialization. Unlike most current proposals, which are designed to alleviate problems in the judiciary, this one was meant to reduce the burdens of Congress. The Court of Claims was established to handle issues formerly addressed through private bills: it adjudicated claims against the United States; claims that, without a waiver of sovereign immunity, were not cognizable in federal courts.[10]

10. For a detailed treatment of the court's history, see Cowen, Nichols, & Bennett, The United States Court of Claims: A History, 216 Ct. Cls. 1 (1978) [hereafter Court of Claims History].

Congress may have chosen to give this power to a special court rather than vest it in the existing federal bench because it was especially concerned with cases that questioned the legality of governmental action.[11] The original Act conferred on the court jurisdiction over only two classes of cases: (1) claims against the United States founded upon its laws, regulations, or contractual obligations; and (2) cases referred to the court by the House of Representatives or the Senate.[12]

In many respects, the Court of Claims functioned like other courts within the federal system. Its judges were appointed by the President with the advice and consent of the Senate and held office during good behavior.[13] Both claimants and the United States were represented by attorneys in proceedings before the court, and decisions could be appealed to the Supreme Court as of

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11. Thus, the initial legislation did not make the court's judgments final. Instead, the court made recommendations to Congress, which had to adopt them. Although this cumbersome process was eliminated in 1863, see Act of March 3, 1863, ch. 92, 12 Stat. 765, 766, the Secretary of the Treasury retained some discretion not to pay judgments until 1866. Act of March 17, 1866, ch. 19, 14 Stat. 9. See also Glidden Co. v. Zdanok, 370 U.S. 530, 557 (1962)("there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to a strict legal accounting.").

12. Act of February 24, 1855, ch. 122, 10 Stat. 612.

13. Congress was apparently sensitive to the importance of establishing public respect for the court. Two of its first judges had previously served on the highest courts of their states (John James Gilchrist had been the Chief Justice in New Hampshire and Isaac Blackford, a justice on the Indiana Supreme Court), and the third, George P. Scarburgh, was an eminent lawyer in Virginia. Court of Claims History, supra note 10, at 19. Significantly, their initial salary was higher than that of the regional judges. Id. at 17.

right. There was, however, no right to trial by jury. Since the court sat in Washington, too far for some litigants, it was given authority to use commissioners; these appointed officials traveled about the country taking evidence and compiling records.[14]

At first, the Court of Claims lacked authority to render binding judgments. Its findings were reported to Congress, together with a recommended disposition, but Congress had to make the final decision. Although the increase in claims due to the Civil War led Congress to reduce its own workload further by making judgments of the Court of Claims final,[15] the Supreme Court continued to treat the court as legislative until Glidden Co. v. Zdanok was decided in 1962.[16] Glidden presented the question whether a regional circuit court could render a binding judgment if one of the judges on the panel came from the Court of Claims.[17] The Supreme Court ruled that specialized courts can

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14. For a full account of procedures before this court, see Court of Claims History, supra note 10, at 33-34.

15. Act of March 3, 1863, ch. 92, 12 Stat. 765, 766. This legislation also created a statute of limitation for claims against the United States, added two judges to the court, and expanded its jurisdiction to include counterclaims and setoffs of the United States against claimants, but left the Secretary of the Treasury with some discretion over appropriating money to pay judgments, Gordon v. United States, 69 U.S. 561 (1864). This provision was repealed in 1866. Act of March 17, 1866, ch. 19, 14 Stat. 9. See also Gordon v. United States, 74 U.S. 188 (1868).

16. Compare Glidden, 370 U.S. 530 (1962) with Williams v. United States, 289 U.S. 553 (1933).

17. Congress authorized the designation of Court of Claims judges to sit on regional circuit courts in 1956, Act of July 9, 1956, ch. 517, 70 Stat. 497. Glidden actually consolidated two cases -- one challenging the designation of a Court of Claims

indeed be constitutional courts, so long as Congress gives their judges Article III protections.[18]

If continual expansion of a court's docket signifies public (or at least, congressional) acceptance, the Court of Claims has been a success. Congress has resolved a host of nettlesome issues by creating a series of narrow rights to sue the United States in the Court of Claims.[19] In addition, passage of the Tucker Act in 1887 greatly expanded the court's jurisdiction by broadening the Government's waiver of sovereign immunity to include suits for refund of taxes illegally collected and just compensation claims.[20] Further business came when patentees obtained the right to sue the United States for compensation for its use of their inventions.[21]

By 1925, the Court of Claim's workload was such that significant reorganization was required.[22] Congress divided the

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judge, the other a judge of the Court of Customs and Patent Appeals.

18. See Glidden, 370 U.S. at 552. The Court recognized that Congress regarded the Court as an Article III court. See Act of July 28, 1953, ch. 253, 67 Stat. 226 (giving the court Article III status).

19. See e.g., Act of Mar 3, 1883, ch. 116, 22 Stat. 485 (Civil War claims); Act of Jan. 20, 1885, ch. 25, 23 Stat. 283 (French Spoliation claims); Act of Mar. 3, 1891, ch. 538, 26 Stat. 851 (Indian depredation claims); Act of May 25, 1908, Pub. Res. 29, 35 Stat. 577 (Boxer Rebellion claims); Acts of Mar. 21, 1918 and Mar. 2, 1919, ch. 25 and 94, 40 Stat. 451 and 1272 (World War I claims).

20. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505.

21. Act of June 25, 1910, ch. 423, 36 Stat. 851.

22. Claims stemming from World War I increased filings by 500 percent between 1922 and 1923. As of April 23, 1924, there were 2,500 cases on the docket and new filings averaged 100 per

court in two: a trial-level legislative court, consisting of former commissioners, and an appellate division, composed of the judges.[23] At about the same time (and also for docket reasons), Congress enacted the "Judges Bill," which made many appeals from the regional circuits to the Supreme Court discretionary.[24] Since the Court of Claims was included in this legislation, review of its decisions declined dramatically, and it became for all practical purposes the court of last resort for non-tort claims against the United States.

After 1925, the court's jurisdiction continued to grow, mainly through accretion of narrow grants of jurisdiction.[25]

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week. In 1925, the court issued 247 opinions, of which 30 were reviewed by the Supreme Court. Court of Claims History, supra note 10, at 87.

23. Act of Feb. 24, 1925, ch. 301, 43 Stat. 964. Soon thereafter, the judges of the Court of Claims received formal recognition of their status as appellate judges when their salary was equalized with the salaries of other federal appellate judges. Act of Dec. 13, 1926, ch. 6, 44 Stat. 919.

24. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 939.

25. See Act of May 29, 1928, ch. 852, 45 Stat. 877 (tax claims); Act of Aug. 30, 1935, ch. 831, 49 Stat. 1049 (oyster damage claims); Act of May 24, 1938, ch. 266, 52 Stat. 438 (unjust convictions); Act of July 1, 1944, ch. 358, 58 Stat. 649 (contract settlements); Act of Aug. 7, 1946, ch. 864, 60 Stat. 902, ch. 646, 62 Stat. 992 (World War II equitable contract claims); Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (appellate jurisdiction over the Indian Claims Commission); Act of May 11, 1954, ch. 199, 68 Stat. 81 (public contract claims); Act of Sep. 8, 1960, 74 Stat. 855 (copyright infringement actions); Act of Sep. 6, 1966, 80 Stat. 599 (federal employees group life insurance claims); Act of Sep. 6, 1966, 80 Stat. 607 (federal employees health benefits claims); Act of Oct. 2, 1968, 82 Stat. 932 (Redwood claims); Act of Apr. 3, 1970, 84 Stat. 96 (claims regarding oil spills); Act of July 23, 1970, 84 Stat. 449 (nonappropriated funds jurisdiction); Act of July 1, 1971, 85 Stat. 98 (renegotiation jurisdiction); Act of Oct. 29 1974, 88 Stat. 1543 (firefighter claims); Act of Oct. 4, 1976, 90 Stat. 1720 (declaratory judgments for tax exempt charitable

Although its integrity and impartiality were never seriously questioned,[26] the Court of Claims was superseded in 1982 when the Federal Court Improvements Act merged its appellate division with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit.[27]

ii. The Court of Customs Appeals and the Court of Customs and Patent Appeals.

The Court of Customs Appeals owes its origins to the Customs Administrative Act of 1890,[28] which created the Board of General Appraisers to adjudicate appraisal and classification issues

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organizations); Act of Oct. 4, 1976, 90 Stat. 1665 (certain privacy claims); Act of Oct. 8, 1976, 90 Stat. 1990 (transfer of the docket of the Indian Claims Comm'n); Act of Mar. 13, 1978, 92 Stat. 153 (Sioux Indians claims); Act of Nov. 1, 1978, 92 Stat. 2383 (jurisdiction over claims under the Contract Disputes Act).

26. But see, "A New Court Lineup for Corporate Litigators," Business Week, Oct. 18, 1982 (arguing that the newly created Claims Court should be less deferential to the government than the Court of Claims).

27. Pub. L. No. 97-164, 96 Stat. 25. This Act also created the Claims Court from the Court of Claims' trial division, keeping it as an Article I court but providing it with greater independence and authority. Members of the Claims Court are appointed by the President with the advice and consent of the Senate for a term of fifteen years; they can only be removed for cause with the concurrence of a majority of the judges of the Federal Circuit. The court's powers were augmented to include the power to render final judgments, to rule on certain motions that were formerly addressed to the appellate division of the Court of Claims and to adopt its own rules of procedure. Like its predecessor, the Claims Court's jurisdiction is confined to non-tort claims against the United States in which the government has waived sovereign immunity. See generally, Sward & Page, The Federal Courts Improvement Act: A Practitioner's Perspective, 33 Am U. L. Rev. 385 (1984).

28. Act of June 10, 1890, ch. 404, 26 Stat. 131.

arising in connection with tariffs and duties on goods imported into the United States.[29] By giving a single tribunal a monopoly on these cases, Congress sought to create uniformity in an area where horizontal equity was considered important.[30] In addition, by removing cases from the regional district courts, Congress also hoped to reduce congestion in those courts and to speed up the disposition of customs cases.[31] Use of a special court was also considered important because the cases within its jurisdiction were likely to raise questions about the exercise of governmental power.[32]

The Act was only partially successful. Board determinations were often reviewed de novo and conflicting decisions in the regional courts frustrated the goal of uniformity.[33] Delay was rampant because of strategic manipulation by litigants and because review in the regional circuits and appeals to the Supreme Court took time.[34] Indeed, the Act actually increased the number of cases by allowing importers to challenge an

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29. As discussed below, the Board of General Appraisers became the Customs Court in 1926 and the Court of International Trade in 1980. See infra notes 104-09 and accompanying text.

30. See G. Rich, A Brief History of the United States Court of Customs and Patent Appeals 6 (1980); cf. United States v. Stone & Downer Co., 274 U.S. 225 (1927).

31. G. Rich, supra note 30, at 6.

32. Brown, The United States Customs Court, 18 A.B.A.J. 333, 335 (1933).

33. See F. Frankfurter and G. Landis, supra note 2, at 148-52; G. Rich, supra note 30, at 7.

34. See F. Frankfurter and J. Landis, supra note 2, at 148-52.

assessment without paying first. In 1909, Congress acted to remedy these problems by creating the Court of Customs Appeals and giving it exclusive power to dispose of appeals from decisions of the Board of General Appraisers.[35]

This system lasted for 20 years,[36] until Congress realized that the patent and trademark cases then heard in the D.C. Circuit also required special competence, uniformity, and quick resolution. Accordingly, the court's jurisdiction was enlarged in 1929 to include review of decisions of the Patent Office, where trademarks were registered and patents granted. Consistent with this new authority, the court's name was changed to the Court of Customs and Patent Appeals (CCPA).[37] In recognition of its special scientific and engineering needs, the CCPA was subsequently authorized to hire technical advisors.[38]

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35. Payne-Aldrich Tariff Act, August 5, 1909, ch. 6, §29, 36 Stat. 11, 105. Congress had restricted appeals to the circuit courts of appeals in the Act of May 27, 1908, §2, 35 Stat. 403, 404.

36. One significant change was made in 1914, when Congress provided both sides with the right to petition the Supreme Court for a writ of certiorari to review constitutional questions and to interpret treaties, and gave the Attorney General the right to certify other cases for review. Act of Aug. 22, 1914, 38 Stat. 703.

37. Act of March 2, 1929, ch. 488, 45 Stat. 1475. Despite Congress's interest in creating a bench with experience in patent law, none of the judges on the court were patent experts. See, e.g., Graham, Speech Before the Federal Bar Association, Oct. 3, 1932, 14 J. Pat. Off. Soc. 932, 940 (1932)("like most general lawyers, most of our judges knew but little of the intricacies of patent practice. We have, however, learned a great deal.") The first appointment with any expertise in the field was William Cole, Jr., appointed in 1952. See generally G. Rich, supra note 30.

The constitutional status of this court remained unsettled for many years. Whereas the Board of General Appraisers was clearly part of the executive branch, the status of the Court of Customs Appeals was not mentioned in the acts under which it was established. And while its judges may have signaled their understanding of their status by accepting a pay decrease in 1932, this decision was characterized as voluntary rather than imposed through an exercise of coercive legislative power.[39] The Supreme Court held that the Court of Customs Appeals was an Article I court in Ex Parte Bakelite,[40] but matters were again thrown into confusion when Congress created the CCPA later that same year. As with the Court of Claims, the Supreme Court held that the CCPA was an Article III court in Glidden v. Zdanok.[41]

This court was not popular at first. Many legislators had opposed specialization. The 1890 Act had passed the Senate by a substantial majority, but was greeted with enough criticism to halt the appointment process for a session.[42] The court's later decision to accept a reduction in pay apparently reflected a

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38. G. Rich, supra note 30, at 118-21 (noting that some judges had previously hired technically trained law clerks).

39. See Legislative Appropriation Act of June 30, 1932, 47 Stat. 382; O'Donoghue v. United States, 289 U.S. 516 (1933); Williams v. United States 289 U.S. 553 (1933). For a description of how the judges reached their decision, which included filing waivers of constitutional rights, see G. Rich, supra note 30, at 89-96.

40. 279 U.S. 438 (1929).

41. 370 U.S. 530 (1962). See supra notes 16-18 and accompanying text.

42. G. Rich, supra note 30, at 8-9.

concern that, like the Commerce Court, it might otherwise be abolished.[43] Several commentators have cited this court as proof of the dubious propriety of specialization.[44] Nonetheless, Congress was never persuaded to eliminate specialization in the fields under this court's jurisdiction. The CCPA was abolished in 1982 only because Congress brought more cases of similar subject matter within its purview: the CCPA was merged with the Court of Claims to create the Court of Appeals for the Federal Circuit.

iii. The Commerce Court.

Reacting to public dismay over regulation of the railroad industry, and impressed by the record of the Court of Customs Appeals, President Taft convinced Congress that a special court was necessary to expedite adjudication of railway disputes, to achieve uniformity, and to bring expertise to national railroad policy.[45] Enacted over the objections of those who feared that the court would be captured by special interests, the Mann-Elkins Act of 1910 created a court with exclusive authority to review decisions of the Interstate Commerce Commission and to adjudicate

43. G. Rich, supra note 30, at 94-99.

44. See, e.g., Baum, Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals, 11 L. & Soc. 823 (1977); Rifkind, supra note 3, at 425-26.

45. Dix, The Death of the Commerce Court: A Study of Institutional Weakness, 8 Am. J. Legal Hist. 238, 254 (1964); Frankfurter & Landis, supra note 2, at 153-56.

certain other disputes arising under railway legislation.[46] Located in Washington, D.C., this new tribunal was authorized to hear cases around the country, and was given all the powers of regional circuit courts, including the power to stay or enjoin orders pending its review and to hire a staff. Its decisions could be reviewed by the Supreme Court.

The status of the Commerce Court was never entirely clear. According to its enabling legislation, the Commerce Court was an Article III court composed of five judges designated by the Chief Justice of the Supreme Court from the circuit courts of appeals. But controversy over the possibility of bias led to a compromise whereby five additional appointments were made by the President with the advice and consent of the Senate.[47] The status of these additional judges was ambiguous: the statute provided that they would hold office during good behavior, would serve on the Commerce Court for "one, two, three, four, and five years, respectively," and would be available "for service in the circuit court for any district, or the court of appeals for any circuit" as the Chief Justice found necessary. When the Commerce Court was disbanded, however, there was extensive debate over the fate of these judges. Some legislators had assumed that the Constitution protected the judges' tenure, while others apparently thought these judgeships could be abolished along with the court.[48] In the end, Congress chose to retain the judges for

46. Act of June 18, 1910, ch. 309, 36 Stat. 539. See also Frankfurter & Landis, supra note 2, at 157-60.

47. See Frankfurter & Landis, supra note 2, at 160 n.74.

48. See Frankfurter & Landis, supra note 2, at 168-69. The debate may have been about the status of all Article III judges

reasons not expressly stated.

This dispute over the status of the judges reflects a more general point about the court itself: it was highly controversial. From its inception, the public perceived the Commerce Court as "owned" by the railways, the ICC objected that it needed to represent itself in litigation reviewing its determinations, the railway owners feared that they would find it more difficult to influence this court than Congress, and the shippers believed that the court was biased in favor of railway owners.[49] To make matters worse, the court was quick to interpret railway legislation in ways that expanded its jurisdiction and scope of review, leading to rapid reversals by the Supreme Court.[50] Congress, which had never been solidly behind the Commerce Court, voted to abolish it in 1913, only three years after its creation.[51]

iv. The Emergency Court of Appeals

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and courts.

49. See Dix, supra note 45, at 241-48.

50. Within a year after the Commerce Court's creation, five of its decisions were reviewed by the Supreme Court, only one of which was affirmed. The reversals were: ICC v. Goodrich Transit Co., 224 U.S. 194 (1912); Procter & Gamble Co. v. United States, 225 U.S. 282 (1912); Hooker v. Knapp, 225 U.S. 302 (1912); ICC v. Baltimore & Ohio R.R., 225 U.S. 326 (1912). The affirmance was in United States v. Baltimore & Ohio R.R., 225 U.S. 306 (1912).

51. Act of Oct. 22, 1913, see 38 Stat. 208, 219 (abolishing the court as of Dec. 31, 1913).

The Emergency Court of Appeals (ECA) was established by the Emergency Price Control Act of 1942 (EPCA).[52] This measure was enacted in response to rising domestic prices when the United States entered World War II. It established an elaborate mechanism for controlling the cost of living throughout the country.[53] While Congress relied on a variety of special agencies to implement aspects of this scheme,[54] Congress recognized that the burdens of waging war could be distributed properly only if final decisions were made centrally and expeditiously by decisionmakers who understood all the intricacies of its plan.[55] Accordingly, Congress created two new

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52. Act of Jan. 30, 1942, 56 Stat. 23, amended by the Inflation Control Act of 1942, Act of Oct. 2, 1942, 56 Stat. 765. For commentary on this court, see Ginsberg, Legal Aspects of Price Controls in the Defense Program: A Presentation of the Views of the Office of Price Administration and Civilian Supply, 27 A.B.A. J. 527 (1941); Note, Some Aspects of OPA in the Courts, 12 Geo. Wash. L. Rev. 414 (1943); Transcript of Proceedings of the Final Session of the United States Emergency Court of Appeals, 299 F. 2d 1 (1961)[hereinafter Transcript of Proceedings]; Nathansan, The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review, 9 L. & Contemp. Probs. 60 (1942); Nathanson, The Emergency Court of Appeals, in Problems in Price Control - Legal Phases 1 (1947).

53. See Hearings Before Comm. on Banking and Currency, House of Representatives, 77th Cong., 2d Sess. on H.R. 5479 10-301 (1941); Emergency Price Control Act of 1942, 56 Stat. 23, §1(a).

54. During the 19 years the Act was in effect, 11 government agencies appeared as respondents before ECA: the Price Administrator, the Director, Division of Liquidation of the Department of Commerce, the Housing Expediter, the Defense Rental Area Advisory Board, the Director of Rent Stabilization, the Director of Price Stabilization, the Office of Defense Mobilization, the Defense Supplies Corporation, the Temporary Controls Administrator, the Reconstruction Finance Corporation and the General Services Administration. See Transcript of Proceedings, supra note 52, at 4, 14.

55. Congress actually considered dispensing with judicial review entirely, but it was persuaded that constitutional guarantees and

entities: the Office of Price Adminstration (OPA) which promulgated regulations and orders and heard protests from the persons to whom they applied, and the Emergency Court of Appeals, which reviewed OPA's actions to "determine the validity of any regulation or order issued under [denominated sections of the Act], of any price schedule effective in accordance with [denominated sectons of the Act], and of any provision of any such regulation, order or price schedule."[56] ECA was empowered to prescribe its own rules of procedure, to hire clerks and to hold sessions at places it selected.

ECA's jurisdiction was exclusive, subject only to review in the Supreme Court, but quite narrow. Congress wanted to rely primarily on the expertise of OPA, so ECA was instructed to review OPA decisions under the deferential "arbitrary and capricious" standard rather than the "substantial evidence" standard that federal courts normally applied to decisions of administrative agencies.[57] To further free OPA's hand, Congress restricted the court's power to review the record. Thus, while ECA could order supplementation of the record and remand proceedings if not satisfied with the Adminstrator's actions, the statute permitted OPA to take "official notice" of materials that would not normally be considered the subject of judicial notice,

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the war effort could co-exist if the court was structured properly. See Wilson, The Price Control Act of 1942, in The Beginnings of OPA 1, 58 (Office of Temporary Controls ed. 1947).

56. EPCA, §204(d).

57. EPCA at §204(b). See Nathanson, Emergency Price Control Act, supra note 52, at 71.

including economic data and facts generated by OPA itself.[58] And to ensure that OPA's decisions would go into effect quickly, Congress gave the court no power to enjoin or stay enforcement of OPA regulations.[59]

The ECA is especially interesting because it was an attempt to establish a temporary Article III court that could be disbanded when the emergency that led to its founding ended. To this end, instead of authorizing the President to appoint new judges to serve on this court, Congress had him designate three existing Article III judges to divide their time between their usual work and adjudicating controversies under the EPCA.[60] By the end of the war, however, the business of the court had grown to the point where five judges had to spend most of their time tending ECA's docket and holding hearings around the country.[61]

Challenges to the constitutionality of ECA gave the Supreme Court the opportunity to decide several important issues relating to specialized courts. In Lockerty v. Phillips, the Court held that Congress could withdraw jurisdiction over particular issues

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58. Nathanson, Emergency Price Control Act, supra note 52, at 66.

59. Nathanson, Emergency Price Control Act, supra note 52, at 73-74.

60. In practice, the power to appoint the judges quickly passed to the Chief Justice of the Supreme Court. Chief Justice Stone appointed as ECA's first three judges Chief Judge Fred Vinson, then on the Court of Appeals for the District of Columbia, Albert Maris, of the Third Circuit, and Calvert Magruder of the First Circuit. See Nathanson, The Emergency Court, supra note 52, at 5; Wilson, supra note 55, at 58.

61. See Transcript of Proceedings, supra note 52, at 13-15; Nathanson, The Emergency Court, supra note 52, at 5.

from some federal courts and put it in others.[62] In Yakus v. United States the Court held that this was constitutional even if it required litigants to bifurcate their claims between a court of general jurisdiction and a specialized tribunal.[63]

The ECA's record was mixed, but generally good. When established, it was accepted as the best compromise between the need for uniformity, expertise, and rapid implementation, and the need to give affected parties an opportunity to be heard.[64] Indeed, it was partly on this basis that the Supreme Court upheld the court in Yakus.[65] But there were two dissenters in Yakus, both of whom argued that specialization was a bad idea. Justice Roberts noted that a large majority of ECA cases were decided in favor of the government and objected that the Administrator had a significant advantage over complainants before the ECA.[66] Justice Rutledge, on the other hand, objected that by putting enforcement of the EPCA in the regional courts, the statutory scheme inevitably required litigants to bifurcate their claims.[67]

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62. 319 U.S. 182, 187-88 (1943).

63. 321 U.S. 414, 437-48 (1944).

64. Wilson, supra note 55, at 56-58.

65. See 321 U.S. at 437-48. Lower courts and even the ECA itself also upheld various features of the statutory scheme on the basis of Congress's emergency war powers, thus leaving open the question whether a similar scheme could be used if the country was not at war. See, e.g., United States v. C. Thomas Stores, 49 F. Supp. 111, 115 (D. Minn. 1943); Taylor v. Brown, 137 F.2d 654 (Emer. Ct. App. 1943). See generally Sprecher, Price Controls in the Courts, 44 Colum. L. Rev. 34 (1944).

66. 321 U.S. at 458-59.

Most observers, however, considered the ECA a successful innovation. This included the judges who sat upon it,[68] commentators,[69] and the lawyers who practiced before it.[70] Apparently Congress also concurred in this judgment because it gave the court additional jurisdiction after the war.[71] And while Congress terminated the court in 1961 when its docket was exhausted, the ECA became the template on which subsequent courts were modeled.

v. The Temporary Emergency Court of Appeals.

Created by the Economic Stabilization Act Amendments of 1971 (ESA),[72] this is the first of the courts patterned directly on the ECA.[73] Like the earlier court, the TECA was established as

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67. 321 U.S. at 465-468.

68. See Transcript of Proceedings, supra note 52, at 18-21.

69. See, e.g., Nathanson, The Emergency Court, supra note 52, at 46-47; Wilson, supra note 55, at 10, 103; "Price Control or Inflation," N.Y. Times, June 19, 1944, at 18, col. 2.

70. See, e.g., Transcript of Proceedings, supra note 52, at 2-3, 12.

71. Additional sources of jurisdiction included the Housing and Rent Act of 1948, 62 Stat. 97, and the Defense Production Act of 1950, 64 Stat. 808. See Transcript of Proceedings, supra note 52, at 15.

72. Pub. L. No. 92-210, 85 Stat. 749.

73. See S. Rep. No. 92-507, 92d Cong., 1st Sess. 10, reprinted in 1971 U.S. Code Cong. & Admin. News 2283, 2292; Elkins, The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibilities, 1978 Duke L.J. 113, 118 n.17. See generally K. Redden, Federal Special Court Litigation 427-43 (1982).

part of a legislative scheme aimed at regulating prices, and a specialized court was chosen to achieve rapid implementation and uniformity.[74] The TECA has exclusive jurisdiction to review cases and controversies arising under the ESA and related legislation and to hear certified constitutional issues from the lower courts. It is composed of judges chosen by the Chief Justice from the regular federal bench. Based in Washington, D.C., the TECA is authorized to sit in other places, generally where the case arose. The court can be expanded by the Chief Justice to meet demand, which has varied over the years.[75] The duties of serving on the TECA have greatly burdened its judges, and the loss of their services to their own benches has been noted as a cost.[76]

The TECA differs from the ECA in several important respects.[77] First, its jurisdiction has altered greatly over time as Congress gave it new responsibilities when the statutes

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74. See S. Rep. No. 92-507, 1971 U.S. Code Cong. & Admin. News, supra note 73, at 2293.

75. The court was to consist of "three or more judges." S. Rep. No. 92-507, 1971 U.S. Code Cong. & Admin. News, supra note 73, at 2292. By 1982, there were 20 judges. K. Redden, supra note 73, at 430; in 1989, there were 12. See 1989 Judicial Staff Directory (A. Brown, ed.).

76. Note, The Appellate Jurisdiction of the Temporary Emergency Court of Appeals, 64 Minn. L. Rev. 1247, 1268 (1980); Burger, Report on the State of the Judiciary, 63 A.B.A.J. 504, 505 (1977).

77. In addition to the procedural differences described in the text, since the ESA was enacted in response to peacetime inflation rather than the economic dislocations of war, the statutes have significant substantive differences. See generally Note, Administration and Judicial Review of Economic Controls, 39 U. Chi. L. Rev. 566 (1972).

that called it into existence lapsed.[78] More important, while the ECA reviewed the disposition of complaints from OPA under a deferential standard, the TECA functions like an ordinary federal appellate court. It sits in panels of three, and its judges review determinations of the regional district courts.[79] Its decisions can be appealed to the Supreme Court by writ of certiorari.

Comparison of the TECA to the regional court of appeals is illuminating. Because uniform implementation of economic measures was Congress's major concern, the legislation gives the TECA not only exclusive jurisdiction of cases arising under the ESA but also permits removal from state courts of defenses based on the constitutionality of the ESA or on actions under its authority. To achieve speedy resolution of disputes, the time limitations for appealing decisions to the TECA are short[80] and the court is authorized to promulgate local rules that further accelerate its determinations.

Its name notwithstanding, the TECA has endured for 19 years. But it has not been popular with litigants or commentators. The attempt to provide an ordinary trial in the

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78. See Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-28, 87 Stat. 727; Energy Policy and Conservation Act of 1975, Pub. L. No. 93-163, 89 Stat. 871; and Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 4. ESA expired in 1974.

79. See generally, Nathanson, Price-Control Standards and Judicial Review -- An Historical Perspective, 18 Prac. Law. 59 (Feb. 1972).

80. Compare ESA §211(b)(2)(30-day time limit to file all notices of appeal) with Fed. R. App. Proc. 4 (allowing 60 days in some cases).

district court with specialization at the appellate level has created difficult problems for the parties. Because courts have thought the TECA's jurisdiction limited to issues arising under the relevant legislation, appeals are frequently bifurcated,[81] causing delay, confusion, and occasionally the loss of the right to appeal.[82] The TECA has further complicated matters by limiting its authority to cases in which the district court actually adjudicated an issue within TECA's jurisdiction, a determination that is sometimes difficult to make.[83] One member of TECA has estimated that a third of the court's cases turn on jurisdictional issues.[84] On the substantive level, the court has been criticized for being overly deferential to the agencies whose activities it reviews[85] or hamstrung by the record that these agencies have compiled.[86]

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81. See Coastal States Marketing v. New England Petroleum Corp., 604 F.2d 179 (2d Cir. 1979). But see Bray v. United States, 423 U.S. 73 (1975)(violation of a district court order appealable to the regional circuit, notwithstanding the fact that the order itself was based on the ESA)(per curiam).

82. See United States v. Cooper, 482 F.2d 1393 (Temp. Emer. Ct. App. 1973); Note, supra note 76, at 1256-57.

83. See, e.g., Texaco Inc. v. Dep't of Energy, 616 F.2d 1193, 1198 (Temp. Emer. Ct. App. 1979).

84. Clark Oil & Ref. Co. v. Department of Energy, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979) (Hoffman, J., dissenting). See also Note, supra note 76, at 1258.

85. See, e.g., Elkins, supra note 73, at 114-19. Elkins points out that deference is particularly inappropriate when reviewing statutes whose delegation was upheld because of the check provided by judicial review.

86. Aman, Institutionalizing the Energy Crisis: Some Structural and Procedural Lessons, 65 Corn. L. Rev. 491, 536 (1980). See also Jaroslovsky, Chalk One Up for the Permanent Government, Washington Monthly, Oct. 1987, at 33 (noting that the Government

vi. The Special Court Created by the Regional Rail Reorganization Act of 1973.

Like the ECA, the Special Court was initially established to adjudicate claims under legislation aimed at solving a particular problem, namely the deterioration of the nation's rail service.[87] The Regional Rail Reorganization Act of 1973 (3R Act),[88] like the Emergency Price Control Act, created a set of new entities: the United States Railway Association was established within the Department of Transportation to promulgate a system for reorganizing a designated group of railways; the Consolidated Rail Corporation (Conrail), a private corporation, was authorized to operate the reorganized system; and the Special Court was set up to consolidate proceedings already before individual bankruptcy courts and to adjudicate outstanding claims. In 1976, Congress enacted the Railroad Revitalization Regulatory Reform Act (4R Act)[89] to regulate reorganization matters after Conrail assumed control. The Special Court was given original and exclusive jurisdiction over claims arising from both the 3R and 4R legislation, with review (generally by writ of certiorari) in the Supreme Court.[90]

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has won 90% of the cases that reach the TECA).

87. See generally K. Redden, supra note 72, at 404-419.

88. Pub. L. No. 93-236, 87 Stat. 985 (1974).

89. Pub. L. No. 94-210, 90 Stat. 31 (1976).

Chosen from the existing federal bench by the Judicial Panel on Multidistrict Litigation, the Special Court is composed of three judges[91] and is based in Washington, although it has no formal term and may sit anywhere within the region covered by the Acts. The court has adopted its own rules, which generally follow the Federal Rules of Civil Procedure but are tailored to its requirements. It has interpreted its jurisdiction narrowly, confining its authority to those rail reorganization issues "where the critical nature of the determination demands the consistent interpretation possible only when review is concentrated in a single court."[92]

The Special Court has not been controversial, partly because its highly specialized and narrow jurisdiction keeps it from the public eye and partly because of the immense distinction and careful work of its members. In addition, a scheme to salvage bankrupt public utilities (including commuter railroads) and make them solvent is unlikely to be criticized, especially since the Supreme Court has held that claims for uncompensated takings arising out of these statutes can be brought in the Court of Claims.[93]

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90. 4R Act §902, codified at 45 U.S.C. §719(e).

91. Its first three judges were Henry Friendly from the Second Circuit, Carl McGowan from the D.C. Circuit, and Roszel Thomsen from the Southern Distict of Maryland. Judge McGowan was later replaced by John Minor Wisdom from the Fifth Circuit.

92. Consolidated Rail Corp. v. Illinois, 423 F. Supp. 941, 948 (Sp. Ct. 1976). See also Stratford Land & Improvement Co. v. Blanchette, 448 F. Supp. 279, 286-87 (Sp. Ct. 1978).

93. Blanchette v. Conn. General Insurance Corp., 419 U.S. 102 (1974).

vii. The Foreign Intelligence Surveillance Courts.

The Foreign Intelligence Surveillance Act of 1978 (FISA)[94] is unique among the statutes establishing specialized courts because it relies on specialization at both the trial and appellate level.[95] Adopted as a compromise between national security interests and the privacy values protected by the Fourth Amendment, the FISA created the Foreign Intelligence Surveillance Courts to hear applications for orders approving electronic surveillance to gather foreign intelligence information.[96] Congress apparently created a specialized court in the belief that the nation's security interests would not be jeopardized by granting surveillance requests under a standard similar to that governing other search warrants so long as the court had the expertise necessary to make "subtle political and operational decisions."[97] In addition, Congress felt that if a special court was created, Congress could more easily establish procedures to keep its proceedings secret. So it created a court with

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94. Pub. L. No. 95-511, 92 Stat. 1783, codified at 50 U.S.C. §§1801-1811.

95. See generally K. Redden, supra note 73, at 466-473.

96. See S. Rep. No. 701, 95th Cong., 2d Sess. 16 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 3873. See also Schwartz, Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Job, 12 Rutg. L. J. 405, 433 (1981).

97. H.R. Rep. No. 1283 pt. 1, 95th Cong., 2d Sess., 116 (1978); S. Rep. No. 95-701, supra note 96, at 93.

exclusive power and required it to keep its cases confidential and to sit only in Washington, D.C. The seven judges of the FISC are chosen by the Chief Justice from the federal district courts for up to a seven-year term; these judges take turns sitting for a month in the District of Columbia.[98]

Decisions of the FISCs are reviewed by the Foreign Intelligence Surveillance Court of Review, with further review by writ of certiorari to the Supreme Court. The Review Court is composed of three appellate court judges chosen by the Chief Justice for up to seven years.[99]

While commentators approved Congress's attempt to balance the competing interests at stake with a procedural system in which security risks could be minimized (and while the constitutionality of the scheme has been upheld on this basis[100]), because the courts' work is classified, it is impossible to evaluate its performance.[101] Members of the legal

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98. The first appointments to the FISC were Albert Bryan from the Eastern District of Virginia, Frederick Lacey from the District of New Jersey, Lawrence Pierce from the Southern District of New York, Frank McGarr from the Northern District of Illinois, George Hart from the District of Columbia District, James Meredith from the Eastern District of Missouri, and Thomas McBride from the Eastern District of California. The term of an appointment is set at seven years, although new appointees' terms are staggered.

99. The initial appointments were Leon Higginbotham, Jr., from the Third Circuit, James Barrett from the Tenth Circuit, and George MacKinnon from the D.C. Circuit.

100. See, e.g., United States v. Posey, 864 F.2d 1487, 1491 (9th Cir. 1989) United States v. Duggan, 743 F.2d 59, 71-78 (2d Cir. 1984); United States v. Belfield, 692 F.2d 141, 148 (D.C.Cir. 1982).

101. Indeed, the judges refuse all comment on the court. See Schwartz, supra note 96, at 447

profession may gain some comfort from the fine reputation of the jurists who have served on these courts and perhaps it is for this reason that the Senate Intelligence Committee announced its satisfaction with FISA.[102] But the same cannot be said of the press, which has tended to portray the courts as secret institutions that side with the government.[103]

viii. The Court of International Trade.

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102. Burnham, "Panel Cites U.S. Compliance With Law Limiting Wiretaps," N.Y. Times, Oct. 19, 1984, §B, at 5, col. 1; Maitland, "A Closed Court's One Issue Caseload," N.Y. Times, Oct. 14, 1982, §B, at 16, col. 4.

103. A NEXIS search turned up a suprisingly large number of articles on the FISCs, especially in light of their limited jurisdiction. See, e.g., Soble, "U.S. Says It Tapped Calls of Palestinian Defendants, Lawyers," N.Y. Times, Feb. 19, 1989, Pt. 2, at 1, col. 5 (speaking of the court as "operating in a closely guarded courtroom, in the main Justice Department building in Washington, which is closed to defendants"); Maitland, supra note 102 (this article begins: "Only one courtroom in America is permanently closed to the public. Located in a vaultlike chamber on the sixth floor of the Justice Department, its locked door is always guarded and its walls are insulated."); Taubman, "Sons of the Black Chamber," N.Y. Times, Sept. 19, 1982, Sec. 7 at 9, col. 1 (noting that secrecy of FISA courts makes difficult to know what the government is doing); Ricks, "A Secret Court Where One Side Always Seems to Win," Christian Science Monitor, May 21, 1982, at 1 (claiming that the court had considered 949 cases and decided for the government in every one). But see Engelberg, "Intelligence Experts See No Link Among Arrests," N.Y. Times, Nov. 26, 1985, sec. B, at 6, col. 1 (noting that wiretaps approved by the FISA courts contributed to catching several spies).

The reactions of judges are mixed. Then-Judge Robert Bork was quoted as claiming that the secrecy of the court makes it difficult to know whether he would be willing to serve on it, see Ricks, supra, while Judge Frederick Lacey expressed gratification at having been appointed to its bench, Narvaiz, "Lacey Leaving Bench," N.Y. Times, Oct. 6, 1985, Sec. 11NJ, at 15, col. 1.

The Court of International Trade is the successor to the Board of General Appraisers, and thus originated in Congress's second effort at specialization -- the Customs Administrative Act of 1890.[104] The Board was created to reduce docket pressure in the district courts and promote quick, uniform decisions in customs cases. It consisted of nine members working under the Secretary of the Treasury.[105] Initially established as an Article I court whose judges were subject to removal by the President for cause, the Board's jurisdiction was limited to classification and valuation issues respecting taxes and duties on imports. It sat in New York City, but held sessions in different ports of entry.

The modern CIT evolved in several stages: in 1926, the Board's name was changed to the United States Customs Court;[106] in 1956, it was made into an Article III court;[107] in 1970, its operating procedures were modified.[108] These changes culminated in the Customs Courts Act of 1980, which significantly expanded the court's authority in order to bring judicial practice in the customs area into line with obligations undertaken by the United States as part of the General Agreements on Tariffs and Trades (GATT).[109] The court had formerly reviewed administrative

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104. Act of June 10, 1890, ch. 404, 26 Stat. 131.

105. See G. Rich, supra note 30, at 6.

106. Act of May 28, 1926, 44 Stat. 669.

107. Act of July 14, 1956, 70 Stat. 532.

108. Customs Court Act of 1970, Pub. L. No. 91-271, 84 Stat. 274.

protests filed with the Customs Service.[110] It now possesses exclusive jurisdiction over any civil action against the United States arising out of a federal law concerning import transactions, including classification and valuation issues. The court also reviews agency determinations with respect to antidumping and countervailing duty investigations; administrative certifications of workers, firms, or communities seeking eligibility for trade adjustment assistance; and administrative decisions to revoke, suspend, or deny customhouse broker's licenses. Finally, the court has exclusive jurisdiction over civil actions by the United States under import transaction legislation, and over actions brought by American workers, communities, and manufacturers alleging adverse affects from import transactions.[111]

The court's operations have been relatively noncontroversial.[112] As with several other specialized courts,

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109. Pub. L. No. 96-417, 94 Stat. 1727; H.R. Doc. No. 96-153, Part I, 96th Cong., 1st Sess. (1979).

110. See generally Cohen, The New United States Court of International Trade, 20 Colum. J. Transnat'l L. 277 (1981).

111. See generally Note, International Trade: The United States Court of International Trade, 22 Harv. Int'l L. J. 480 (1981).

112. See, e.g., Lempert, "Proceedings on Steel Reflect Changes in Rules of Trade Game," Legal Times, Aug. 9, 1982, at 1. Lay coverage is mostly in trade journals and focuses on groups engaged in international trade. The court receives rather neutral reviews, perhaps because readers include both importers and exporters. See, e.g., Sfiligoj, "Ruling Seen Aiding Import Relief," 14 Metalworking News, April 6, 1987, at 4; Hess, "Trade Court Rule Seen Beneficial to Importers," 41 Footwear News, Oct. 21, 1985, at 2; Wightman, 149 Women's Wear Daily, Jan. 9, 1985, at 32.

however, jurisdictional questions have sometimes proved troublesome for the courts and parties.[113]

ix. The Court of Appeals for the Federal Circuit

The most recent addition to the specialized judiciary, the Federal Circuit was established by the Federal Court Improvements Act of 1982 in response to a recommendation in one of Congress's previous studies of the federal judiciary, the report of the Hruska Commission.[114] Although that Commission is remembered mostly for the fact that Congress rejected its principal suggestion -- creation of a National Court of Appeals -- Congress accepted a secondary finding that there was a special problem in patent law.[115] Noting that the Supreme Court rarely gave effective review to patent law decisions of the regional circuits, the Commission suggested creating a specialized court with near exclusive jurisdiction in patent matters.[116]

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113. See, e.g., Kennedy, A Proposal to Abolish the U.S. Court of International Trade, 4 Dickenson J. Int'l L. 13 (1985); Cohen, Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and a Critique, 58 St. John's L. Rev. 600 (1984).

114. See Pub. L. No. 97-164, 96 Stat. 25.

115. See Commission on Revision of the Federal Appellate Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975), reprinted in 67 F.R.D. 195, 236 (1975) [hereafter Recommendations for Change]; S. Rep. No. 275, 97th Cong., 2d Sess., at 5-6, reprinted in 1982 U.S. Code Cong. and Admin. News 11, 15.

116. Recommendations for Change, supra note 115, at 13-15, 67 F.R.D. 195, 217-20.

Somewhat wary of specialized tribunals,[117] but impressed by the achievements of the TECA and the FISCs,[118] Congress decided to create a new kind of specialized tribunal: one with the exclusivity necessary to achieve uniformity in patent law, the concentration of patent cases needed to develop expertise, and enough other business to prevent the court from succumbing to intellectual isolation.[119] Thus, the court has almost plenary jurisdiction over patent law, having been given the jurisdiction of the CCPA to review decisions of the Patent and Trademark Office, the power of the Court of Claims to review its trial division's adjudication of patent disputes against the United States and the patent jurisdiction of the regional circuits over appeals from cases arising under the patent law.[120] At the same time, the court has jurisdiction to hear a variety of other

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117. See, e.g., S. Rep. No. 97-275, supra note 115, at 37, 1982 U.S. Code Cong. & Admin. News at 46 (letter from Legal Affairs Officer William Weller); id. at 39, U.S. Code at 48 (additional views of Senator Patrick Leahy); id. at 40, U.S. Code at 49 (additional views of Senator Max Baucus).

118. S. Rep. No. 97-275, supra note 115, at 4, 1982 U.S. Code Cong. & Admin. News at 14.

119. See generally Adams, The Court of Appeals for the Federal Circuit: More Than A National Patent Court, 49 Miss. L. Rev. 43 (1984).

120. Although the statute describes the court's jurisdiction as "exclusive," 28 U.S.C. §1295, patent questions sometimes arise as defenses or counterclaims in other actions. First, if the original action is filed in state court, it cannot be removed to federal court, because of the well-pleaded complaint rule. In addition, the Federal Circuit has extended the well-pleaded complaint rule to cases involving patent defenses that are brought in federal district courts. Cf. Christianson v. Colt Indus. Operating Corp., 108 S.Ct. 2166 (1988).

matters. Since it received the entire jurisdiction of the CCPA, this put customs and tariff cases on its docket along with review of the Patent and Trademark Office's trademark registration decisions.[121] It was also given the docket of the Court of Claims, which includes some tax cases as well as many government contract and labor disputes.[122] Over time, moreover, Congress has added other matters to the court's agenda.[123]

The Federal Circuit was initially established by combining the benches of the CCPA and the Court of Claims, both of which courts were terminated. New judges are chosen by the same process as in the regional circuit courts. The court generally

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121. 28 U.S.C. §1295(a)(5) and (6). The court reviews the decisions of the Court of International Trade and final orders of the International Trade Commission. It does not, however, hear appeals from district court trademark actions. 28 U.S.C. §1295(a)(1) and (4).

122. The Federal Circuit has exclusive jurisdiction over all appeals from the Claims Court (including claims against the United States for more than $10,000 under the Tucker Act) and over appeals from final decisions of agency boards of contract appeals under the Contract Disputes Act of 1978, 28 U.S.C §1295(a) (2), (3), and (10). In addition, the Federal Circuit has exclusive jurisdiction over appeals from federal district court actions for all non-tax and non-tort claims against the United States for $10,000 or less (the "little Tucker Act"). Id. Finally, the Federal Circuit also has exclusive jurisdiction over most final orders and decisions of the Merit Systems Protection Board. 28 U.S.C. §1295(a)(9), 5 U.S.C. secs. 1101-8913.

Other grants of jurisdiction include appeals from the Department of Agriculture's orders under 7 U.S.C. 2461, the Plant Variety Protection Act, see 28 U.S.C. §1295(a)(8), and exclusive jurisdiction over findings on questions of law of the Secretary of Commerce relating to the importation of technological and scientific material, 28 U.S.C. §1295(a)(7).

123. For example, Congress recently added review of certain veteran's claims to the court's jurisdiction. Act of Nov. 18, 1988, Pub. L. No. 100-687, 102 Stat. 4122.

sits in Washington, D.C., but it has power to convene anywhere in the nation.[124] It has authority to make local rules and to hire technical assistants along with an administrative staff. Its decisions are reviewed by writ of certiorari to the Supreme Court.

The Federal Circuit has received mixed reviews. It has clearly made patent law more uniform.[125] While the general perception is that the court has favored technology producers (patentees) over consumers, there is substantial disagreement as to whether this is the result Congress intended and whether it is good for the nation.[126] Commentators have also noted that the boundary law created by the court has posed difficulties for litigants, impeding the Federal Circuit's success in alleviating docket problems.[127] Comments on the court's employment decisions

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124. In the seven years of its existence, the Federal Circuit has held sessions outside of Washington on only 13 occasions. Markey, The First Two Thousand Days, reprinted in Pat. Trademark & Copyright J. (BNA) No. 935, at 179, 183 (1989).

125. See generally Dreyfuss, The Federal Circuit: A Case Study in Specialized Courts, 64 N.Y.U. L. Rev. 1 (1989); K. Krosin, Federal Circuit Patent Law Decisions 78 (1986); Bender, Griffen, & Lipsey, Patent Decisions of the United States Court for the Federal Circuit: The Year 1985 In Review, 35 Am. U. L. Rev. 995 (1986); Walick & Ellis, The United States Court of Appeals for the Federal Circuit: At the Leading Edge of High Technology Issues, 36 Am. U. L. Rev. 801 (1987).

126. See, e.g., Dreyfuss, supra note 125; Mintz & Racine, Anticipation and Obviousness in the Federal Circuit, 13 AIPLA L.Q. 195 (1985); Bender, Griffen & Lipskey, supra note 125, at 997; Moskowitz, "Technology Owners' Ace in the Hole," Chemical Week, March 4, 1987.

127. See Dreyfuss, supra note 125, at 34; Goldstein, The Federal Circuit's Appellate Jurisdiction Over Federal District Court Patent Cases: The First Three Years, 13 A.I.P.L.A. L. Q. 271 (1985); Note, An Appraisal of the Court of Appeals for the Federal Circuit, 57 S. Cal. L. Rev. 301 (1984).

has similarly been mixed,[128] and criticism has been leveled at some of its tax opinions.[129]

b. Making Use of Specialized Courts.

This study of past experience demonstrates that specialization has been a mixed bag -- successful in some contexts, but poorly received in others. This section abstracts the factors that contribute to the success of a specialized tribunal from the record described above. The criteria fall into three clusters: the field specialization, the identity of the participants, and the strategy chosen for implementation.

i. The Field.

While the choice of field is obviously critical to the success of the specialization enterprise, four factors appear to be important in this regard: (1) the complexity of the law and facts raised by cases in the field; (2) the extent to which cases in that field can be segregated from cases involving other fields of law; (3) the extent to which there is consensus on the

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128. See, e.g., Vaughn, Federal Employment Decisions of the Federal Circuit, 35 Am. U. L. Rev. 1037 (1986)(generally approving); Nelson, Markey's Fast-Track Approach Attracts Controversy, Legal Times, Aug. 4, 1986, at 5 (noting that the court and its procedures disfavor the claims of federal workers).

129. See, e.g., Blatt, The Federal Circuit's 1985 Tax Cases: The Exercise of Equity, 35 Am. U. L. Rev. 1097 (1986).

objectives of the law in that field; and (4) the way in which cases in the field are distributed among the regional courts of general jurisdiction.

Complexity. We begin with complexity because it is central in determining the success of specialization and because the majority of proposals cite this as the major justification for creating a specialized tribunal. It led Learned Hand to call for reform in patent litigation,[130] and, at least in part, motivates proposals for special tribunals in fields such as product liability,[131] environmental law,[132] tax, and antitrust law.[133]

The more intricate the law, the more likely it is that a generalist will get things wrong, confuse matters and encourage litigation. The more complicated the facts of a case, the more the judge must master before the case can be decided at all. Thus, transferring complex cases to courts staffed by experts should produce three of the major benefits ascribed to specialization: improved decisionmaking, a reduction in the size of the docket and a diminution in the number of judge-hours required to clear it. As Chief Judge Markey put it: "[I]f I am

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130. Parke-Davis & Co. v. H.K. Mulford Co., 189 Fed. 95, 115 (S.D.N.Y. 1911). See also F. Frankfurter and J. Landis, supra note 2, at 175.

131. See, e.g., Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277 (1985).

132. Cf. NRDC v. NRC, 547 F.2d 644, 645-46 (D.C. Cir 1976), rev'd, Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

133. See, e.g., H. Friendly, Federal Jurisdiction: A General View, 153-96 (1973).

doing brain surgery every day, day in and day out, chances are very good that I will do your brain surgery much quicker, or a number of them, than someone who does brain surgery once every couple of years."[134] And, of course, he might have added that the experienced brain surgeon is more likely to do the operation correctly.

It is, unfortunately, difficult to demonstrate the relationship between complexity and efficient adjudication. The Federal Circuit, for example, has received considerable praise for its handling of patent cases -- which are certainly complex -- yet the court's success cannot be demonstrated empirically. The number of cases filed has not decreased, nor have median decision times declined.[135] But this simply suggests that the relationship between specialization and complexity is more complicated than one might assume at first.

First, many of the benefits from assigning cases to judges more capable of handling their complexities may not translate into faster dispositions. For example, complex statutory schemes are often administered piecemeal by a variety of agencies. A specialized court that obtains exclusive authority over a formerly dispersed caseload may need more time -- at least in its early years -- to sort out the effects of prior poor

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134. Court of Appeals for the Federal Circuit--1981: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 42-43 (1981)(statement of Howard T. Markey, Chief Judge, Court of Customs and Patent Appeals).

135. See Dreyfuss, supra note 125, at 76-77.

administration. Similarly, where problems result from having many courts deciding cases in a poorly understood area, the advantages of consolidating adjudication into a single forum might not translate into fewer filings. Having a single court may make the law more predictable and thus make settlement more likely. But if the tribunal also decides each case more rapidly, it may attract more cases as adjudication becomes more competitive with alternative methods of dispute resolution. Moreover, turning a chaotic legal environment into a stable one may encourage more of the activity that the court regulates, which will produce more lawsuits. Thus, in the years following establishment of the Federal Circuit, more patent applications were filed.[136]

Another reason that it is difficult to measure the benefits of specialization is that the variables affected by specialization do not always lend themselves to scrutiny. For example, cases involving numerous parties may be complex enough to benefit from expert adjudication. Thus, no one doubts that Judge Weinstein's experience with the Agent Orange controversy[137] helped him (and Special Master Feinberg) handle the Shoreham litigation.[138] But the benefits in such cases may be in producing a better quality of decision, something that is not

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136. See Dreyfuss, supra note 125, at 24 n. 150.

137. See, e.g., In Re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983).

138. See, e.g., Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989); Benkelman, "LILCO Settlement OKd," Newsday, March 23, 1989, at 5.

subject to quantification. In the same fashion, taking complex cases out of the court of general jurisdiction circuits trims the those courts' dockets in ways that are probably helpful, but not easily documented.

Sometimes, however, the lack of any discernible effects from specialization may indicate that something has gone wrong. It is important to match the level at which a specialized court is established with the reason a particular field is complex.[139] If, as in patent cases, the factual underpinnings of a case are highly technical, then specialization will have its greatest impact at the trial court level. If, on the other hand, it is the legal scheme that is the source of complexity, specialization may produce benefits only at the appellate level. The failure of a specialized court to produce demonstrable efficiencies may thus indicate a mismatch in the specialized court and the problem that led Congress to establish it.

Segregability. A substantive factor that demonstrably affects the success of a specialized court is the extent to which the issue targeted for special treatment arises in cases that also present other questions. Litigation between a recalcitrant taxpayer and the government is generally limited to tax-centered questions, so that matters in the Tax Court are highly segregable; patent cases, in contrast, are often joined in antitrust actions and so are less segregable.

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139. See infra notes 166-69 and accompanying text.

Here, again, the picture is complex, however, for the segregability of the special issue points in opposite directions. On the one hand, past experience suggests that specialized courts may have problems with "border" disputes, sometimes to the point of impairing the docket-control advantages of specialization. The experience of the TECA is a good example. The court was given power to review district court decisions on questions arising under a succession of regulatory schemes, with the hope that its small docket would promote rapid and uniform implementation of important policies. To further that goal the court's jurisdiction extends only to the TECA issues in cases it hears, and other issues in the same case must be appealed to the regional circuit court.

This division might work if TECA questions usually arose in isolation, but instead they arise in a variety of cases including criminal prosecutions. Parties frequently find themselves saddled with the burdens of a bifurcated appeal. Moreover, the court must devote considerable time and effort to resolving jurisdictional issues that are unrelated to the expertise it was expected to develop.[140]

To avoid this problem, careful thought should be given to the way in which questions arise in a chosen field. If they are segregable -- that is, if they generally arise in cases that can be adjudicated by the special court in their entirety -- then specialization will work easily. A specialized Tax Court is

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140. See supra notes 81-84.

feasible for this reason.[141] By contrast, if the specialized issues are generally embedded in larger cases, specialization may prove inefficient. A Constitutional Court, for example, would almost certainly be unproductive.

On the other hand, there be advantages when the specialized issue regularly arises in litigation raising other matters. An isolated bench may lose touch with the generalized judiciary and so fail to perceive developing trends in the law.[142] By the same token, as adjudication in the specialized court passes out of common experience, other courts will no longer be influenced by the specialized tribunal or by developments in the law it adjudicates. Isolation may even reduce the incentive of specialized judges to write persuasive opinions.

The effects of isolation can to some extent be countered if the specialized court has "case" jurisdiction, i.e., the power to decide non-specialized issues that arise in the specialized area. There will then be areas where the authority of the special court overlaps with that of the regional courts, and this overlap, while preserving exclusivity with respect to the specialized issue, creates avenues for interchange between the special and general courts. A similar effect can be achieved by adding unrelated matters to the jurisdiction of specialized courts, as was done with the Federal Circuit, but the specialized

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141. See, e.g., Friendly, Averting the Flood by Lessening the Flow, 59 Corn. L. Rev. 634, 644 (1974); H. Friendly, supra note 133, at 161-68. Indeed, we propose the establishment of such a court below. See infra Part IV.

142. See, e.g., Dreyfuss, supra note 125, at 53-58.

court may gain more if its exposure to law outside its area of expertise comes from deciding non-specialist issues in cases that include its area of special jurisdiction. Issues that arise together often raise related policy considerations. A court that hears an entire case gets a better view of the broader universe within which its specialty exists. Hence, when the specialized court's issue is not segregable, the court may gain from having jurisdiction over entire cases, including non-specialty issues.

The experience of the Federal Circuit is informative. One of that court's prime missions is to bring uniformity and stability to patent law. But the patent jurisdiction of the Federal Circuit has bred frequent litigation over jurisdictional matters because patent claims are generally nonsegregable. Although the Federal Circuit has not adopted the TECA's "issue" jurisdiction rule, it has interpreted its authority narrowly to avoid as many nonpatent issues as possible.[143] The court has further tied its hands by adopting a choice-of-law rule that requires it to follow the law of the regional courts with respect to the non-patent aspects of cases it adjudicates.[144] These actions complicate the court's decisionmaking and increase the cost to litigants. They also leave the court open to accusations that its pro-patentee bias results from the failure fully to appreciate competition policy.[145] Were the court freer to

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143. See, e.g., Christianson v. Colt Indus. Operating Co., 108 S.Ct. 2166 (1988).

144. Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984)(per curiam); Atari, Inc. v. JS & A Group, 747 F.2d 1422 (Fed. Cir. 1984)(en banc).

consider antitrust issues for itself, this problem -- or the perception that there is a problem -- might disappear.

Consensus. Public consensus on the goals of the law administered by the specialized tribunal emerges from our study as one of the most striking contributors to the success of specialization. Comparing the experiences of the Commerce Court and the Foreign Intelligence Surveillance Courts on the one hand, with the Special Court and the Emergency Court of Appeals on the other illustrates this point. It is hard to find significant differences in these courts. All utilized (or utilize) judges appointed from the regional circuits; all were given narrow grants of jurisdiction over highly specific statutory schemes. Both the Commerce Court and the Special Court dealt with railroads; the FISCs and the ECA, with the ramifications of foreign hostility. Yet the Commerce Court was abolished after only three years of operation, and while the FISCs have lasted longer, they are regarded with suspicion in some quarters. The ECA, on the other hand, became a model for the future, and the Special Court has managed to effect major changes in an important sector of the economy with great success.

What distinguishes these courts is the extent to which there was public agreement on their missions. In the case of the unsuccessful courts, this consensus was lacking. The Commerce Court was established during the regulatory state's infancy, at a time when the role of the federal government in utility

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145. See Dreyfuss, supra note 125, at 55-57.

regulation was hotly debated. Even those who concurred in the need for regulation had little sense of how the interests of the eastern states should be balanced against those of the west, or how the needs of shippers should be weighed against the demands of railway owners.[146] Similarly, with respect to the FISCs, there has been longstanding public debate over the extent to which basic guarantees of freedom should be sacrificed to national security interests. In contrast, the ECA was created in direct response to the nation's entry into World War II, when the nation was united in its willingness to make sacrifices to win the war, and there was general opposition to the notion that scarce goods should be allocated solely on the basis of purchasing power. The Special Court's mission -- to save the railways from destruction -- was, similarly, a popular goal.[147]

Upon reflection, it is not surprising that consensus on the goals of the legislation administered by the specialized court should influence its success. A generalist court does not need public agreement to gain public trust. The heterogeneity of its docket makes it likely that there are some issues it can handle in a manner that validates the bench; indeed, the court need only receive and follow the law of its predecessor courts to gain a measure of public acceptance.[148] The court's resolution of

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146. F. Frankfurter and J. Landis, supra note 2, at 153.

147. See also Jordan, Specialized Courts: A Choice?, 76 Nw. U. L. Rev. 745, 760-62, 765 (1981).

148. See, e.g., Mintz, Patent Appeals Now Centralized in New Circuit Court, Legal Times, Nov. 29, 1982, at 12.

particular controversial questions may be rejected but its general reputation is likely to remain intact. In contrast, when a specialized court is established in an area where there is no consensus, there is nothing for the public, practitioners, or other courts to measure the new court's rulings against. The court becomes an easy target for those who disagree with its decisons.

For this reason, certain proposals for specialized courts are unlikely to succeed. Consider, for example, the proposal to establish a Science Court.[149] The proposal is defended on the ground that generalist judges lack the expertise, experience, and authority to decide scientific issues. But much discontent with respect to the way these issues are handled comes from the fact that many questions that pass for scientific questions actually involve policy choices as to which there is no public agreement. Consider the Delaney Clause, which prohibits the use of food additives that induce cancer.[150] Many of the disputes generated by this prohibition sound like scientific issues: Are animal tests for carcinogenicity appropriate? How should high-dose data be extrapolated to human dosage levels? But many of the central questions really address whether prohibitory rules make sense in the face of uncertainty, whether significant resources should be expended on quantifying one risk to human

149. See, e.g., Kantrowitz, Proposal for an Institution for Scientific Judgment, 156 Sci. 763 (1967); Martin, The Proposed "Science Court", 75 Mich. L. Rev. 1058 (1977).

150. 21 U.S.C. §348(c)(3)(A).

health when people engage in so many riskier activities on a daily basis, and who should decide which risks are acceptable. A Science Court could decide these issues, but there is no assurance that the public would accept its conclusions.

Moreover, the fact that specialized courts take less time than other courts to resolve open controversies makes it harder to build a consensus. During the time that generalist courts debate an issue, the public may grow to understand both sides of the question better. More important, experience under the disparate rules of different circuits will generate data that can be taken into account when the issue is finally resolved, be it by Congress, the Supreme Court, or de facto agreement among the circuits. Once achieved, the ultimate resolution is more likely to enjoy public understanding, if not acceptance. Specialized courts like the ECA and the Special Court tend to settle the law rather quickly and on a nationwide basis without an extended period under conflicting legal rules. Indeed, this is one of the chief advantages of specialized courts. But speed and uniformity also have costs. If there is no clear idea of the policy a special court is intended to implement, the court may run into resistance and find it difficult to create public consensus on the issue. Specialized adjudication is simply not a substitute for forging public agreement on a legislative agenda. This may be the lesson of the Commerce Court.

Similarly, specialized adjudication is not a substitute for forging public agreement on a legislative agenda. An Environmental Court, for example, is not likely to succeed if

animated by a desire to curb freewheeling agencies while avoiding the political consequences of balancing risks to future generations against present profit maximization.[151] A court established in such a legislative atmosphere would decide the tough questions when they are presented in litigation, but its decisions would not end the controversies. Those who disagreed with its decisions would enumerate the many dangers of specialization and claim that the court's decision was the expected result. And it will not be possible to determine whether the court properly used its expertise rather than having been captured by the side that won.[152]

The proposal for a Court of Administrative Appeals may stand on more secure footing.[153] Although such a tribunal may be charged with responsibility to review agencies whose activities are controversial, its docket would be broad enough to include jurisdiction over matters on which there is public consensus. Cases from that portion of the docket would help build public confidence in the court. Much of the controversy over judicial review of agency action could then be abated by the expertise developed by a specialized court with a solid public reputation.

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151. See, e.g., Whitney, The Case for Creating a Special Environmental Court System, 14 Wm. & Mary L. Rev. 473 (1973).

152. See also Jordan, supra note 147, at 765 (noting that lack of national consensus in environmental law and health and safety regulation makes it unlikely that specialized courts will work in those areas).

153. See, e.g., Nathanson, The Administrative Court Proposal, 57 Va. L. Rev. 996 (1971); Cooper, The Proposed United States Administrative Court, 35 Mich. L. Rev. 193 (1936); H. Friendly, supra note 133, at 177-90.

Public consensus may also be important to the judges who staff a specialized court. The repetitive nature of such a court's docket may make these judgeships somewhat less attractive to the nation's best legal minds. Experience with past specialized courts, however, demonstrates that when the tribunal is organized to further an important public objective, able people will agree to serve. Moreover, anecdotal evidence suggests that appointment to a specialized bench composed of handpicked jurists can be a satisfying experience. The challenge in devising a common law to implement national policy is attractive, especially when there is general agreement on the policy. The ECA's judges, for example, spent their war years hearing cases in 65 different cities while balancing the demands of their own circuits. Undoubtedly, one reason these judges were willing to devote so much of themselves to this enterprise was that their cause was generally appreciated.

Distribution. Another factor that may affect whether specialization will succeed is how a specialized court alters the distribution of cases within the judicial system. If the cases are distributed among the regional courts in such a way that each court hears only a small number each year, the advantages of channelling all such cases into a single court are substantial. The regional judges' lack of familiarity with the issues is likely to make adjudication time consuming and prone to error.[154] Concentrating the cases into a critical mass in a

154. See R. Posner, The Federal Courts, supra note 3, at 182; ABA Study, supra note 1, at 14.

single court should produce a bench with the motivation, expertise and opportunity to create a better crafted, more stable body of law. Where existing courts already hear enough cases in a field to possess these advantages, specialization is less beneficial.

A related question is the extent to which administration of the law is currently fragmented, or would become fragmented through specialization: will specialization prevent or create disuniformity? If several courts independently interpret and apply the law and have no power to overrule each other, dissimilar -- and even contradictory -- rules will be applied in different locations. This may create a perception of unfairness because litigants around the country are treated differently. More important, it makes it more difficult for intercircuit actors to predict what law will apply to them. Finally, fragmented administration risks problems of legal incoherence. Each court may see too little of the picture to know what its overall objectives should be or how to fulfill them. If the field is sufficiently complex, the law can become internally inconsistent as various doctrines are made to work at cross purposes.

Specialization is often a means of reducing disuniformity and incoherence in the law. Consider the success of the Federal Circuit in adjudicating the patent portion of its docket. Patent disputes used to be spread among the regional district courts, the CCPA and the Court of Claims. No regional circuit was likely to hear more than 20 patent cases in a single year.[155] The CCPA

mainly handled issues like patentability, which came up in patent issuance litigation, while the regional courts handled enforcement questions, such as patent misuse. Gathering all these cases into a single court produced a critical mass that improved the capacity to make the law uniform and to knit the conceptual strands of patent law into a coherent whole without Supreme Court involvement.

Of course not every branch of law suffers from the distribution problems that formerly afflicted patent cases. Furthermore, in some fields uniformity may not be particularly important. Consumers of patent law are intercircuit actors who base their decisions to invest in innovation upon their expectations of achieving patent protection. Thus, the uniformity, predictability and coherence achieved by the Federal Circuit is especially valuable. Where these factors are less compelling, the benefits of creating a specialized court may not outweigh the costs associated with isolating its field from the mainstream of adjudication.

ii. The Participants.

The establishment of a specialized court directly affects three groups: the parties whose rights the new tribunal adjudicates, the lawyers who practice before it, and the judges who serve on it. Characteristics of each group influence the

155. See Dreyfuss, supra note 125, at 66 n.338.

extent to which specialization can be an effective means fo. resolving disputes.

The Parties. The conditions that make specialization beneficial to the parties have already been discussed. If the parties are intercircuit actors who require predictability in the law, the stability and uniformity produced by a specialized bench will be of great value. Localized actors who are not affected by conflicting decisions in other circuits may be indifferent to this benefit. In addition, if specialization makes the law clearer and speeds up the process of litigation, it may facilitate the ability of parties to avoid litigation and minimize the costs when litigation cannot be avoided.

The cost side of the equation is a factor of the parties' relative wealth. Of course, relative wealth is important in ordinary, non-specialized litigation, and wealthier parties normally have an advantage. Indeed, the expertise of judges on a specialized court may reduce the importance of this factor to the extent that it helps compensate for the inability of poorer litigants to hire superior counsel. But specialization may also exacerbate the importance of wealth. Most proposals for specialized courts envision a single tribunal that sits permanently in one location -- usually Washington, D.C.[156] The farther the parties must go to reach the specialized court, or the more that resolution of disputes turns on geographic factors

156. For example, in seven years, the Federal Circuit has held sessions outside Washington on only 13 occasions. See supra note 124.

(like the location of evidence or witnesses), the more disparity in the litigants' resources will influence litigation.

Consider, for example, the proposal for a centralized Environmental Court. In some respects, it makes eminent sense to channel challenges to actions of federal agencies that affect the environment, EPA enforcement suits, and civil litigation raising environmental issues into a specialized trial-level court. The factual questions in such cases are technically abstruse, making the expertise of the bench a valuable asset. Gathering these cases into a single tribunal would bring together related issues that would profit from being heard together. Having these cases decided by a single tribunal would be especially helpful to multicircuit environmental defendants. But environmental disputes are the prototype of controversies that benefit from being litigated where they arise. The cost of bringing experts and other witnesses to Washington could be great, especially when the cost of room and board is taken into account. If the defendants in such disputes are more often large enterprises and the plaintiffs mostly residents of the locality where the claim arose, the difference between their financial resources will systematically affect the parties' ability to litigate.[157]

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157. Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1 (1975), argue that proximity is overvalued in the modern era because the cost of travel is now low. But these authors compare the cost of traveling to a district court to the cost of traveling to an appellate court in the same circuit. Since the distance between a district court and a centralized court will often be greater than the distance to the circuit court, travel will be more expensive. If the specialized tribunal is located in the

The easiest way to avoid this problem is to have the judges of the specialized court hear cases at many places around the country. If, as is usually the case, the bench is small in order to ensure collegiality and uniformity, these judges may have to ride circuit, traveling around to hold trial sessions. This is how the Tax Court handles its cases.[158]

Another attribute of the parties that contributes to the success of specialization is their relative sophistication in legal matters. Parties who litigate often, or who belong to tightly allied groups with parallel interests, have an advantage over infrequent users of the judicial system. Repeaters can more easily capture a specialized court because their experience teaches them how the court operates, how its judges think, and the kinds of arguments and issues that appeal to them. Repeaters also possess certain strategic advantages: they can push their policy arguments in a coordinated way and may be able to wait for a sympathetic case to push the positions they favor. Infrequent litigants cannot pick their cases this way and have many fewer opportunities to frame the issues to their advantage.

District of Columbia, the costs of overnight accommodations are also likely to be higher than these authors anticipate.

158. Similarly, ECA avoided the problem of requiring people to present their cases centrally by having the judges travel to 65 different cities. The judges on the Claims Court also travel. See Court of Claims History, supra note lo, at 167-68. Traditionally, such duties have not been popular. See, e.g., J. Goebel, I History of the Supreme Court of the United States: Antecedents and Beginnings to 1901, 557 (1971); S. Estreicher and J. Sexton, Redefining the Supreme Court's Role 9-10 (1986).

Of course, not all specialized courts would suffer from an imbalance in the sophistication of the parties. The Federal Circuit has not had this problem. Many of its litigants are vertically integrated firms that both manufacture and conduct research and development. The same parties may therefore appear as either plaintiffs or defendants in infringement actions, and so lack the motivation to sway the court in any particular direction. But other proposals for specialization involve subjects where imbalance is more likely to occur. And the experience of the Commerce Court suggests that when such imbalance occurs -- or when the pubic perceives that it has -- the specialized tribunal will find it much more difficult to function effectively.

The Bar. The composition of the bar may compensate for imbalance among the litigants. If the bar in a particular field is well organized and sophisticated, the fact that some of the litigants are one-timers may not matter. Examples include the bankruptcy bar and the tax bar. A well-organized bar can strategize and orchestrate litigation in ways that compensate for the fact that the clients are not organized.

But reliance on the bar is not a complete answer to the problem of imbalance. First, it works only if the clients have access to these sophisticated legal services. Second, the sort of mastery that reliance on a specialized bar contemplates may itself increase other risks of specialized adjudication. Isolation of a specialized tribunal can be partially countered if those who practice before the court have practices outside the

special field and can present arguments that draw on developments in other areas of law. The more the bar organizes and specializes, the more internally focused it becomes, and the less likely it is that practitioners will keep abreast of developments elsewhere.

The Bench. One criticism frequently leveled at proposals for specialized courts is that these courts will be unable to attract high quality judges. The usual reason given is that the business of the court will be too boring or too repetitive to hold the interest of a creative mind for long. To this may be added the fact that specialized judges may have to ride circuit as a way to avoid the access problems noted above. Yet the reputation of the judges who serve a court can be vital to its perceived success.[159]

The personnel problem has long been recognized. Eminent figures were chosen for both the Court of Claims and the Court of Customs Appeals, and while we cannot know for certain why these people chose to serve, it is noteworthy that Congress set their salary above that of the regional courts.[160] Since salary

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159. Prestige is also often cited as an important factor in the ability of a specialized court to attract high quality judges. But prestige is more a consequence of the factors described in text than it is an independent factor. That is, a court whose work is interesting and that is perceived to serve an important public purpose is likely to be prestigious enough to attract qualified judges.

160. See, e.g., Court of Claims History, supra note 10, at 17 (Court of Claims judges received $4000 in 1855, when the Supreme Court justices were earning $4500 and regional judges, less than $4000); G. Rich, supra note 30, at 8 (judges on the Court of Customs Appeals were to receive $10,000 per year in 1909, when the judges of the Circuit Court of Appeals received $7000).

differentials may no longer be an acceptable way to attract good people to new specialized benches, proponents of specialization must consider other ways to improve the candidate pool by making the experience more rewarding professionally.

The authors of Justice on Appeal recommended staffing specialized courts with judges from the regional courts who would serve the special bench on a part-time basis.[161] Used in connection with the ECA, the TECA, the FISCs, and the Special Court for Rail Reorganization, this approach has many advantages. The judges' service on regional courts prevents them from becoming isolated or bored; a court composed in this manner is flexible because the size of the bench can be adjusted to reflect demand. Experience also demonstrates that the specialized assignment brings together, on a sustained basis, judges who would not normally sit together. This is personally rewarding and it facilitates cross-fertilization within the federal system, possibly promoting national uniformity in areas outside the field of specialization.[162] If the entire federal bench is eligible to serve on the court, appointment may come to be viewed as an honor -- a nonmonetary form of compensation.[163]

An alternative to part-time judges is the procedure Congress used in creating the Federal Circuit. The judges of that court

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161. Carrington, Meador & Rosenberg, supra note 1, at 167-84.

162. See McGowan, "Friendly Walked in Diverse Intellectual Universe," Legal Times, March 24, 1986, at 20.

163. See Narvaiz, supra note 103.

have near exclusive jurisdiction over patent law, but avoid isolation by deciding cases in other areas, such as contract and labor law. This method has several advantages. The judges gain the benefit of a more varied docket but are not torn between the conflicting demands of two sets of colleagues. More important, the long-term commitment to full-time service on the special court should inspire greater collegiality and encourage the judges to hone their expertise.[164]

It is important not to exaggerate the potential problem with attracting qualified judges to serve on specialized courts. However persuasive these problems may seem in theory, the quality of the judges willing to serve has in the past been high. And Congress can take other action to enhance the professional value of a judgeship. Appellate judges on the special courts could sit by designation on the regional circuits oftener and vice versa; specialized trial judges could be given assignments by the Multidistrict Litigation Panel. The President could make a practice of nominating special judges to serve on the regional courts and vice versa. If the special judges assume a more important role in the judicial process, the public may be more confident that the President and the Senate thought rigorously about candidates' general suitability to the judiciary.

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164. The propensity toward isolation and capture could be countered more effectively than has been done with the Federal Circuit. Even that court's nonpatent matters are highly specialized, and many are within the court's exclusive power. It would be better to give specialized courts authority in fields where a fruitful interchange between the special court and the regional circuits is more likely and where the court's view of the policies within its special jurisdiction is challenged.

iii. The Strategy.

There are many ways to structure a specialized court. There are Article I specialized courts and Article III specialized courts; specialized courts with generalized judges, generalized courts with exclusive special jurisdiction, and panels with categorical case assignments.[165] Within these broad patterns, there are further variations: specialization at both the trial and appellate levels; specialized trial courts with general appellate courts; or general trial courts reviewed by specialized appellate courts. The judges can be chosen in different ways. The court may sit in one place or many or its judges may ride the circuit. The court can be given exclusive, nationwide jurisdiction over the special subject matter or share its jurisdiction. Litigants may be given a choice whether to sue in a special or general court. The viability of specialization is a function of the strategy chosen to implement it. The relative advantages of many of these strategies have been discussed at several earlier points in the analysis, and are summarized here.

The Locus of Specialization. One of the most significant determinants of success in specialization is the level in the judicial hierarchy where the special bench is located. The choice should depend on the problem that led to the decision to specialize in the first place. If the problem is complexity in

165. See P. Carrington, D. Meador, M. Rosenberg, supra note 1, at 167-79.

the factual determinations that must be made, as in patent litigation, specialization at the trial level is appropriate; if, however, the problem is complexity in the legal regime, Congress may want to create a specialized appellate forum.

Specialization at both the trial and appellate levels is an attractive option from several perspectives. In fields whose complexity makes specialization desirable because of the need for expertise, dual specialization may work best. The parties obtain the benefit of proficiency at the factfinding level, and the trial court's expert interpretation and application of the law is not diluted through insensitive review. Specialization at both levels is particularly advantageous in fields where normal judicial procedures must be modified to attain specific goals. The new court can use the revised procedures in all its cases, without disturbing the operations of the remainder of the judicial system.[166] Finally, where timeliness is important, dual specialization promotes the most rapid decisionmaking.[167]

This strategy has only been used rarely. The FISCs are organized this way, and in some of its specialty areas, the Federal Circuit reviews trial courts that are themselves

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166. The FISCs, for instance, use special procedures to keep their docket confidential. Cf. H. Dubroff, The United States Tax Court, An Historic Analysis 207-08 (1979) (noting that the Tax Court was not converted from an Article I into an Article III court because of the Treasury Department's unwillingness to conform to the procedure in the federal courts whereby the Justice Department represents administrative agencies).

167. This was a consideration in establishing the ECA and the TECA. See supra text at notes 55, 74. Jurisdiction over tax deficiencies has also been influenced by the time-value of the judgments. Cf. H. Dubroff, supra note 166, at 395-97.

specialized, but Congress has seldom been willing to use dual specialization. This may reflect the disadvantages of this strategy. First, the possibility of doctrinal deviation due to isolation is significantly increased when there is no generalist input into a case. More important, there is nothing in such a system to counteract the risk of capture. The FISCs may require dual specialization because of the security problems that would attend the review of foreign surveillance warrants in regional courts. There may also be other situations in which the benefits of specialization make it advisable to establish special courts for both trial and appeal. But careful implementation of a single-level model can often capture the best of both worlds -- providing generalists to keep legal developments in line with general legal thinking and specialists to provide expertise.

If only one level of the adjudicatory process is to be specialized, the question is whether it should be the trial level or the appellate level. Specialization at the appellate level may be preferable if uniform, predictable, stable law is the motivation for specialization, or if the law is so complex that expertise is required to interpret it. An appellate court has plenary power to reverse lower court determinations on the law. If it is given exclusive jurisdiction over a field, it may be able to make needed doctrinal innovations while still attaining uniformity without Supreme Court involvement. Appellate specialization is also better when geographic proximity is an issue because there is less need for the litigants to appear at the appellate stage of the proceedings, and the appellate court does not engage in fact-finding.[168]

But where the facts of the case give rise to the problems that require specialization, it is the trial court that should be specialized. A specialized trial judge has the proficiency necessary to evaluate the evidence and the expertise to make the best use of the federal rules for complex cases.[169] In jury-tried cases, the judge's skill would be an asset in instructing the jury and determining the admissibility of the esoteric sorts of evidence sometimes proffered. Generalized review would assure that like issues are treated the same way in all contexts, and that the law in the special area is kept within the legal mainstream.

The Court's Status. The courts discussed in our review of past experience are or were all staffed by judges with Article III protections. But the federal system has long made use of Aticle I courts and agency-based adjudicators to achieve many of the objectives sought through specialization. Thus, another point to consider in establishing a specialized court is whether the judges should have Article III protections.

Article I courts offer advantages in certain contexts. Consider a field regulated by an administrative agency in which adjudication is conducted by an independent tribunal set up within the agency, subject to review by a generalist court at

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168. In some cases, legal complexity may require specialization at both trial and appellate levels. In tax law, for example, expert trial judges may be needed to sort out the relationship between the complex provisions of the Tax Code and the myriad transactions they cover. But expert appellate judges may also be needed to review this interpretation.

169. See, e.g., Fed. R. Civ. P. 16, 53; Fed. R. Evid. 201, 706.

either the district or appellate level.[170] Agency adjudication is attractive because assignment of the judges to specific agencies means that they can concentrate on their field and develop a strong understanding of its intricacies; the judges will not be diverted to other administrative cases, as would judges on a more generalized Administrative Court.[171] The court's placement within the agency would remind the reviewing general court to be vigilent for signs of capture. Facilities such as specialized libraries could be shared.[172] More important, whenever Congress expanded the administrative scheme and gave the agency more funding, the budget of its adjudicatory division would also increase, so that the court would automatically receive resources to meet the new demand for adjudication.

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170. Cf., e.g., ABA Section on Antitrust Law, Special Comm. to Study the Role of the Federal Trade Comm'n, 56 Antitrust & Trade Reg. Rpt. Special Supp., at S-35 - S-36 (BNA April 6, 1989). This is basically the one-tier model discussed by Currie & Goodman, supra note 157, at 1-61. For purposes of this discussion, the reviewing role of officials such as commissioners is ignored. Such review procedures, though common, are not consistent with rigorous independence if the reviewing officials also possess policy-making power.

171. Indeed, the Hoover Commission's suggestion that the Tax Court be expanded into an Administrative Court was rejected because of the likelihood that other federal judges would lose their expertise in tax matters. Commission on Organization of the Executive Branch of the Government, Report to Congress on Legal Services and Procedure 85-88 (1955); Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedures 246-56 (1955); Gribbon, Should the Judicial Nature of the Tax Court Be Recognized?, 24 Geo. Wash. L. Rev. 619 (1956); H. Dubroff, supra note 166, at 202.

172. Technical assistants could also be shared, although this might compromise the appearance of independence.

Finally, the flexibility offered by legislative and agency models is sometimes advantageous. The current docket crisis obscures the fact that in any particular field of law, the demand for adjudication may vary over time.[173] Courts whose judges are not protected by life tenure can be made smaller if litigation activity in the specialty field diminishes.

One problem with relying on Article I courts or agency adjudicators is that the federal system assumes that life tenure and salary guarantees are the best assurance of judicial independence. To provide similar insulation between Article I courts and the legislature, Congress has relied upon long terms and a tradition of virtually automatic reappointment.[174] Ironically, in some ways this mechanism provides less flexibility than an Article III court established on the part-time model. After World War II, for example, the judges of the ECA simply returned to full time service on their original circuits.

In addition, it is important to bear in mind that the constraints of Article III are sometimes constitutionally mandated. The Supreme Court has been less than clear in delineating the precise limit of Congress's power to steer cases

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173. See generally Galanter, The Life and Times of the Big Six; Or, the Federal Courts Since the Good Old Days, 1988 Wisc. L. Rev. 921.

174. Members of the Tax Court currently serve 15-year terms. Judges who are not reappointed may retire at full pay. See Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 730. Members of the Board of General Appraisers had life tenure. Act of May 27, 1908, ch. 205, §3, 35 Stat. 406. See also H. Dubroff, supra note 166, at 212 (noting that since 1924, only three members of the Tax Court and its predecessor, the Board of Tax Appeals, have ever been refused reappointment).

to Article I tribunals and a full discussion of this complex area is beyond the scope of our study. But the Supreme Court apparently has rejected the notion that the requirements of Article III can be overcome simply by establishing a need for specialized adjudication.[175]

Exclusivity. Many proposals for specialized courts assume that the new tribunal will have exclusive or nearly exclusive nationwide authority in the specialty field, a procedure that is clearly advantageous if the reason for specializing is to achieve uniformity. The specialized court's pronouncements will be final, except when reviewed by the Supreme Court.[176] Thus, even without Supreme Court intervention, a single rule will be in effect across the nation.[177]

But exclusivity is not the only possible deployment of specialized courts. Uniformity can also be achieved if the specialized court's holdings are binding on other courts with overlapping jurisdiction. Although the federal system does not usually require courts in equivalent hierarchical positions to

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175. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Granfinanciera S.A. v. Nordberg, 57 U.S.L.W. 4898, 4903 (U.S. June 23, 1989).

176. Judge Friendly suggested that the Supreme Court accord a greater degree of finality to the decisions of specialized courts. H. Friendly, supra note 133, at 159 n.29. The problem is that this may exacerbate still further the risks of isolation and capture. Supreme Court review provides some, albeit little enough, control. Besides, the Supreme Court's docket pressures make review of any court a rare enough ocurrence already.

177. Unless, of course, litigants take the position that they need not acquiesce in the appellate court's decision. See Estreicher and Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679 (1989).

defer to one another, this approach has been suggested in other contexts.[178] Such a procedure would enable the special bench to establish itself in a given city, while providing a forum for litigants who do not wish to travel. It would also allow the system to accommodate more cases in the specialty area without expanding the specialized bench or endangering its collegiality.

Where specialization is used for reasons other than achieving uniformity, neither exclusivity nor deference are required. In that case, the possibility of giving litigants a meaningful choice between a specialized court and a court of general jurisdiction should be explored. Tax law is currently administered on this model. Taxpayers who disagree with the Internal Revenue Service's assessment of liability can pay the assessment and sue for a refund in federal district court or in the Claims Court. Alternatively, the deficiency can be challenged directly in the Tax Court. Claims Court cases are reviewed by the Federal Circuit, the others by the regional circuits.

Conferring jurisdiction in the specialty area on both general and specialized courts is also advantageous to the

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178. See, e.g., S. Estreicher and J. Sexton, supra note 158, at 124 (one way to lighten the burden on the Supreme Court would be to require some degree of deference to the first regional circuit to decide a legal issue). Cf. Christianson v. Colt Industries Operating Corp., 870 F.2d 1292, 1298 (7th Cir. 1989)("Although we recognize that the Federal Circuit's decision does not bind us, the comprehensive nature of the decision, along with the recognition that Congress created the Federal Circuit with the goal of achieving uniformity and coherence in the patent laws, counsel us against straying far from the court's thorough analysis of the difficult [patent] issues presented by this case.")

judges. It creates an audience for the special court's opinions, which would motivate that tribunal to fully explicate its decisions. Consideration of similar issues by both generalized and specialized courts would prevent intellectual isolation and give each bench the benefits of the other's thinking. Although Supreme Court review is eventually necessary to eliminate conflicts between the courts, the delay permits percolation of the issues and gives the ultimate decisionmakers an experiential foundation for their determinations.

As commentators have pointed out, this approach also has disadvantages. It requires maintenance of a new tribunal without a fully compensatory reduction in the workload of the generalist courts. Furthermore, forum shopping between the special and generalist court creates new sources of conflict, or at least a need to resolve definitively which litigant's choice of forum should prevail.[179]

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179. Jordan, supra note 147, at 754, notes that this has not been a problem in the tax context because establishment of the Tax Court implicitly waived the Commissioner's claim to adjudicate in the district court or the Claims Court. She speculates as to how well an optional system would work in private litigation, where each side is likely to prefer a different court. The regional courts have adopted one solution to this problem: the side that files first usually avoids litigating in its adversary's choice of forum, unless forum non conveniens comes into play. Alternatively, simultaneous litigation is ended when one of the two courts in which an action is pending renders a judgment that will support dismissal of the other action on res judicata grounds. Note that in these cases, the happenstance of filing or deciding first is not seen as objectionable because the litigant is not thought to have an independent right to have a specific forum apply the law. But since one of the attractions of specialized adjudication is the expertise of the bench, it might be harder to argue that litigants were not injured if their choice of a specialized forum

Jurisdiction. The importance of a specialized court's jurisdictional grant cannot be overemphasized. The proper choice of subject areas can offset the problems associated with doctrinal isolation and diffuse the ability of interest groups to influence the appointments process inappropriately. Another aspect of the jurisdictional question centers more closely on the parties, for one of the significant costs of specialization from the litigants' point of view is that it sometimes requires them to bifurcate their case.[180] Specialization is likely to be more acceptable to the public if the need to resort to more than one forum can be avoided. Analogous complaints are made about bifurcated appeals.[181]

Certain restrictions on the subject-matter jurisdiction of trial courts are inevitable. The federal judicial power is limited. Furthermore, the parties may be able to expand the scope of a special court's power by manipulating the claims they join without some limitations. At the same time, unified resolution of claims that arise from the facts that led to the specialized claim would better serve the interests of the parties

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was not honored.

180. See, e.g., supra note 15 (describing expansion of Court of Claims jurisdiction so claims for set offs and counterclaims could be asserted) and text accompanying note 113 (noting problems presented by limitations on the jurisdiction of the Court of International Trade). A similar problem concerns limitations on the types of relief the special court can accord, for such limitations may also require the parties to bring their case to more than one court.

181. See supra notes 81-84 and accompanying text (describing the problems posed by the TECA's jurisdiction).

and alleviate some of the problems caused by disparities in wealth. The logic of the federal joinder rules is that the judicial system as a whole conserves resources by handling transactionally related claims only once. That insight should not be lost when specialized courts are established.

Rules that require bifurcation of the issues raised in a single case are even less defensible at the appellate level. Since the case is already in the federal system, there is clearly no constitutional impediment to plenary adjudication in the specialized court. Nor is there reason to favor jurisdictional rules that require bifurcation on the ground that they speed up the disposition of cases. Thus, the only question is whether the objectives of specialization would be impeded if these courts decided appeals in every case in which the specialty issue was raised at the trial.

It is difficult to see how this procedure compromises the goals of specialization so long as the parties can be prevented from manipulating their cases in order to forum shop between the specialized and regional appellate courts. But since the frivolousness of a claim is easily discernible after a trial, the parties' ability to invoke the specialized court's power could be limited with strict penalties for asserting frivolous specialty issues; rules of res judicata will similarly prevent the parties from avoiding the special court by reserving their specialized claims for other litigation.[182]

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182. See Dreyfuss, supra note 125, at 61-65.

Moreover, there are substantial advantages in bringing an entire "case" up on appeal. Litigants are less likely to lose their appellate rights inadvertently. Because the route of review would be clear no later than the time that the final pretrial order was entered, trial courts would be able to apply any distinctive procedural rules required by the specialized tribunal.[183] For courts that have been given exclusive jurisdiction to create uniformity, being able to hear entire cases would insure that every time the issue is raised in the federal system, it is heard by the specialized court.[184] Finally, hearing and deciding the additional issues that make up a case will help keep the intellectual perspective of the specialized court fresh and broad.

c. Conclusion.

The nation's past experience in specialized adjudication suggests that the technique can make a significant contribution to judicial administration, but that it is not without its problems. These are most evident when one thinks about designing an ideal specialized court. If its judges are to become proficient enough to impart expertise; if the court is to be

183. See, e.g., Daniel Meador, An Appellate Court Dilemma and a Solution Through Subject Matter Organization, 16 U. Mich. J.L. Reform 471, 475 (1983).

184. The removal rules were altered in the legislation creating the TECA for this reason, ESA §211(a), see supra text accompanying note 80.

collegial enough to create stable, predictable law; if the docket is to be small enough so that cases are decided swiftly, the jurisdiction of the court must be narrow and defined with precision. But these constraints may give the judges of the court a crabbed view of the legal landscape.

Unfortunately, it is difficult to prove (or disprove) that specialized judges do a better, fairer or more proficient job, although it is possible to demonstrate that these judges take the policies that their field of law furthers very seriously indeed. Similarly, it is impossible to prove (or disprove) that specialists have a parochial outlook that is out of touch with mainstream legal thinking. Even with the benefit of historical experience many of the risks and benefits of specialization remain conjectural.

And controversies do not present themselves to the legal system in the manner in which they are considered in the classroom. A casebook editor waves a blue pencil and issues that are not in the curriculum disappear. These questions do not vanish with similar dispatch in the course of litigation. Either the specialized court must decide them or the parties must bring part of their case in other courts. If the first route is followed, the specialized court may become busier than initially predicted. On the other hand, broadening the court's jurisdiction makes its task both more interesting for the judge and more connected to developments in other fields of law. If the second route is taken, the parties are burdened with litigating in more than one place, boundary law must be written,

and the decisions reached in bifurcated cases may, as a whole, look very different from the resolution that would have been achieved by any single tribunal.

Problems can be avoided by carefully choosing the specialty field and by structuring the specialized court with care. Subjects singled out for special treatment should be segregable from the remainder of the federal docket, yet still involve the court in adjudicating a broad range of issues. Thought should also be given to the level in the adjudicatory hierarchy where expertise is most helpful, so that room can be left in the process for meaningful input from generalists. And because it is not possible to distinguish between changes in the law that occur because a bench is expert and changes that occur because it has been captured, schemes must be designed with systemic guarantees of impartiality. For similar reasons, specialization should be used only when there is some public consensus on the policies underlying the law that the special tribunal administers.

In the end, it seems clear that there are some fields of law that would benefit from consolidation and expert adjudication. Decisions to establish new specialized tribunals should be animated by a desire to capture these benefits, and the specialized court should be structured in ways that will minimize the pitfalls. Our examples follow in the proposals below.

2. Review of Administrative Agencies.

Many proposals for specialized courts concern areas regulated by executive or independent agencies -- an unsurprising coincidence since Congress often establishes agencies to implement complex regulatory statutes or respond to some other need for expertise. The specialized nature of the agencies' work, in turn, gives rise to tensions between the agencies and generalist courts. Administrators often resist judicial supervision, complaining that judges do not understand complex regulation and obstruct its implementation. Critics of agencies, citing the potential for capture by regulated entities, urge that review by independent Article III courts is essential to keep the agencies in line.

Mediating these claims has led courts to develop a complex body of administrative law. It has also led to proposals for structural reform -- of which the most frequently made and far-reaching is to establish an Article III Court of Administrative Appeals to hear cases subject at present to direct review in the courts of appeals. We conclude that while there are strong arguments in favor of establishing such a court, the proposal is unworkable.

a. Problems in Reviewing Administrative Agencies.

The practice of making agency orders directly reviewable in the courts of appeals was first established in the Federal Trade

Commission Act of 1914[1] and subsequently extended to the orders of numerous other agencies in the Administrative Orders Review Act of 1950.[2] The courts of appeals have interpreted their authority to review agency "orders" to include not only formal adjudication but also agency rules.[3] As a result, courts of appeals now frequently review agency rules on the basis of the record compiled through "notice and comment" rulemaking procedures required by the Administrative Procedure Act.[4]

The rationale for administrative review by the courts of appeals directly is that a first tier of review in the district court is unnecessary because the functions the district court ordinarily performs are performed by the agency. A trial is unnecessary because the record has already been developed at the administrative level in trial-like hearings conducted in accordance with the APA, and either the agency or an administrative law judge has prepared an opinion defining and focusing the issues. Moreover, the screening role usually played by district courts is also played by the administrative process. Only a small fraction of the cases processed by most agencies wind up in court, and a high proportion of these would probably reach the courts of appeals even if required to pass

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1. 38 Stat. 717, 719, currently codified at 15 U.S.C. § 45(c).

2. 28 U.S.C. §§ 2341-53. See H.R. Rep. No. 2122, 81st Cong., 2d Sess. (1950); S. Rep. No. 2618, 81st Cong., 2d Sess. (1950).

3. 4 K.C. Davis, Administrative Law Treatise §23:3 at 133-34 (1983).

4. See generally Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975).

through the district courts. The efficiency argument is thus obvious: bypassing the trial court significantly expedites the ultimate decision, lessening the burden on both courts and litigants.[5]

Not all judicial review of agency action takes place in the courts of appeals. A few statutes, like the Social Security Act, expressly provide for initial review in the district courts. More important, there is an amorphous category of agency action, usually referred to as "informal adjudication" that is also reviewed first in the district courts. Basically, any agency action that directly affects individual rights or interests but is not rulemaking or formal adjudication falls into this category -- the only common characteristic being the absence of a record based on a formal adjudicatory hearing (which is why it makes sense to bring these cases in the district court). Informal adjudication thus includes everything from the unstructured discretionary determinations of enforcement agencies to enforce a regulation to decisions to grant or deny a license or charter.[6] Although we lack precise statistics, there are many more challenges to informal actions than to formal adjudications or rulemakings.[7] But direct review also accounts for a substantial

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5. David P. Currie & Frank I. Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 5-6 (1975).

6. Currie & Goodman, supra note 5, at 54-55.

7. See K.C. Davis, supra note 3, at 131 (early in the 1980's, the ratio of district court to court of appeals decisions in administrative law was more than 5 to 1); Currie & Goodman, supra note 5, at 54 n.231 (informal adjudication constitutes "the vast bulk" of agency adjudication).

amount of litigation: for instance, the 3,043 such appeals lodged in 1988 represented more than 8% of the total docket of the courts of appeals.[8]

i. Lack of Uniformity.

Direct review of agency action takes place in 12 independent courts of appeals. As a result, the only real guarantor of uniformity is Supreme Court review, an uncertain protection given the Supreme Court's limited capacity. Judicial decentralization is particularly problematic in the context of reviewing administrative agencies. The success of many regulatory programs requires uniform national enforcement, particularly in fields involving economic regulation of multistate industries (for example, transportation or communications), or where the effects of regulation extend across state boundaries (for example, environmental law). Moreover, the agencies' internal organization is designed to administer programs uniformly nationwide. Inconsistent judicial interpretations disrupt the organization and create regulatory inefficiencies. The resultant clash between decentralized courts and centralized agencies generates significant interbranch frictions.

Inconsistent appellate interpretations also encourage forum shopping, a practice made easy by broad venue provisions.[9] In

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8. 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Table B-1 [hereafter 1988 AO Report].

addition to exacerbating problems of disuniformity, forum shopping impedes the agency's ability to implement a regulatory program, because the regulated entity ordinarily has the choice of forum and may go to the jurisdiction with favorable law.

In addition, some agencies have responded to the problem of disuniformity by refusing to acquiesce in the interpretations of courts below the Supreme Court.[10] Of course, not all forms of nonacquiescence are undesirable. There are affirmative benefits from intercircuit nonacquiescence -- in which a loss in one circuit does not require the agency to change its internal policy nationwide while it attempts to relitigate the issue in other circuits. Requiring an agency to conform nationwide to an adverse ruling in one circuit has all the disadvantages of a specialized court without the offsetting advantages.[11] If the first adverse decision binds the agency, we lose the benefits of reconsideration by different judges. In addition, the Supreme Court comes under pressure to decide issues sooner, and must do so without the reasoning and experience of judges in different courts. Yet the single panel of circuit judges whose decision binds the nation lacks the advantages of familiarity and expertise that specialization provides. In addition, requiring

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9. Most actions against the government may be brought where the petitioner resides, where the cause of action arose, or in the D.C. Circuit. See Estreicher & Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 764-70 (1989).

10. Agencies honor court orders for the litigating parties; nonacquiescense is the refusal to accord them broader effect.

11. See generally Estreicher & Revesz, supra note 9, at 735-41.

intercircuit acquiescence would bias administration against the agency. Individual claimants would not be bound by adverse rulings in other circuits and could press their claims until one of them prevailed, at which point the agency would become bound and lose the benefit of any earlier victories. And the agency would be unable to get the issue relitigated.

It is more difficult to make a case for intracircuit nonacquiescence -- in which the agency refuses to alter its policy even within a circuit that has declared it unlawful. In some cases, this practice results from broad venue provisions, since it is not always clear when a decision is being made which court will review it. But some agencies refuse to acquiesce even when it is clear that venue will be in a court that has already disapproved their policies. Not surprisingly, courts have been hostile to this practice.[12] The agencies defend it as necessary to avoid the inequalities and inefficiencies of applying the law differently in different circuits.[13] But intracircuit nonacquiescence simply creates a different inequality -- between claimants who appeal agency orders (and receive nearly automatic reversals) and those who do not. Moreover, intracircuit nonacquiescence also creates administrative inefficiencies by

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12. See, e.g., Lopez v. Heckler, 713 F.2d 1432 (9th Cir. 1983), prelim. injunction aff'd, 725 F.2d 1489 (9th Cir.), vacated and remanded, 469 U.S. 1082 (1984).

13. See, e.g., Social Security Disability Insurance Program: Hearing Before the Senate Comm. on Finance, 98th Cong., 2d Sess. 115 (1984); Uretz, The Chief Counsel's Policy Regarding Acquiescence and Nonacquiescence in Tax Court Cases, 14 Tax Couns. Q. 129, 139 (1970).

encouraging additional litigation at both the administrative and the judicial levels. Some intracircuit nonacquiescence is desirable: one of the benefits of review in multiple forums is that each court may learn from the experience and reasoning of other courts, but a court that rules adversely to an agency cannot reverse itself unless the agency brings another case in that jurisdiction.[14] But this justifies only the occasional test case. There is no justification for a persistent strategy of ignoring judicial precedent.

Most agencies take an ad hoc approach to nonacquiescence, and give up after a series of reversals.[15] Yet because persistence in the face of lower court rejection sometimes leads to victory in the Supreme Court,[16] agencies have an incentive to endure considerable abuse from courts of appeals in order to keep an issue alive. In the interim, policy is in limbo and citizens receive unequal treatment at the hands of the two branches. And in the long run distrust between the branches develops, with a variety of subtle effects on how the agency is treated in the courts.

ii. Loss of Perspective.

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14. Estreicher & Revesz, supra note 9, at 743-47.

15. Estreicher & Revesz, supra note 9, at 713-18.

16. See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

The limited perspective of decentralized courts creates further obstacles to effective agency review. This characteristic can be seen most clearly by examining some agency programs. Consider, for example, the Social Security Administration's disability benefits program. Every year SSA considers well over two million new claims for benefits and holds approximately 250,000 hearings before administrative law judges (ALJs) to determine whether claimants are totally disabled. ALJ decisions can be appealed to SSA's Appeals Council, whose orders granting or denying benefits are administratively final. Judicial review, which begins in the district courts, reached nearly 30,000 cases per year in the mid-1980s and is currently about 13,000 cases.[17]

Given this massive number of cases, the judicial voice is heard relatively faintly in SSA's bureaucracy.[18] Judicial review touches only a small fraction of SSA orders, and frequently the issue is simply whether substantial evidence supports the agency's decision. There are no formal mechanisms to inform administrators that their decisions have been reversed in court, and this limits the extent to which judicial review creates incentives to change practices. When a broad issue of law or policy does arise, SSA often refuses to acquiesce. Consequently most control over decisions in the lower reaches of the bureaucracy comes from the agency's own monitoring activities --

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17. R. Posner, The Federal Courts: Crisis and Reform 64 (1985); 1988 AO Report, supra note 8, at Table C-2A.

18. J. Mashaw, Bureaucratic Justice 185-90 (1983).

internal reviews, regulations of general applicability, budget and staffing levels, and the like.

SSA's nonacquiescence extends to the intracircuit level.[19] Faced with a massive federal and state bureaucracy to supervise, SSA has chosen to administer its statute uniformly, at the cost of regularly clashing with courts that have invalidated some aspect of its program.[20] SSA argues that courts see only slices of very complex and subtle issues about agency management and that the need to process many thousands of disability cases requires the agency to make delicate tradeoffs between the accuracy of any particular decision and the efficiency with which it can handle them all.

Whatever one thinks of SSA's arguments, these problems illustrate the disadvantages of relying on federal courts to review the administration of a large-scale entitlements program. Judges cannot be sure that their review of individual orders promotes consistent outcomes because they do not see the cases in bulk and because there is no central administration to ensure consistency. The courts can, however, perform two modest tasks that are nonetheless critical to the legitimacy of the program: they can ensure that the substance of the agency's policy is coherently explained and is consistent with the statute, and they can review the agency's procedures for ~~compliance~~ with due process.[21]

19. Estreicher & Revesz, supra note 9, at 692-704.

20. See Strauss, One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1112-13 (1987).

Compare this with the more successful judicial supervision of the Federal Communications Commission, an independent agency engaged in traditional economic regulation through licensing. Since 1934, the FCC, acting largely through adjudication, has fleshed out a bare statutory command to issue broadcast licenses in the "public convenience, interest, or necessity."[22] The courts have felt themselves on firm ground in reviewing FCC determinations, partly because of the relatively limited number of licensing proceedings and partly because of the nontechnical nature of many broadcast regulation issues (such as the fairness doctrine). But the most important component of this successful judicial supervision is the concentration of FCC litigation in the D.C. Circuit. Review of certain important FCC orders, such as license denials, is vested exclusively in the D.C. Circuit by statute.[23] Review of other FCC orders may be had in other circuits,[24] but practical considerations -- the concentration of the communications bar in Washington and the D.C. Circuit's reputation for comparative strictness with the agency -- bring most of these cases to the D.C. Circuit as well.[25]

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21. See generally Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Sup. Ct. Rev. 177; Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505 (1985); J. Mashaw, Due Process in the Administrative State (1985). Our recommendations for reforming the Social Security Disability Claims process in Part IV are consistent with this analysis, encouraging greater reliance on administrative determinations of fact and limiting judicial review to issues of law and constitutional claims.

22. 47 U.S.C. § 307.

23. 47 U.S.C. § 402(b).

24. 47 U.S.C. § 402(a).

The relationship between the courts and the FCC has been described as a "partnership"[26] -- a term that certainly does not spring to mind in describing the relationship of the courts and SSA. By turns, the courts have endorsed broad FCC discretion,[27] have prodded it to exercise that discretion in the agency's best view of the public interest,[28] and have reined in perceived abuses.[29] The FCC has periodically resisted what it regarded as unpalatable court orders,[30] and the FCC and the D.C. Circuit have engaged in prolonged squabbles over the criteria for license renewal and over format regulation. But compared to SSA, the FCC has been relatively amenable to judicial oversight.

iii. Doctrinal Distortion.

Unable to impose uniformity by reviewing every decision of the courts of appeals, the Supreme Court has sometimes responded

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25. See Robinson, The Judicial Role in Communications Policy, in Communications for Tomorrow: Policy Perspectives for the 1980's (G. Robinson ed. 1978).

26. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

27. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

28. FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) (Frankfurter, J.).

29. E.g., Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

30. See, e.g., ITT World Communications, Inc. v. FCC, 635 F.2d 32, 43 (2d Cir. 1980).

by limiting judicial review.[31] In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., for example, the Court directed reviewing courts to defer strongly to agencies' interpretations of their statutes.[32] The case involved EPA's "bubble" approach to air pollution control, which aggregates emissions from separate facilities within the same factory, allowing decreases from one facility to offset increases from another. Two courts of appeals had disagreed on the legality of this policy, and the resulting difficulties for EPA may have spurred the Supreme Court to write broadly. According to the Court, reviewing judges should first determine whether "Congress has directly spoken to the precise question at issue" in the text or legislative history of the statute. If so, Congress's will must govern. If not, however, the question is whether the agency's interpretation is "reasonable" -- a notoriously lax standard of review. If the agency's interpretation satisfies this minimal scrutiny, the court must defer to it.

Chevron certainly reduces the potential for inconsistent interpretations of statutes by the lower courts on doubtful issues of law,[33] but it does this by shifting an enormous amount of power from courts back to the agencies. Administrators rarely fly in the face of clear statutory text or legislative history.

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31. See generally Strauss, supra note 20.

32. 467 U.S. 837 (1984). See generally Pierce, Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301 (1988).

33. Strauss, supra note 20, at 1121-22.

In the interstices, where most litigated issues arise, the courts have routinely decided difficult questions of statutory interpretation -- varying the degree of deference depending on the nature of the issue, the regulatory scheme, and past experience with the agency. Sometimes courts deferred to agency interpretations, sometimes not.[34] While this practice is problematic if it leads to disuniformity, the judicial check often keeps agencies in line with what Congress intended. The cumulative effect of minor agency deviations that survive relaxed scrutiny under Chevron may significantly ease this control. Of course, Chevron itself involved a technical issue embedded in a complex statutory scheme. Here, law and policy tend to intertwine in ways that make overly zealous, independent judicial review a potentially disadvantageous interference with administration. But even if deference is appropriate on such issues, a less deferential approach is appropriate for nontechnical subject matter or for statutes intended to curb agency abuses. If -- as appears to be the case -- Chevron means that lower courts must defer strongly no matter the context, it may disable needed review.[35]

Similarly, in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,[36] the Court had rebuked lower courts

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34. See generally G. Robinson, E. Gellhorn & H. Bruff, The Administrative Process 155-57 (3d ed. 1986).

35. In several recent cases, the court has indicates its uncertainty about the exact breadth of Chevron. See, e.g., NLRB v. United Food & Commercial Workers Union, 108 S.Ct. 413 (1987); INS v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987).

36. 435 U.S. 519 (1978).

(especially the D.C. Circuit) for requiring agencies to adopt rulemaking procedures not prescribed by statute. The Court emphasized both the unpredictability caused by this judicial tinkering and its tendency to force agencies to increase procedural formality in self-defense. Apparently unwilling to surrender too much judicial power, the Court left the door open for substantive remands that could have much the same effect.[37]

Judicial authority to second-guess agency determinations was subsequently confirmed in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co., which ratified the so-called "hard look" doctrine requiring courts to review the substantive rationality of agency policy.[38] This raises all the concerns addressed in Vermont Yankee. Hard-look review is unpredictable because some reviewing courts will overstep their role and substitute their judgment for the agency's; and agencies are likely to respond -- indeed, have already responded -- by padding their records with explanatory documents to avoid remands for insufficient consideration of issues that become important only on appeal.

Lower court judges complain that, taken together, State Farm and Chevron disable them from performing a function they do well in favor of an inquiry into substantive agency policy that often exceeds their competence.[39] While this combination is

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37. See Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 Harv. L. Rev. 1805 (1978).

38. 463 U.S. 29 (1983). See Sunstein, supra note 21; Garland, supra note 21.

questionable,[40] the difference between what was forbidden in Vermont Yankee and what was permitted in State Farm may have to do with the potential consequences of judicial mistakes. State Farm allows stringent review of substantive decisions in a context that is unlikely seriously to disrupt agency operations since judicial mistakes are likely to be limited to that one rule or order.[41] Vermont Yankee, by contrast, prevents a practice that may be broadly disruptive of the administrative process: requiring an agency to employ procedures not found in any statute may have a ripple effect both on other decisions made by the agency and on other statutory programs of a similar nature.

39. See Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 397 (1986).

40. One cannot explain Vermont Yankee and State Farm as straightforward applications of the "plain" language of the APA. With respect to Vermont Yankee, the legislative history of the APA is, at best, ambiguous concerning the courts' ability to continue to develop administrative procedures beyond the minimal requirements codified in the APA. With respect to State Farm, while the language of the statute does not preclude hard-look review, it also does not require it. Both decisions thus involved exercises of judicial discretion.

An alternative explanation is that the two decisions require courts to eschew pretextual remands on procedural grounds in favor of a candid assertion that the agency's conclusions are suspect. This would be fine if courts were able confidently to draw such conclusions, but much tension in administrative law derives from the fact that courts are often incapable of making this determination. Not all remands prior to Vermont Yankee were pretextual. Instead, if the court was unsure about a particular finding, it could bolster its confidence in the agency's conclusions by ensuring that adequate procedures had been followed. By ending this practice Vermont Yankee forced judges to second-guess actual determinations. Some pretextual remands may be eliminated, but at the cost of increasing the overall risk of judicial error.

41. Strauss, supra note 20, at 1129-31. Of course, one should not minimize the possible disruption of an agency's agenda that is caused by remand of an especially important matter -- for example, the passive restraints regulation in State Farm.

Doctrinal distortion may also result from the courts' concern with overall caseloads in the federal courts. This concern may have contributed, for example, to recent decisions restricting standing to seek review,[42] and expanding implied preclusion of review.[43] The D.C. Circuit seems to have caught the spirit, for it too has taken a newly strict approach to such threshold issues.[44]

b. The Proposal for a National Court of Administrative Appeals.

i. Advantages and Disadvantages.

The problems discussed above are not unique to any particular regulatory program, which raises the question of a system-wide solution. The most frequent proposal is to establish a single Court of Administrative Appeals to review agency actions that would otherwise go directly to the courts of appeals.[45]

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42. E.g., Allen v. Wright, 104 S.Ct. 3315 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

43. Block v. Community Nutrition Institute, 104 S.Ct. 2450 (1984).

44. See Panel, The Contribution of the D.C. Circuit to Administrative Law, 40 Admin. L. Rev. 507, 524-25 (1988) (remarks of Chief Judge Wald).

45. See, e.g., Henry J. Friendly, Federal Jurisdiction: A General View 188-89 (1973); President's Council on Executive Organization, New Regulatory Framework: Report on Selected Independent Regulatory Agencies (1971); Nathanson, The Administrative Court Proposal, 57 Va. L. Rev. 996 (1971).

Such a court could take a variety of forms. Its jurisdiction could be limited to a homogeneous class of agencies or could embrace a wider and more heterogeneous class. Its members could be selected either for preexisting expertise in one or more of the subject areas of adjudication or on the basis of more general qualifications similar to those ordinarily sought in picking appellate judges. Sitting judges could be designated, and their appointment to the new court could be permanent or for a fixed term after which they would return to their home bench. The new court could be divided into permanent panels based on subject matter or shifting panels like the present courts of appeals. All panels could sit in Washington, or some could sit elsewhere, achieving a measure of regionalization. Conflicts among panels would be resolved en banc, and panels specialized by subject matter could presumably refer issues of general administrative law to the full court. Many other variations can be imagined.[46]

By centralizing review of agency actions, a Court of Administrative Appeals would cure the problems identified above. The court would insure uniformity in the application of administrative law -- thus eliminating inconsistent interpretations, removing incentives to forum shop, and reducing the likelihood that agencies would adopt a strategy of nonacquiescence. In addition, such a court would have a broad perspective on the relation of its rulings to other issues in a regulatory scheme and to other regulatory schemes. The

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46. See generally Currie & Goodman, supra note 5, at 75-76.

elimination of circuit splits might reduce the Supreme Court's felt need to distort administrative law to minimize the effects of inconsistent judicial rulings.

Other advantages of specialized courts would also obtain in this setting. A Court of Administrative Appeals would be staffed by expert judges, thus improving the quality of decisionmaking in this complex and specialized area of law. Although the potential for judges to develop substantive expertise in particular programs would diminish as the court's jurisdiction broadened, there are many similarities among modern regulatory programs since Congress utilizes similar procedures and substantive analyses across regulatory schemes. To take an obvious example, the APA's standards for substantive review call for courts to determine whether agency actions are supported by "substantial evidence" (adjudication) or whether they are "arbitrary [or] capricious" (rulemaking and informal adjudication).[47] These standards are difficult to apply confidently, and the subtleties involved have spawned a voluminous literature. Reading and deciding a lot of cases seems to be the best way fully to grasp these terms of art and apply them properly.

Aside from intrinsic difficulties in applying the APA's review standards, special difficulties arise in reviewing technical regulatory decisions. Long administrative records with technical evaluations and analyses can be extremely difficult to understand, much less to review. Experience in the D.C. Circuit

47. 5 U.S.C. § 706.

confirms that exposure enables judges to acquire skill at picking quickly through briefs, appendices, and records for the important material in technical cases. In addition, the judges may learn how better to utilize oral argument in such cases.

On the procedural side, the gains from specialization also appear substantial. Insights about process gained under one program often transfer readily to another.[48] Although the APA's procedures appear relatively simple and straightforward, more than forty years of interpretation have added to the sparse text of the statute, and a considerable body of case law is now applicable to most agencies. Other government-wide statutes also appear regularly in administrative litigation, such as the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Equal Access to Justice Act. The law in all these areas is complex enough that concentrating the cases in a single, specialized forum should improve the quality and speed of decisionmaking.

A Court of Administrative Appeals would escape many of the problems associated with specialization. Ranging across agencies and industries, the court would consider a rich mix of issues, which should enable it to avoid perceptions of bias and provide it with enough variety to prevent intellectual isolation. Opposition to specialized courts is often based on fear that appointments will turn on how likely a prospective candidate is to favor the government, but at this level of generality such an

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48. See Nathanson, supra note 45, at 1013.

inquiry resembles the normal identification of general political orientation. Finally, the court's subject matter should be interesting enough and the court's importance great enough to attract able judges -- as the D.C. Circuit's roster confirms.

On the other hand, a Court of Administrative Appeals would suffer from some disadvantages associated with specialized adjudication. Most obviously, creating such a court would reduce the opportunity for issues to percolate through various courts. And while the Supreme Court might find it easier to monitor one court than twelve, the Court would lose both the signaling effect of circuit splits and the benefits of experience under different rules in different circuits. Moreover, jurisdictional overlap between an administrative court and the regional courts may be difficult to eliminate entirely, although overlap can be minimized by specifying particular agencies and types of actions over which jurisdiction is conferred.[49] As in primary jurisdiction cases, issues within the specialized forum's competence that arise in other litigation could be channeled to it under 28 U.S.C. §1631, which was enacted to minimize jurisdictional confusion in administrative law generally.

The greatest obstacle to creating such a court is the size it would have to be. There were 3,043 direct appeals from administrative agencies to the courts of appeals in 1988,[50] and

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49. Currie & Goodman, supra note 5, at 73-74.

50. See supra note 8 and accompanying text. This figure may overstate the number of actual cases in the courts of appeals, since these courts sometimes consolidate petitions challenging a single order.

channeling them into one court would create a docket of about average size for a modern-day federal court of appeals.[51] That figure is misleading, however, since administrative appeals are more complex and time-consuming than the average case. The regional courts of appeals may be overworked, but their dockets are padded with easy appeals in habeas corpus cases, Social Security cases, criminal cases, and the like. A Court of Administrative Appeals would have far fewer easy cases, and would therefore need to be quite large.

More important, this 3,043 figure does not include cases challenging informal adjudication, since these do not come directly from the agency but go through the district courts first. As noted above, while there are no statistics indicating the exact number of such cases, knowledgeable estimates suggest that they far outnumber direct appeals from the agency.[52] To be sure, these cases are not all appealed from the district court,

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51. 1988 AO Report, supra note 8, Table B-1. The dockets of the courts of appeals in 1988 were as follows:

Circuit	Total cases filed	Administrative Appeals Filed
Dist. Colum.	1,925	1,066
1st	1,239	60
2d	2,942	180
3d	2,933	160
4th	3,203	185
5th	4,331	269
6th	3,831	278
7th	2,409	145
8th	2,387	111
9th	6,334	368
10th	2,066	110
11th	3,924	111

52. See supra note 7 and accompanying text.

but even at a rate of appeal similar to other cases, adding these cases would inflate the new court's docket beyond the point of workability. Congress could leave review of these cases in the regional courts of appeals, but that would defeat many of the goals of the Court of Administrative Appeals, especially that of achieving uniformity.

ii. The D.C. Circuit Experience.

One way to get a sense of how likely a Court of Administrative Appeals is to succeed is by examining experience in the D.C. Circuit, which already specializes in administrative law to a large extent. More than half of the D.C. Circuit's cases are appeals from federal agencies, and it hears 35% of the entire nation's administrative appeals.[53] As Justice (then Professor) Scalia put it, "[a]s a practical matter, the D.C. Circuit is something of a resident manager, and the Supreme Court an absentee landlord" in administrative law.[54] Indeed, this concentration makes the D.C. Circuit a natural candidate for conversion into a specialized tribunal if such a recommendation is adopted. Congress could simply give the D.C. Circuit exclusive jurisdiction over all agency appeals and fold the D.C.

53. In 1988, 1,066 of the D.C. Circuit's 1,925 new cases were appeals from agencies, or 55% of its docket. As noted above, there were 3,043 appeals from agencies filed around the nation. See 1988 AO Report, supra note 8, Table B-1.

54. Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345, 371.

Circuit's other jurisdiction into the Fourth Circuit. In many ways, the D.C. Circuit already behaves like a national court. Unlike other courts -- whose members are usually chosen after consultation with state senators and whose appointments often turn on local political contacts -- the D.C. Circuit is drawn from a national pool. Moreover, probably because the court sits "inside the beltway" and hears cases that arise in other states, judges on the D.C. Circuit often assume (correctly) that they are acting for the whole nation. But has it been successful?

The D.C. Circuit has struggled throughout the 1970s and 1980s to discharge its administrative review functions. Many problems resulted simply because many issues of administrative law are difficult: the APA provides only rudimentary procedures for rulemaking and none at all for informal adjudication, and the APA does not specify what kind of record must be made for judicial review. The court experimented with different approaches and had some difficulty settling these issues.

Equally difficult problems resulted from the sheer size and complexity of many of the cases. A major modern rulemaking frequently produces an administrative record in excess of 10,000 pages, filled with conflicting material on technical issues of fact and policy. It takes considerable time and effort to understand the technical issues and to evaluate the soundness of their resolution by the agency.[55] One result is that the D.C.

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55. Wald, Making "Informed" Decisions on the District of Columbia Circuit, 50 Geo. Wash. L. Rev. 135 (1982); Bazelon, Coping With Technology Through the Legal Process, 62 Cornell L. Rev. 817 (1977); Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509 (1974); Wright, The

Circuit decides fewer cases than other circuits: about 136 per year per judge, compared to a national average of 240.[56] Large administrative records not only take more time to master, but also tend to produce longer judicial opinions.

Moreover, semi-specialization in the D.C. Circuit has not reduced and may have exacerbated problems of doctrinal distortion by the Supreme Court. The relationship between the D.C. Circuit and the Supreme Court has for years been uneasy, often unpleasant.[57] The Supreme Court has taken -- and reversed -- more cases from the D.C. Circuit than from other circuits.[58] Vermont Yankee, Chevron, and State Farm all disapproved examples of what the Supreme Court viewed as the D.C. Circuit's interference with agency discretion. It appears that the Supreme Court's ability to monitor even a single specialized court is limited (although undoubtedly better than its ability to monitor twelve courts) and that if the Court does not share the specialized court's philosophy the result may still be doctrinal distortion. Chevron may have been a response to EPA's difficulties with conflicting interpretations of the validity of its "bubble" policy, but may also have been a reaction to what the Supreme Court perceived as yet another example of overreaching by the D.C. Circuit.

Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Corn. L. Rev. 375 (1974).

56. See 1988 AO Report, supra note 8, Table 1 at 2, Table B at 140.

57. See Scalia, supra note 53.

58. Panel, supra note 44, at 507.

The D.C. Circuit example suggests the practical difficulties of establishing a Court of Administrative Appeals. As noted above, the D.C. Circuit's 12 judges handle about 35% of the nation's administrative appeals, these cases making up 50% of the court's docket. But anecdotal evidence suggests that these cases actually occupy a much larger percentage of the court's time. If Congress desired, the D.C. Circuit could make room for (some of) the rest of the nation's administrative review cases by dropping the part of its caseload that does not involve administrative law. But this would still mean increasing its total caseload by 50% -- with the new cases being more difficult and more time-consuming than the cases they replaced. To handle this burden, the court would have to become more than twice as large as it is. Probably it would need to be larger than the Ninth Circuit, which has 28 judges and has experienced significant administrative difficulties as a result. Bear in mind, moreover, that these calculations do not include challenges to informal adjudication or to rules that are challenged first in the district courts. Adding these would clearly yield an impossibly large docket. Failing to add them, however, would impair the court's ability to produce a uniform and consistent body of administrative law.

On balance, then, despite some persuasive arguments for a Court of Administrative Appeals, we believe that Congress should reject this proposal. We doubt that such a court could actually bring uniformity and coherence to judicial interpretation of regulatory schemes. Indeed, if the D.C. Circuit experience is

indicative, such a court would be likely to engender political controversy and to become involved in conflicts with both the agencies and the Supreme Court. More important, such a court would be impractical. To achieve uniformity, cases challenging informal adjudication would have to be included in the court's docket. But that would produce a docket too large to manage; indeed, even without jurisdiction over these cases the court's docket would probably be unmanageable. In any event, if the court's jurisdiction were limited to direct-review cases it would not produce the benefits that led to the proposal for a national court in the first place.

iii. Giving the D.C. Circuit Power to Review Decisions of Other Courts of Appeals.

An alternative to creating a specialized court to handle all administrative review would be to give the D.C. Circuit responsibility for coordinating the nation's administrative law. The mechanism might work as follows. En banc reconsideration of a panel decision in any regional circuit could occur in the D.C. Circuit. Any party could petition for review. To prevent nonacquiescence, the government would be required either to seek en banc review in the D.C. Circuit or to acquiesce in the panel ruling. If granted, review would not be by the full court, because en banc review is cumbersome and this proposal would require the D.C. Circuit to sit en banc much more than it presently does. Instead, there would be limited en banc review by a panel of seven judges. (This number assures that a

majority of four judges is needed to override a unanimous panel decision without making it necessary to expand the size of the D.C. Circuit by more than a few judges.) The result would bind the nation, pending Supreme Court review. This device could proceed in an experimental fashion, perhaps under temporary authorization.

There are obvious comity problems in designating one court of appeals to review the work of others. The quid pro quo for other courts of appeals is the creation of a mechanism that could prevent government nonacquiescience in their decisions. Moreover, judges in other circuits should be able to recognize the advantages of utilizing the expertise that judges on the D.C. Circuit already possess as a consequence of their semi-specialization in administrative law.

But there are more serious deficiencies with the proposal. It would enhance uniformity only to the extent that the D.C. Circuit was able to hear more cases than the Supreme Court. There might be some incremental gains, but they would be likely to fall short of what a fully specialized court would achieve. Moreover, rather than easing caseload pressures, this alternative would exacerbate them by adding another layer of review. Hence, if anything is to be done in this area, creating a specialized court seems preferable. But we recommend that Congress reject both alternatives.

3. Jurisdiction Over Civil Tax Cases.

a. The Need for Reform.

The existing system for resolving disputes over federal taxes is "the result of history rather than logic."[1] Jurisdiction over tax cases is handled less rationally and more haphazardly than any other class of cases -- with significant consequences for tax administration that make reform of federal tax jurisdiction a matter of considerable importance even though the potential for caseload relief is modest. In 1988, the 2,555 civil tax cases commenced in federal district courts accounted for only 1.1% of new filings;[2] in 1987, the 2,784 such cases had constituted 1.2% of the district courts' civil caseload.[3] At the appellate level, in 1988, 264 appeals from district courts and 512 appeals from the Tax Court represented 2.1% of the docket of the courts of appeals,[4] while in 1987, 288 appeals from district courts and 436 appeals from the Tax Court had accounted for the same percentage.[5]

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1. Henry J. Friendly, Federal Jurisdiction: A General View 161 (1973)[hereafter Friendly, Federal Jurisdiction].

2. 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 183 [hereafter 1988 AO Report].

3. 1987 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 180 [hereafter 1987 AO Report].

4. 1988 AO Report, supra note 2, Tables B-1A, B-3 at 145, 150.

Under existing law, a taxpayer who wishes to dispute his or her income, gift, or estate tax liability may choose one of three different forums, each with different procedures and different routes for appeal. Before paying an alleged tax deficiency, the taxpayer may challenge the tax in the Tax Court, an administrative court created under Article I. Although the court is located in Washington, D.C., the 19 judges of the Tax Court "ride circuit," hearing cases in approximately 80 cities. After a hearing before a single tax judge, the case may be reviewed by the full court in Washington, and an appeal can be taken from the Tax Court to the court of appeals for the circuit in which the taxpayer resides (or, if the taxpayer is a corporation, where it has its principal place of business). There is no right to a jury in the Tax Court, and only limited discovery. Approximately 95% of tax cases are brought in this court.[6]

Alternatively, the taxpayer can pay the tax and file a refund suit in the Claims Court, also an Article I court. There is no right to a jury in the Claims Court, but, unlike the Tax Court, the Claims Court permits discovery pursuant to the Federal Rules of Civil Procedure.[7] Appeals from the Claims Court are to the Court of Appeals for the Federal Circuit. A disadvantage of

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5. 1987 AO Report, supra note 3, Tables B-1A, B-3 at 142, 147.

6. See 1988 Annual Report of the Commissioner of the Internal Revenue Service at 35 [hereafter 1988 IRS Report](70,815 of 74,323 pending cases).

7. 28 U.S.C. §2508 authorizes the Claims Court to adopt rules of procedure, and the court has incorporated Rules 26-37 of the Federal Rules of Civil Procedure.

suing in the Claims Court is that the taxpayer must travel to Washington for both the trial and the appeal. Only 1% of the cases are brought in this court.[8]

Finally, the taxpayer may pay the tax and file a refund suit in the federal district court where the taxpayer resides or has his principal place of business; 3.5% of tax cases are brought in federal district courts.[9] The Federal Rules of Civil Procedure govern such suits, and the taxpayer is entitled to have his case heard by a jury.[10] Appeals from decisions of the district court go to the appropriate regional court of appeals.

i. The Problem of Uncertainty.

This trifurcated jurisdiction fosters uncertainty in the administration of the tax system. One commentator has complained that "[i]f we were seeking to secure a state of complete uncertainty in tax jurisdiction, we could hardly do better than to provide for [96] Courts with original jurisdiction, [13] appellate bodies of coordinate rank, and only discretionary

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8. 1988 IRS Report, supra note 6, at 35, 38 (829 of 74,323 pending cases).

9. 1988 IRS Report, supra note 6, at 35, 38 (2,679 of 74,323 cases).

10. As with other civil actions, only a small percentage of the cases go to trial, and of these only a small percentage are jury trials. In 1988, only 175 tax trials were held in the district courts, and only 43 were jury trials. 1988 AO Report, supra note 2, Table C-8 at 230. These figures are somewhat misleading in that the mere threat of a jury shapes the parties' litigation and settlement strategies.

review of relatively few cases by the Supreme Court."[11] There is no place to obtain an authoritative interpretation short of the Supreme Court, and that overburdened Court can resolve only a handful of the conflicts that develop in tax law.[12] As it is, the Supreme Court already hears three to four cases each year involving circuit splits over tax issues.[13] Many more conflicts go unresolved, often for years or even decades.[14] The Department of Justice, for example, reported finding 28 intercircuit conflicts in 1987 and 1988.[15] More impressive, a study performed by students at the University of Virginia Law School found 56 intercircuit conflicts on income tax issues alone during the five-year period from 1983-1988, only 12 of which the Supreme Court was able to resolve.[16] Given the pressure on the Court to

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11. Magill, The Impact of Federal Taxes 209 (1943).

12. Friendly, Federal Jurisdiction, supra note 1, at 161-63.

13. Advocates of the status quo suggest that this figure demonstrates that lack of uniformity is a minor problem. But the Supreme Court faces enormous pressure to hear cases in a wide variety of areas, and the Court actually addresses only a fraction of the circuit splits in any particular field. Moreover, the current Court seems rather uninterested in commercial litigation generally and tax cases in particular. It sees itself increasingly as a Constitutional Court.

14. See Report of the American Bar Association Standing Committee on Federal Judicial Improvements, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth 15 (1989)("some conflicts on significant issues have remained unresolved ... for one or two decades")[hereafter ABA Report]; Michael I. Saltzman, Should There be a National Court of Tax Appeals?, 8 ABA Section of Taxation Newsletter 61 (1989); Friendly, Federal Jurisdiction, supra note 1, at 162-63 (conflicts took from three years and one month to thirty years tc resolve).

15. Memorandum from Edward Dennis to Dick Thornburgh dated October 16, 1989 at 5.

deal with other business, such numbers cannot be regarded as insignificant.

Why should conflicts, and disuniformity, and uncertainty concern us more here than in other fields of law? Most issues of federal law can be litigated in 94 district courts and reviewed in 12 regional courts of appeals. Indeed, most federal questions are subject to the concurrent jurisdiction of the state courts, adding another 50 possible forums and making uniformity even less likely.

The commentators argue that uniformity is critical because tax law involves the collecting of revenue.[17] That is, tax law determines how much revenue is collected for the nation as a whole, and incorrect decisions therefore affect the whole nation. Revenues may not be collected, or citizens in one part of the country may pay a disproportionate share of the costs of government.

But there are other reasons to be concerned with uniformity in the tax field. Ordinarily, decisions in one circuit do not affect persons or businesses in another. When it comes to administering the tax laws, however, the uncertainty created by conflicting decisions has "spillover" effects that encourage costly strategic behavior by both the government and taxpayers. The power of the IRS to choose when and where to challenge an

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16. Special Project, An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues, 9 Va. Tax Rev. 125, 138-39, 142 (1989).

17. See, e.g., Friendly, Federal Jurisdiction, supra note 1, at 162-63.

adverse decision puts taxpayers in a vulnerable position until the Supreme Court finally settles an issue. Moreover, the fact that, by raising an issue elsewhere, the IRS may generate a conflict that eventually leads to a favorable decision from the Supreme Court encourages the Service to oppose even reasonable decisions that are adverse to the government.[18] At the same time, the existence of conflicting precedents enables taxpayers to "whipsaw" the government in choosing a reporting position. Assume, for example, that a conflict arises with respect to whether a particular transaction qualifies as a like-kind exchange (the gain or loss from which is currently not recognized). If the transaction yields a gain, the taxpayer can treat it as a like-kind exchange, while if the same transaction yields a loss the taxpayer can treat it as a taxable exchange. The specific facts and the existence of adverse precedent need not be disclosed on the tax return, and the existence of favorable precedent should insulate the taxpayer from any penalty. Conflicting precedents thus encourage taxpayers to play the "audit lottery," and may leave the government worse off than an authoritative resolution of the issue either way.

ii. The Problem of Forum-Shopping.

The trifurcated jurisdiction of tax cases encourages forum shopping. Factors that ought to be irrelevant in administering

18. See Erwin Griswold, The Need for a Court of Tax Appeals, 57 Harv. L. Rev. 1153, 1155-56 (1944).

the tax system become important because of how they influence the taxpayers' choice of forum and how this in turn influences outcomes. Moreover, because some taxpayers have fewer options than others, the present system operates inequitably.[19]

It is easy to see how the parties can exploit forum shopping opportunities to the government's disadvantage. Most obviously, the taxpayer can sue in the court with the most favorable precedents. This is especially important when it comes to the jurisdiction of the Claims Court, since once that court decides a point in favor of a taxpayer, other similarly situated taxpayers can bring their suits there (if they are able to pay the tax assessment up front). There are, however, a variety of other ways in which the taxpayer can exploit the present system. If the taxpayer has a weak case, he can sue in the district court and try to convince a confused jury to return a verdict in his favor. If he wants to delay the disposition of a case, perhaps to obtain a more favorable settlement, he can sue in the district court, which takes longer than the tax court to resolve most cases and provides numerous procedural mechanisms for delay. If he wants to limit the government's discovery, he can sue in the Tax Court, which provides only limited discovery. Or if he wants to avoid facing lawyers from the Justice Department, he can sue in the Tax Court, where the IRS represents the United States.

Forum shopping operates inequitably because taxpayers who can pay an alleged deficiency up front can buy the right to be

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19. See generally Cramton, Forum Shopping, 31 Tax Lawyer 321 (1978).

heard in the district court or the Claims Court, with whatever advantages this may offer, while taxpayers who are relatively poor or illiquid often have no choice but to sue in the Tax Court. Forum shopping in the tax area is thus to some extent a special privilege of wealth. As Judge Dawson of the Tax Court observed, "[i]t is obviously inequitable to have a procedure where the doors of certain courts are open to those with the financial resources to pay their putative tax liability in advance and closed to those who cannot raise the money required."[20]

iii. The Need for Expertise.

Perhaps the most important reason to change the existing allocation of tax jurisdiction is the need to have tax cases heard by judges with special expertise. The Tax Code is among the most complex and technical pieces of federal legislation. Just to understand its language requires familiarity with a rich historical and legislative background. The Code is long and confusing, and its provisions reflect a mix of principle and political compromise that is often difficult to fathom. Yet the number of tax cases is small enough that most judges other than those on the Tax Court hear only a few in any given year.[21]

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20. Howard A. Dawson, Should the Federal Civil Tax Litigation System Be Restructured?, Tax Notes 1427 (Sept. 26, 1988).

21. In 1988, for example, most districts had fewer than 100 tax cases, and only 175 tax cases went to trial across the nation. 1988 AO Report, supra note 2, Table C-3 at 187-93, Table C-8 at 230. Similarly, the Ninth Circuit received 61 tax appeals, while

These judges have little opportunity, therefore, to develop expertise in handling tax cases. Most of these judges admit that they find these cases somewhat bewildering. Consider Judge Learned Hand's confession:

> In my own case the words of such an act as the Income Tax ... merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception -- couched in abstract terms that offer no handle to seize hold of -- leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to abstract, but which is within my power, if at all, only after the most inordinate expenditure of time.[22]

Only tax lawyers pretend that the tax field is anything other than extraordinarily intricate and difficult, and in private conversation even they criticize the courts of general jurisdiction for having a weak understanding of tax law. They like the present system for the litigating advantages it gives them.

A recent article suggests that "the velocity of fundamental changes in the tax law" since 1976 make "a quaint relic" of the notion of a tax specialist, since even full time tax attorneys have difficulty keeping up with new developments.[23] Rather than weakening the argument for a specialized court, however, the frequent changes in tax law make the need for such a court all the more pressing. Understanding the most recent version of the

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no other circuit had more than 31 such cases. Id., Table B-7 at 168.

22. Learned Hand, Thomas Walter Swan, 57 Yale L.J. 167, 169 (1947).

23. Saltzman, supra note 14, at 77.

Tax Code often depends on understanding earlier versions -- something the specialist is much more likely to do. Moreover, many tax cases involve liabilities from past years under different versions of the Code, again requiring a decisionmaker who is familiar with the law's evolution. If frequent changes in the tax law have made this field difficult even for specialists, the solution is not to leave decisionmaking in the hands of even less well informed generalists.

b. Recommendation.

We recommend that Congress vest exclusive jurisdiction over all civil tax cases concerning the income, estate, and gift taxes (including civil penalties under these taxes) in a single court of limited jurisdiction.[24] The adoption of this recommendation will increase certainty in tax law, eliminate forum shopping, and improve the quality of tax decisions. It will also reduce the number of cases (albeit only modestly), since the same legal issue will not be relitigated in multiple forums.

As the discussion below elaborates, this recommendation requires changing both existing trial and appellate structures. We propose to do this by expanding the present Tax Court and dividing it into a trial division and an appeals division. But the two parts of this proposal are severable: Congress could

24. Federal district courts would retain their present jurisdiction over other tax matters, such as criminal trials, IRS enforcement procedures (such as tax liens), and other taxes (such as employment taxes).

consolidate trial level jurisdiction without changing existing appellate structures, or Congress could leave trial jurisdiction as it is but consolidate appeals in a national court of tax appeals. We believe that both steps are necessary.

i. Conferring Exclusive Jurisdiction Over Civil Tax Cases on the Tax Court.

The first step is to reduce the available trial forums from three to one. Of the courts that exercise jurisdiction over tax cases at present, the Tax Court is the logical choice to be given exclusive jurisdiction. It handles more than 95% of all civil tax cases and its judges are well-respected experts in tax matters. The quality of the Tax Court's opinions and its fairness are widely recognized; the fact that such a huge percentage of cases is brought in the Tax Court suggests that taxpayers may prefer it to the other two forums even apart from the advantage of not having to pay the tax before suing. Moreover, because the Tax Court already hears most tax cases, it can most easily assume the additional burden of cases now brought in the other courts. Assigning exclusive jurisdiction to the Tax Court would be least disruptive of existing practices.

While channeling primary litigation into the Tax Court partially solves the problems discussed above, it is not enough. Many of the benefits of having trials conducted by judges with a sophisticated understanding of the Tax Code will be lost if their decisions are reviewed by judges lacking this expertise in twelve different courts of appeals. Uncertainty

will still be a problem, and some taxpayers will continue to forum shop by filing their cases in different venues in order to be able to appeal to different courts of appeals.

Solving the problems identified above thus requires vesting exclusive appellate jurisdiction in a specialized court as well. This, of course, is not a new idea: reformers have advocated it for more than half a century.[25] We recommend creating an appellate division in the Tax Court with exclusive jurisdiction to review the decisions of the trial judges.[26]

ii. Questions Raised by the Proposal.

A number of questions must be answered in order to evaluate the feasibility of this proposal. The most important of these are addressed below.

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25. See, e.g., Traynor, Administration and Judicial Procedure for Federal Income, Estate, and Gift Taxes -- A Criticism and a Proposal, 38 Colum. L. Rev. 1393 (1938); Surrey, The Traynor Plan -- What It Is, 17 Tax. Mag. 393 (1939); Griswold, supra note 18. Most recently, the ABA's Standing Committee on Federal Judicial Improvements reviewed this proposal favorably, although the Committee's Report stopped just short of an outright recommendation. See ABA Report, supra note 14, at 13-18.

26. In the general discussion of specialized adjudication, supra Part IV-A, we mentioned the importance of finding the proper level for specialization. We suggested there that legal complexity usually requires a specialized appellate bench, in contrast to factual complexity which justifies creating a specialized trial bench. But we also noted that tax is one field where specialization is appropriate at both levels. Much of the Tax Code's complexity comes in determining how it applies to a myriad of closely related transactions. An expert trial judge is necessary to characterize the facts properly in light of the law. But the internal complexity of the Code also requires specialization at the appellate level.

The Status of Tax Court Judges. The Tax Court is an Article I court whose members are appointed for 15-year terms. We recommend making the Tax Court an Article III court. As Dean Griswold observed, the notion that the present Tax Court is an executive agency is just "a polite fiction," since the Tax Court is "in organization, tradition, and function a judicial body ...."[27] In addition, the reconstituted Tax Court will be an important court, and its judges should therefore have all the privileges of constitutional judges, including life tenure, salary protection, and the ability to sit by designation on other Article III courts. Finally, making the Tax Court an Article III court might reduce fears of government "capture" and enhance the court's prestige.[28]

Opposition to conferring Article III status on Tax Court judges comes chiefly from judges who already have this status. We noted in Part II that it is important to preserve the prestige that accompanies serving on the federal courts. But the proposal would give Article III status to fewer than 30 judges on a special court of limited jurisdiction. So modest an addition to the Article III federal judiciary will not diminish the prestige of the powerful federal courts of general jurisdiction.

The Size of the Court. The Tax Court handles 95% of the civil tax cases with only 19 members. Two or three additional

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27. Griswold, supra note 18, at 1154.

28. It also seems unlikely that the amount of tax business will decrease to such an extent that there will be too little work for these judges.

judges could handle the court's expanded trial responsibilities adequately. In addition, the courts of appeals presently decide between 750 and 800 tax appeals a year.[29] According to the Administrative Office, these courts also averaged 722 new filings per panel in 1988.[30] Thus, even assuming that the average tax case is above average in difficulty, no more than five judges, presumably sitting in panels of three but occasionally convening en banc, should be needed to handle the Tax Court's appellate responsibilities. Enlarging the present Tax Court to 26 or 27 members should suffice to enable this court to handle the nation's entire federal tax business.[31]

Selecting Judges to Serve as Appellate or Trial Judges. A third question concerns the choice of judges to serve as appellate judges. This is only a transition problem: once the initial appointments and division are made, vacancies would be filled in the same way that vacancies are filled in the federal district courts and courts of appeals. As for the initial appointments and assignments to the trial or appellate division, if the new Tax Court is an Article III court, these decisions must be made by the President, subject to Senate confirmation. Presumably all or most of the current members of the court would be appointed to the successor entity.[32] The risk that elevating

29. See supra notes 4-5 and accompanying text.

30. 1988 AO Report, supra note 2, Table 1 at 2.

31. With the minor exceptions noted supra note 24.

32. Reconstituting the Tax Court as an Article III court presumably requires nomination from the President and approval by the Senate in accordance with the Appointments Clause of the

five tax judges to review decisions of their former colleagues will create frictions is no greater than the same risk when district court judges are appointed to the courts of appeals.

Location of the Court. The Tax Court is headquartered in Washington, but rides circuit to try cases. There would be value in allowing taxpayers to make their appeals close to home, but whether it is feasible to have appellate panels roaming the country in search of appeals remains to be decided.

With respect to the trial division, the relatively modest increase in the number of cases makes it feasible to continue the current practice of circuit riding. Alternatively, as Judge Friendly suggested,[33] Congress could establish regional headquarters, each with its own chief judge and clerk's office. This would allow tax judges to ride a much smaller circuit and to develop greater familiarity with the non-tax law of the states under their jurisdiction. Either way, litigants will retain the ability to bring their cases in local courts.

The Right to Trial by Jury. If exclusive jurisdiction is vested in the Tax Court, taxpayers will no longer be able to demand a jury trial. Congress could authorize a reconstituted Tax Court to conduct jury trials, but we recommend leaving this aspect of Tax Court procedure undisturbed. There is no constitutional right to trial by jury in tax cases, and the right to a jury in a refund action is a special statutory exception to

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Constitution.

33. Friendly, Federal Jurisdiction, supra note 1, at 171.

the general rule in suits against the government.[34] The use of juries in civil tax cases is generally undesirable given the need for special expertise in this highly technical area of law. For similar reasons, Congress provides no right to a jury in the Court of International Trade, which hears custom and import tax cases.

This is not to say that juries are incapable of handling all tax cases. Some tax disputes resemble ordinary contract or property cases. But there is no reason to expect these to be the cases heard by a jury. Lawyers often decide to demand a jury on tactical grounds which have nothing to do with judicial administration. Thus, a lawyer might demand a jury if his client's case was weak and the lawyer believed that he could sway the jury's sympathies. This is a perfectly rational litigation strategy -- which is precisely why we recommend eliminating the right to a jury. Retaining this right simply preserves a tactical weapon that the parties can exploit at the expense of developing a rational tax system.

Although most of the Tax Court's other rules of procedure will serve adequately, a few modifications may be needed. For example, in refund suits where there was no audit, the Government may require more discovery than is presently available in the Tax Court in order to develop a defense. Such details should be easy to work out, however.

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34. See, e.g., Atlas Roofing Co. v. Occupational Safety Commission, 430 U.S. 442, 450 (1977); Helvering v. Mitchell, 303 U.S. 398 (1938); Friendly, Federal Jurisdiction, supra note 1, at 171.

Refund Actions and the Public Fisc. A further consideration in expanding the trial jurisdiction of the Tax Court is the potential effect on the public fisc. At present, the government benefits from the payment of disputed tax liabilities in refund actions brought in the district courts or Claims Court. The Tax Court has no jurisdiction over refund actions, and this would have to be changed. Even so, fewer taxpayers will pay before trial if there is nothing to be gained. Of course, under the present system, only 5% of the cases are refund actions, so the impact on the public fisc would be small, indeed miniscule.[35] Moreover, the government's interests are adequately protected by the requirement that the taxpayer pay interest on unpaid liabilities that are ultimately upheld. Indeed, some taxpayers pay before trial and sue for a refund in order to prevent the accrual of such interest charges.

The Government's Lawyers. At present, the IRS has jurisdiction over cases in the Tax Court while the Justice Department handles refund suits brought in district courts or the Claims Court. The same reasons that justify consolidating jurisdiction over tax cases in the Tax Court justify giving exclusive prosecutorial responsibility at the trial level to the IRS. IRS personnel already handle 95% of the cases and are familiar with Tax Court procedures. Moreover, while the Justice Department's lawyers are among the best in the country, IRS

35. The total amount in dispute in refund actions commenced in 1987 was only $254,788,000. See 1988 IRS Report, supra note 2, at 35.

personnel are likely to be more familiar with the way in which the government's litigation strategy coincides with general tax policy, since the Service implements this policy on a daily basis.

The situation on appeal is different. The Tax Division of the Department of Justice currently handles all appeals in tax cases. Since procedures in the appellate division of the new Tax Court probably will not differ from procedures in the regional courts of appeals, the advantage of experience supports leaving these cases to the Justice Department. Concern for coordinating litigation strategy with tax policy has little force in the appellate context, since the issues will already have been shaped at the trial level. It is not unusual for the government to transfer cases to different departments as they move through the judicial system, and the IRS and Justice Department have successfully coordinated this transition in the past. Consequently, we recommend that Congress leave responsibility over appeals with the Justice Department.

Other Administrative Issues. A number of other administrative loose ends must be resolved before this proposal can be implemented. For example, the Tax Court's budget is presently not part of the budget of the judiciary. Will this change if the Court is converted into an Article III court? What committees in Congress will have jurisdiction over legislation affecting the new Tax Court? What should be done with the Tax Court's "Special Trial Judges," who handle small tax cases and many of the shelter cases? (We recommend treating these judges

as magistrates, which would not disrupt present procedures.) Although these details must be resolved, none of them poses a particularly serious obstacle.

c. Some Objections.

One aspect of this proposal -- the creation of a national court of tax appeals -- has been discussed for years, and while respected commentators have supported it, other knowledgeable experts have raised objections. Opponents of a national tax court defend the availability of multiple forums on the ground that "successive consideration by several courts constitutes a leavening process which in the long run improves the quality of adjudication."[36] In other words, it is worth enduring periods of uncertainty because additional consideration by other judges increases the likelihood that the eventual decision is "right."

Perhaps it is true that several courts of general jurisdiction are more likely than one such court to reach the correct resolution of a tax problem. But a better approach is to make the first court to consider the issue one that has special expertise in the field of tax law. To say that the present system has the blind leading the blind may put matters somewhat too strongly, but the metaphor is nonetheless appropriate. As explained above, tax cases are more complex than most cases on

36. Letter from fourteen Tax Court judges to Assistant Attorney General Daniel J. Meador dated October 13, 1978; Saltzman, supra note 14, at 61, 77.

the federal docket, while the small number of such cases denies judges the opportunity to develop any expertise in handling them. Having more judges consider tax issues thus provides no assurance of improved decisionmaking. A specialized court may also make mistakes, but probably fewer than courts of general jurisdiction -- while at the same time providing the advantages of certainty and uniformity of results.

Another objection that is sometimes made is that specialist judges will have an unduly parochial outlook: "A decision from a generalist judge makes sense because he may be informed by a breadth of experience in dealing with other federal agencies and their rulemaking, as well as a consideration of local law, and local or regional experience."[37] Even if this is true, the benefits of the generalist's experience probably do not outweigh the value of the specialist's knowledge in the tax field. Few tax cases turn on questions of general law, and those issues typically are straightforward.[38] Moreover, while general law may be relevant to some tax controversies, it is seldom more important than the Tax Code itself. What the generalist brings to the tax case is less valuable than what he fails to bring.[39]

More importantly, while tax judges would be "specialists" in the sense that they work on tax cases, tax law is unique in the extent to which it deals with problems "touching every phase of

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37. Saltzman, supra note 14, at 77.

38. See Griswold, supra note 18, at 1188.

39. See ABA Report, supra note 14, at 15-16.

life and, consequently, of law."[40] The caricature of a specialist as someone with no practical experience and little grasp of matters outside his area of expertise is simply inappropriate in the tax context. A tax lawyer must deal not only with statutes and committee reports and regulations but also with questions of property, contracts, agency, partnerships, corporations, equity, trusts, insurance, procedure, accounting and economics. As Dean Griswold observed: "He must be broad in his outlook, if he is to deal effectively with the manifold problems which make up the modern field of tax law. There is no reason to expect that a judge in this field should become narrow and specialized."[41] On the contrary, an experienced tax lawyer will be able to combine a broad understanding of the affairs and transactions to which the tax laws are applied with the special knowledge necessary to identify the nuances that have implications for tax policy. Finally, the experience of tax judges can be enhanced by having them sit by designation on the federal courts of general jurisdiction.

Opponents of a national Tax Court also fear that the court will become an "instrument of the government."[42] In part, this fear is apparently based on the assumption that the Tax Court will remain an Article I court, since the examples most often cited to prove that specialized courts are easily captured are or

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40. Friendly, Federal Jurisdiction, supra note 1, at 165.

41. Griswold, supra note 18, at 1183-84.

42. ABA Report, supra note 14, at 45 (dissenting statement).

were independent agencies or Article I courts.[43] The risk of government capture should be reduced by making the Tax Court into an Article III court. Even apart from this, however, there is little evidence to support the spectre of a court controlled by the IRS or Justice Department. Certainly the present Tax Court is not unduly pro-government -- otherwise 95% of the taxpayers probably would not bring their litigation in this court. Moreover, the percentage of dispositions favoring the government is nearly identical in the Tax Court (89.4%) and the district courts and Claims Court (88.3%).[44] The fear that the new court's judges will be drawn disproportionately from the government can be counteracted in the confirmation process. Taxation is a highly visible subject on which diverse interest groups, independent of the government, regularly exert political pressure.[45] It is even possible (though probably not necessary) to provide in the statute creating the new Tax Court that some proportion of its members not come from the IRS or the Treasury Department, or from the Tax Division of the Department of Justice.[46] It is worth noting in this connection that 11 of the 18 judges presently sitting on the Tax Court (there is one vacancy) came from the private sector.

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43. See ABA Report, supra note 14, at 44-45 (dissenting statement).

44. Theodore Tannenwald, The Tax Litigation Process -- Where It Is and Where It Is Going 4 (10th Herman Goldman Memorial Lecture, Assoc. of the Bar of New York City, Sept. 12, 1989). See 1988 IRS Report, supra note 6, at 38-39.

45. ABA Report, supra note 14, at 16.

46. See Friendly, Federal Jurisdiction, supra note 1, at 166.

Opponents of consolidating tax jurisdiction sometimes argue that taxpayers should be able to bring their cases before local judges familiar with local law.[47] As James P. Holden of the American Bar Association's Section on Taxation explained in a letter to the Committee:

> Many [tax] cases involve commonplace issues having their origins in local law concepts of marriage, divorce, probate, trusts, business, organizations, charitable pursuits, property, etc. Although the application of tax law may [be] a common thread among them, the underlying sets of relationships [are] individually unique and [are] akin to those likely to be found in any personal or commercial undertaking.... Tax litigants, like other litigants, require assurance that ... their appeals at least will be heard by generalist judges who will decide tax cases ... in the context of the law as a whole.[48]

This argument reflects two concerns: (1) the taxpayer's convenience in being able to challenge the government without having to go to Washington; and (2) the judge's familiarity with non-tax law that might be relevant to the disposition of tax cases. With respect to the first concern, our proposal retains the existing practice of having tax judges hear cases in cities around the country at the trial level and, if necessary, a similar practice can be instituted at the appellate level. Indeed, the new Tax Court should be able to hear cases in more

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47. See. e.g., Letter to Assistant Attorney General Daniel Meador, supra note 36, at 16; Saltzman, supra note 14, at 77-78.

48. Letter dated August 29, 1989, from James P. Holden to Richard A. Posner. The organized bar appears to be divided with respect to our proposal to reform jurisdiction over tax cases. While the ABA's Section on Taxation is opposed to any change that limits the available choice of forums, the ABA's Standing Committee on Federal Judicial Improvements favors the proposal. See ABA Report, supra note 14, at 13-18.

places than the courts of appeals. The argument about knowledge of general law has largely been addressed above, but to the extent it is based on the judges' knowledge of local law rather than on their supposedly better "feel" for general law, it is exaggerated. Federal judges are seldom experts in local law.

Finally, advocates of the present system warn that creating a specialized tax court may "leave the American taxpayer with the impression that the judicial system is unresponsive, an attitude which, in the end, could profoundly undermine the voluntary compliance that all concede is the cornerstone of the most effective system of taxation in the world."[49] To begin with, the vast majority of the American public never has any contact with the tax litigation system and will almost certainly be unaware of, as well an unaffected by, the changes we recommend. More important, 95% of taxpayers who do become involved in tax litigation already choose to bring their cases in the specialized Tax Court. Nor will it do to argue that what preserves confidence in the system is the opportunity to seek review in generalist courts, for in reality this opportunity is denied to most taxpayers. It is seldom feasible for taxpayers of modest means to pay their taxes and seek a refund, and the typical case in the district court therefore involves either a corporation or a wealthy individual. We do not believe that eliminating the glaring inequity that, under present law, gives a special privilege to the wealthy will decrease taxpayer confidence. On

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49. Memorandum from Edward Dennis to Dick Thornburgh, supra note 15, at 14.

the contrary, our proposal would for the first time put all taxpayers on an equal footing and allow them all to obtain review in an independent Article III tribunal.

Specialized courts are neither always good nor always bad. The need to create a specialized court depends on a variety of particular circumstances. In the area of tax law, the case for specialization is clear. Indeed, there are few contexts in which the argument for specialization is stronger. The tax field is complex at both the trial and appellate levels, but the small number of cases makes it unlikely that general jurisdiction judges will develop the expertise necessary to understand these cases. There is a strong need for uniformity, because uncertainty in tax law has intercircuit effects. Moreover, while tax cases are generally segregable from other parts of the federal docket, they offer a breadth of other issues sufficient to protect the judges from intellectual isolation. Finally, unlike the Commerce Court or the Foreign Intelligence Surveillance Courts, there is general consensus regarding the policy objectives of tax law. All the relevant factors thus support the creation of a special court of limited jurisdiction.

4. Social Security Disability Claims Process.

A significant portion of the federal courts' caseload consists of reviewing disability determinations made in the Social Security system. Appeals from denials of Social Security disability claims constituted 7.8% of the civil cases filed in the district courts in 1983, 11% in 1984, 6.9% in 1985, 5.3% in 1986, 5.3% in 1987 and 6.0% in 1988.[1] During this same period, there have been between 40,000 and 50,000 disability cases pending in the district court at any given time.[2] Social security cases represented a smaller but still significant portion of the docket of the courts of appeals during the same period: 4.0% in 1983, 4.5% in 1984, 4.2% in 1985, 4.0% in 1986, 3.2% in 1987 and 3.0% in 1988.[3]

Equally important in the Committee's decision to examine this area are the complaints of judges about the need for reform. The Committee received communications from a significant portion of the federal bench. While these letters suggested a variety of questions for the Committee to examine, they were

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1. 1988 Annual Report of the Director of the Administrative Office of the United States, Table C-2 [hereafter 1988 AO Report]; 1987 Annual Report of the Director of the Administrative Office of the United States, Table C-2 [hereafter 1987 AO Report].

2. C. Koch & D. Kaplow, The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council, 1987 ACUS 625, 677 (Report for Recommendation 87-7) [hereinafter Appeals Council Report].

3. 1988 AO Report, supra note 1, Table B1-A; 1987 AO Report, supra note 1, Table B1-A.

virtually unanimous in mentioning Social Security cases. Judges apparently find these cases burdensome, but feel that their efforts contribute little to improving administration in this area.

We conclude that systemic reform is indeed desirable, both to conserve judicial resources and to improve the disability determination process. In particular, we recommend that judicial review of disability determinations be vested exclusively in the courts of appeals (eliminating district court review) and limited to questions of law and constitutional claims; that an independent Article I Court of Disability Appeals be established to conduct final administrative review; that the Administrative Law Judges who hear disability cases be placed in an independent corps; and that efforts to improve disability determinations at the state level be continued. Taken together, these recommendations restructure the disability determination process, creating a unified and specialized, yet independent, institutional structure to adjudicate and review disability claims. Our reasons for making these recommendations are developed at length in the discussion below.

a. The Social Security Disability Claims Process.

What is commonly referred to as "Social Security" includes two programs. The Old Age Survivors and Disability Insurance program (OASDI) is a government insurance program for workers, financed by payroll taxes. The Supplemental Security Income

program (SSI) is a pure welfare program in which eligibility is based on need.[4] Although the two programs have different financial eligibility requirements, their disability requirements are the same. Making disability determinations under these programs constitutes the bulk of the adjudicatory work of the Social Security Administration (SSA).[5]

i. Substantive Standards.

We begin with a brief discussion of the substantive standards that are applied in Social Security disability cases, since this is essential to understand many of the problems and their solutions. The key question is whether the claimant is "disabled" within the meaning of the relevant statutory provisions. Under both OASDI and SSI, disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not

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4. The Social Security Amendments of 1972, Pub. L. 92-603 § 301, 86 Stat. 1329, 1465-75 (1972), codified as amended at, 42 U.S.C. §§ 1381-1383c (1986) (Title XVI of the Social Security Act), replaced the previously state-run program with a federal one operated through the same administrative apparatus as OASDI. Implementing regulations for SSI generally parallel OASDI regulations and are codified at 20 C.F.R. Part 416.

5. See Current Problems in the Social Security Hearings and Appeals Process: Hearings Before the Subcomm. on Social Security, House Comm. on Ways and Means, 99th Cong., 2d Sess. 62 (1986) (Statement of Frank V. Smith III, Associate Commissioner for Hearings and Appeals, Social Security Administration).

less than 12 months."[6] Both programs require that the claimant's impairment must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy ...."[7]

To satisfy these standards, the claimant must establish a number of elements. First, the claimant must establish that he is not engaged in substantial gainful activity.[8] Second, the claimant must establish that his impairment is "severe" within the meaning of the statute.[9] Even if the impairment is severe, however, the claimant must show that it is equal to or greater than the listing of impairments contained in Social Security regulations.[10] If the claimant cannot make this showing, he may show that he lacks sufficient "residual functioning capacity" (RFC) to return to his previous employment.[11]

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6. 42 U.S.C. § 423(d)(1)(A) (OASDI); id. § 1382c(a)(3)(A) (SSI).

7. 42 U.S.C. § 423(d)(2)(A) (OASDI); id. § 1382c(a)(3)(B) (SSI).

8. 20 C.F.R. § 404.1572 (OASDI); 20 C.F.R. § 416.972 (SSI).

9. "Severity" involves both the inability to perform basic work activities, see 20 C.F.R. § 404.1521 (OASDI); 20 C.F.R. § 416.921 (SSI), and a statutory 12-month duration requirement. See 20 C.F.R. § 404.1509 (OASDI); 20 C.F.R. § 416.909 (SSI).

10. See 20 C.F.R. Part 404, Subpart P, app. 1.

11. Residual functioning capacity measures a claimant's physical and mental ability to perform work, and involves evaluation of factors such as the ability to walk, stand, sit, bend, and lift; as well as memory, ability to adjust psychologically to work, and various other factors. See 20 C.F.R. § 404.1545 (1988) (OASDI); 20 C.F.R. § 416.945 (1988) (SSI). Currently, SSA makes a finding

If the claimant successfully shows that he cannot return to his previous employment, the burden shifts to SSA to produce evidence that the claimant can perform other work that is available in the national economy.[12] In most cases, SSA makes this determination by evaluating the claimant's case against a set of objective criteria compiled in regulations known as the "Grids." The Grids are tables based upon national patterns of job availability in which RFC and vocational factors such as age, education, and skill level are used to determine whether a claimant can perform work that is available in the national economy.[13] If a claimant's impairment does not fit the Grids, SSA will make an individualized vocational determination.[14] Only if there is no work in the national economy that the claimant can perform -- without regard for whether that work is in the claimant's geographic area or whether the claimant is likely to

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as to whether the claimant can perform sedentary, light, medium, heavy, or very heavy work. See 20 C.F.R. § 404.1567 (1988) (OASDI); 20 C.F.R. § 416.967 (1988) (SSI). RFC is relevant not only to the claimant's ability to return to previous employment, but also to the application of the "Grids." See infra notes 13-14 and accompanying text.

12. See Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987); Torres v. Schweiker, 682 F.2d 109 (3d Cir. 1982).

13. See 20 C.F.R. Part 404, subpart P, app. 2; Heckler v. Campbell, 461 U.S. 458 (1983) (upholding use of Grids).

14. The Grids are binding when a claimant's impairments match precisely with one of their categories. When the match is imperfect, the grids can only be used as guidelines. See, e.g., Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); see also 20 C.F.R. § 404.1569 (OASDI); 20 C.F.R. § 416.969 (SSI). In such cases, the SSA will often hear testimony from vocational experts regarding the availability of jobs in the national economy that can be performed by the claimant. See, e.g., Campbell v. Bowen, 822 F.2d 1518, 1520 (10th Cir. 1987).

be hired to perform it -- is the claimant disabled. If the agency fails to show that other work is available, the claimant is disabled and entitled to benefits.

Making the determination of disability under these standards is quite difficult. The applicable regulations are technical and complex. Moreover, evaluating the medical and vocational evidence typically presented requires familiarity and expertise if it is to be done well. Finally, because the claimant's subjective claims of pain (or other symptoms) may be crucial in evaluating the degree of impairment, disability determinations often depend on an assessment of credibility.[15] The substantive difficulty of making this determination adds to SSA's burden in moving an extraordinarily high number of claims through the laborious disability claims process.

ii. The Disability Claims Process.

Initial applications for disability benefits are received by a regional SSA branch office and forwarded to state agencies

15. In order to establish disability, a claimant's statements as to pain must be supported by objective evidence of a medical impairment that could reasonably be expected to produce pain. This requirement was initially imposed by a statutory provision, 42 U.S.C. § 423(d)(5)(A) (1982), which has since lapsed under sunset provisions, see Pub. L. No. 98-460, § 3(a), 98 Stat. 1794, 1799 (1984), but has continued as SSA policy under Social Security Ruling 82-58. Once the medical cause of pain is identified, however, SSA must consider testimony concerning subjective conditions such as pain. See Avery v. Secretary of HHS, 797 F.2d 19 (1st Cir. 1986); Foster v. Heckler, 780 F.2d 1125 (4th Cir. 1986); Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984).

operating under federal supervision. The state agencies' determinations are then subject to two layers of administrative review at the federal level. Finally, a disability determination is subject to two further layers of judicial review in the federal courts.

State Disability Determination Service. A disability claim is first evaluated by a federally funded state Disability Determination Service.[16] The Disability Determination Service makes both initial eligibility decisions regarding applications for benefits and "Continuing Disability Reviews" of previously allowed claims.[17] In addition, the Disability Determination Service may reconsider its initial determination upon request by a disappointed claimant. Determinations are made according to SSA regulations.

In order to make an initial determination of disability regarding a new application, the Disability Determination Service must develop a medical file. Although the claimant must provide the Disability Determination Service with pertinent information, the Disability Determination Service will also solicit other

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16. Before forwarding an application for benefits to the state Disability Determination Service, the district office will make a threshold determination of whether the applicant meets the relevant financial eligibility requirements. See Appeals Council Report, supra note 2, at 661.

17. Initial determinations sometimes involve other issues, such as the amount of benefits; reduction of benefits because of workers compensation, work, refusal to accept rehabilitation services, or penalties; computation of overpayment or underpayment; and revision of earnings record. See 20 C.F.R. §§ 404.902-404.905 (OASDI); 20 C.F.R. §§ 416.1402-416.1405 (SSI). But these issues comprise only a small portion of SSA's adjudicatory workload.

relevant medical records and, if necessary, order an examination by a consulting physician under contract with the Disability Determination Service.[18] Once sufficient information is compiled, a medical advisor and a disability examiner make the initial determination of disability.[19] Since the claimant has the burden of proving disability, inadequacies in compiling the record often lead to a denial of benefits.

A second type of initial determination made by the Disability Determination Service is the Continuing Disability Review that is conducted periodically to determine whether a claimant's medical condition has significantly improved.[20] As in the case of new applications, the decision is made on the basis of a paper record.[21] But because termination of benefits under

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18. See 20 C.F.R. §§ 404.1512-404.1518 (OASDI); 20 C.F.R. §§ 416.912-416.918 (SSI).

19. See 20 C.F.R. § 404.1615(c) (OASDI); 20 C.F.R. § 416.915(c) (SSI). The bulk of the work compiling the medical evidence is performed by the disability examiner, with the consulting physician providing expertise where necessary regarding medical conditions. See Appeals Council Report, supra note 3, at 662 n.108. SSA is currently experimenting with allowing claimants to have "personal appearance interviews" at the initial determination stage. See 20 C.F.R. § 404.906 (OASDI); 20 C.F.R. § 416.1406 (SSI). See generally A. Shoenberger, State Disability Services' Procedures for Determining and Redetermining Social Security Claims, 1987 ACUS 579 (Report for Recommendation 87-6) [hereinafter State Procedures Report].

20. See 20 C.F.R. § 404.1590 (OASDI); 20 C.F.R. § 416.990 (SSI). Continuing Disability Review was mandated by the Social Security Disability Amendments of 1980, Pub. L. 96-265, 94 Stat. 439 (1980). After various problems emerged with the initial implementation of the Continuing Disability Review program, Congress revised the program. See, infra notes 57-58 and accompanying text.

21. In the OASDI program, if the Disability Determination Service determines that a claimant is no longer disabled, the claimant is entitled to pretermination notice and an opportunity

Continuing Disability Review requires the Disability Determination Service to carry the burden of proof, inadequacies in the record tend to benefit the claimant.

A disappointed claimant may seek reconsideration from the Disability Determination Service. Procedures at this level vary depending on whether the claimant is seeking review of a new application or Continuing Disability Review. For new applications, different Disability Determination Service personnel are assigned to reconsider the decision according to the same procedures used in making the initial determination.[22] The claimant has the right to submit additional evidence at this stage.[23]

A claimant who seeks reconsideration of a Continuing Disability Review decision is generally entitled to a "disability hearing" conducted by a separate state agency for disability hearings or a federal official.[24] At this hearing, the claimant

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to respond and submit new information. See 20 C.F.R. § 404.1595. In SSI cases, following pretermination notice the claimant proceeds directly to the reconsideration stage. See 20 C.F.R. § 416.1330(b). The experimental program to grant "personal appearance interviews" extends to Continuing Disability Review cases and the claimant is entitled to an interview prior to termination of benefits. See 20 C.F.R. § 404.906 (OASDI); 20 C.F.R. § 416.1406 (SSI).

22. See 20 C.F.R. § 404.913 (OASDI); 20 C.F.R. §§ 416.1413-416.1413a (SSI); Appeals Council Report, supra note 2 at 117. In SSI cases, non-medical issues may be resolved through an informal conference at the option of the claimant. See 20 C.F.R. §416.1413a(a).

23. See 20 C.F.R. § 404.913(a) (OASDI); 20 C.F.R. §§ 416.1413(a)-416.1413a (SSI).

24. See 20 C.F.R. §§ 404.913-404.917 (OASDI); 20 C.F.R. § 416.1413-1417 (SSI).

has the right to SSA assistance in obtaining evidence, to representation, to review the evidence in the file, and to present and cross-examine witnesses.[25] SSA regulations provide that in OASDI cases, nonmedical issues should be determined through a paper hearing process;[26] in SSI cases, the claimant may elect to have such issues determined through a paper hearing process, informal conference or formal conference.[27] When an informal or formal conference is held in SSI cases, the claimant has some limited procedural rights, most importantly the right to present witnesses.[28]

Federal Administrative Review. Following reconsideration by the Disability Determination Service, a two-tiered administrative review process is available at the federal level. First, a disappointed applicant is entitled to a hearing before an administrative law judge.[29] The ALJ hearing, often the claimant's first opportunity to appear in person and present witnesses, is a de novo reconsideration of the disability claim.[30] Although the ALJ uses the record made in connection

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25. See 20 C.F.R. § 404.915(b) (OASDI); 20 C.F.R. § 416.1415(b) (SSI). The case file is prepared by an official within the agency who may make a favorable reconsideration decision without a hearing. See 20 C.F.R. §§ 404.915(c)-(d) (OASDI); 20 C.F.R. § 416.1415(c)-(d) (SSI).

26. See 20 C.F.R. § 404.913.

27. See 20 C.F.R. §§ 416.1413-416.1413c.

28. See 20 C.F.R. §§ 416.1413(b)-(c) (1988).

29. See 20 C.F.R. § 404.929 (OASDI); 20 C.F.R. § 416.1429 (SSI).

30. 42 U.S.C. § 405(b)(1) (OASDI); id. at § 1383(c)(1) (SSI).

with the initial determination and reconsideration, additional evidence is freely admitted.[31] The ALJ hearing is relatively informal and nonadversarial. No one appears from SSA to oppose the claimant.[32] The ALJ is responsible for assisting the claimant in presenting his case.[33] Nonetheless, the majority of claimants are represented by counsel at this stage.[34] The ALJs' independence is protected by provisions of the Administrative Procedure Act that apply to ALJ hearings.[35]

An ALJ's decision is reviewed by the SSA Appeals Council, a twenty-member body created by regulation in 1940. Disappointed applicants may ask the Council to review the ALJ's decision,[36]

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31. See 20 C.F.R. §§ 404.944, 404.950 (OASDI); 20 C.F.R. §§ 416.1444, 404.1450 (SSI).

32. SSA experimented with "government representatives" in ALJ hearings, but the experiment was halted after a federal district court enjoined it. Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986). See Appeals Council Report, supra note 3, at 670 n.128.

33. See generally 2 H. McCormick, Social Security Claims and Procedures §§573-575 (1983 & Supp. 1989); Appeals Council Report, supra note 2, at 670-71.

34. See Appeals Council Report, supra note 2, at 668 n.123 (citing 9 Social Security Forum No. 3, at p. 7 (Mar. 1987)). The payment of fees to representatives must be approved by SSA. See 42 U.S.C. § 406; 20 C.F.R. § 404, Subpart R (OASDI); 20 C.F.R. § 416, Subpart O (SSI). A court may also order the government to pay fees under the Equal Access to Justice Act.

35. 5 U.S.C. §§ 554(d), 3105, 5362, 7521. See Appeals Council Report, supra note 2, at 669.

36. See 20 C.F.R. §§ 404.967-404.981 (OASDI); 20 C.F.R. § 416.1467-416.1481 (SSI). The Council will review a case if the ALJ's decision constitutes an abuse of discretion, contains an error of law, or is not supported by substantial evidence; or if the case presents an important issue of law or policy. See 20 C.F.R. § 404.970(a) (OASDI); 20 C.F.R. § 416.1470(a) (SSI). In addition, the Council will review a case if new evidence is submitted and the ALJ's decision is contrary to the weight of the evidence. See 20 C.F.R. § 404.970(b) (OASDI); 20 C.F.R. §

but the Council also reviews ALJ decisions on its own motion[37] and may reopen cases in various circumstances.[38] The Council may also become involved in a case when further review is sought in a federal district court or after a court remands for further consideration by SSA.[39]

416.1470(b) (SSI). Most courts have held that the Council's jurisdiction to review cases is not limited to the reasons listed in the regulations. See, e.g., Bauzo v. Bowen, 803 F.2d 917 (7th Cir. 1986); Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986); Razey v. Heckler, 785 F.2d 1426 (9th Cir. 1986). Contra Baker v. Heckler, 730 F.2d 1147 (8th Cir. 1984).

37. The Council ended its practice of reviewing virtually all ALJ decisions for "gross error" in 1975, as a result of caseload pressure, but in 1980 the "Bellmon Amendment" required that sua sponte review be reinstituted. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441, 446 (1980) codified at 42 U.S.C. § 421 note. The Council's practice of "targeting" certain ALJ's for own motion review proved to be controversial, and was eventually abandoned. See infra notes 115-119 and accompanying text. Currently, the Council randomly selects ALJ awards for review. See Appeals Council Report, supra note 2, at 708 & n.229 (10-15% in 1987). In addition, the Council reviews on its own motion "protest" cases in which an SSA official protests an ALJ decision on technical or substantive grounds. See id. at 711-713.

38. See 20 C.F.R. §§ 404.987-404.996 (OASDI); 20 C.F.R. §§ 416.1487-416.1494 (SSI).

39. The attorney handling the case for the government may ask the Council to reconsider its decision in light of additional evidence submitted by the claimant; or if the attorney believes the case will be difficult to defend in court (even if correctly decided), he may suggest that the Council take the case back either to pay the claim or to bolster the administrative record and/or rationale for the denial of benefits. See Appeals Council Report, supra note 2, at 736-41. Otherwise, the Council neither participates in the defense of its decisions in court nor follows the fate of its decisions as they are reviewed by the judiciary. See id. at 734-36, 741. After remand, the Council may "interpret" the court's decision before sending the case to an ALJ for further consideration, see id. at 742, and the Council is responsible for the final SSA decision after remand.

Review in the Appeals Council typically involves a kind of sequential evaluation of the record.[40] The case is first sent to a division of the Office of Appeals Operations, where it is randomly assigned to an analyst who prepares the file and makes an initial recommendation. From there, the case is sent to the Council and assigned to a member. If the analyst recommends denying review and the member agrees, review is denied. If the member disagrees with the recommendation that review be denied, or if analyst recommends that review be granted, two members will review the case. If these two members agree on a result their decision is final; if they disagree the case is reviewed by a third member who casts the deciding vote.[41]

The role of the Appeals Council varies depending on whether it is reviewing an initial ALJ decision or one made after remand from a federal court. Initial ALJ decisions are usually final, and the Council functions more or less as an appellate tribunal. But the Council has broad power to consider new evidence and may independently weigh the evidence and reach its own conclusions.[42] In contrast to initial decisions, decisions

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40. The regulations provide that the Council may grant oral argument upon the request of a claimant if the case presents important issues of law or policy, see 20 C.F.R. § 404.976(c) (OASDI); 20 C.F.R. § 416.1476(c) (SSI), but oral argument is rarely granted. See Appeals Council Report, supra note 2, at 730.

41. See 20 CRF §422.205; Appeals Council Report, supra note 2, at 726-28.

42. The courts have generally held that the issue on review is whether the Appeals Council's decision, not the ALJ's decision, is supported by substantial evidence. See, e.g. Bauzo v. Bowen, 803 F.2d 917 (7th Cir. 1986); Mullen v. Bowen, 800 F.2d 535 (6th Cir. 1986); Fierro v. Bowen, 798 F.2d 1351 (10th Cir. 1986);

by an ALJ following remands from a federal court are merely "recommended"; the Council must approve them before they are final.[43]

Judicial Review. A disappointed applicant may seek review of a final decision from SSA in federal district court.[44] From there, appeal lies to the regional courts of appeal and to the Supreme Court. Review is limited to determining whether the SSA's decision is supported by substantial evidence and was made according to correct legal standards. Despite this deferential standard of review, reversal rates are high.[45]

It is unusual explicitly to vest first instance judicial review of administrative decisions in the federal district courts rather than the courts of appeals.[46] Two reasons justify doing

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Parker v. Bowen, 788 F.2d 535 (11th Cir. 1986) (en banc); Parris v. Heckler, 733 F.2d 324 (4th Cir. 1984). But see Smith v. Heckler, 760 F.2d 184 (8th Cir. 1985) (credibility determinations are for the ALJ); Appeals Council Report, supra note 2, at 718 n.250.

43. See 20 C.F.R. § 404.983 (OASDI); 20 C.F.R. § 416.1483 (SSI). Thus, the Council does not have the option of denying review of such cases.

44. See 42 U.S.C. § 405(g); 20 C.F.R. § 404.981 (OASDI); 20 C.F.R. § 416.1481 (SSI). The Appeals Council's decision or the ALJ's decision (if the Council denied review) constitutes the final decision of the SSA. The claimant is normally required to exhaust administrative remedies, 42 U.S.C. 405(g); Weinberger v. Salfi, 422 U.S. 749 (1975), although this requirement may be waived in exceptional cases. See Bowen v. City of New York, 476 U.S. 467 (1986); see also 20 C.F.R. §§ 404.923-404.928 (OASDI expedited appeals process for constitutional challenges); 20 C.F.R. §§ 416.1423-416.1428 (same for SSI).

45. During the early to mid-1980s, a period in which SSA applied a number of controversial policies to deny or terminate benefits, reversal rates (excluding remands) exceeded 50%. See infra Table 3 and text at note 65. Reversal rates have since declined, but remain high.

so for SSA disability determinations. First, the sheer volume of SSA decisions subject to review seems to demand it.[47] Second, SSA disability determinations are fact-intensive and thought to be more appropriately reviewed by district courts, which are better equipped to develop the record if that is necessary.[48] But this second rationale is fallacious, since when a district court concludes that the record is inadequate it remands the case to the SSA for further proceedings rather than taking evidence itself.[49]

b. The Need for Reform.

As noted in the introduction, appeals from denials of Social Security disability benefits are a significant component of the federal courts' docket.[50] The sheer number of disability cases that make their way into the federal court warrants consideration of ways to reform the disability determination process. But reform efforts require an accurate picture of the dimensions and

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46. See S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 1016 (2d ed. 1985); Appeals Council Report, supra note 2, at 675 n.137.

47. Appeals Council Report, supra note 2, at 675 n.137; see also Currie & Goodman, Judicial Review of Administrative Action: The Quest for the Optimal Forum, 75 Colum. L. Rev. 1, 24-25 (1975).

48. See Appeals Council Report, supra note 2, at 675 n.137; Harrison v. PPG Industries, Inc., 446 U.S. 578, 596-97 (1980) (Rehnquist, J., dissenting); S. Breyer & R. Stewart, supra note 46, at 1016; Currie & Goodman, supra note 47, at 10-12.

49. See H. McCormick, supra note 33, at § 754.

50. See supra notes 1-3 and accompanying text.

causes of the disability caseload crisis. Our examination of the Social Security process suggests that disability cases will continue to be a sizable drain on judicial resources (unless there is reform), but that many of the problems in the early 1980s were caused by particular, controversial policies that vastly increased benefit terminations and denials at the administrative level. Moreover, analysis of these policies provides considerable insight into vulnerabilities in the disability claims process. The bulge in cases filed in the early and mid-1980s was to some extent aberrational, but its lessons about how the Social Security process works are not.

i. The Caseload Crisis.

Historical Overview. In 1972, Congress enacted legislation that brought several state welfare programs, including the new federal Supplemental Security Income program, under the jurisdiction of the Social Security Administration.[51] By 1975, SSA faced an expanding caseload, growing costs, and substantial delays in processing claims.[52] These caseload increases were

51. Social Security Amendments of 1972, Pub. L. No. 92-603, §1601, 86 Stat. 1329, 1465 (1972).

52. S. Mezey, No Longer Disabled: The Federal Courts and the Politics of Social Security Disability 50 (1988); see also Disability Insurance Legislation: Hearings before the Subcomm. on Social Security of the House Comm. on Ways and Means, 96th Cong., 1st Sess., 3-11 (1979) [hereinafter Disability Insurance Legislation] (statement of Robert J. Myers, actuarial consultant to the subcommittee). From 1970 to 1975, new cases increased 365 percent and pending cases increased 809 percent.

accompanied in the late 1970s by increasing concern over the fiscal integrity of the disability program.[53]

Not satisfied with administrative responses to these financial and caseload pressures, Congress enacted the Social Security Disability Amendments of 1980.[54] The Amendments responded to concerns that many recipients were not entitled to the benefits they received by providing for SSA review of state Disability Determination Service determinations and periodic review of recipients' disabled status.[55] In addition, Congress addressed inconsistencies in the rates at which ALJs reversed state disability determinations by instituting the "Bellmon Review Program" authorizing the Appeals Council to review ALJ decisions on its own motion.[56]

In the early 1980s, SSA implemented Continuing Disability Review and Bellmon Review aggressively and adopted several other restrictive policies and practices to improve productivity and

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53. See Disability Insurance Legislation, supra note 52, at 1-2; Lewis, Social Security: Public and Private Sector Options for the Future, 10 J. LEGIS. 81, 85 (1983).

54. Pub. L. No. 96-265, 94 Stat. 441 (1980). See Social Security Act Disability Program Amendments: Hearings Before the Senate Comm. on Finance, 96th Cong., 1st Sess. (1979).

55. Social Security Amendments of 1980, Pub. L. No. 96-265, §§ 304, 311, 94 Stat. at 453-57, 460. The latter provision later became the Continuing Disability Review program. See also S. Mezey, supra note 52, at 76-80.

56. Id. at § 304(g), 94 Stat. at 456; see D. Cofer, Judges, Bureaucrats and the Question of Independence: A Study of the Social Security Administration Process 117-22 (1984); Social Security Hearings and Appeals: Pending Problems and Proposed Solutions: Hearings Before the Subcommittee on Social Security of the House Ways and Means Committee, 97th Cong., 1st Sess. 10-11 (1981) [hereinafter Pending Problems].

prune the disability roles. The harsh results of these policies led to considerable public, judicial, and congressional criticism. Congress addressed some of the problems with further reform legislation in 1982,[57] and again in 1984.[58] Other restrictive policies were eventually modified or abandoned by SSA.[59]

Rather than improving caseload pressures, SSA's restrictive policies exacerbated them, causing a caseload explosion at both the administrative and judicial levels. This explosion resulted from the dramatic increase in denials and terminations of disability benefits, which led to a similarly dramatic increase in the number of claimants seeking review. Since these restrictive policies were relaxed, caseload pressures have subsided significantly, as the caseload statistics below illustrate.

Caseload Statistics. Cases filed in both the district courts and the courts of appeals experienced steady growth that accelerated in the late 1970s, mushroomed in the mid 1980s, and has subsided in recent years. This pattern is reflected in Table I:

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57. Pub. L. 97-455, 96 Stat. 2498 (1982).

58. Disability Benefits Reform Act of 1984, Pub. L. 98-460, 98 Stat. 1794 (1984).

59. These policies and practices are discussed in detail *infra* notes 67-143 and accompanying text.

Table I: Social Security Cases Filed in Federal Court[60]

Year	District Courts Total	OASDI	SSI	Courts of Appeal
1965	1,147	NA	NA	139
1966	1,091	NA	NA	136
1967	960	NA	NA	127
1968	1,188	NA	NA	89
1969	1,572	NA	NA	101
1970	1,735	NA	NA	133
1971	1,792	NA	NA	130
1972	2,288	NA	NA	210
1973	2,497	NA	NA	193
1974	2,585	NA	NA	246
1975	5,846	NA	NA	247
1976	10,355	NA	NA	293
1977	10,095	NA	NA	478
1978	9,850	NA	NA	585
1979	9,942	5,702	866	574
1980	9,043	4,795	976	627
1981	9,780	5,539	1,628	642
1982	12,812	8,002	2,378	779
1983	20,315	15,169	3,595	992
1984	29,985	24,215	4,495	1,204
1985	19,771	15,403	3,344	1,188
1986	14,407	10,778	2,670	1,178
1987	13,338	10,035	2,609	982
1988	15,412	11,412	3,044	992

These figures are large in absolute terms, and they reflect a correspondingly large proportion of the federal judiciary's caseload. But the number of Social Security cases in federal

60. Data are from the Annual Reports of the Director of the Administrative Office of the United States Courts, Tables C2 (district courts) & B-1A, B3, B4, or B5 (courts of appeal). "NA" indicates that statistics were not available. The 1978 figure for court of appeals filings is the revised figure contained in the 1979 Report, and the 1987 figures for district courts are the revised figures contained in the 1988 report. Specific data regarding OASDI and SSI are available only regarding district court cases after 1979. Throughout the 1980s, the rate of appeal from district court decisions remained relatively constant, ranging from about 4% to 8% of district court decisions terminated.

court is actually a small percentage of the extraordinarily large number of claims that move through the elaborate disability determination process described above. From 1965 to 1987, SSA annually made over 3,000,000 new awards of OASDI benefits alone, with a peak of 4,610,730 new awards in 1977.[61]

The caseload pattern in the federal courts reflects corresponding trends in the administrative caseload. Consider, for example, the statistics compiled in Table II:

61. See U.S. Dept. of Health and Human Services, Social Security Administration, Social Security Bulletin Annual Statistical Supplement 244, Table 6.A1 (1988) [hereinafter Social Security Bulletin].

Table II: Administrative Caseload[62]

Year	New Apps. OASDI only	CDR	Recons.	ALJ Hearings	Appeals Council
1974	1,330,200	NA	215,300	121,504	23,097
1975	1,285,300	NA	NA	154,962	36,677
1976	1,232,200	NA	NA	157,688	48,759
1977	1,235,200	NA	256,489	193,657	47,719
1978	1,184,700	NA	262,926	196,428	52,490
1979	1,187,800	NA	284,593	226,240	51,537
1980	1,262,300	NA	311,705	252,023	49,742
1981	1,161,300	NA	336,355	281,737	55,912
1982	1,020,000	401,182	376,767	320,680	68,935
1983	1,017,700	465,174	512,061	363,533	93,906
1984	1,035,700	156,073	403,089	271,809	85,867
1985	1,066,200	5,123	378,956	245,090	66,210
1986	1,118,400	47,737	380,356	230,655	44,700
1987	1,109,100	174,800	461,588	278,440	57,805
1988	NA	318,134	454,804	290,393	64,861

These figures suggest several points with respect to the caseload crisis. First, the dramatic increase in cases in the federal

62. The statistics do not reflect a uniform statistical base, since Table 2 is made up of statistics from various sources:

New Applications: Statistics on new OASDI applications are taken from Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 53 (1988) (Table 7) [hereinafter Background Material]; figures on new SSI applications were unavailable.

Continuing Disability Review & Reconsiderations: Statistics on Continuing Disability Review and Reconsiderations are taken from SSA data prepared annually in the Background Material. Prior to 1982, the Reconsideration statistics include only OASDI and concurrent OASDI and SSI cases; after 1982, the statistics also include pure SSI cases, although in pure SSI cases SSA has replaced the Reconsideration stage with personal interviews. See id. This discontinuity in statistical base makes identification of chronological trends in the Reconsideration caseload difficult.

ALJs and Appeals Council: Statistics on ALJ and Appeals Council caseloads were provided by SSA and reflect all programs within its jurisdiction.

courts of the early and mid-1980s does not appear to be the result of an influx of new applications for benefits, which remained relatively constant throughout this period.[63] Second, one of the principal causes of the caseload increase was the addition of Continuing Disability Review cases, and the consequent administrative and judicial review required of decisions terminating benefits; indeed, the high points in the ALJ and Appeals Council caseloads correspond to the high points in Continuing Disability Review cases. Third, Continuing Disability Review cases do not provide a complete explanation for the influx of cases, because increases in Continuing Disability Review do not always lead to corresponding increases at other levels in the administrative review process.[64]

It is logical to assume that higher rates of adverse decisions would lead to an increase in the number of appeals. Thus, the rate of adverse decisions is compiled in Table III:

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63. The point would be established more conclusively if statistics on new applications included SSI applications, but SSI statistics were unavailable. Nonetheless, a similar pattern is probably present for SSI applications: there is no discussion in the literature of a dramatic increase (and subsequent decline) in new SSI applications, and there is no reason to suppose that SSI applications followed a different pattern than OASDI applications.

64. For example, while Continuing Disability Review increased at a dramatic pace from 1986 to 1988, ALJ caseloads actually decreased slightly.

Table III: Unfavorable Disposition Rates[65]

Year	Initial	CDR	Recons.	ALJ	Appeals Council
1980	67%	NA	85%	42%	87%
1981	70%	NA	87%	42%	89%
1982	72%	45%	89%	45%	88%
1983	68%	41%	86%	47%	86%
1984	65%	24%	84%	48%	88%
1985	64%	11%	86%	48%	88%
1986	61%	6%	83%	51%	79%
1987	64%	13%	85%	45%	80%
1988	64%	12%	86%	43%	69%

These figures suggest that higher denial and termination rates at every level of the administrative process were a significant component of the caseload crisis. This factor is most striking with respect to Continuing Disability Review termination rates, which dropped dramatically from a high of 45% in 1982 to 13% and 12% in 1987 and 1988. While the variance in other categories is less significant, the overall pattern is striking -- in every category, higher denial and termination rates were experienced in the early 1980s than in recent years.[66]

65. Statistics are taken from Background Material, supra note 62, at Section 2, Table 4 (1981-1989). From 1980 to 1982 the figures reflect OASDI and concurrent OASDI/SSI cases only; thereafter they reflect all OASDI and SSI cases. The 1987 and 1988 figures for Reconsideration, ALJ hearings, and Appeals Council decisions do not include review of Continuing Disability Review determinations.

66. Note that ALJ denial rates actually increased in the mid-1980s before decreasing in 1987 and 1988. This anomaly is explained in part by the lingering effects of SSA oversight efforts, and in part by SSA's mid-1980s moratorium on Continuing Disability Review cases, which eliminated a large number of cases in which ALJs frequently decided favorably to a claimant. See

As the foregoing historical and statistical analysis suggests, the Social Security disability caseload crisis came in two waves. The first wave came in the latter half of the 1970s with the addition of SSI cases to the federal administrative process. The second wave was experienced in the early and mid-1980s due to aggressive pursuit of Continuing Disability Review and other restrictive policies that increased the rate of decisions unfavorable to claimants. This aspect of the caseload crisis appears to have eased significantly, although the resumption of Continuing Disability Review may cause some resurgence in caseload growth. Nonetheless, any resurgence will probably fall short of the dramatic increases experienced in the early and mid-1980s, because current disposition rates are more favorable to claimants. Caseloads are likely, however, to remain at least at the relatively high levels of the late 1970s. For present purposes, the important point to notice is the way in which the restrictive policies of the 1980s contributed to the caseload growth. Understanding this effect has important consequences for reforming the Social Security Disability Claims process.

ii. Restrictive Policies and the Caseload Crisis.

"The Reagan Administration state[d] in its fiscal year 1985 budget justification for the Social Security Administration that

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infra notes 115-127 and accompanying text.

there will be 891,000 fewer disability beneficiaries in 1984 [than] in 1981."[67] As noted above, most of this pruning was accomplished through the aggressive pursuit of Continuing Disability Review to terminate benefits. In addition, SSA made it more difficult to receive benefits by tightening the substantive standards for proving disability, a change that affected both new applications and Continuing Disability Reviews. Finally, disability decisionmakers were pressured to decide more cases unfavorably to claimants through aggressive administrative oversight measures, including "targeting" of ALJs with high allowance rates for own-motion review by the Appeals Council. The impact of these policies on the judicial caseload was further exacerbated by SSA's policy of nonacquiescence in adverse judicial rulings. As the discussion below elaborates, each of these policies provoked considerable criticism, and all were eventually struck down by the courts, abandoned or modified by SSA, or altered legislatively by Congress. Together, however, they provide important information about weaknesses in the Social Security process that must be kept in mind in developing reform proposals.

Continuing Disability Review. Responding to concerns that rapid growth in the Social Security disability roles threatened the fiscal integrity of the Social Security system and to reports that many individuals on the roles were no longer disabled,

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67. Social Security Disability Reviews: A Costly Constitutional Crisis: Hearing Before the House Select Comm. on Aging, 98th Cong., 2d Sess. 2 (1984) [hereinafter Costly Constitutional Crisis] (prepared statement of Chairman Roybal).

Congress in 1980 enacted legislation requiring SSA to review cases involving nonpermanent disabilities at least once every three years.[68] Although the legislation did not require Continuing Disability Review to be implemented until January 1, 1982, SSA initiated an aggressive Continuing Disability Review program in March of 1981. By 1984, SSA had terminated nearly five hundred thousand recipients' benefits.[69]

Various aspects of the Continuing Disability Review program proved to be very controversial. Continuing Disability Review was intended to preserve Social Security resources by terminating the benefits of those who were no longer disabled, but instead the program resulted in wrongful termination of benefits for literally hundreds of thousands of recipients.[70] States were forced to handle a huge number of Continuing Disability Reviews without any increase in their resources, which led to inaccurate

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68. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 311, 94 Stat. 441, 460 (1980), codified as amended, 42 U.S.C. § 421(i) (1982 & Supp. III); see, H.R. Rep. NO. 944, 96th Cong., 2d Sess. 60 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1338; S. REP. NO. 408, 96th Cong., 1st Sess. 60-61 (1979), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1408; Schweiker v. Chilicky, 108 S. Ct. 2460 (1988); Lindh, An Examination of the Proposed Closed Record Administrative Law Judge Hearing in the Social Security Disability Program, 6 W. New Eng. L. Rev. 745, 745 n.2 (1984).

69. See, e.g., Social Security Disability Reviews: The Human Costs (Part 1): Hearing Before the Senate Special Comm. on Aging, 98th Cong., 2d Sess. 79 (1984) [hereinafter Human Costs (Part 1)]; Note, Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity, 52 Brooklyn L. Rev. 89 (1986) [hereinafter Note, SSA in Crisis].

70. See, e.g., Chilicky, 108 S. Ct. at 2464 (SSA itself conceded that benefits for over 200,000 recipients were wrongfully terminated).

decisions based on poorly developed records.[71] Moreover, as one Senator put it, "the message perceived by the State agencies ... was to deny, deny, deny ...."[72] While many wrongful terminations were eventually corrected, recipients often suffered irreparable harm in the meantime. The public perceived a faceless bureaucracy, indifferent to the human suffering it caused.[73]

Two specific points warrant further discussion. First, in conducting Continuing Disability Review, SSA required the claimant to prove disability and often terminated benefits simply by reevaluating the claimant's condition under new, stricter disability standards.[74] Various courts rejected SSA's approach, holding that in Continuing Disability Review cases SSA must rebut

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71. See, e.g., Costly Constitutional Crisis, supra note 67, at 5 (statement of Representative Hammerschmidt), 7 (prepared statement of Representative Regula); Weinstein, Equality and the Law: Social Security Disability Cases in the Federal Courts, 35 Syr. L. Rev. 897, 913 (1984).

72. See 130 Cong. Rec. S6213 (May 22, 1984) (remarks of Senator Cohen, cosponsor of the Social Security Disability Benefits Reform Act).

73. This perception was fueled by highly publicized examples of individuals whose benefits were terminated, and who subsequently died of their disability or committed suicide. See, e.g., Kubitschek, A Re-evaluation of Mathews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence, 31 Ariz. L. Rev. 53, 67-72 (1989). The congressional hearings are replete with horror stories of obviously disabled individuals whose benefits were abruptly cut off.

74. See Chilicky, 108 S. Ct. at 2463; see also id. at 2473 (Brennan, J., dissenting) (citing H.R. Rep. No. 618, 98th Cong. 2d Sess. 6-7, 10-11 (1984)). These standards included strengthening the "severity" requirement; disregarding mental impairments and disorders; disregarding a claimant's statements as to pain despite medical evidence of a condition that might cause pain; and refusing to consider the combined effects of impairments.

a presumption of continuing disability by presenting substantial evidence that a claimant's condition has improved.[75] Likewise, a number of states objected to SSA's standard, and some imposed statewide moratoria on Continuing Disability Reviews.[76]

A second area of particular controversy was SSA's treatment of mental impairments. Consideration of mental impairments in determining disability is required both by statute and regulation.[77] Since mental impairments are not always factored into "residual functional capacity," the SSA should make an individualized determination of whether a claimant with such an impairment can perform work that exists in the national economy.[78] In 1984, however, a federal district court found that SSA had consistently followed an illegal and clandestine policy of conclusively presuming that most mentally disabled claimants retained the capacity to perform unskilled work.[79]

Congress responded to the Continuing Disability Review problem in 1982, enacting legislation providing for continued

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75. See 1 Unemployment L. Rptr. [CCH] ¶ 12,441 at pp. 1253-2 to 1253-7 (1989) (collecting cases).

76. See S. Mezey, supra note 52, at 150-53.

77. See, e.g., 42 U.S.C. § 423(d)(1)(A); id. at § 1382c(a)(3)(B).

78. See supra note 13 and accompanying text.

79. See City of New York v. Heckler, 578 F. Supp. 1109, 1115 (EDNY), aff'd 742 F.2d 729 (2d Cir. 1984), aff'd sub nom. Bowen v. City of New York, 476 U.S. 467 (1986). The district court concluded further that this policy led to "tainted" residual functioning capacity assessments by state Disability Determination Service physicians that were subsequently given great weight by ALJs in the administrative appeals process.

receipt of benefits pending review of the termination decision and giving recipients subject to Continuing Disability Review the right to a disability hearing at the reconsideration stage.[80] Congress addressed the Continuing Disability Review problem again in the Disability Benefits Reform Act of 1984, requiring that benefits not be terminated without substantial evidence that the claimant's condition has improved.[81] In addition, the statute placed a moratorium on Continuing Disability Review of mental impairment cases pending promulgation of new regulations regarding mental disorders, codifying a moratorium on all Continuing Disability Review that had previously been announced voluntarily by SSA in an effort to stave off legislative changes.[82] These regulations are now in place, and the moratorium has been lifted.[83]

Substantive Standards. SSA also changed the way it applied its "severity" regulation -- the element of the disability determination which requires a claimant to show that his impairment "significantly" limits his ability to work without

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80. See supra notes 24-28 and accompanying text. This program was legislatively mandated only with respect to OASDI cases, but extended to SSI cases by regulation. See supra note 24.

81. Pub. L. 98-460, 98 Stat. 1794 (1984), codified in scattered sections of 42 U.S.C. (1982 & Supp. III). The statute also addressed other controversial aspects of SSA disability determinations discussed below.

82. See Pub. Law 98-460, § 5, 98 Stat. 1795, 1801-02 (1984), codified at 42 U.S.C. 421 note; Social Security Ruling 84-13; Costly Constitutional Crisis, supra note 67, at 160-63 (reprinting news release issued by SSA).

83. See 20 C.F.R. §§ 404.1588-1599 (OASDI); 20 C.F.R. §§ 416.988-999 (SSI); SSA 1987 Annual Report to the Congress 11.

regard to age, education or work experience.[84] SSA had formerly used this as a threshold requirement to screen out frivolous claims, but it was applied much more strictly in the early 1980s. SSA vastly expanded the number of impairments that were regarded as non-severe,[85] disregarded the relationship between a particular impairment and a claimant's prior work,[86] and refused to consider the combined effects of impairments that were individually regarded as non-severe.[87]

The effect of these changes was dramatic. The percentage of denials for failure to satisfy this element of the disability test rose from approximately 8% in 1975 to 40% in 1982.[88] In some cases, the denials involved claimants who were obviously disabled.[89] A number of courts held the regulation invalid because it precluded consideration of vocational factors as required by the statute; other courts construed the regulation

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84. See supra note 7 and accompanying text.

85. See e.g., Social Security Ruling 82-55 (listing impairments regarded as per se non-severe).

86. See Social Security Ruling 82-56.

87. See 20 C.F.R. § 404.1522 (1981) (OASDI); 20 C.F.R. § 416.922 (SSI).

88. See Bowen v. Yuckert, 482 U.S. 137, 157 (1987) (O'Connor, J., concurring).

89. See, e.g., Estran v. Heckler, 745 F.2d 340 (5th Cir. 1984) (SSA concluded that depressive neurosis, somatization disorder, hypertrophic arthritis, and angina were non-severe impairments in 58 year-old illiterate woman with 69 IQ); Brady v. Heckler, 724 F.2d 914 (11th Cir. 1984) (SSA concluded that hypoglycemia, emphysema, pericarditis, dizzy spells, fainting, and depression were non-severe impairments in 47 year old man with 10th grade education).

narrowly.[90] In Bowen v. Yuckert, however, the Supreme Court upheld the validity of the regulation, but left unclear whether a narrowing construction was required.[91]

Eventually, SSA's application of the severity regulation was eased through a combination of congressional and administrative action. In the Social Security Benefits Reform Act of 1984, Congress required SSA to consider the combined effect of multiple impairments.[92] Congress took no other action respecting the severity regulation, to give SSA an opportunity to revise its policies,[93] but the legislative history evinced "concern" that SSA had applied the regulation without considering vocational factors and urged "that all due consideration be given [by SSA] to revising [the non-severity] criteria to reflect the real impact of impairments upon the ability to work."[94] Taking the hint, SSA modified the severity regulation in Social Security Ruling 85-28, which states that when the effect of an impairment or combination of impairments on an individual's ability to do

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90. These cases are cited in Justice O'Connor's concurring opinion in Bowen v. Yuckert, 482 U.S. at 156 nn. 1 & 2 (1987).

91. 482 U.S. 137, 154 n.12 (1987).

92. Pub. L. 98-460, § 4, 98 Stat. 1794, 1800-01 (1984), codified at 42 U.S.C. §§ 223(d)(2)(C), 1614(a)(3)(G); see H.R. Conf. Rep. No. 1039, 98th Cong. 2d Sess. 29-30, reprinted in 1984 U.S. Code Cong. & Ad. News 3080, 3087-88.

93. The House Report noted that "the Secretary [of HHS] has already planned to reevaluate current criteria for non-severe impairments." H.R. Rep. No. 618, 98th Cong. 2d Sess. 8 (1984), reprinted in, 1984 U.S. Code Cong. & Ad News 3038, 3045.

94. H.R. Rep. No. 618 at 7-8, 1984 U.S. Code Cong. & Ad. News at 3044-45.

basic work is unclear, the adjudicator must "evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience."[95]

Also controversial was SSA's treatment of a claimant's subjective symptoms, especially pain. Under regulations adopted in 1980, a claimant's subjective description of symptoms could not establish an impairment.[96] Social Security Ruling 82-58 then gave this regulation a heightened significance by interpreting it to make subjective symptoms irrelevant in determining the severity of an impairment.[97] The denial of benefits after disregarding statements of pain led to a number of court decisions repudiating SSA's policy.[98]

Congress responded to these SSA policies in the Social Security Benefits Reform Act of 1984.[99] That Act provides that a claimant's subjective statements of pain "shall not be conclusive evidence of disability" but that "statements of the individual or his physician as to the intensity and persistence of such pain

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95. Quoted in Yuckert, 482 U.S. at 158 (O'Connor, J., concurring).

96. See 20 C.F.R. § 404.1508 (OASDI); 20 C.F.R. § 416.908 (SSI).

97. The Ruling stated that "[w]hen a medically determinable severe impairment cannot be established on either a physical or a mental basis, the claim must be denied regardless of the intensity of the symptom ...."

98. Many of these opinions are described in Goldhammer & Bloom, Recent Changes in the Assessment of Pain in Disability Claims Before the Social Security Administration, 35 Admin. L. Rev. 451, 461-73 (1983).

99. Pub. L. No. 98-460, 98 Stat. 1794 (1984).

... which may reasonably be accepted as consistent with the medical signs and findings" must be considered.[100] These provisions were made temporary pending submission of a report by a Commission on the Evaluation of Pain (the Report has since been prepared), but they have been continued as a matter of SSA policy.[101]

These statutory provisions did not end disputes between SSA and the courts. SSA continued to apply Social Security Ruling 82-58 to require that a claimant show objective medical evidence to support the intensity of pain asserted by the claimant's subjective statements.[102] Ultimately, SSA modified its policy to recognize that subjective symptoms may cause a greater impairment than medical evidence alone would suggest.[103]

Administrative Oversight. In addition to the various restrictive legal standards described above, SSA efforts to oversee Disability Determination Services and ALJs increased the number of disability benefit denials and terminations. While many of these practices reflected laudable efforts to improve the timeliness, accuracy, and consistency of disability determinations, in operation they produced inconsistent standards that threatened the impartiality of disability determinations.

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100. 42 U.S.C. §423(d).

101. See Social Security Ruling 88-13, reprinted in H. McCormick, supra note 33, at 462-66 (Supp. 1989).

102. See Foster v. Heckler, 780 F.2d 1125, 1129 (4th Cir. 1986); Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984); Green v. Schweiker, 749 F.2d 1066 (3d Cir. 1984).

103. See Social Security Ruling 88-13.

Moreover, these practices created a climate in which those responsible for making disability determinations were pressured to process claims quickly and to deny benefits whenever possible.[104]

SSA relies on two principle mechanisms to ensure the quality and consistency of state Disability Determination Service determinations. First, it provides the Program Operating Manual System (POMS), which contains binding written guidelines for state Disability Determination Service disability determinations.[105] The POMS is intended to clarify and interpret SSA policy so that it may be correctly applied by the state Disability Determination Service. But "there are glaring examples of POMS provisions which are in direct conflict with the statutes or regulations and with Federal court decisions interpreting the Social Security Act."[106] As a result, state Disability Determination Services follow decisional standards at variance from those followed by ALJs -- who consider themselves bound only by statutes, regulations and court decisions.[107]

SSA also oversees state Disability Determination Service determinations by conducting "Quality Assurance Reviews" of some state decisions before they enter into effect.[108] Quality

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104. See, e.g., Schweiker v. Chilicky, 108 S. Ct. 2460, 2464 (1988) (pressure in Continuing Disability Review program).

105. See 20 C.F.R. § 1633(b) (OASDI); 20 C.F.R. § 1033(b) (SSI).

106. D. Cofer, supra note 56, at 125.

107. See Appeals Council Report, supra note 2, at 688 n.180.

108. 42 U.S.C. §421(c); 20 C.F.R. §416.903(d) (SSI); Appeals Council Report, supra note 2, at 664 n.112.

Assurance Reviews were required by the 1980 amendments to the Social Security Act and are conducted at the state, regional and national levels. While these Reviews were intended to assure the accuracy of state Disability Determination Services disability determinations, in practice they placed pressure on Disability Determination Services to deny benefits. First, statutory provisions required SSA to review Disability Determination Service decisions granting benefits but did not contain a similar requirement regarding Disability Determination Service decisions denying benefits.[109] Second, to the extent that regional and national review reflected an apparent SSA policy of denying benefits,[110] states had an incentive to comply "because quite serious consequences to the careers and bureaucratic standing of individuals may follow if they persist in making 'mistakes.'"[111] Confronted with a system that virtually exempted decisions denying benefits from Quality Assurance Review and with various indications that SSA wanted to see benefits denied, state decisionmakers could avoid trouble by simply denying benefits whenever possible.[112]

109. See Social Security Disability Reviews: A Federally Created State Problem, Hearing Before the House Select Comm. on Aging, 98th Cong., 1st Sess. 522 (1983) [hereafter State Problem] (statement of Margaret Heckler, then Secretary of HHS). SSA responded to this problem by voluntarily reviewing some state decisions disallowing benefits and proposing legislation providing for review on a neutral basis. See id. at 522, 530.

110. SSA denied having such a policy, but the overall impact of the practices described above casts doubt on its denial. At one time at least, SSA viewed the principal goal of Quality Assurance Review to be the reduction of the disability roles. See D. Cofer, supra note 56, at 116.

111. D. Cofer, supra note 56, at 116.

A similar story can be told with respect to SSA oversight of ALJs. The need for accountability may justify such oversight, but oversight may also threaten the ALJs' independence. Nonetheless, prompted by high ALJ allowance rates, inconsistent patterns in ALJ reversals of state Disability Determination Services and problems of delay, Congress directed SSA to evaluate and improve ALJ performance. SSA pursued these objectives through a variety of methods, including SSA initiated review of ALJ decisions granting benefits, production "goals," and disciplinary actions.[113] These programs strained relations between the SSA and its ALJs and pressured ALJs to deny benefits.[114]

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112. See, e.g., Costly Constitutional Crisis, supra note 67, at 92 (letter from Governor of Alabama); State Problem, supra note 104, at 555 (State of Michigan Task Force Report).

113. In addition to these methods, the message perceived by many ALJs was that SSA wanted to reduce the rate at which ALJs reversed state Disability Determination Services and granted benefits. As one ALJ described it:

> On my second day as an Administrative Law Judge, my "class" was addressed by Rhoda Greenberg, then Director of the Office of Disability Programs. In her remarks she informed us that the State Agencies were correct 95% of the time. I, along with many other judges felt that this was, in effect, a statement that most claims deserved to be denied . . . .
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> Throughout the orientation session . . . the lecturers, while imparting their vast knowledge of the law and regulations to the new judges, argued with us on mock cases, attempting to convince us that they should not be granted.

Social Security Disability Reviews: The Role of the Administrative law Judge, Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmnetal Affairs, 98th Cong., 1st Sess. 295 (1983) [hereafter ALJ Role] (statement of Joyce Krutick Barlow).

Appeals Council review of ALJ decisions granting benefits was required by the Bellmon Amendment to the Disability Amendments of 1980.[115] SSA initially targeted ALJs with high rates of disability allowances for more extensive review. This reflected SSA's view that high allowance rates indicated a high rate of ALJ error, but created an incentive for ALJs to deny benefits in close cases in order to avoid review.[116]

Not surprisingly, targeting ALJs with high allowance rates for Bellmon review produced considerable litigation. In Association of Administrative Law Judges v. Heckler, a district court concluded that targeted review of high allowance ALJs, coupled with memoranda advising ALJs that other steps would be taken if their performance did not improve, threatened the independence of ALJs; the court nonetheless declined to grant injunctive relief because SSA had altered its policy to review on a random sample basis.[117] Subsequently, in W.C. v. Bowen, the Ninth Circuit concluded that targeted review constituted a

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114. Officials within SSA maintained that there was no pressure on ALJs to deny benefits. See ALJ Role, supra note 113, at 21 (testimony of Louis B. Hayes, Associate Commissioner for Hearings and Appeals). But 70% of ALJs responding to an independent survey indicated that they believed there was agency pressure to deny benefits. See id. at 73.

115. In addition to requiring continuing review, the Amendment required the Secretary of HHS to make a progress report to Congress by January 1982.

116. See W.C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir. 1987), modified, 819 F.2d 237 (9th Cir. 1987); Barry v. Heckler, 620 F. Supp. 779, 782 N.D. Cal. 1985); Stieberger v. Heckler, 615 F. Supp. 1315, 1398 (S.D.N.Y. 1985).

117. 594 F. Supp. 1132 (D.D.C. 1984).

substantive rule that had been adopted in violation of the notice and comment procedures of the Administrative Procedure Act.[118] The court relied in part on a district court finding that the program was intended to, and did, alter ALJ decisions.[119]

Faced with large caseload backlogs and considerable delays in processing cases, SSA sought to increase ALJ productivity by setting monthly case disposition "goals."[120] This practice was terminated in 1979 as part of a settlement of a lawsuit by ALJs challenging various SSA practices in the late 1970s.[121] Nonetheless, in the early 1980s, SSA set a goal of forty-five cases per month (much higher than the 26 cases per month goals originally set in 1976).[122] ALJs opposed these production goals on the grounds that the goals compromised their independence and the quality of their decisions.[123]

SSA efforts to improve the accuracy and quantity of ALJ decisions were enforced through various mechanisms, such as restrictions on travel privileges, denial of staff, public praise

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118. 807 F.2d 1502 (9th Cir. 1987), modified 819 F.2d 237 (9th Cir. 1987).

119. 807 F.2d at 1505.

120. See D. Cofer supra note 56, at 140; ALJ Role, supra note 113, at 466 (memorandum of OHA objectives sent to ALJs in 1981).

121. Bono v. United States Social Security Administration, Civ. No. 77-0819-CV-W-4 (W.D. Mo.). The settlement agreement is reprinted in ALJ Role, supra note 113, at 448-50.

122. See D. Cofer, supra note 56, at 140; ALJ Role, supra note 113, at 466.

123. See ALJ Role supra note 113, at 73 (statement on behalf of the Association of Administrative Law Judges by Charles N. Bono, President).

for productive judges and letters advising ALJs that they must increase productivity or decrease their allowance rates.[124] One of the more controversial mechanisms was SSA's efforts to discipline specific ALJs. During the late 1970s and early 1980s, SSA brought a large number of disciplinary actions before the Merit System Protection Board.[125] Included among these actions were cases in which SSA sought to remove an ALJ for inadequate productivity, a ground which was rejected by the Board.[126] Even if such actions are brought against only a relatively small proportion of ALJs and are not particularly successful, the threat of disciplinary action may compromise ALJ independence.[127]

While many of SSA's more controversial practices have been withdrawn or modified, these attempts to dictate results have left a lingering climate of tension and hostility at SSA. As one study put it, "if the skirmishes have now abated or been driven underground, a substantial reservoir of mutual suspicion and hostility lingers nonetheless."[128] To some extent, such tension is inevitable in a system which houses supposedly independent adjudicators within a misoriented department.[129]

124. See ALJ Role, supra note 113, at 72-73 (statement on behalf of the Association of Administrative Law Judges by Charles N. Bono, President).

125. Before 1979, only one disciplinary action had been brought against an ALJ. Between 1979 and 1983, 16 such actions were brought. See ALJ Role, supra note 113, at 265-68.

126. See D. Cofer, supra note 56, at 146-49; Rosenblum, Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors, 6 W.N. Eng. L. Rev. 593, 621-32 (1984).

127. See Appeals Council Report, supra note 2, at 669 n.125.

128. Appeals Council Report, supra note 2, at 686.

Nonacquiescence. When SSA disagreed with a lower federal court decision, it followed a policy of nonacquiescence.[130] That is, SSA would comply with the decision only with respect to the party or parties to that case -- refusing to treat the decision as binding precedent, even within the circuit in which the decision was handed down.[131] While the IRS and the NLRB have at times followed a practice of nonacquiscence, SSA's policy took on particular importance given the disputed validity of various SSA disability determination practices.

Moreover, unlike these other agencies, nonacquiescence was official SSA policy, expressly stated in general terms in the Office of Hearings and Appeals' Handbook.[132] In some instances, SSA issued separate nonacquiescence rulings with respect to specific judicial decisions.[133] Other times, SSA simply ignored

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129. See D. Cofer, supra note 56, at 197: "[A]t the very least this study has demonstrated that management-minded bureaucrats and APA-admonished ALJs cannot live under the same roof and that the current situation is a disservice to the American people."

130. See Kubitschek, supra note 73; Stormer & Ferber, Legal Responses to Unconstitutional Termination of Disability Benefits, 22 Idaho L. Rev. 201 (1984).

131. This intracircuit nonacquiescence should be distinguished from intercircuit nonacquiescence, i.e. the refusal to treat federal court of appeals decisions as legally binding outside the circuit in which they were rendered. This latter practice is generally regarded less critically. See, e.g., Maranville, Nonacquiescence: Outlaw Agencies, Imperial Courts and the Perils of Pluralism, 39 Van. L. Rev. 471, 485 (1986).

132. OHA Handbook § 1-161 (1975), quoted in Stieberger v. Heckler, 615 F. Supp. 1315, 1351 (S.D.N.Y. 1985), vacated 801 F.2d 29 (2d Cir. 1986).

133. See, e.g., Maranville, supra note 131, at 477 n.15 (listing ten nonacquiescence rulings by SSA).

decisions with which it disagreed.[134] During the early to mid-1980s, SSA refused to accede to judicial decisions rejecting most of its restrictive policies regarding disability determinations.[135]

Emphasizing that Congress had delegated authority to implement Social Security programs to it rather than to the federal courts, SSA insisted that nonacquiescence was necessary to ensure uniform national standards for disability determinations.[136] In addition, SSA argued that nonacquiescence was an appropriate mechanism for seeking a change in the law.[137] But rather than achieving uniform standards, SSA's policy effectively created two different sets of standards. One set of more restrictive SSA standards was followed by the state Disability Determination Services and the Appeals Council, while ALJs and reviewing courts followed a different set of less restrictive standards developed by the courts. These conflicting standards put considerable pressure on ALJs,[138] and effectively

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134. See, e.g., S. Mezey, supra note 52, at 131; Maranville, supra note 131, at 481-82.

135. See, e.g., Social Security Rulings 82-10c, 82-49c, 82-33a.

136. See, e.g., D. Cofer, supra note 56, at 193; Judicial Review of Agency Action: HHS Policy of Nonacquiescence, Oversight Hearings Before the Subcomm. on Administrative Law and Government Relations, 99th Cong., 1st Sess. 6-10 (1986) [hereafter Judicial Review of Agency Action] (statement of Martha A. McSteen, Acting Commissioner of SSA); id. at 12-13 (statement of Carolyn B. Kuhl, Deputy Assistant Attorney General, Civil Division, Dept. of Justice).

137. See, e.g., Kuhl, The Social Security Administration's Nonacquiescence Policy, 4 Det. Coll. L. Rev. 913 (1984); Note, Government Nonacquiescence Case in Point: Social Security Regulation, 2 Touro L. Rev. 197, 209 (1986).

divided claimants into two classes who received different treatment depending on their persistence in seeking review.[139]

SSA also contended that as a coordinate, nonjudicial branch of government it was not bound by stare decisis to follow lower federal court decisions. To some observers, however, it appeared that SSA simply chose to engage in a war of attrition with claimants rather than petition for certiorari and risk an adverse decision by the Supreme Court.[140] In any event, nonacquiescence increased the amount of litigation by forcing many cases that could have been resolved at the administrative level into court.

Faced with a consensus of commentators opposing the policy, adverse judicial decisions, and the threat of congressional action, SSA modified its nonacquiescence policy.[141] Nonetheless,

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138. See, e.g., Judicial Review of Agency Action, supra note 136, at 132-33 (statement of Professor Brilmayer); D. Cofer, supra note 56, at 194; S. Mezey, supra note 52, at 133. If ALJs followed the SSA standards, they were likely to be overruled by a federal court. If, as most did, they followed the judicial standards, the Appeals Council was likely to reverse. This latter alternative might also adversely affect an ALJ under the targeted Bellmon review program.

139. See, e.g., S. Mezey, supra note 52, at 132; Note, Administrative Agency Intracircuit Nonacquiescence, 85 Colum. L. Rev. 583, 603 (1985).

140. See, e.g., Judicial Review of Agency Action, supra note 136, at 107 (comment by Rep. Frank).

141. 10 Soc. Sec. L. Rep. Serv., No. 3, Interim Circular 185, at 27 (OHA Handbook). This new policy does not require state Disability Determination Services to follow judicial decisions, and provides for relitigation of judicial standards if the SSA Special Policy Review Committee determines that the case is "an appropriate vehicle for relitigating the issue." Id. at 30. Critics of the SSA contend that this "new" policy does not really limit nonacquiescence. See, e.g., Judicial Review of Agency Action, supra note 136, passim; S. Mezey, supra note 52, at 165-66; Note, Government Nonacquiescence, supra note 137, at 215-17.

nonacquiescence left its mark, weakening confidence in the fairness and accuracy of SSA disability determinations. For even where denials were appropriate, claimants were encouraged to believe that decisions were unfair, and that appeals were justified.[142] Likewise, federal courts were less likely to accept SSA's positions at face value, and generally grew less deferential to the SSA.[143] This willingness to overturn SSA decisions in turn reinforced the tendency of dissatisfied claimants to seek judicial review.

iii. Conclusions: The Need for Reform.

While the social security disability caseload "crisis" may be past, the need for reform remains evident. Social Security appeals are below the levels experienced in the early 1980s but nonetheless remain a signicant portion of the district courts' docket and a somewhat lower, but still burdensome, portion of the docket of the courts of appeals. Moreover, the drop in appeals has been less than in district court filings. Further growth may be anticipated from continuing growth in the number of new applications and from the resumption of Continuing Disability Review on a broad scale,[144] although it is unlikely that

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142. See, e.g., Kubitschek, supra note 73, at 75.

143. See Kubitschek, supra note 73, at 75-76.

144. These increases can already be seen on the administrative level. See Table 2, supra text at note 62. See also Delays in Social Security and SSI Hearings Are Worst in a Decade, 21 Clearinghouse Rev. 539 (1987).

increases will match those of the early 1980s. The rate of termination of benefits in current Continuing Disability Review cases is much lower than that during the peak years of restrictive SSA practices.[145]

Even at current levels, the substantial judicial resources allocated to disability determinations are not used cost effectively. For the most part, judicial review of disability determinations serves two main purposes: first, additional review might correct good faith errors that inevitably occur in the complex disability determination process; second, judicial review provides an independent check on administrative decisionmaking that can counter systematic biases.

The federal courts are not well situated to perform the first function, catching good faith mistakes.[146] Judges have no particular expertise with respect to the medical and vocational judgments necessary to determine disability.[147] Even the legal issues involved in disability determinations are often technical issues of the sort on which courts normally defer to agency expertise.[148] Moreover, the number of these cases and their

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145. In fiscal year 1988, only 12% of the 318,134 Continuing Disability Reviews conducted resulted in termination of benefits. Background Material, supra note 62, at 51 (1989). 45% of all terminations sought reconsideration, and 45% of them were successful. Id. In contrast, in fiscal year 1982, 45% of the 401,182 Continuing Disability Reviews conducted resulted in termination of benefits. Id. at 83 (1983).

146. See Appeals Council Report, supra note 2, at 757.

147. See, e.g., S. Mezey, supra note 52, at 15.

148. See, e.g. D. Cofer, supra note 56, at 37-39

relative importance to judges means that the accuracy of administrative fact-finding gets short shrift; the judges prefer to concentrate on potential broad policy implications of administrative practices. These institutional weaknesses are particularly pronounced in the district courts, which are not well situated to review records. Several days of the week must be devoted to conducting trials, and most of the remaining time is spent on related matters. Review of disability claims is thus often overlooked or given to staff attorneys or clerks with no serious examination by the judge. Thus, while federal judges are certainly capable of learning to review these medical conclusions with care, they are not likely to do so in fact. There is little evidence that judicial review successfully serves a corrective function.

The same cannot be said of the courts' structural role in countering bias in the administrative process. The importance of this function is underscored by the role courts played in the controversy over SSA's restrictive policies. The threat of systemic bias is real, but while review by some body independent of SSA is essential, the experience of the 1980s suggests that the current system may not provide the best institutional configuration to fulfill this role. First, judicial review is fragmented among more than 90 district courts. Thus, many controversial issues must be relitigated in several jurisdictions before finally making their way to the courts of appeals, leaving the law unsettled and perhaps producing conflicting results. Second, securing judicial relief from an erroneous benefit

decision is a time consuming process at best, and many meritorious appeals are lost to attrition.

Nonetheless, if the role of the federal courts in reviewing disability determinations is to be reduced, it is important that some independent review be instituted in its place in order to guard against systemic bias.[149] As currently structured, administrative review is not sufficiently independent. Despite the ALJs' theoretical independence from SSA, their location within the SSA's bureaucratic hierarchy enables SSA to compromise ALJ decisional independence. More important, since ALJ decisions are subject to de novo review by the Appeals Council on its own motion, the final layer of administrative review is conducted by a body that is not safeguarded by even minimal APA protections.[150]

Thus, any restriction of the judicial role in reviewing disability determinations must be accompanied by a strengthening of independent administrative review. Moreover, in addition to accommodating efficiency and fairness concerns, comprehensive reform of the administrative process is necessary to address two other factors: the fragmentation of authority over substantive

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149. While the most immediate concern in the wake of the 1980s may be the danger of anti-claimant bias, Congress should also safeguard against the emergence of pro-claimant bias. Some observers have argued that disability determinations inherently tend to favor the claimant. J. Mashaw, Bureaucratic Justice 73-74 (1983); Lindh, supra note 68, at 759-62. In fact, SSA defended many of its restrictive policies as intended to counteract this pro-claimant tendency. It was such concerns that prompted Congress to provide for Continuing Disability Review in the Social Security Disability Amendments of 1980.

150. See Appeals Council Report, supra note 2, at 692-94.

disability standards, and the inadequacy of resources devoted to the disability determination process.

First, current institutional arrangements divide authority over disability policy, producing a confusing array of different disability standards. Administrative policies may be promulgated in various forms -- remands of Quality Assurance Reviews, POMS provisions, Social Security Rulings and Regulations -- but the binding effect of any particular form on different decisionmakers remains unclear.[151] If SSA and judicial standards are at odds, ALJs are placed in the untenable position of being reviewed by two separate entities applying different legal standards. Finally, judicial standards themselves are often inconsistent from district to district and circuit to circuit. In addition to creating confusion for claimants, ALJs, and SSA, judicial inconsistency contributed to the courts' difficulty in responding to SSA's restrictive policies.[152] Thus, reform should include a restructuring of institutional arrangements to centralize and rationalize the formulation of disability standards.

Second, reform should address the shortage of resources that pervades the administrative determination of disability at both the state and federal level. The number of claims processed is

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151. Quality Assurance Reviews and POMS provisions affect only state Disability Determination Services, but the binding effect of Social Security Rulings on ALJs is a matter of some dispute.

152. Not only did the potential for inconsistent judicial decision require that many issues be relitigated in various jurisdictions, but it also supported SSA's claim that nonacquiescence was necessary to achieve uniform disability standards.

vast, and many of the problems that arose in the early 1980s represented well-intended administrative efforts to cope with caseload growth. Investing relatively greater resources in the early layers of the disability determination process would be cost effective because benefits would redound throughout the system, reducing the ALJs' burden of case development and increasing claimant satisfaction with adverse decisions. This might also limit the number of reversals that are the product of new evidence or a poorly developed record at the ALJ level.

c. Recommendations.

Consistent with the analysis above, we make four specific recommendations for reforming the social security disability determination review process: (1) limit judicial review to the courts of appeals on questions of law and constitutional claims; (2) reconfigure the Court of Veterans Appeals into a Court of Disability Appeals and vest it with final administrative review; (3) increase the independence of ALJs by separating them from SSA; and (4) continue current efforts to improve the procedures for initial determination and reconsideration by state Disability Determination Services.

i. Judicial Review.

An obvious and, in this context, compelling reason to limit review is the savings of judicial resources. At least ten to

fifteen thousand disability appeals are expected annually in the district courts, comprising more than 5% of their caseload,[153] and these figures can be expected to rise.[154] Elimination of district court review would thus ease district court dockets considerably.

In the context of comprehensive reform, moreover, the judicial resources saved need not entail the sacrifice of accuracy or fairness. As noted above, judicial review in this context is not a good device for catching good faith errors in disability determinations. And while district court review may provide a structural safeguard against systemic bias, this function can be served by retaining review on questions of law in the courts of appeals and by changing administrative review to make it more independent.

An additional function performed by the district courts is case screening and preparation for the courts of appeals. Without district courts to screen cases, disability cases would flood the Court of Appeals.[155] In light of this possiblity, we recommend changes in the administrative review process that should make it more effective in fulfilling the screening function now served by the district courts.

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153. See supra note 60.

154. See supra notes 144-45 and accompanying text.

155. In 1987, for example, district courts heard 12,628 disability cases, while the courts of appeals heard 982. See supra notes 1-3. The total caseload in the courts of appeals that year was only 30,798. 1987 AO Report, supra note 1, Table B-1.

It is more difficult to assess what, if any, savings of judicial resources can be expected from limiting fact-based review of disability cases by the courts of appeals. Social security appeals represent a modest, but nonetheless sizable portion of the caseload of the courts of appeals, and most of these cases seek some review of the facts.[156] Any savings in this regard may be offset by the influx of cases that were previously screened by the district courts. Nonetheless, we believe that the savings from eliminating district court review will be substantial and that restricting fact-based review by the courts of appeals will prevent these savings from being swallowed by a flood of disability cases at that level.

Limiting fact-based review by the courts of appeals confines the role of judicial review to those situations where it is essential. The courts' success in checking administrative bias did not come through the review and reversal of many cases of error, but through the review and striking down SSA legal policies in a few cases. This function may be performed at the appellate level. Indeed, the greater speed with which courts of appeals can resolve questions for a larger geographic area may actually improve the efficacy of an Article III check on SSA legal policies. Limiting fact-based review thus preserves the jurisdiction of the federal courts with respect to those matters where it can do the most good.

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156. See, e.g., Appeals Council Report, supra note 2, at 676; Currie & Goodman, supra note 47, at 26.

There are, however, countervailing concerns that warrant careful consideration and may call for retention of at least some fact-based review. First, it is not possible to prevent all cases seeking review of the facts from coming before the courts of appeals. The difference between factual and legal issues is notoriously difficult to identify, and factual arguments can be couched as questions of law so as to invoke the jurisdiction of the court of appeals. For example, cases involving the evaluation of pain demonstrate that disputes over whether substantial evidence supports a determination that a claimant is not disabled often involve disputes over the appropriate legal standards to be used in evaluating the evidence. Likewise, it might be possible to obtain jurisdiction by arguing that the evidence on the record was insufficient to support a given finding as a matter of law. This problem is compounded by allowing the courts of appeals to review factual determinations when necessary to resolve constitutional issues.[157] Moreover, uncertainty over when fact-based review is available might lead to litigation and the development of complex "boundary" rules that wastes some judicial resources.

Conversely, if preclusion of fact-based review is effective, it will to some extent limit the ability of the courts of appeals

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157. The exception for review of factual determinations regarding constitutional issues, which is included in the Veteran's Judicial Review Act as well as in this recommendation, serves principally to ensure adequate judicial power with respect to constitutional issues and to avoid due process and separation of powers concerns that might otherwise arise under the "constitutional fact doctrine."

to ensure compliance with the law. The potential for decisionmakers to manipulate applicable legal standards by making appropriate factual findings has long been recognized in the context of federal review of state court fact-finding.[158]

It might be appropriate, then, to retain fact-based review at the circuit court level in some form. One possibility is to provide for discretionary fact-based review by the courts of appeals.[159] This would give the courts of appeals power to ensure proper application of legal standards.

In our judgment, however, the better solution is simply to limit review in the courts of appeals to questions of law. Once the door is opened by any of these alternative rules, the courts of appeals are likely to be overwhelmed, threatening the workability cf the reform effort, for small gains. Of course, limiting judicial review this way will not be effective unless administrative review of the facts is made more reliable. Otherwise, claimant dissatisfaction may threaten the acceptability and legitimacy of the whole program, and the courts of appeals will find it hard to resist the pressures to sneak more expansive review of the facts into the cases (thus encouraging claimants to look to the courts of appeals for relief and flooding the courts with difficult appeals). Consequently, this recommendation cannot be considered in isolation, but must

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158. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964); Comment, Federal Preemption, Removal Jurisdiction, and the Well Pleaded Complaint Rule, 51 U. Chi. L. Rev. 634, 636 n.10 (1984).

159. See Currie & Goodman, supra note 47, at 19-23, 25-27.

be evaluated together with our proposals for strengthening administrative review.

Before turning to these proposals, however, it is necessary briefly to discuss some constitutional issues raised by the limiting judicial review. The Supreme Court has long recognized that judicial review in an Article III court is constitutionally required in some circumstances. Any serious worries about constitutionality may be unnecessary given the longstanding judicial tolerance of the statutory provision precluding review of analogous disability determinations made under veterans' benefits statutes.[160] But the Supreme Court has not squarely addressed the constitutionality of those provisions,[161] and the Court's willingness to reconsider even longstanding practices makes it prudent to consider these issues.

The question is whether restricting judicial review in the manner we propose renders our recommendation that Congress delegate power to adjudicate to an Article I Court of Disability Appeals unconstitutional under Article III. In Commodities Futures Trading Comm'n v. Schor,[162] the Supreme Court upheld the delegation to the Commodities Futures Trading Commission (CFTC)

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160. See 38 U.S.C. § 211(a). This provision has been amended to allow limited review in the Court of Appeals for the Federal Circuit. See Veteran's Judicial Review Act, Pub. L. 100-687, § 301, 102 Stat. 4105, 4120 (1988), to be codified at 38 U.S.C. § 4092.

161. See, e.g., Johnson v. Robison, 415 U.S. 316 (1974) (narrowly construing preclusion provision so as not to foreclose review of constitutional challenge to statute).

162. 478 U.S. 833 (1986).

of jurisdiction over common law counterclaims filed in the course of administrative proceedings against brokers. The Court concluded that Article III requires evaluation of three factors:

> [1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.[163]

Applying these factors to the recommended restriction on judicial review, the recommendation appears to be within constitutional limits.

To determine whether the essential attributes of judicial power had been retained in Article III courts, the Supreme Court in Schor examined the scope of jurisdiction exercised by the CFTC, whether the Commission could enforce its own orders, and the scope of review exercised by Article III courts.[164] Like the CFTC's authority in Schor, the authority of the Court of Disability Appeals to adjudicate claims "deals only with a 'particularized area of law.'"[165] On the other hand, disability determinations can be implemented without judicial action, whereas CFTC orders are enforceable only by order of a court. But it is difficult to see much importance in this fact; aggrieved individuals may seek review in the courts of appeals, and in other cases the agency simply terminates benefits without ~~need for any~~ further assistance from the courts.

163. 478 U.S. at 851.

164. See 478 U.S. at 851-53.

165. 478 U.S. at 852 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

A more difficult question arises from the fact that the scope of judicial review contemplated by our recommendation is narrower than that provided for in Schor. Our proposal provides de novo review of the law, but review of the facts is more limited than in Schor, which mentions that the CFTC's factual determinations were reviewable under the "weight of the evidence" standard.[166] The limitation on review of the facts is not dispositive. In Thomas v. Union Carbide Agricultural Products Co.,[167] the Court upheld a congressional delegation of judicial power to an arbitrator appointed by the Federal Mediation and Conciliation Service to resolve claims for compensation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Judicial review of the arbitrators' decisions was available only for "fraud, misrepresentation, or other misconduct,"[168] which is more restrictive than our recommendation to limit review of the Court of Disability Appeals.

The second and third factors discussed in Schor generally favor our recommendation. The right to receive disability benefits is a quintessential example of a "public right," since it involves a claim by an individual against the government arising from a public regulatory scheme, and the Court has recognized that Congress has broad power to structure the adjudication of such rights.[169] Moreover, Congress has

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166. See 478 U.S. at 853.

167. 473 U.S. 568 (1985).

168. 7 U.S.C. § 3(c)(1)(D)(ii).

169. See Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782

persuasive reasons for vesting adjudicative authority in the Court of Disability Appeals: concern that disability cases would overload the judicial system and the need to strengthen the disability determination process by making administrative review more independent. Reallocating authority to review disability determinations is essential to the congressional goal of ensuring a fair, accurate and efficient system for resolving the tremendous number of disability claims that must be processed annually.

ii. The Court of Disability Appeals.

We recommend establishing an Article I Court of Disability Appeals with jurisdiction to review ALJ disability determinations. This recommendation can be implemented by amending §301 of the Veterans' Judicial Review Act to expand the size and jurisdiction of the Court of Veteran Appeals, which already makes similar determinations in veterans' disability cases.[170] It is not essential that this court be combined with the Veterans Court, however, and it may be established

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(1989); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

170. A proposal for a specialized Article I disability court is not new. See e.g., Subcomm. on Social Security, House Ways and Means Comm., Administrative Law Judges Survey and Issue Paper 11-12 (1979) [hereinafter Administrative Law Judges Survey and Issue Paper]; Pending Problems, supra note 58, at 13-14; Current Problems, supra note 5, at 2-3 (statement of Rep. Archer). Our proposal, however, differs from these prior proposals in many of its particular features.

separately, though we recommend a similar model. For administrative purposes, the logical place to locate the court is in the judicial branch. The discussion below describes the proposed Article I court, considers the need for an independent Article I tribunal, and suggests an alternative use for the Appeals Council.

The Structure of the Court. Because review in the Article III courts is being limited, the final level of administrative review takes on added significance. Our recommendation thus envisions an independent Court of Disability Appeals that is larger than either the current Appeals Council or the Court of Veterans Appeals.[171] The Court should probably sit collegially in panels of three, and some form of oral argument is essential.[172] While the scope of review should be appellate and presentation of new evidence permitted only rarely if ever,[173] the claimant should appear and be represented by counsel. Since the Court of Disability Appeals will be independent of SSA, the agency should be allowed to initiate review by the Court of Disability Appeals and to appear in opposition to the claimant. This is the sort of proceeding that Congress contemplated for the Court of Veteran's Appeals, and it makes sense to work with that model in establishing the proposed Court of Disability Appeals.

171. The Appeals Council has twenty members, and the Court of Veterans Appeals has three to seven members.

172. Under current regulations the Appeals Council allows oral argument only rarely, as an exception to its normal practice of conducting paper reviews. See supra note 40.

173. Failure to "close" the administrative record contributes to the unevenness of administrative review. See Bellmon Report, Social Security Bulletin 27 (May 1982).

Because the procedures contemplated are more elaborate than those currently used by the Appeals Council, the Court of Disability Appeals must be considerably larger than the Appeals Council. Moreover, it will be necessary to distribute panels geographically to hear appeals from ALJ decisions within various regions. Geographic distribution is especially important in this context: no class of claimants is likely to find the time, expense and difficulty of travel more burdensome. The geographic division of the Court may, of course, result in inconsistencies between regions, but these can be resolved through an en banc mechanism or by review in the courts of appeals.

The Status of the Court. The most important reason for vesting the Appeals Council's review function in an Article I Court of Disability Appeals is to ensure the independence of the administrative review process. Indeed, once Article III judicial review is limited, independent administrative review becomes imperative, not only to ensure fairness for individual claimants, but also to make limited judicial review workable. If either claimants or the courts of appeals lack confidence in the administrative review process, then more claims are likely to be appealed and there will be considerable pressure on the Article III courts to expand the availability of review. Moreover, without independent administrative review, many of the benefits of the work done by the ALJs are wasted. As explained above, allowing the Appeals Council, which is not subject to guarantees of independence, to review ALJ decisions de novo renders the independence of the ALJ of little benefit to the claimant.

Moreover, SSA's bureaucratic controls pressured ALJs to follow disability standards that were more restrictive than those imposed by the federal courts.

Given the force of these considerations, one might argue that the Court of Disability Appeals should have Article III status. Indeed, prior legislative proposals for the creation of a Social Security court have sometimes been criticized on precisely this ground.[174] While Article III status would enhance the independence and stature of the Court of Disability Appeals and obviate any concerns over the constitutionality of limiting review by the courts of appeals, we believe that an Article I court is more desirable. As noted above, a court to handle these claims will have to be large and geographically dispersed. Indeed, given the physical and financial burdens of travel on disability claimants, it will probably be necessary to provide hearings on at least the district level. Expanding the Article III judiciary to accomodate these cases may well have consequences for the way Article III status is perceived -- something that, as explained in Part II, has serious repercussions for the administration of Article III courts.

More important, since an Article III appointment requires presidential nomination and Senate approval, appointing and then filling vacancies on this court will impose a substantial burden on an already overburdened appointments process; alternatively,

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174. See Rains, A Specialized Court for Social Security? A Critique of Recent Proposals, 15 Fla. St. L. Rev. 1, 25-26 (1987).

difficulties in filling these positions may leave the court understaffed and unable to process cases.[175] Finally, as we have seen, the Social Security caseload is quite sensitive to changes in policy, and the number of claims is likely to vary widely from year to year. While Congress has flexibility to change Article III courts by not filling vacancies or by reassigning judges to different courts, it has considerably less flexibility than with an Article I court. If the patterns of the past hold true, there may be large shifts in the caseload both up and down over relatively short periods of time, and the additional flexibility Article I status would give to Congress may prove useful.

Fearing that specialization in disability review produces systematic anticlaimant bias, some commentators suggest using magistrates attached to Article III district courts.[176] We believe, however, that any systemic bias in disability determinations is less the product of specialized administrative adjudication than of SSA's restrictive policies and practices. Indeed, the tension between "specialist" ALJs and SSA arose because the ALJs refused to comply with SSA's restrictive practices. Moreover, as suggested above, the common wisdom has

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175. A third alternative is that the confirmation process will become a pro forma rubber stamp, as appears to be the case, for example, with respect to Senate confirmation of officers in the armed forces. But such officers do not have tenure, and we do not believe that anyone favors a similar process for the approval of Article III judges.

176. See, e.g., Current Problems, supra note 5, at 336 (letter from Stephen D. Pepe, U.S. Magistrate); Ogilvy, The Social Security Court Proposal: A Critique, 9 J. Legis. 229, 250-51 (1982).

been that if anything specialization tends to favor the claimants.[177] Finally, we believe that the advantages of specialization in terms of expertise in evaluating technical medical testimony and evidence outweigh any danger of systemic bias. Magistrates, for whom these cases will be only a part of a much larger workload, are not likely to succeed as well as specialized administrative judges.

We noted in our general discussion of specialization that Congress must be cognizant not to fragment the policymaking or adjudicatory processes to the point of paralyzing a program or rendering it incoherent. The "split-enforcement" model we recommend divides policymaking authority between SSA and the Court of Disability Appeals and makes disputes between SSA and the Court of Disability Appeals a distinct possibility. But our proposal is no worse in this regard than the present structure, and may actually be significantly better. By mixing independent and political review in an alternating fashion, the current disability claims system produces conflicts between ALJs and SSA, ALJs and the federal courts and SSA and the federal courts. The centralized heirarchy created by our proposal should be more effective at resolving such disputes than the current system. Moreover, this dispute-solving capability can be enhanced by legislation specifying the relative authority of SSA and the Court of Disability Appeals regarding such matters as statutory construction and interpretation of Social Security rules

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177. See supra note 149 and accompanying text.

regulations.[178] Finally, as discussed more fully below, the Appeals Council can be adapted to coordinate SSA's disability policy with the developing case law of the new disability claims heirarchy.

The Appeals Council. Since this recommendation creates the Court of Disability Appeals from the Court of Veterans Appeals and eliminates the Appeals Council's administrative adjudication function, the question remains what should become of the Council. While many of its members may seek and receive appointments to the Court of Disability Appeals, it is neither necessary nor desirable to dissolve the Council. A recent comprehensive study of the Appeals Council recommended that the Council utilize its review power more selectively to shape disability policy through the resolution of cases presenting significant issues.[179] Under our proposal, the Council can perform an analogous function by coordinating SSA regulatory policy with the developing case law. This function is all the more important because of the increased independence of administrative review.

As a coordinating body, the Appeals Council can help to prevent or resolve policymaking disputes between SSA and the

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178. See T. McGarity & S. Shapiro, OSHA Regulation: Regulatory Alternatives and Legislative Reform, 1987 ACUS 999, 1129-31 (Report for Recommendation 87-10); G. Johnson, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experience, 1986 ACUS 293, 335-36 (Report for Recommendation 86-4).

179. Appeals Council Report, supra note 2, at 798-821, adopted as Recommendation 87-7, 1987 ACUS 36.

review apparatus in several ways, serving within SSA a function akin to that served in Congress by the proposed OJIA. First, the Appeals Council can evaluate litigation strategy with an eye toward maximizing SSA's ability to obtain adjudicatory principles it can live with. Second, it can review existing regulations and recommend revisions to clarify provisions and avoid disputes. Third, it can examine decisions from the Court of Disability Appeals or court of appeals, analyzing their implications for SSA, and develop appropriate responses such as appeal, promulgation of new regulations, or legislative reform. If these tasks are performed well, the separation of Social Security regulatory and adjudicatory functions should not disrupt the smooth operation of the disability determination system.

iii. Administrative Law Judges.

We recommend continuing to rely on an ALJ hearing, but increasing the independence of ALJs by removing them from the administrative heirarchy of the SSA. Legislation will be necessary to create an independent ALJ corps and to establish a bureaucratic structure under which it could function.

The ALJs who process Social Security Disability claims are currently protected by the Administrative Procedure Act. Under the APA, ALJs are not "employed" by SSA and can be removed from office only for "good cause" after a hearing before the Merit Systems Protection Board.[180] In addition, SSA is prohibited from conducting performance evaluations of ALJs.[181] These protections

have proved inadequate for two reasons. First, the decision of an ALJ is subject to review by the Appeals Council, which is not protected by APA safeguards. Second, SSA still exercises significant power over ALJs through bureaucratic pressures to increase productivity and reduce allowance rates, and "targeting" ALJs for Bellmon Review.

Thus, the experience of the 1980s suggests that additional safeguards are needed to protect the independence of ALJs. We have already proposed one such safeguard: review by an independent Article I tribunal. But the impact of SSA's oversight efforts suggests that SSA's residual authority over ALJs should be curtailed further by removing the ALJs from the administrative heirarchy of SSA and placing them in an independent corps.[182] This step would reduce, though not completely eliminate, the administrative pressures that could be placed on ALJs. ALJs will still have to process a large number of claims, and pressure to dispose of cases quickly is likely to remain even in an independent ALJ corps -- just as it remains in

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180. See 5 U.S.C. §§ 5372, 7521.

181. See 5 U.S.C. § 5372; 5 C.F.R. § 930.211.

182. This recommendation has been made by other observers with respect to both ALJs in general and Social Security ALJs in particular. See, e.g., D. Cofer, supra note 56, at 188-91 (Social Security ALJs); Lubbers, A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level, 65 Judicature 266 (1981) (all ALJs); Note, Preserving the Independence of Federal Administrative Law Judges: Are Existing Protections Sufficient?, 4 J.L. & Pol. 207, 288-32 (1987) (all ALJs). Indeed, Senator Heflin recently introduced a bill to make all ALJs independent from their respective agencies. See S. 594, 101st Cong., 1st Sess. (1989).

Article III courts. But creating an independent ALJ corps will at least reduce the danger that pressure to process claims quickly will be accompanied by pressure to reach particular outcomes.

Moreover, while SSA's practice of initiating Bellmon review would be eliminated, SSA will have the power to seek review of ALJ decisions in the Court of Disability Appeals. This is necessary to enable SSA effectively to pursue its policy objectives. SSA may be inclined to appeal more frequently from decisions of high allowance ALJs, and the threat of reversal by the Court of Disability Appeals may influence ALJs to deny claims. But this represents a properly functioning adjudicatory system in which decisionmakers are influenced by the law articulated by superior courts rather than by direct political pressure to reach predetermined results.

In addition, an ALJ who fails properly to perform his duties may be disciplined or removed by the Merit Systems Protection Board. Under present law an action against an ALJ must be taken by the agency in which the ALJ is employed.[183] If ALJs are made independent, then, disciplinary proceedings would presumably have to be initiated from within the ALJ corps; this, in fact, is the scheme envisioned by other proposals for ALJ independence.[184] However, we believe that in the context of the Social Security programs an exception should be made, and SSA should retain the

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183. 5 U.S.C. §7521.

184. See, e.g., S. 594, 101st Cong., 1st Sess. (1989)(Heflin bill to make all ALJs independent).

power to seek relief before the Board. SSA has an important interest in protecting the fiscal integrity of the Social Security programs from judges who neglect their duty or engage in other misconduct, and the power to seek relief from the Board provides an important protection for ALJs whose malfeasance or neglect of duty cannot be controlled by reversals in the Court of Disability Appeals. To be sure, this power too may be abused.[185] But the risk that disciplinary proceedings will be used improperly to pressure ALJs is small since charges must be proved to the independent Merit Systems Protection Board. In any event, we believe that the risk of abuse is outweighed by the necessity of giving SSA some such power to protect the system from ALJs who are guilty of malfeasance or neglect of duty.

The question remains whether the increased independence of ALJs calls for a change in the procedures employed in ALJ hearings. Under current law, proceedings before ALJs are basically nonadversarial -- the ALJ decides the case, represents the government's interest (because SSA does not appear), and plays a significant role in assisting the claimant to develop his case. The increased independence of ALJs may necessitate a more adversarial process. As noted above, SSA will be able to initiate appeals and appear in opposition to claimants. Similar considerations suggest that SSA be allowed to appear before ALJs in opposition to claimants. While SSA's participation will obviously detract from the nonadversarial nature of the ALJ

185. See supra notes 124-27 and accompanying text.

hearing, SSA's principal goal should not be to oppose disability benefits whenever possible, but rather to ensure that only eligible claimants receive benefits. Maintaining this goal is in large measure a question of SSA's attitude, but it can be reinforced by keeping the adversarial aspects of the ALJ hearing to a minimum. Thus, the ALJs can and should continue to assist claimants in developing their case.

Having ALJs assist claimants -- a function that will be aided by increased ALJ independence -- is also dictated by practical considerations. Most claimants are represented by counsel at the ALJ stage, but ALJ assistance is vital for those who are not represented -- particularly if SSA appears in opposition. Even claimants with counsel often have limited means and may require government assistance to obtain medical evidence. In addition, although the quality of the administrative record is likely to be improved by increasing the resources devoted to state Disability Determination Service and allowing SSA to become involved as a party, ALJ participation in developing a record would ensure an adequate record for review by the Court of Disability Appeals and federal courts of appeals.

iv. Improving State Disability Determination Service Processes.

While a thorough review of disability determinations at the state level is beyond the scope of this Report, the Report would be incomplete without some mention of the relationship between these initial determinations and the review process as a whole.

Our recommendation that Congress also focus its attention on the state role is based on recognition that improvements in the quality and accuracy of the initial determination process would produce benefits throughout the system. Increased claimant and SSA satisfaction with state Disability Determination Service determinations will reduce the caseload at each succeeding level. And even in cases that are appealed, improvements in the quality of initial determinations and reconsiderations will facilitate review at succeeding levels.[186]

Current experiments with face-to-face hearings at the state level are a promising beginning. Not only does the opportunity to observe claimants improve the initial assessment of disability,[187] but claimants may be more satisfied with adverse decisions if they have an opportunity to appear and make their case. If such face-to-face hearings prove effective, they should be adopted on systemwide basis. But systemwide adoption can be undertaken only if there are sufficient resources to ensure the quality of the hearings. A concomitant savings of resources might be obtained by eliminating the reconsideration stage.[188] A

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186. The poor quality of state Disability Determination Service determinations has been a major complaint of ALJs. See, e.g., Administrative Law Judges Survey and Issue Paper, supra note 170, at 53-54.

187. See Administrative Law Judges Survey and Issue Paper, supra note 170, at 46-48 (ALJs are nearly unanimous on the value of face-to-face hearings in improving decisional accuracy).

188. Under the current experiments, reconsideration is foreclosed when face-to-face hearings are provided at the initial determination level. If hearings are of high quality, reconsideration can be eliminated without a significant reduction in state Disability Determination Service accuracy. Moreover, unless reconsideration also involved a hearing, retention of

number of other worthwhile recommendations were recently made to SSA by a Disability Advisory Committee; these deserve serious consideration.[189]

In our view, SSA should continue to oversee the operation of state Disability Determination Services. But Congress should adopt legislation specifying that state Disability Determination Services are bound only by statutes; SSA regulations promulgated pursuant to APA notice and comment rulemaking; and decisions of the Court of Disability Appeals, the courts of appeals and the Supreme Court. Such legislation would not only prevent confusion in the event of conflict between SSA and the independent review apparatus but would also alleviate the problem of nonpublic policy-making through mechanisms such as the POMS.

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paper review would undermine the gains from hearings at the initial determination level.

189. See Report of the Disability Advisory Committee to the Commissioner of Social Security (July 25, 1989). The Report also includes some worthwhile recommendations for improving ALJ hearings.

5. Jurisdiction Over Bankruptcy Cases.

Because Congress only recently reconsidered the allocation of jurisdiction over bankruptcy cases, it is probably politically premature to consider a major restructuring of bankruptcy jurisdiction. It may also be too soon as a practical matter. The Bankruptcy Code was rewritten in 1978 with additional major changes in 1984. The full consequences of these reforms cannot yet be seen, making it too early to consider substantial revisions.

At the same time, bankruptcy cases are an important part of the federal courts' docket. In 1988, 594,567 new bankruptcy petitions were filed, and the bankruptcy courts' pending docket reflected 815,497 petitions.[1] Most of these petitions are non-adversary and administrative, but in 1988 alone there were 58,260 adversary proceedings commenced under the Bankruptcy Code;[2] 60,164 such proceedings had been commenced in 1987.[3] Adversary proceedings are handled by the corps of 276 bankruptcy judges and most do not involve federal district courts or courts of appeals. But 5,558 cases made their way from the bankruptcy courts into the federal district courts in 1988, representing

1. 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Table F at 360 [hereafter 1988 AO Report].

2. 1988 AO Report, supra note 1, Table F-8 at 368.

3. 1987 Annual Report of the Director of the Administrative Office of the United States Courts, Table F-8 at 355 [hereafter 1987 AO Report].

2.3% of the total civil docket; of these, 1,153 were appealed further to the courts of appeals, representing 3.1% of those courts' docket.[4] The figures for 1987 are comparable.[5] Consequently, while it may be too soon to consider reconstructing jurisdiction over bankruptcy cases, it is worthwhile to examine more modest suggestions for improvement. We have three such recommendations for Congress.

a. The Use of Bankruptcy Appellate Panels.

The Bankruptcy Reform Act of 1978 gave bankruptcy judges broad powers to resolve all disputes arising in or related to bankruptcy cases. Appeals from decisions of a bankruptcy judge were to the district court, which reviewed these decisions under the traditional "clearly erroneous" standard, and from there to the court of appeals. If the parties stipulated, an appeal could be taken directly to the court of appeals.

The 1978 Act also provided a third option: If a circuit council voted to do so, it could establish "bankruptcy appellate panels" (BAPs) to hear appeals instead of the district court from judgments and orders entered by a bankruptcy judge. Decisions of a BAP, which consists of three-judge panels drawn from the bankruptcy judges, could be appealed to the court of appeals. To

4. 1988 AO Report, supra note 1, Tables B-1, C-2.

5. In 1987, 4,701 bankruptcy cases accounted for 2% of the district courts' civil docket, and 1,040 appeals accounted for 3% of the docket of the courts of appeals. See 1987 AO Report, supra note 3, Tables B-1, C-2.

prevent bankruptcy judges from reviewing their own decisions, the statute provided that a bankruptcy judge could not hear an appeal from a judgment he or she had entered.

Only two circuits established BAPs. The First Circuit established a BAP in 1980 to hear appeals from all districts in the circuit except the District of Puerto Rico. The Ninth Circuit established a BAP in 1979 to hear appeals from two of the 13 districts in the circuit. In 1980, the Ninth Circuit BAP was expanded to cover four additional districts.

In 1982, the operation of the BAPs was disrupted by the Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., which held that bankruptcy judges could not adjudicate certain state-law claims because they lacked Article III salary and tenure protections.[6] The Marathon Court invalidated the entire statute that transferred district court jurisdiction over bankruptcy proceedings to the bankruptcy courts. When Congress did not act promptly to resolve the jurisdictional lacuna this created, the district courts adopted the so-called "Emergency Rule" referring all bankruptcy proceedings to bankruptcy judges as special masters. In matters directly concerning the bankruptcy petition, the bankruptcy judge could enter binding orders subject to de novo review by the district judge. In other matters related to the bankruptcy, the bankruptcy judge was to make recommendations to the district judge, but these recommendations had no force or effect unless adopted by the district judge after de novo review.

6. 458 U.S. 50 (1982).

Marathon disrupted the operation of the BAPs in two ways. First, it interrupted the flow of cases to the BAPs, since bankruptcy judges could no longer enter binding orders subject to BAP review. Second, it called into question whether non-Article III bankruptcy judges could constitutionally hear appeals from orders entered by other bankruptcy judges.

Congress revamped the structure of the bankruptcy courts in the Bankruptcy Amendments and Federal Judgeship Act of 1984. The 1984 Amendments vest jurisdiction over bankruptcy cases in the district court but authorize those courts to refer bankruptcy proceedings to the bankruptcy court, which is reconstituted as part of the district court. The district court may withdraw the reference to the bankruptcy court in any case and must do so in cases posing significant non-bankruptcy questions affecting interstate commerce. In addition, the district court must hear personal injury or wrongful death claims. With respect to matters heard by the bankruptcy judge, the 1984 Amendments distinguish between "core proceedings," matters centrally related to administering the bankruptcy case or involving rights arising under the Bankruptcy Code, and "non-core proceedings," a residual category of matters otherwise related to the bankruptcy case. In core proceedings, the bankruptcy judge functions in the manner envisioned by the 1978 Act, conducting hearings and entering final orders subject to appellate review by the district court. In non-core proceedings, the bankruptcy judge conducts hearings, but unless the parties consent to his decision, his findings must be submitted to the district court and have no force unless

adopted by that court after de novo review. According to an estimate of the National Conference of Bankruptcy Judges, non-core proceedings constitute less than 5% of the matters before the bankruptcy courts.[7]

The 1984 Amendments made few changes in the handling of bankruptcy appeals. First-level appeals are heard by the district courts. Parties can no longer stipulate to have an appeal from a decision of the bankruptcy court heard immediately by the court of appeals.[8] As under the 1978 Act, each circuit may, in its discretion, establish a BAP. The provision prohibiting bankruptcy judges from hearing appeals from judgments they had entered, however, was broadened to prohibit bankruptcy judges from hearing any appeals originating from the district for which they were appointed. Appeals from decisions of the BAPs and district courts are heard by the court of appeals.[9]

The 1984 Amendments made one important change in the provisions governing BAPs: a BAP may hear an appeal only "upon the consent of all the parties."[10] The statute does not specify whether the parties' consent must be express or may be implied. Also, after 1984 establishing a BAP requires approval not only of the circuit council but also of the judges of the district court.[11]

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7. Report to the Federal Courts Study Committee by the National Conference of Bankruptcy Judges 55 (Sept. 1, 1989).

8. See 28 U.S.C. §158(d).

9. 28 U.S.C. §158(d).

10. 28 U.S.C. §158(b)(1).

The First Circuit BAP ceased to operate shortly after the Marathon decision. The court of appeals avoided the question whether BAPs are unconstitutional under Marathon by concluding that the Emergency Rule implicitly revoked the court's authorization to establish a BAP,[12] and it did not elect to reestablish BAPs after enactment of the 1984 Amendments. The Ninth Circuit BAP never ceased operating. Shortly after Marathon, the court issued an order stating that the BAP could continue to hear appeals from orders and judgments entered by the bankruptcy courts before the effective date of the Marathon decision. A panel of the Ninth Circuit subsequently held that the continued operation of the BAPs was not unconstitutional under Marathon, even where the parties objected to having their appeal heard by the BAP.[13]

Following enactment of the 1984 Amendments, the Ninth Circuit had to decide whether the parties' consent to having their appeal heard by the BAP must be express or may be implied. The court initially required express consent. However, after discovering that, because of the parties' inertia, too few appeals were going to the BAP,[14] the court adopted an implied

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11. 28 U.S.C. §158(b)(2).

12. See Commonwealth of Massachusetts v. Dartmouth House Nursing Home, Inc., 726 F.2d 26 (1st Cir. 1984).

13. See In re Burley, 738 F.2d 981 (9th Cir. 1984).

14. In part, the problem resulted from the statutory requirement that all parties must consent to have an appeal heard by a BAP. Thus, if any party to a multiparty proceeding failed affirmatively to consent, the appeal had to go to the district court.

consent rule that requires parties to "opt out" of review by the BAP. The percentage of appeals heard by the BAP rose from 30% to approximately 66%.[15] In August 1987, Bankruptcy Rule 8001(e) became effective. Rule 8001(e) provides that the circuit council may adopt a local rule prescribing the method by which parties may consent to have their appeal heard by the BAP.[16]

The Ninth Circuit BAP now hears appeals from all districts in the circuit. In 1987 and 1988, it disposed of 902 appeals and 664 appeals, respectively.

i. Recommendation.

We recommend that Congress establish BAPs for each circuit. BAPs clearly reduce the workload of district court judges since an appeal decided by a BAP need not be heard by a district court judge. BAPs may also reduce the number of appeals to the courts of appeals. A study of the Ninth Circuit BAP by the Federal Judicial Center noted that 25% of the district courts' bankruptcy decisions are appealed to the court of appeals, compared to 10% of the BAP's decisions. According to the Study, in 1987, the BAP may have reduced the number of bankruptcy appeals taken to the Ninth Circuit by 135 -- a 40%

15. Between August 1984 and May 1985, the parties affirmatively "opted in" to the BAP in approximately 30 percent of the cases. Since adoption of the implied consent rule, one or more parties have "opted out" of the BAP in approximately the same percentage of the cases. See 1988 Annual Report of the Ninth Circuit at 77.

16. See Bankruptcy Rule 8001(e) and 1987 Advisory Committee Note.

decrease.[17] Experience in 1988 was similar: almost two-thirds of bankruptcy appeals were decided by the BAP, but only 77 BAP decisions were appealed to the Ninth Circuit as compared with 142 district court decisions.[18] District court decisions were three times as likely as BAP decisions to be be the subject of an appeal.

BAPs may reduce appeals to the courts of appeals because attorneys have more confidence in the correctness of their decisions or believe that these decisions will be harder to overturn on appeal. A survey of bankruptcy attorneys in the Ninth Circuit conducted by the Federal Judicial Center reports that attorneys believe (1) by a 2 to 1 margin the BAP gives cases closer study than the district courts; (2) by the same margin the BAP is more likely than the district court to decide a complex case correctly; (3) by a 3 to 2 margin the BAP's opinions are "better" than those of the district court; (4) by a margin of 7 to 1 the BAP should be continued in the Ninth Circuit.[19] The survey also reported that two thirds of the attorneys surveyed prefer to litigate bankruptcy appeals before the BAP than before a district judge.

While striking, these results are not surprising. The Bankruptcy Code rivals the Internal Revenue Code in complexity.

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17. Gordan Bermant & Judy B. Sloan, Bankruptcy Appellate Panels: The Ninth Circuit's Experience 21 Ariz. St. L.J. 181, 209-10 (1989)[hereafter FJC Study]; 1987 AO Study, supra note 3, Table B-1 at 141.

18. See 1988 Annual Report of the Ninth Circuit at 76.

19. See FJC Study, supra note 17, at 212-16.

And while the typical district court hears more bankruptcy cases than tax cases, the difference is not large. As a result, even the most diligent district judges cannot acquire the same expertise in bankruptcy matters that BAP judges obtain through their service as trial judges in the bankruptcy courts.

District judges view the BAP as favorably as the bar does. A 1982 survey of judges in districts covered by the Ninth Circuit BAP reported that 67% of the judges believed the BAP reduced their workload. Only 3% of the judges believed the BAP had no effect on their workload. The remaining 30% had no opinion. More important, 85% percent of the judges said that the BAP should be continued (the remaining 15% expressed no opinion) and 75% recommended expanding the BAP to other districts.[20]

BAPs contributes to the development of more predictable and coherent bankruptcy law. The BAP is a small, collegial court that can keep up with changing doctrines in bankruptcy law. At present, the Ninth Circuit BAP is composed of seven judges. These seven judges, sitting on three-judge panels, hear appeals from 68 bankruptcy judges. In contrast, there are approximately 84 active district judges in the Ninth Circuit who hear bankruptcy appeals -- more than the number of bankruptcy judges from whom they hear appeals, and twelve times the number of BAP judges. Furthermore, district judges do not sit on three-judge panels when hearing bankruptcy appeals, and thus there is less of

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20. Unpublished results of a survey of district judges performed by the Circuit Executive of the Ninth Circuit in May 1982. See also FJC Study, supra note 17, at 211-12.

the dampening effect that collegial decisionmaking is likely to have on judicial idiosyncracies. Given the large number of decisionmakers, their lesser expertise in bankruptcy law, and the relatively small number of bankruptcy appeals each district judge hears in a year, the district courts are less well suited than a BAP to create a coherent body of bankruptcy law.

BAPs also publish opinions more frequently than district courts do. In 1987 and 1988, for example, the BAP was 2.5 times more likely than a district court to publish an opinion in a bankruptcy case.[21] This, in turn, enhances the parties' ability to plan their out-of-court conduct.

The major direct costs of BAPs are the costs of staff, extra law clerks for BAP judges, and additional travel expenses of BAP judges. In the Ninth Circuit, the BAP hired its own court clerk and a small supporting staff. BAP judges are permitted to hire one additional law clerk to help with the additional workload they carry by sitting as both trial judges and BAP judges. Finally, because BAP judges cannot hear cases from their own districts and must sit in panels of three, the establishment of BAPs necessitates travel expenses that are not incurred by district judges hearing bankruptcy appeals.[22]

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21. In 1987 and 1988, the BAP decided approximately 66 percent of the bankruptcy appeals in the Ninth Circuit; district courts decided the remaining 34 percent. See 1988 Annual Report of the Ninth Circuit at 77. A survey of published decisions for those two years, however, reveals that the BAP issued 83.4 percent of the published opinion in first-level bankruptcy appeals, while the district courts issued only 16.6 percent of the published decisions.

The major indirect cost of BAPs is the additional work they impose on bankruptcy judges. The judges of the BAP are sitting bankruptcy judges who perform their BAP duties in addition to their trial court duties. The Ninth Circuit has handled this by reducing the trial court caseload of the BAP judges, but this simply increases the burden on other bankruptcy judges. To date, the Ninth Circuit has not sought additional bankruptcy judgeships based on the BAP workload. The bankruptcy judges have simply assumed the additional burden voluntarily. The Federal Judicial Center Study reports:

> [C]onversations we have conducted with the Panel judges leave us no doubt that working on the Panels is perceived by them as an honor and an opportunity to serve, for which they are willing to shoulder considerable additional burdens of work .... To the extent that a judge's participation on the Panels causes an additional burden on the judge's colleagues on the bankruptcy bench, all of these judges are performing additional work to bring improved judicial service to the litigants who desire it.[23]

A number of bankruptcy judges reported difficulties in scheduling both trials and appeals. Such problems will be especially acute for judges who do not sit in the place where the appeals are heard. Consequently, if BAPs are to be used in every circuit, it may make sense to appoint some bankruptcy judges to hear appeals full time. In addition to relieving scheduling difficulties, establishing full time bankruptcy appellate judges would enhance the prestige of the job and create a career path that could reward good service on the trial level.

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22. See FJC Study, supra note 17, at 186-87, 206-07.

23. FJC Study, supra note 17, at 218.

ii. Possible Objections.

One concern with widespread use of BAPs is that they lessen the district court's ability to supervise the work of the bankruptcy courts. Such concern is misplaced. Congress determined that the benefits of independence to the stature and morale of the bankruptcy courts outweighed the benefits of close district court supervision when it made the bankruptcy courts wholly independent in the Bankruptcy Reform Act of 1978. This system was altered in 1984 only to the extent necessary to address the constitutional problems created by the Marathon decision. To the extent that substituting BAPs for the district courts is constitutional, there is no clash with Congress's scheme for bankruptcy administration.[24]

Moreover, the parties are protected by the consent requirement. Thus, if one of the parties does not want his or her proceeding heard by a BAP, that party can force the case into the district court by refusing to consent to the BAP's jurisdiction. The Ninth Circuit's experience suggests that even with a consent provision the benefits of a BAP are likely to be substantial.

This raises a related question whether consent must be express or may be implied. As noted above, the relevant

24. As explained below, any potential constitutional problems with this structure are solved by the provisions for consent. See infra notes 27-29 and accompanying text.

statutory provision does not resolve this question, although the Bankruptcy Rules permit a circuit establishing a BAP to adopt an implied consent rule.[25] We recommend that Congress amend 28 U.S.C. §158 clearly to state that a party is deemed to consent to have the BAP hear its appeal unless the party objects promptly after the notice of appeal is filed.[26] The Ninth Circuit experience suggests that perhaps a third of the litigants are indifferent as between a district court and a BAP and will accept whatever default rule the system provides. Steering these parties to the BAP, together with those who affirmatively prefer it, is appropriate given the advantages of BAPs to the judicial system. At the same time, any party who wants to avoid the BAP may have its appeal heard in the district court merely by filing a timely demand.

The Constitution may not require consent at all in core proceedings.[27] But even if consent is required, there seems to be no constitutional problem with implying it from a procedural default. In Thomas v. Arn, the Court held that a Sixth Circuit rule providing that failure to object to a magistrate's report within 10 days waived the right to appellate review by either the district court or the court of appeals did not violate Article

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25. See Bankruptcy Rule 8001(e) and Advisory Committee Notes to 1987 Amendments.

26. In the Ninth Circuit, the parties have 21 days from the date the notice of appeal is filed. See Amended Order of the Ninth Circuit Judicial Council Establishing and Continuing The Bankruptcy Appellate Panel of the Ninth Circuit, May 3, 1985.

27. See In re Burley, 738 F.2d 981 (9th Cir. 1984).

III or the due process clause.[28] Similarly, in Commodities Futures Trading Comm'n v. Schor, the Court upheld a statute that permitted an administrative agency to hear certain state-law actions. The rules of the agency provided that if a customer brought an action against a broker before the agency based on the broker's alleged violation of agency regulations, the broker could file a counterclaim against the customer for any unpaid commissions. According to the Court, one reason the agency's adjudication of the state-law counterclaim did not violate the customer's right to have that action heard by an Article III judge was that the customer impliedly consented to the agency's jurisdiction by filing a complaint with the agency:

> Even were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver. . . . [A]t the time Schor decided to seek relief before the CFTC rather than in the federal courts, the CFTC's regulations made clear that it was empowered to adjudicate all counterclaims "aris[ing] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." [citation omitted] Thus, Schor had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but, with full knowledge that the CFTC would exercise jurisdiction over that claim, chose to avail himself of the quicker and less expensive procedure Congress had provided him. In such circumstances, it is clear that Schor effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum.[29]

A final question to be addressed if BAPs are to be

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28. 474 U.S. 140, 155 (1985).

29. 474 U.S. 833, 849-50 (1986).

implemented nationwide is the problem posed in small circuits dominated by a single district. Under 28 U.S.C. §158(b), a BAP judge may not hear an appeal arising from his or her own district. In a small circuit, a substantial proportion of bankruptcy appeals may arise from one district while an equally substantial proportion of the bankruptcy judges in that circuit are disqualified by this "same-district rule" from hearing them. In such circumstances, virtually all the judges from other districts might have to sit on the BAP to create a three-judge panel eligible to hear appeals from the dominant district. This problem is most acute in the D.C. and First Circuits, and to a lesser extent in the Second and Third Circuits.[30]

To avoid this problem, we recommend permitting two or more circuits to form a consolidated BAP where necessary. The same-district rule serves an important purpose by preserving the confidence of litigants in the integrity of the appellate process and smooth working relations among the bankruptcy judges of a district. Congress could, of course, appoint judges to sit on a BAP full time. But this would be far more costly than the additional travel costs of a multi-circuit BAP -- particularly in the D.C., First, Second, and Third Circuits, which are

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30. There is only one bankruptcy judge in the D.C. Circuit. The number of bankruptcy judges in each district in the First, Second, and Third Circuits are as follows:

First Circuit		Second Circuit		Third Circuit	
Mass.	4	S.D.N.Y	7	N.J.	7
Me.	2	E.D.N.Y.	4	E.D. Pa.	3
N.H.	1	W.D.N.Y.	3	M.D. Pa.	2
R.I.	1	Conn.	2	W.D. Pa.	4
P.R.	2	Vt.	2	Del.	1

geographically small and close to other circuits. The determination when a multi-circuit BAP is necessary could be left to the Judicial Conference of the United States.

iii. Proposal.

To implement the recommendations above, Congress could amend 28 U.S.C. §158(b) to read as follows (new language is italicized; deletions are indicated by a line through the middle):

> (b)(1) The judicial council of ~~a~~ each circuit ~~may~~ shall establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
>
> ~~(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.~~
>
> ~~(3)~~ (2) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.
>
> (3) A party shall be deemed to consent to allow a panel to hear and determine an appeal unless it files a demand that the district court hear and determine the appeal within 30 days after the notice of appeal is filed.
>
> (4) The Judicial Conference of the United States may authorize two or more circuits to establish a joint bankruptcy appellate panel.

b. Consent to Orders of the Bankruptcy Court in Non-core Proceedings.

Under 28 U.S.C. §157(c)(2), a bankruptcy judge may enter final orders and judgments in non-core proceedings, subject only to traditional appellate review, "with the consent of all the parties." This language does not say whether the consent must be express or implied, but Bankruptcy Rules 7008 and 7012 interpret it to require express consent. We recommend amending the statute to provide that the parties to a non-core proceeding will be deemed to consent to the entry of orders and judgments by the bankruptcy judge unless a timely objection is made.

This amendment will reduce the workload of the district court by eliminating the need for de novo district court review in non-core proceedings where no timely objections have been filed. An implied consent rule might also reduce litigation over whether a proceeding is core or non-core, because the question will be moot if no party timely objects to the bankruptcy judge's entering a judgment in the matter.[31] Finally, implied consent will eliminate the problem that presently exists in default cases, where the plaintiff often finds it difficult to obtain express consent.

As explained above, implied consent is constitutional. Indeed, the proposal is essentially one to treat findings of a bankruptcy judge the way many courts already treat findings of a magistrate -- something the Supreme Court held constitutional in Thomas v. Arn.[32] The Second, Sixth, and Ninth Circuits have

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31. See In re Men's Sportswear, Inc., 832 F.2d 1134, 1137 (2d Cir. 1987).

32. 474 U.S. 140 (1985). See supra notes 27-29 and accompanying text.

addressed whether a bankruptcy judge may appropriately enter a binding order in a non-core proceeding in the absence of either any express consent or objection, and all three courts held that bankruptcy judges could do so.[33]

This proposal can be implemented by adding the following language to 28 U.S.C. §157(c)(2):

> A party shall be deemed to consent to the bankruptcy judge's hearing and determining a proceeding unless the party files an objection thereto by the earlier of: (A) the first pleading by that party concerning the non-core claim for relief; or (B) 30 days after service of a pleading initiating the non-core claim for relief.

c. Appeals of Orders Regarding Abstention or Remand.

Under present law, three types of bankruptcy-related orders are not appealable: (1) an order dismissing or suspending bankruptcy proceedings under 11 U.S.C. §305; (2) a decision to abstain from hearing a bankruptcy proceeding under 28 U.S.C. §1334; and (3) an order under 28 U.S.C. §1452 remanding a claim removed to federal court under §1334. Although these provisions were probably written to limit appeals from the district courts to the courts of appeals, they have been interpreted to prohibit any appeal from an initial decisionmaker -- including appeals from bankruptcy judges to the district courts.[34] Because

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33. See In re Southern Industrial Banking Corp., 809 F.2d 329 (6th Cir. 1987), In re Men's Sportswear, Inc., 834 F.2d 1134 (2nd Cir. 1987), In re Daniels-Head and Associates, 819 F.2d 914 (9th Cir. 1987). In all three cases, Bankruptcy Rules 7008 and 7012, which require express consent, had not yet become applicable.

34. See, e.g., In re Walsh, 79 Bankr. 28, 29 (D. Nev. 1987);

bankruptcy judges are not appointed under Article III, however, they cannot render binding decisions even in core proceedings unless these are subject to review by an Article III court. As a result, motions to abstain or remand are treated as non-core proceedings: the bankruptcy judge recommends a disposition, but this has no force or effect until it is reviewed and entered by the district court.

The purpose of the prohibition against appellate review is to "get to the merits of the proceeding as promptly as possible."[35] But the present system delays this determination because no action can be taken until the district court's review is completed. This seems particularly unnecessary in the many cases in which no objection is made to the bankruptcy judge's decision. In addition, because the bankruptcy judge is preparing a record for the approval of the district judge, he or she must prepare written proposed findings of fact and conclusions of law; if bankruptcy judges could issue binding judgments, they could rule from the bench (with a considerable savings in judge time).

These disadvantages can be reduced by making orders regarding abstention or remand appealable from the bankruptcy court to the district court. A decision on a motion for remand or abstention is not a final judgment on the merits, and it is well established that bankruptcy judges may enter binding

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Hillvard Farms v. White County Bank, 52 Bankr. 1015, 1019 (S.D. Ill. 1985); In re Pankau, 65 Bankr. 204 (N.D. Ill. 1986); In re Newman, 61 Bankr. 27, 29 (D.N.M. 1986).

35. 1 Collier on Bankruptcy §3.01(5)(g) at 3-81 (15th ed. 1987).

interlocutory orders in both core and non-core proceedings.[36] Moreover, a motion for remand or abstention is a classic core proceeding in that it concerns a right created by Congress as part of its bankruptcy scheme.[37]

This is only a partial solution since some proceedings will still be delayed until the district court hears an appeal from the decision of the bankruptcy court. At first blush, then, it may appear that a still better solution is to have motions to abstain or remand heard directly in the district courts. This could be accomplished by withdrawing the reference to the bankruptcy court as soon as such a motion was made; if the district judge decided to retain jurisdiction, the case could be referred again to the bankruptcy judge. But the relevant criteria for abstaining or remanding bankruptcy proceedings turn on considerations unique to bankruptcy law. Unlike other forms of abstention, the decision to abstain in the bankruptcy context is primarily a question of case management. The judge must determine how important it is to the bankruptcy case to resolve the particular proceeding promptly and together with other proceedings in the bankruptcy and how much delay would result from abstaining or remanding to state court. Such determinations require a thorough understanding of bankruptcy law as well as a

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36. See, e.g., In re Lion Capital Group, 46 Bankr. 850, 854 (S.D.N.Y. 1985); In re One-Eighty Investments, Ltd., 72 Bankr. 35, 37 (N.D. Ill. 1987); In re THB Corp., 94 Bankr. 797, 803 (D. Mass. 1988); In re Earle Indus., Inc., 72 Bankr. 131, 135 (E.D. Pa. 1987).

37. See In re Mankin, 823 F.2d 1296 (9th Cir. 1987).

feel for the underlying bankruptcy case, and are thus best left to the bankruptcy judge.[38]

In short, while the proposal to establish a limited right of appeal from orders regarding abstention and remand is not ideal, it appears to be the best overall solution to an unusual problem. This proposal can be implemented by amending the relevant statutes as follows:

> 28 U.S.C. §1334(c)(2): [] Any decision to abstain <u>or not to abstain</u> made under this subsection is not reviewable by appeal or otherwise <u>by the court of appeals under sections 158(d), 1291, or 1292 of this title, or by the Supreme Court under section 1254 of this title</u>. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

> 28 U.S.C. §1452(b): [] An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise <u>by the court of appeals under sections 158(d), 1291, or 1292 of this title, or by the Supreme Court under section 1254 of this title</u>.

> 11 U.S.C. §305(c): An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise <u>by the court of appeals under sections 158(d), 1291, or 1292 of this title, or by the Supreme Court under section 1254 of this title</u>.

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38. In many cases, moreover, district judges are likely to take longer than bankruptcy judges to rule on motions to abstain or remand both because of docket pressures and because the bankruptcy judge will be more familiar with the case and the issues.

B. Administrative Remedies.

Administrative remedies are another way of reducing the federal caseload. In one sense, shifting cases into an administrative forum is simply a form of specialized adjudication, since these forums are invariably specialized and are used for the same reasons as the specialized courts discussed above. However, requiring claimants to use or exhaust administrative remedies is more controversial than transferring their cases to a specialized court because administrative remedies are more informal than the remedies available in specialized courts. Opponents of administrative remedies therefore claim that these remedies are inadequate and unfair.

There is another side to this issue. Full blown adjudication in an Article III court may well provide a better opportunity to establish a claim, if only because of the availability of elaborate discovery. But these proceedings are also expensive. As a result, claimants with small claims may actually be better off in a less elaborate but also less expensive administrative tribunal. Moreover, given the limitations on federal judicial resources, one must ask whether it is rational to devote scarce judge time to claims that can be resolved fairly and easily in simpler proceedings.

In this section, we identify three classes of cases that we believe should be resolved in administrative proceedings: personal injury claims of railway employees and seamen; small claims under the Federal Tort Claims Act; and civil claims by

state prisoners under 42 U.S.C. §1983. While we recommend making the administrative remedy exclusive for the first two classes, we recommend merely requiring state prisoners to exhaust available administrative remedies before beginning an action in federal court. Although related for the reasons just explained, there are special reasons that led us to select these particular cases and not others. These are elaborated below, along with our recommendations. Note especially our recommendation that Congress establish a small claims procedure for cases under the Federal Tort Claims Act, which we believe may be the template for eventually creating a federal small claims court with jurisdiction over many different kinds of claims.

1. The Federal Employers' Liability Act and the Jones Act.

a. History and the Need for Reform.

We noted in Part II that it is difficult to earmark cases to be removed from the federal docket because there is no broad consensus on the role of federal courts. There are, however, some federal claims which seem obviously inappropriate. Among these are personal injury suits by railway employees under the Federal Employers' Liability Act (FELA)[1] and by seamen under the Jones Act.[2]

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1. 45 U.S.C. §51 *et seq.*

2. 46 U.S.C. §688.

i. The FELA.

The FELA provides that employees of railroads may recover damages for any injury incurred in interstate commerce

> resulting in whole or in part from the negligence of any of the officers, agents, or employees of [the railroad], or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.[3]

The Supreme Court has held that the FELA provides the exclusive remedy for railway employees injured while engaged in interstate commerce.[4]

It seems anomolous that there is a federal remedy only for workplace injuries of railway employees. Federal protection of railway employees has its origins in the unique role of railroads in nineteenth century America. The importance of the railroad, both practically and as a romantic manifestation of American expansion, is well-known. Unlike any other industry, the federal government was deeply involved in subsidizing the growth of the railroads. Between 1850 and 1871, the federal government granted railroad developers 175 million acres of land.[5] The railroad industry later became the first industry subject to direct

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3. 45 U.S.C. §51.

4. New York Central R.R. v. Winfield, 244 U.S. 147 (1917); Rogers v. Consolidated Rail Corp., 688 F. Supp. 835, 836-37 (N.D.N.Y. 1988).

5. Robert L. Frey, Encyclopedia of American Business History and Biography: Railroads in the Nineteenth Century xvi (1988).

federal control in the Interstate Commerce Act of 1887. By the end of the 19th century, public attention had focused on abuses of the railroads, including mistreatment of workers. In fact, the injury rate among railroad employees in the late 19th century was frightening -- the average life expectancy of a switchman was seven years, and a brakeman's chances of a natural death were 1 in 5.[6]

Congress responded in 1893 by enacting the Federal Safety and Appliance Act, but when this Act failed to improve conditions Congress passed a first version of the FELA in 1906.[7] The Supreme Court held this legislation unconstitutional on the ground that it exceeded Congress's power under the Commerce Clause.[8] Congress enacted the present law in 1908, and this time it withstood constitutional challenge.[9] The principal objective of the FELA was to make it easier for injured railroad employees to recover by abrogating the fellow-servant rule and the doctrine of assumption of risk, and by replacing the common law principle making contributory negligence a complete defense with a rule of comparative negligence.[10]

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6. Melvin L. Griffith, The Vindication of a National Public Policy Under the Federal Employers' Liability Act, 17 L. & Contemp. Probs. 160, 162-63 (1953)(citing Annual Reports of the Interstate Commerce Commission).

7. 34 Stat. 232 (1906).

8. Employer's Liability Cases, 207 U.S. 463 (1908).

9. Second Employers' Liability Cases, 223 U.S. 1 (1912).

10. See W. Thorton, A Treatise on the Federal Employers' Liability and Safety Appliance Acts 557 (3d ed. 1916)(reprinting

If Congress were debating how to provide compensation to injured workers today, it would undoubtedly create a workers' compensation program. When the FELA was passed, however, workers' compensation was still a new idea. New York adopted the first American workers' compensation law in 1910,[11] and it was immediately held unconstitutional by the New York Court of Appeals.[12] The validity of such laws under the United States Constitution was not established until 1917.[13] It is thus not surprising that Congress did not even consider a workers' compensation option in the debates over the FELA.[14]

ii. The Jones Act.

The federal government has from its beginnings assumed primary responsiblity for the protection of seamen and other maritime workers. Indeed, the Supreme Court has held that the grant of admiralty jurisdiction in Article III, §2 of the Constitution prohibits states from modifying or displacing federal admiralty law.[15] This principle led the Court to strike

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the Report of the House Judiciary Committee).

11. See Richard A. Epstein, Charles O. Gregory, Harry Kalven, Jr., Torts 913-17 (4th ed. 1984). England had enacted the first modern workers' compensation law in 1897. Id.

12. Ives v. South Buffalo Ry., 201 N.Y. 271 (1911).

13. New York Central R.R. v. White, 243 U.S. 188 (1917).

14. See Henry Friendly, Federal Jurisdiction: A General View 130 (1973).

15. See Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). See also Director v. Perini North River Assoc., 459 U.S. 297,

down several attempts by Congress to permit state compensation remedies to apply to injured maritime workers whose employment was not local,[16] eventually forcing Congress to enact a workers' compensation scheme for shore-based workers in the Longshoremen's and Harbor Worker's Compensation Act (LHWCA).[17] Blue-water seamen have always had a federal remedy in the form of an action for maintenance and cure or for breach of the warranty of seaworthiness.

In 1903, the Supreme Court held in The Osceola that these traditional admiralty remedies did not permit seamen to sue a shipowner for injuries caused by the shipowner's negligence or by the negligence of other members of the crew.[18] Congress acted to fill this gap in 1915 with legislation abolishing the fellow servant rule in actions by injured seamen,[19] but the Supreme Court negated this legislation by construing it narrowly and holding that it did not abrogate the prohibition on recovery for negligence.[20] Congress responded in 1920 with the Jones Act, which permits a seaman injured in the course of his employment to sue under the FELA.[21] The Jones Act thus supplements the

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306-07 (1983); Carey v. Bahama Cruise Lines, 864 F.2d 201, 206-07 (1st Cir. 1988).

16. See, e.g., Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

17. 44 Stat. 1424 (1927), codified as amended at 33 U.S.C. §901 et seq.

18. 189 U.S. 158 (1903).

19. 38 Stat. 1164 (1915).

20. Chelentis v. Luckenbach Steamship Co., 247 U.S. 372 (1918).

seamen's traditional actions for maintenance and cure and for breach of the warranty of seaworthiness.[22]

iii. The Argument for Reform.

While the absence of an adequate remedy and the special federal concern with railroads and with admiralty law may once have justified giving railroad workers and seamen a federal tort remedy, the development of workers' compensation long ago eliminated the need to maintain these remedies. Workers' compensation schemes provide the same benefits as the FELA and Jones Act -- elimination of common law doctrines that made recovery difficult -- but go farther by relieving the plaintiff of the burden of proving the employer's negligence. In addition, the administrative remedy provided by workers' compensation is faster and less costly to maintain than a court action. To be sure, workers' compensation has its faults. But the unanimous verdict of states, unions, and workers in every other field favors workers' compensation over a traditional judicial remedy. As one administrator explained:

> [Workers' compensation] is a means through which prompt and reasonable compensation is paid to victims of work-produced injuries and to their dependents; it is a means of freeing the courts of the delays and costs inherent in the hearing of such a common situation; it is a method of relieving the public welfare agencies of a tremendous financial drain which would otherwise

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21. 46 U.S.C. §688(a).

22. See G. Gilmore & C. Black, The Law of Admiralty ch. 6 (2d ed. 1975).

> result if such injured individuals and their families did not have this system of compensation; it provides through its case files ample evidence for those interested in learning the causes and the possible preventions of the most typical industrial accidents.[23]

For covered employees, the disadvantage of workers' compensation is that it limits their potential recovery. The FELA, for example, permits damages for pain and suffering, while most workers' compensation schemes are limited to medical costs and lost wages. A recent study by the General Accounting Office compared FELA awards paid by Amtrak in 1984 to what Amtrak would have paid had the same claims been brought under state workers' compensation laws and found that the awards would have been lower.[24] But the GAO did not consider differences in the time it took to get an award, and it was unable to determine the impact of attorneys' fees and other costs associated with more elaborate court proceedings. Moreover, the GAO examined only cases in which an award was paid and did not take into account cases in which an employee was unable to recover under the FELA because he could not prove negligence. Thus, it is unclear which system provides workers with better benefits overall -- though once again, widespread satisfaction with workers' compensation in other fields suggests its superiority.

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23. Kelly, Workmens' Compensation -- Still a Vehicle for Social Justice, 55 Mass. L.Q. 251, 252 (1970)(quoted in Friendly, supra note 14, at 130).

24. General Accounting Office, Amtrak: Comparison of Employee Injury Claims Under Federal and State Laws (August 11, 1986). The average award under the FELA was $5,400. In states with generous workers' compensation schemes, the average award was $600 lower per case; in states with the least generous schemes, the difference was much greater -- $3,900 per case. Id. at 4.

Moreover, even if awards under the FELA and the Jones Act are larger than awards provided through workmens' compensation, this does not support preserving these causes of action. Why should railroad employees and seamen receive a benefit that is denied to other workers, including workers in other forms of interstate transportation? If workers' compensation awards are too small, the proper solution is to increase these awards, not to select two classes of employees for special treatment. It is not even clear that these workers benefit on average. By increasing the costs of railroad and maritime labor, the FELA and the Jones Act reduce the level of wages that employers are willing to pay and the number of employees they hire.

While eliminating FELA and Jones Act cases will not alone solve the caseload problem of the federal courts, it will make at least a dent in the courts' docket. In both 1987 and 1988, FELA and Jones Act cases accounted for 2% of the district courts' civil docket and 1% of the docket of the courts of appeals.[25] These figures understate the impact of the FELA and the Jones Act, at least at the district court level, for FELA and Jones Act cases are more likely than average to go to trial and to require

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25. See 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-7, C-2 [hereafter 1988 AO Report]; 1987 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-7, C-2 [hereafter 1987 AO Report]. In 1988, there were 2,540 FELA cases and 2,413 Jones Act cases out of total district court civil filings of 239,634; in 1987, there were 2,436 FELA cases and 2,939 Jones Act cases out of total district court civil filings of 238,982. At the appellate level, in 1988, there were 91 FELA appeals and 241 Jones Act appeals out of 32,686 total appeals, while in 1987, there were 80 FELA appeals and 245 Jones Act appeals out of 30,798 total appeals.

a jury. In 1988, for example, FELA and Jones Act cases accounted for 4.6% of all civil trials and 7.5% of civil jury trials; in 1987, cases under these laws constituted 5.3% of civil trials and 8.9% of civil jury trials.[26]

b. Recommendation.

The analysis above suggests that covered employees are better off with an administrative workers' compensation remedy and that eliminating FELA and Jones Act claims will reduce caseload pressures in the federal courts. The question is, what should replace these remedies? We recommend different solutions for railroad workers and for seamen.

i. Railroad Employees.

Apart from the FELA, tort remedies for most workplace injuries are a matter of state law. The logical solution therefore seems to be to leave these cases to the states. To accomplish this, Congress need only repeal the FELA, making clear that this overrules Supreme Court decisions holding state workers' compensation laws preempted.

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26. 1988 AO Report, supra note 25, Table C-8; 1987 AO Report, supra note 25, Table C-8. In 1988, there were 12,536 civil trials including 5,448 civil jury trials. Of these, 208 were FELA trials of which 183 were jury trials, and 369 were Jones Act trials of which 225 were jury trials. In 1987, there was a total of 13,162 civil trials of which 5,565 were jury trials. Of these, 250 were FELA trials of which 222 were jury trials, and 444 were Jones Act trials of which 274 were jury trials.

Some commentators have suggested that Congress could establish a federal workers' compensation remedy for these employees.[27] We see no reason to do this. State workers' compensation laws are perfectly adequate, and workers in other forms of interstate transportation, such as bus lines, truckers, and airlines, have been handled quite satisfactorily under the states' laws.[28] While there may have been a time when singling railroad employees out for special treatment by the federal government seemed logical and necessary, that time has passed. We see no reason to treat railroad employees differently than other workers.

ii. Seamen.

Congress cannot similarly leave seamen to seek remedies under state workers' compensation laws for the simple reason that the Supreme Court has held this unconstitutional.[29] Fortunately,

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27. See, e.g., Friendly, supra note 14, at 131 (favoring a state remedy but noting that political opposition may require a federal workers' compensation remedy); Clarence Miller, The Quest for a Federal Workmen's Compensation Law for Railroad Employees, 18 L. & Contemp. Probs. 188 (1953).

28. Friendly, supra note 14, at 131.

29. See cases cited supra note X. Even if Congress could leave these claims to the states, however, we would not recommend this solution. The administrative problems in sorting out where to seek compensation for injuries on the high seas and in which states shipping companies must make contributions would be extremely complex. Moreover, the potential foreign relations and international law problems with state regulation of foreign flag ships support a federal solution. Finally, leaving seamen to seek a state law remedy leaves the anomoly of a federal workers' compensation remedy for shore-based workers but not for seamen.

the existence of a workers' compensation scheme for maritime employees resolves this problems. We therefore recommend that Congress amend the LHWCA to include seamen. The Longshoremen's Act provides one of the most generous workers' compensation remedies,[30] and it has worked satisfactorily for shore-based employees.

This leaves only the question of seamen's traditional remedies under admiralty law for breach of the warranty of seaworthiness and for maintenance and cure. The remedy for maintenence and cure is subsumed in a workers' compensation remedy and is thus no longer necessary. But we see no reason to disturb the remedies for breach of the warranty of seaworthiness. The Jones Act was adopted to fill a gap in the protection this remedy afforded. We recommend that Congress fill that gap with an administrative rather than a judicial remedy, but the traditional admiralty claim retains its own purpose and usefulness.[31]

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30. See U.S. Chamber of Commerce Analysis of Workers Compensation Laws (1989).

31. See generally Gilmore & Black, supra note 22, ch. 6.

2. Exhaustion of Remedies by State Prisoners in Civil Rights Cases: 42 U.S.C. §1997e.

a. The Problem of Prisoners' Civil Rights Cases.

One of the fastest-growing areas in the federal docket consists of actions filed by state prisoners under 42 U.S.C. §1983. Between 1966 and 1978, the number of such cases grew from 218 to 9,730 -- an increase of more than 4,000%.[1] Between 1978 and 1988, the number of prisoner civil rights suits increased another 250%, reaching 24,421,[2] and now constitute 10.2% of the civil docket of the federal district courts.[3] There are more of these cases than all other civil rights cases combined.[4] The proportion of prisoner civil rights cases is even larger at the appellate level, where the 4,070 such appeals accounted for 12.5% of the docket of the courts of appeals in 1988.[5]

In part the growth in prisoner cases reflects the recognition of new rights and the expansion of old ones during

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1. William Bennett Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 611 (1979).

2. 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2A at 185 [hereafter 1988 AO Report].

3. There were 239,634 civil suits filed in federal courts in 1988. 1988 AO Report, supra note 3, Table C2-A at 184-85.

4. In comparison to the 24,421 prisoner civil rights cases, there were 19,323 civil rights cases involving such issues as voting rights, employment and housing discrimination and welfare rights. 1988 AO Report, supra note 3, Table C2-A at 184-85.

5. 1988 AO Report, supra note 3, Table B-7 at 169.

the last several decades. In part it reflects the growth in the prison population and the increased length of sentences. In part it reflects the increasing awareness and ability of prisoners to challenge prison officials in court (this is related to the length of sentence in that the long-term prisoner is more likely to learn the legal ropes). As the Supreme Court has pointed out, "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the state."[6] In addition, civil litigation offers prisoners a chance to avoid the daily prison routine and perhaps to earn a trip out of prison.

Whatever its cause, the proliferation of prisoner civil rights cases is a source of obvious problems. Because so many of the prisoners' actions seem meritless or unimportant, judges often presume that a prisoner's claim is a waste of time. As a result, meritorious claims are likely to get lost among the frivolous ones. From the courts' standpoint, prisoner civil rights cases typically require less time and effort than the average case, but sheer volume causes these cases to consume a sizeable chunk of time.[7] Observers have long agreed that reform in this area is desirable.[8]

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6. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

7. See Steven Flanders, The 1979 Federal District Court Time Study at Table 12 (Fed. Judic. Cent. 1980).

8. A sample of the literature is collected in Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 7, n.12 (Fed. Judic. Cent. 1980).

b. The Enactment of 42 U.S.C. §1997e.

One solution is for state prisons to reduce the number of §1983 cases by remedying meritorious claims and weeding out groundless claims before the point of litigation. Recourse to the federal courts could then serve as a backstop to keep prison remedial systems honest and to adjudicate disputes that these systems failed to resolve. Prior to 1980, however, the fact that state prisoners were not required to exhaust prison remedies before filing suit under §1983 presented an obstacle, enabling prisoners to by-pass existing administrative remedies and, more important, discouraging state and local prisons from providing such remedies in the first place.[9] Moreover, state prisoners' option of avoiding internal grievance processes contrasted sharply with the situation of federal prisoners, who were required to exhaust whatever administrative procedures their prison afforded.[10]

In 1980, Congress enacted 42 U.S.C. §1997e in an effort, which has proved unsuccessful, to remedy this situation. Subsection (a)(1) provides that in any prisoner's action under §1983 "the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice,

9. See Sen. Rep. No. 96-416, 96th Cong. 2d Sess. 34 (1979), reprinted in 1980 U.S. Code Cong. & Admin. News 787, 816.

10. See Ila J. Sensenich, Compendium of the Law of Prisoners' Rights 21-22 (Fed. Judic. Cent. 1979); Daniel Manville, Prisoners' Self-Help Litigation Manual 188-89 (2d ed. 1986).

continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." Subsection (a)(2) qualifies this requirement by providing that the court may not order exhaustion "unless the Attorney General [of the United States] has certified or the court has determined that such administrative remedies are in substantial compliance with the minimal acceptable standards promulgated under subsection (b) of this section."

Subsection (b) directs the Attorney General to promulgate standards to govern state grievance procedures, standards that are to include: (1) an advisory role for employees and inmates in "the formulation, implementation, and operation of the system"; (2) specific maximum time limits for written replies to grievances at each level of the process; (3) provisions for priority processing of grievances that are of an emergency nature; (4) safeguards to avoid reprisals against grievants; and (5) independent review of the disposition of grievances "by a person or other entity not under the direct supervision or direct control of the institution." Subsection (c) instructs the Attorney General to develop a procedure for "prompt review" of state grievance procedures submitted for certification. Subsection (d) provides that a state's decision not to implement a certified grievance procedure is not itself actionable.

These statutory provisions must be read in conjunction with the Attorney General's regulations, which are found at 28 C.F.R. Part 40. For present purposes, the most important regulation is

§40.7(b), which provides that "[a]t a minimum, some employees and inmates shall be permitted to participate in an advisory capacity in the disposition of grievances challenging general policy and practices and to review the effectiveness and credibility of the grievance procedure." The regulation further states that "[i]n any instance in which inmates and employees are afforded an advisory role in the disposition of an individual grievance, the opportunity for such participation shall occur before the initial adjudication of the grievance." These requirements go beyond the strict language of the statute, which says that inmates should have a role in the "formulation, implementation, and operation" of the system, but makes no specific mention of inmate input into grievances challenging general policy and practices.

It is noteworthy that federal regulations governing administrative remedies in federal prisons do not impose these minimal standards, and federal prisons do not require either inmate participation or outside review.[11]

c. The Failure -- and Success -- of §1997e.

Nearly a decade after the enactment of §1997e, the Attorney General has certified only the procedures developed by the states of Iowa, Missouri, Nebraska, Ohio, Tennessee and Virginia, plus those of the Wyoming Penitentiary and several local jails in

11. See 28 C.F.R. Part 542; Department of Justice Program Statement No. 1330.7: Administrative Remedy Procedure for Inmates (Oct. 12, 1979).

Virginia and Maryland. The United States District Court for the Middle District of Louisiana has approved grievance procedures adopted in the Louisiana state prison system, and judicial certification has apparently also been granted in Washington and Oklahoma. A recent decision from the Eastern District of Michigan requires that state to develop a procedure that will qualify for certification.

A number of other states and localities have tried to take advantage of §1997e, but have been unable to satisfy the Justice Department's certification requirements. Inactive applications are on file with the Department from the states of California, Kansas, New York, Washington, and Wisconsin, and from local prisons in Arlington County and Virginia Beach, both in Virginia. The Department has denied applications from Alabama, Arizona, Colorado, the District of Colombia, Florida, Kentucky, New Mexico and Oklahoma, as well as from the City of Las Vegas and Washington County, Washington.

Judge Donald Lay chronicled the reasons so few states have complied with §1997e in 1986,[12] and recent interviews with state administrators confirm his conclusions.[13] First and foremost,

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12. Donald P. Lay, Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act, 71 Iowa L. Rev. 935 (1986).

13. These interviews were conducted as part of a study prepared under the direction of Judge Patrick Higginbotham for the Committee on Federal-State Jurisdiction of the Judicial Conference [hereinafter Judicial Conference Study]. These reasons are also reiterated in a letter from John K. Van de Kamp, Attorney General of the State of California, to Doug Ross, Nat'l Assoc. of Attorneys General, dated August 17, 1989 [hereinafter Van de Kamp Letter].

states are deterred from seeking certification by the requirement in the Justice Department's regulations for inmate participation in the grievance process. Prison administrators are reluctant to accede to a federal rule that gives inmates even a peripheral role in the administration of state prisons. More important, these officials object that inmate participation creates adversarial relationships among inmates and between inmates and prison employees, and in these and other ways creates more problems than it solves.

The Attorney General's regulations make matters worse in this regard by interpreting the statute strictly.[14] In practice, the regulations are not always applied rigorously. For example, in 1985 the Attorney General approved an Iowa plan that did not provide inmates with any role in the plan's formulation or in the day-to-day operation of the grievance process. The Iowa plan simply provided for semiannual evaluation by a committee that would accept comments from inmates.[15] But Iowa's plan has not been treated as precedent, and other states may not even be aware of it. Hence, whether rightly or wrongly -- and certainly with reason -- states administrators believe that §1997e requires more inmate participation than these administrators consider useful or wise. This, in turn, discourages them from seeking certification under §1997e.

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14. Lay, supra note 12, at 945.

15. See Lay, supra note 12, at 945; Van de Kamp Letter, supra note 13, at 2-3.

In addition, many state officials believe that requiring outside review of the prison administration's disposition of grievances is unduly burdensome. If a grievance cannot be resolved through the prison's procedures, they say, it is highly unlikely that further appeal will resolve it prior to litigation. Third, some state officials regard the whole certification process as an unwarranted federal intrusion and resent being told how to run a grievance system. Finally, some state officials remain unconvinced that obtaining federal certification offers any real advantages.

While §1997e has failed to attract widespread interest among the states, it is quite successful in the states that have obtained certification. By all accounts, the grievance procedures have worked well both to resolve prisoners' complaints and, as a result, to decrease the number of §1983 lawsuits filed in federal courts. Between January 1 and November 30, 1984, for example, the State of Virginia invoked §1997e in 241 pending federal cases. The state was able conclusively to resolve 70 of the cases, and only 105 of them were actively resumed in the federal courts.[16] Similarly, a study conducted by the Judicial Conference noted that prisoner civil rights cases decreased by 33% in the Middle District of Louisiana after that state's procedures received judicial approval; the study cautions that other factors may have contributed to this decrease, but some part was plainly attributable to successful resolution of claims within the prison.[17]

16. Lay, supra note 12, at 943. The ultimate disposition of the remaining 66 cases is unclear.

To be sure, most evidence of §1997e's success is anecdotal, but the anecdotal evidence is impressive in its consistency. Officials in states with grievance procedures all report that the procedures successfully reduced the number of inmate petitions that reached the courts while also reducing tensions within the prison.[18] After interviewing officials in a number of these states, Judge Lay concluded that "[a]n early and effective grievance procedure can without question minimize much of the burdensome inmate litigation under section 1983 and still provide inmates with an expeditious and fair resolution of their often legitimate complaints."[19] The Judicial Conference Study reached the same conclusion.

d. Increasing Flexibility in Satisfying §1997e.

We need to encourage more states to adopt prisoner grievance procedures. Since the main obstacle to more widespread adoption seems to be the "minimum standards" required by §1997e(b)(2), the obvious solution is to relax these requirements. The question is whether this will defeat or undermine the purpose of §1997e. Are these standards essential to establish a grievance procedure that effectively reduces civil rights filings while treating prisoners fairly?

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17. Judicial Conference Study, supra note 13, at 16-17.

18. See Lay, supra note 12, at 943, 944, 947.

19. Lay, supra note 12, at 951-52.

We believe that the answer is no. Prison administrative remedies work primarily for three reasons. First, they inform prison officials of problems the officials might not otherwise discover, enabling them to respond before litigation. Second, they reduce prisoner dissatisfaction by allowing prisoners to air their complaints. Third, they tend to be less adversarial, and so more effective, than litigation -- which seriously disadvantages the (invariably pro se) inmate. None of these advantages is peculiar to a process that incorporates the particular requirements of §1997e(b)(2). The fact that federal prisons do not provide some of the protections required of the states in §1997e strongly supports this conclusion.

This conclusion is supported by experience in states with procedures that do not satisfy federal requirements. Judge Lay mentions programs in South Carolina, Connecticut and Texas;[20] the Judicial Conference Study adds detailed analyses of programs in the California state prison system and the Los Angeles county jail.[21] These plans have succeeded as well as the federally approved plans. In South Carolina, there was a 33% decrease in the number of §1983 lawsuits after adoption of the administrative remedy.[22] In California, complete or partial relief was granted in over half of the 40,000 grievances considered.[23] Moreover,

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20. See Lay, supra note 12, at 950.

21. See Judicial Conference Study, supra note 13, at 8-16.

22. Lay, supra note 12, at 950.

23. Judicial Conference Study, supra note 13, at 10-11.

interviewees in these states expressed as much satisfaction as interviewees in states with federally approved plans about the extent to which the grievance procedures decreased the number of prisoner lawsuits and reduced tensions within the prison.

While the arguments for requiring minimum standards are weak, it is clear that these standards prevent many states from seeking federal certification. As noted above, there are several reasons for this. To the extent that state officials object that the federal requirements are unnecessary or counterproductive, they appear to be correct. To the extent that these officials simply resent what they perceive as federal imperialism, they may be overreacting (though it is certainly unseemly for the federal government to require more from the states than it requires from itself). Nonetheless, this response is hardly surprising. In any event, requiring the states to adopt these unnecessary minimal standards impedes the arrival of much-needed relief for the federal courts. The sensible response is therefore to eliminate the requirements.

e. Recommendation.

While the analysis above suggests that Congress should relax the requirements of present §1997e, the question is how much? The most strenuous objections are aimed at §1997e(b)(2)(A) and (E) -- the requirements of inmate participation and outside review. One possibility is simply to eliminate these two requirements but otherwise to leave the statute alone. We recommend bolder action.

To begin with, the analysis above suggests that (apart from procedures already required by due process) it is difficult to say that any particular provisions must be a part of a successful grievance procedure. Conditions vary from state to state and from prison to prison. What may be essential in one prison may be unnecessary or burdensome in another. Requiring inmate participation may foster conflict between inmates who grieve and inmates who participate in the grievance process in a maximum security prison, but not in a minimum security prison. Consequently, the best solution is to leave state and local prison administrators flexibility to develop plans suited to their particular prisons.

Second, many state officials resent being told by the federal government what they must do to be fair. These officials believe that they know what works in their prisons better than federal bureaucrats. For this reason, any particularized federal requirements are likely to discourage some state and local officials from opting into the federal program. Whether this belief is irrational is beside the point: federal courts and federal claimants suffer from the resultant influx of prisoner civil rights cases.

Third, the most that is necessary is to ensure that state plans provide some minimally adequate level of fairness. Ultimately, no prisoner's claim is delayed for more than a few months, and the prisoner can always reactiviate his federal suit if the administrative procedure provides inadequate relief. Moreover, the states have their own reasons to adopt adequate

administrative programs. State officials are no happier than federal judges with the number of lawsuits being prosecuted by prison inmates. To the extent that an administrative remedy can reduce the time and expense associated with resolving prisoner claims, the states have an incentive to create a good one.

Accordingly, we recommend that Congress repeal the minimal standards. The general standard adopted in §1997e(a)(1) -- that the state's remedy be "plain, speedy, and effective" -- is adequate for these purposes.

Another question concerns the certification procedure administered by the Attorney General. At present, this procedure operates alongside the process of judicial review of state remedial programs. But judicial approval may come slowly; courts in one district may accept a state's procedures while courts in another reject them -- or different judges in the same district may reach different conclusions about the same procedures. When this happens, the state must await a definitive ruling from the court of appeals. Certification by the Attorney General, in contrast, provides a clear and unequivocal declaration that a state's plan is adequate. Certification thus offers states a "safe harbor" in addition to the option of obtaining judicial approval.

This may describe how certification ought to be perceived, but it is not how certification is perceived in fact. Many state officials assume that they are required to obtain approval from the Attorney General, and they resent it. As a result, something that could facilitate state adoption of internal grievance programs seems to have become an obstruction.

Given these problems, a case can be made for eliminating the Attorney General's role in implementing §1997e altogether. The question whether a particular remedy is adequate is well suited for judicial resolution. Bur the Attorney General's participation tends to reduce the courts' role because administrative regulations receive a great deal of deference. If the Attorney General construes the statute narrowly (as in 28 C.F.R. §40.7), he effectively establishes a nationwide obstruction to state participation in the scheme established in §1997e. On the other hand, if it were clear that the courts were not bound to defer to the Attorney General's interpretations or decisions denying certification, there would be little harm in retaining this option for state and local prisons that choose to exercise it.

A final problem concerns the length of time the federal action should be stayed. The 90-day limit in §1997e may be too short for some states. In California, for example, at least 50 days are needed to complete the three levels of review even if no time is included for informal resolution, delivery of papers to and from the inmate, and the inmates' decisions to proceed further. At the same time, it is important both for inmates and for the federal courts to specify a time limit. Accordingly, we recommend extending the 90-day period to 120 days. This should provide adequate time for reasonable state grievance procedures without unduly prejudicing the claimant of the claim is not resolved.

Congress can implement these recommendations by rewriting §1997e as follows:

> (a) In any action brought pursuant to section 1983 of this title by an adult confined in any jail, prison or other correctional facility, the court shall continue the case for 120 days in order to require exhaustion of administrative remedies if the defendant shows the court or if the Attorney General certifies that plain, speedy, and effective remedies are available to the confined person, provided that the Attorney General's failure to certify an administrative procedure shall not be binding on the courts.
>
> (b) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, satisfy the requirements of subsection (a).
>
> (c) The Attorney General may suspend or withdraw the certification under subsection (b) whenever he has reasonable cause to believe that the procedure no longer provides a plain, speedy, and effective remedy.
>
> (d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an actioin under section 1997a or 1997c.

3. The Federal Tort Claims Act.

a. The Tort Claims Process.

In 1946, Congress enacted the Federal Tort Claims Act (FTCA) to permit recovery of damages from the federal government for torts committed by government employees acting within the scope of their employment.[1] As originally enacted, the FTCA provided that any tort claim against the government in excess of $1,000 (a figure later raised to $2,500) could be settled only after the claimant had filed suit in a federal district court. But this procedure led to unnecessary litigation, and Congress amended the FTCA in 1966 to require claimants to present their tort claim for settlement to the allegedly responsible federal agency before filing suit. Claimants can sue only after the agency either denies their claim or fails otherwise to dispose of it within six months.[2]

In making these changes, Congress hoped that the notice requirement would "protect the [government] from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit."[3] Settlement would be facilitated by making it "possible for the claim first to be considered by the agency whose

1. 28 U.S.C. §§1346(b), 2671 et seq.

2. 28 U.S.C. §§2401(b), 2675(a).

3. S. Rep. No. 1327, 89th Cong., 2d Sess. 4 (1966).

employee's activity allegedly caused the damage. That agency would have the best information concerning the activity which gave rise to the claim."[4] To further encourage administrative settlement, Congress increased the agencies' authority to settle claims without Department of Justice approval from $2,500 to $25,000.[5]

It is difficult to measure how successful this effort has been in shifting the disposition of federal tort claims to the administrative realm. On the one hand, despite the changes in the administrative settlement process, the number of federal tort actions filed in the federal courts has continued to grow. FTCA cases increased by 130% between 1960 and 1983.[6] In 1986, the Civil Division of the Department of Justice reported that the number of new tort cases filed against the government had doubled from the prior year to 3,289 cases.[7] Data from the Government Accounting Office suggest that the number may have been closer to 3,000, and that the number of FTCA claims remained in that range in both 1987 and 1988. Unfortunately, because the federal government does not keep detailed statistics on the disposition of FTCA tort claims, it is impossible to discern the exact number

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4. S. Rep. No. 1327, supra note 3, at 5.

5. 28 U.S.C. §2672. 38 U.S.C. §233(a) allows the Attorney General to delegate settlement authority to the Administrator of Veteran Affairs, and the Attorney General has exercised this power by authorizing the Administrator to settle FTCA cases up to $100,000. 53 Fed. Reg. 37753 (Sept. 28, 1988).

6. R. Posner, The Federal Courts: Crisis and Reform 82 at Table 3.9 (1985).

7. 1986 Annual Report of the Attorney General 119.

of cases settled at the administrative level. What evidence exists, however, suggests that the number is high.[8] In addition, the administrative process has been successful in exposing the meritless character of many claims and resolving them before formal litigation. A study undertaken for the Administrative Conference of the United States, for example, states that while "no accurate ratio [of lawsuits filed to denied claims] can be posited,... informal estimates ... would put the ratio at no more than one to ten and more likely at one to fifteen or twenty."[9]

Nonetheless, although the administrative settlement process seems to be working fairly well, as long as the number of federal tort claims continues to mount there is reason to look for further improvements. The discussion below offers a number of suggestions toward this end.

b. Proposals for Reform.

Our review of the administrative settlement process revealed two ways to reduce the number of FTCA claims in the federal courts without unfairly penalizing either claimants or the government. First, Congress should enact statutory provisions requiring claimants to provide more detailed information for settlement purposes to the appropriate agencies. By facilitating

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8. Bermann, Federal Tort Claims at the Agency Level: The FTCA Administrative Process, 35 Case W. Res. L. Rev. 509, 535-38 (1985).

9. Bermann, supra note 8, at 538-39 & n.144.

agency investigation and evaluation of claims, disclosure would increase the likelihood of settlement at the agency level and thus reduce the burden on the courts. At best, however, this measure will succeed only partly, and many tort claims will remain to be litigated. In our view, there is little need for full-blown Article III adjudication of many of these claims, particularly the smaller ones. Moreover, the costs of litigating small claims may place litigants at an unfair disadvantage (especially in settlement negotiations). Accordingly, we also recommend that Congress shift the adjudication of claims for less than $10,000 to an alternative administrative forum that is more informal and less expensive. This could be done by establishing Administrative Law Judges (ALJs) within the various agencies whose sole function would be the impartial resolution of federal tort claims. Alternatively, Congress could establish an independent small tort claims court with exclusive jurisdiction to handle small FTCA claims. If successful, this procedure could be extended to other small claims against the government.

These proposals are examined in turn.

i. Facilitating Administrative Settlements.

Although presentment of claims to the agency was made a jurisdictional prerequisite to FTCA suits in the 1966 amendments, Congress failed to specify whether and in what manner claimants must substantiate their claims.[10] The Attorney General has filled this gap by promulgating a comprehensive set of

regulations governing the procedures by which agency heads may conduct and settle claims.[11] The pertinent regulations state that a claim is properly presented when the federal agency receives an executed Standard Form 95 or other written notification that includes a claim for money damages of a particular amount and evidence of the representative authority of the person signing on the claimant's behalf.[12] In addition, the regulations specify evidence or information that a claimant may be required to submit to an agency, such as a list of survivors in a claim based upon death or a physician's report in a personal injury claim.[13]

Rather than facilitate the settlement process, the Attorney General's regulations have generated substantial litigation over their meaning and effect. Courts disagree about whether the regulations establish jurisdictional requirements for presenting a claim or merely outline the procedures for settlement negotiations. While ostensibly a dispute over how to interpret the regulations, the courts are also divided over whether the FTCA grants the Attorney General power to define what constitutes a jurisdictionally sufficient claim.

One view, exemplified by Swift v. United States,[14] makes

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10. See, e.g., GAF Corp. v. United States, 818 F.2d 901, 917 (D.C. Cir. 1987).

11. 28 C.F.R. §§14.1-.11.

12. 28 C.F.R. at §14.2.

13. 28 C.F.R. at §14.4.

14. 614 F.2d 812 (1st Cir. 1980).

compliance with the Attorney General's regulations a jurisdictional prerequisite for maintaining a federal court action. Unless the claimant provides this information, both agency and court may treat the claim as if it has not been filed. Other courts have rejected the Swift standard for a "minimal notice" test. On this view, agencies may require compliance with the Attorney General's regulations to facilitate settlement review, but not to prevent claimants from filing suit in federal court. To establish jurisdiction, the FTCA is deemed to require only that claimants provide enough information to give the agency notice of the nature of the claim. Thus, Adams v. United States[15] found "minimal notice" satisfied by a written and signed statement setting out the manner in which the injury was received in enough detail to enable the agency to begin its investigation together with a claim for monetary damages. Several other circuits have adopted this position,[16] which is also favored by many commentators.[17]

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15. 615 F.2d 284, 292 (5th Cir. 1980).

16. See GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987); Warren v. United States Dept. of Interior Bureau of Land Management, 724 F.2d 776 (9th Cir. 1984) (en banc); Douglas v. United States, 658 F.2d 445 (6th Cir. 1981).

17. See, e.g., Bermann, supra note 8, at 568-569; Comment, The Act of Claimantship: What Constitutes Sufficient Notice of a Claim Under the Federal Tort Claims Act, 52 Cinn. L. Rev. 149, 169-171 (1983); Note, Federal Tort Claims Act: Notice of Claim Requirement, 67 Minn. L. Rev. 512, 529 (1982); Note, Torts -- Federal Tort Claims Act Administrative Claim Prerequisite -- Avery v. United States, 680 F.2d 608 (9th Cir. 1982), Ariz. St. L.J. 173, 189 (1983).

In our view, the more lenient Adams standard fails to provide agencies with adequate information to conduct meaningful settlement negotiations, thus frustrating the settlement process. The 1966 amendments were intended to encourage settlement before litigation was commenced. Adams leads claimants instead to treat this process as a procedural hurdle to be surmounted as quickly and with as little effort as possible on the way to the courthouse. In contrast, the Attorney General's regulations foster early resolution at the agency level by enabling agencies to obtain the information necessary to make a meaningful assessment of the claimed injury before litigation is commenced.[18]

The arguments most often made against the Attorney General's regulations are that requiring claimants to disclose available information to agencies might prejudice them in ensuing FTCA litigation by apprising the government of weaknesses in the claim, and that the information requested is not always readily available. These objections are insubstantial. The information requested by the regulations is practically always obtainable in discovery anyway, so the government in fact obtains no advantage.[19] Similarly, the regulations seek only information

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18. See Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 Mich. L. Rev. 1641, 1650-51 (1983).

19. See Note, supra note 18, 81 Mich. L. Rev. at 1650. The sole exception is 28 C.F.R. §14.4(b)(1), which provides that "the claimant may be required to submit to a physical or mental examination by a physician employed by the agency ...." Federal Rule of Civil Procedure 35 allows such examinations, but requires judicial approval after a showing of good cause.

that ordinarily the claimant already possesses. It would be easy enough, however, to make an exception for any rare cases in which this is not true.

The chief problem with the regulations is, as some courts have suggested, that it is far from clear that Congress meant to give the Attorney General power to define the jurisdictional requirements for stating a sufficient claim. Congress should rectify this uncertainty by amending the FTCA to include a suitable definition of what a claimant must present to the agency for purposes of satisfying this jurisdictional requirement. In particular, Congress should require: (1) written notice of the time, place, cause, and circumstances of the injury; (2) a claim for damages in the form of a sum certain; and (3) basic substantiation along the lines of the Attorney General's regulations. Congress should also specify that, to satisfy the jurisdictional prerequisites of the FTCA, the required information must be presented to the agency within a reasonable period (not to exceed 30 days) after a claim is made.

Congress should permit agencies to demand full disclosure only on condition that they make equally full disclosure to claimants. By increasing the fairness of the agency settlement process, parity in access to information -- with appropriate sanctions for noncooperation or abuse by either side -- will encourage claimants to take the process more seriously and to accept it as the proper vehicle for resolving their claims rather than as a procedural barrier to litigation. Greater disclosure by both sides will also contribute to more informed settlement negotiations at an earlier stage.

Before turning to more substantial suggestions for improving the disposition of federal tort claims, we suggest three additional minor reforms to improve the administrative settlement process. First, the $25,000 cap on agencies' settlement authority should be raised to at least $50,000 so that fewer settlements require Justice Department approval. The need for approval impedes the settlement process in several ways. It impairs the ability of claims officers to make binding concessions in negotiations and win concessions from claimants. If approval of a proposed settlement is withheld, claims officers may not only be embarrassed before their colleagues and claimants, but also lose credibility and leverage in attempting to persuade the claimant to accept what will often be a substantially reduced sum. Furthermore, some claims officers apparently refuse to negotiate large settlements solely to avoid the hassle of dealing with the Justice Department.[20]

We also recommend that Congress make all settlements payable from the general judgment fund. Presently, settlements over $2,500 are paid in the same manner as final judgments and settlements after litigation has begun -- out of the general judgment fund[21] -- whereas settlements for less than this amount

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20. See Bermann, supra note 8, at 644-48. Given these considerations, there is some reason to question the need for a limitation on agency discretion to settle. Agency employees no less than employees of the Department of Justice are employees of the United States and we see no reason to presume that they will be less responsible in protecting the fisc. If the concern that too much power will be given to low-level agency employees, this may be addressed by requiring agency heads to approve large settlements.

21. See 28 U.S.C. §2414; 31 U.S.C. §1304(a)(3)(A).

are paid out of agency funds.[22] Because (unlike the judgment fund) agency appropriations are not automatically replenished, this system gives agency officials a disincentive to settle very small claims. Since these cases ought to be the easiest to settle, Congress should eliminate this disincentive. From the standpoint of overall government expenditures, settling cases for less than $2,500 is likely to be less costly than litigating even a relatively small percentage of these cases.

Finally, we recommend that Congress amend 28 U.S.C. §2678, which allows an attorney to charge up to 25% of the value of a judgment after litigation but only 20% of the value of a settlement. While this difference may be justified on the ground that litigating requires more work from the attorney, it nonetheless creates a disincentive to settling. As a general matter, we believe that attorneys and clients should be free to work out their own fee arrangements. Even if there is a reason to establish a cap, there is no reason to make it different depending on how the case is resolved. We therefore recommend making the limitation 25% in all cases and allowing attorneys and clients to negotiate within that limit.

ii. Alternative Methods of Adjudication.

The above suggestions should offer some relief to the overloaded federal courts, but they are not enough. Even with an

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22. See 28 U.S.C. §2672.

improved settlement process, many FTCA claims will inevitably result in litigation. Some of these cases will involve very small amounts of money, and it seems unfortunate and unnecessary to devote the limited resources of the overworked federal courts to them -- particularly since they invariably turn on state law and are in federal court only because the United States is the defendant. An alternative forum is used for even large contract claims against the government; they must be heard in the Claims Court. Yet under present law, a federal prisoner complaining of the loss of a $2 comb occasioned by the negligence of a guard may demand a full-scale trial before an Article III judge. We believe that Article III federal judicial resources can be put to better use.

At the same time, we also believe that the present system is disadvantageous many claimants. Litigating in federal district court under the Federal Rules of Civil Procedure is expensive, and the federal government finds it much easier to pursue this litigation than the small claimant. A less formal, less expensive procedure for small claims may thus benefit claimants by enabling them to base their choice between settlement and litigation on the merits of the government's offer rather than on the costs of litigating.

For these reasons, we recommend that Congress transfer power to decide FTCA claims for less than a specified minimum amount in controversy to independent but non-Article III decisionmakers. The simplest way to do this would be to establish an impartial decisionmaking mechanism within each federal agency by appointing

new or additional ALJs to hear claims under a certain amount, say $10,000. De novo review by the federal courts could then be limited to questions of law with questions of fact reviewed under either a substantial evidence or a clearly erroneous standard.[23] Alternatively, district court review of FTCA claims might be eliminated altogether, with direct appeal or certiorari review placed in the courts of appeals. Indeed, because FTCA cases usually involve routine application of common law tort principles -- as opposed to issues of constitutional or civil rights or federal statutory law -- we believe that Congress could give the ALJs final decisionmaking power over claims for less than the minimum amount in controversy.[24]

Because our recommendation is limited to small claims, however, it would be unfair to force litigants to come to Washington to litigate. This could be avoided if the agencies placed ALJs in their branch offices around the country. Such a solution is certainly feasible for large agencies that maintain offices in every state and are often involved in FTCA cases, such as the Postal Service. And while this solution may be less viable for smaller agencies, there is no reason why ALJs in one

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23. See, e.g., 42 U.S.C. 405(g) (substantial review of social security claims).

24. See Free v. United States, No. 88-1710, slip op. at 3 (7th Cir. July 19, 1989) (suggesting Congress "give serious consideration to creating an exclusive rather than merely a preliminary administrative remedy for small tort claims by federal prisoners); Tinker-Bey v. Meyers, 800 F.2d 710, 710 (7th Cir. 1986) (maintaining that a "full-scale federal lawsuit" is not the proper vehicle to determine the flood of prisoner claims alleging loss of personal belongings).

jurisdiction could not adjudicate the FTCA claims of several agencies.

A more serious objection to this approach concerns the possible unfairness or appearance of unfairness of giving exclusive jurisdiction to make final determinations of small FTCA claims to the agencies themselves. As noted above, this problem could be redressed by providing for Article III review. But a still better alternative -- one more consistent with the goals of preserving Article III resources and providing a simplified and less expensive procedure for small claims -- would be for Congress to establish a small tort claims court. This court could dispose of all FTCA claims where the amount in controversy is less than $10,000. Claimants would still be required to present their claims to the appropriate administrative agency, but in the event a settlement could not be reached, claimants would be directed to a specialized claims court. Because such a court would, like the present Claims Court, entertain only claims against the government, full Article III status for its judges would not be constitutionally required.

As noted above, small tort claims are particularly amenable to disposition by a non-Article III tribunal. Such claims rarely involve complicated questions of federal law requiring the oversight of a federal court. On the contrary, they typically involve routine, fact-based determinations of liability and damages under state law. We do not, however, propose to use the state courts as federal small-claims courts -- the usual consequence of establishing a minimum amount-in-controversy

requirement for a particular class of federal litigation. That is a demeaning assignment for the already overworked state courts. Moreover, we believe that the power to adjudicate claims against the United States is more appropriately placed in federal tribunals.

Because FTCA claims share many common features, sending all small FTCA claims to one court may produce significant gains in expertise and efficiency. In 1965, for example, five agencies accounted for over four-fifths of the tort lawsuits filed against the federal government: the Defense Department, the Post Office (as it was then called), the Federal Aviation Agency (as it was then called), the Department of Interior, and the Veterans Administration.[25] The similarity of complaints would thus lead to the fairly rapid development of expertise by the judges with respect to both the operations and policies of the different agencies and the different theories of liability against the government. Small claims court judges would also gain expertise on federal issues arising under the FTCA itself.

The most serious drawback to a centralized FTCA small claims is also a drawback to an ALJ system: it would require victims of small torts to bear the burden and expense of litigating their claims in Washington. One possible solution is to require the judges of the small claims court, like the judges of the Tax Court, to ride circuit and hear claims in various jurisdictions

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25. S. Rep. No. 1327, 89th Cong., 2d Sess. (1966), quoting H.R. No. 1532, 89th Cong. 2d Sess. (1966). See also Bermann, supra note 8, at 589.

around the country. A better solution, however, would be for Congress to vest power to decide small FTCA claims in the magistrates of the various district courts. While this would reduce the gains from consolidation, it would still provide a relatively inexpensive forum in which to litigate FTCA claims.

Other details must still be worked out. Important as they are, however, the details are less important than the principle of establishing some sort of small-claims procedure. If successful, this procedure could be extended to other small monetary claims against the federal government. Small cases of purely pecuniary significance do not belong in an overloaded Article III judiciary already groaning under the burden of important federal litigation.

C. The Division of Jurisdiction Between State and Federal Courts.

Our final recommendations concern the division of jurisdiction between state and federal courts. The implications of this issue for the federal docket are obvious. But doctrines that demarcate the respective spheres of state and federal authority take on added significance because they implicate the bundle of political values collectively labeled "federalism." Even were we inclined to do so, we could not recommend dumping cases on the state courts to reduce the federal docket. We remain sensitive to the rightful claims of independent sovereigns to control certain litigation and to be free of burdens needlessly imposed or assumed.

We believe that the general (though not unvarying) principle of division ought to be that state courts resolve disputes over state law and federal courts resolve disputes over federal law. We do not base this principle on a love of symmetry, but on a theory of comparative advantage and on a concern that federal courts remain accessible to federal claimants in a practical as well as a theoretical sense. It is no use having a technical legal right to sue in federal court if the courts are too crowded to give timely, considered, and competent attention to one's claim.

Consistent with this principle, we approached this area with as much concern for reallocating cases as for reducing the federal caseload. Consequently, some of these recommendations shift cases to the state courts, but others broaden federal

jurisdiction. If the end result leaves the federal docket smaller, that is only because the effects of our recommendation to eliminate diversity jurisdiction dwarf the other recommendations. But our goal in this study is to make the federal courts better, not just smaller.

The six recommendations below fall roughly into two groups. The first three recommendations address the scope of the federal courts' original jurisdiction: diversity jurisdiction, habeas corpus, and removal. We believe our recommendation to abolish most diversity jurisdiction to be among our most important recommendations. For reason having to do with caseload pressues and federalism, it is time to eliminate this long outdated jurisdiction.

The second group of recommendations deal with mechanisms designed to protect the respective jurisdiction of the state and federal courts: pendent and ancillary jurisdiction, the Anti-Injunction Act, and abstention. These three doctrines are related in that all constitute mechanisms for shifting cases involving a mix of state and federal issues into the appropriate forum. Although we find these doctrines basically to be sound, we recommend a number of changes to fine-tune them. The overall theme is to protect a federal claimant's practical ability to obtain a federal forum without needlessly asserting federal jurisdiction to decide state law issues.

1. Diversity Jurisdiction.

When the federal courts were created, deciding diversity cases was one of their most important functions. Indeed, without diversity jurisdiction, "the circuit courts created by the First Judiciary Act would have had very little to do."[1] At the time, there was not much federal law and thus not much need for federal question jurisdiction. Instead, the most important concerns in establishing federal courts were to "enhance[] awareness in the people of the existence of the new and originally weak central government,"[2] and to foster a secure environment for interstate commerce.[3]

While the grant of diversity jurisdiction apparently served these purposes well, conditions had changed by the end of the nineteenth century. Commerce among the states was flourishing and less in need of protection from the federal courts. Furthermore, the federal government and the laws it enacted were vastly more important than they had been when the federal courts were established. General federal question jurisdiction had been conferred in 1875, and the business of the federal courts focused increasingly on questions of federal law. These changes soon generated pressures to curtail or eliminate diversity jurisdiction. Roscoe Pound delivered the opening salvo in 1906,

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1. Henry J. Friendly, Federal Jurisdiction: A General View 141 (1973)[hereinafter Friendly, Federal Jurisdiction].

2. American Law Institute, Study of the Division Between State and Federal Courts 101 (1969)[hereinafter ALI Study].

3. Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928)[hereinafter Friendly, The Historic Basis]; Jerome Frank, Historical Bases of the Federal Judicial System, 13 L. & Contemp. Probs. 2 (1948).

describing diversity as "archaic" in a speech to the American Bar Association.[4] Outraged members of the bar accused Pound of attempting to "destroy that which the wisdom of centuries has evolved" and made concerted efforts to prevent his speech from being printed.[5]

The debate begun by Dean Pound continues today, and while its tone has mellowed, the underlying emotions apparently have not. Few issues of judicial administration have evoked the same degree of concern and attention. Interestingly, the alignment of parties on the diversity question has changed very little since 1906. As one group of researchers observed, "[i]t is not too great a simplification to say that public and private sectors are ... joined in issue over diversity jurisdiction."[6] Abolition or curtailment of diversity has been supported by every Administration since President Carter's, as well as by the Judicial Conference, the American Law Institute, the state courts, numerous public interest and legal aid organizations and most legal scholars. A member of this Committee observed that a listing of the twentieth century critics of diversity jurisdiction "reads like a lawyer's Hall of Fame"; his list, which failed to mention many prominent diversity critics,

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4. Pound, Address on the Causes of Popular Dissatisfaction with the Administration of Justice, reprinted in 35 F.R.D. 273 (1964).

5. J. Hurst, The Growth of American Law: The Law Makers 362 (1950).

6. Katherine E. Douglas, Jeanna F. Celeste & John M. Dawson, A Justice Impact Statement on the Abolition of Diversity Jurisdiction, Report Submitted to the Department of Justice at 6 (April 1980).

included Roscoe Pound, Louis Brandeis, Felix Frankfurter, Robert Jackson, Henry Friendly, Charles Alan Wright, Warren Burger and Earl Warren.[7] On the other side of the debate stands the private bar, which has generally opposed changes in diversity jurisdiction.[8] To be sure, a few judges and academics have supported retaining diversity jurisdiction,[9] but the primary support for this position has come from state and national bar associations and the American Trial Lawyers Association.

The bar has successfully blocked most efforts to abolish or curtail diversity jurisdiction. Congress did recently raise the minimal amount in controversy from $10,000 to $50,000, but while it is too early to measure the actual affect of this reform, we do not expect it to have much effect given the ease with which this amount can in good faith be pleaded.[10] Participants on both sides of the diversity dispute have advised the Committee that any recommendation to abolish or curtail diversity jurisdiction is unlikely to succeed.

Nonetheless, the task Congress assigned us makes it impossible to ignore this issue. And after carefully examining

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7. Robert W. Kastenmeier & Michael J. Remington, Court Reform and Access to Justice: A Legislative Perspective, 16 Harv. J. Legis. 301, 313 (1979).

8. See John P. Frank, Diversity Jurisdiction: Let's Keep It, 3 Adelphi L.J. 75, 76-78 (1984)[hereinafter Frank, Let's Keep It].

9. See, e.g., Charles L. Brieant, Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet, New York State Bar Journal 20 (July, 1989); Moore & Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 Tex. L. Rev. 1 (1964).

10. See infra notes 85-89 and accompanying text.

the arguments on both sides of this debate, we conclude that abolishing or curtailing diversity jurisdiction should be among the first steps taken to ease the caseload pressures in the federal courts. While a case could possibly be made for diversity jurisdiction in a world of unlimited resources, few other classes of disputes have a weaker claim on federal judicial resources. Moreover, while eliminating diversity jurisdiction will not alone solve the problem of federal caseload pressures, no other single step can do anywhere near as much. Accordingly, we recommend abolition of diversity (with three exceptions to be discussed below). Alternatively, we offer several narrower proposals to curtail diversity jurisdiction in cases where the arguments for retaining this jurisdiction are weakest.

a. The Impact of Diversity Jurisdiction: Caseload Statistics.

Diversity cases constitute a substantial portion of the federal docket. In 1988, 68,224 cases were filed in the district courts based on diversity of citizenship: 28.5% of the district courts' civil docket and 24.1% of the total district court docket.[11] During this same year, 4,504 of the 32,686 appeals filed were diversity cases: 13.7% of the docket of the courts of appeals.[12] In 1987, 67,071 diversity cases were filed,

11. 1988 Annual Report of the Director of the Administrative Office of the United States Court, Tables C-2, D [hereinafter 1988 AO Report].

12. 1988 AO Report, supra note 11, at Table B-1A.

comprising 28% of the federal courts' civil docket and 23.8% of the total federal docket.[13] In that year, 13.2% of the docket of the courts of appeals were diversity cases (4,065 of the 30,798 appeals filed).[14] Since at least the early 1970's, diversity cases have consistently accounted for 25% of the district courts' civil docket, 20% of the total district court docket, and 10-14% of the docket of the courts of appeals.[15]

To gauge the full impact of diversity cases on the federal courts, we must adjust these raw caseload figures for the difficulty of diversity cases relative to other components of the courts' dockets. With respect to the district courts, diversity cases are more demanding than the average case on the docket as a whole. This conclusion is supported by two measures. First, diversity cases are overrepresented among trials, which place the greatest demand on the time and energy of federal district judges. Thus, in 1987, diversity cases accounted for 42.6% of civil trials and 56.5% of civil jury trials;[16] in 1988, 39.2% of

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13. 1987 Annual Report of the Director of the Administrative Office of the United States Courts, Tables C-2, D [hereinafter 1987 AO Report].

14. 1987 AO Report, supra note 13, at Table B-1A.

15. See Henry J. Friendly, Federal Jurisdiction, supra note 1, at 140-41 (1972 figures); Report of the Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts (January, 1977)(1976 figures)[hereinafter Bork Report]; M. Caldwell Butler, Diversity in the Court System: Let's Abolish It, 3 Adelphi L.J. 51, 54 (1984)(1982 figures); Richard A. Posner, The Federal Courts: Crisis and Reform 139-141 (1985)(1983 figures)[hereinafter Posner, The Federal Courts]. Prior to the 1970's, diversity cases constituted an even larger portion of the federal docket. See Friendly, Federal Jurisdiction, supra note 1, at 140.

16. 1987 AO Report, supra note 13, at Table C-4. In 1987, a

civil trials and 51.5% of civil jury trials were in diversity cases.[17] These percentages are relatively unchanged since at least the early 1970's.[18] Second, diversity cases were found to be more difficult than average in a "time and motion" study of federal district judges conducted by the Federal Judicial Center in 1979. The study assigned a weight of 1.2192 to diversity cases, which means that the average diversity case was 22% more demanding than the average case on the district courts' docket as a whole.[19] More recent case weightings indicate that in 1987 the diversity cases that made up 28% of the civil cases filed that year constituted 36.5% -- more than one third -- of the weighted civil caseload.[20]

With respect to the courts of appeals, there is little evidence to judge the difficulty of diversity cases. The number of published opinions of a given type might provide a good measure of difficulty, since opinions are generally reserved for the most difficult cases. Unfortunately, there are no published

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total of 11,913 civil cases were disposed of during or after trial. Of these, 5,078 were diversity cases. Of the 6,299 civil cases disposed of during or after a jury trial, 3,562 were based on diversity.

17. 1988 AO Report, supra note 11, at Table C-4. Of the 11,618 civil cases disposed of during or after trial, 4,559 were based on diversity. Of the 5,920 jury civil jury trials, 3,051 were based on diversity.

18. See authorities cited supra note 15.

19. Steven Flanders, 1979 Federal District Court Time Study (Fed. Jud. Center, October 1980).

20. See Anthony Partridge, The Budgetary Impact of Possible Changes in Diversity Jurisdiction 16 (Fed. Judic. Cent. 1988)[hereinafter Partridge, Budgetary Impact].

statistics on the subject-matter of written opinions. In his study of the federal courts, Judge Posner examined a sample of opinions from 1983 and found that only 8% of the opinions in the sample were diversity cases.[21] Although this sample was by no means representative,[22] it suggests that diversity cases may be below average in difficulty at the court of appeals level.

b. The Case For and Against Diversity Jurisdiction.

Before considering the arguments for and against diversity jurisdiction, it is necessary preliminarily to address one point that is sometimes made by advocates of diversity. Noting that diversity has been part of federal jurisdiction since 1789, its proponents claim that so well-established a practice "should not be altered in the absence of a compelling showing of need for change."[23] We do not dispute the proposition that Congress should not needlessly disturb the status quo (though it seems evident that if the federal courts were being established for the

21. Posner, The Federal Courts, supra note 15, at 139.

22. Judge Posner chose the volume of the Federal 2d Reporter in which the first opinion was dated January and then counted off the first 100 cases in that or (if necessary) the succeeding volume, subject to the constraint that each circuit be represented in each sample by the same proportion that it bore to all signed opinions for the fiscal year. See Posner, The Federal Courts, supra note 15, at 71.

23. Statement of Robert D. Raven, President, American Bar Association, before the Federal Courts Study Committee, Tr. at 4 (March 20, 1989). See also Marbury, Why Should We Limit Diversity Jurisdiction?, 46 A.B.A.J. 379 (1960); Frank, The Case for Diversity Jurisdiction, 16 Harv. J. Legis. 403, 406 (1979)[hereinafter Frank, The Case for Diversity].

first time today they would not have diversity jurisdiction). But the issue of whether to retain diversity jurisdiction can be resolved by burdens of persuasion. If Congress concludes that the workload of the federal courts is a problem, the issue then becomes how best to solve the problem. No class of cases or head of jurisdiction carries a presumption in its favor that does not rest on some reasoned argument. Hence, the question is not whether opponents of diversity jurisdiction can carry some burden of proof. The question is, if decreasing the jurisdiction of the federal courts is necessary, what jurisdiction should be preserved, eliminated or curtailed? Diversity jurisdiction has no favored status in this analysis.

Moreover, the point that diversity jurisdiction has been around since 1789 is misleading. For while other facets of federal jurisdiction have steadily expanded over the last century, there has been a trend to limit diversity. To be sure, Congress so far has enacted only modest restrictions -- retaining and then increasing the minimal amount-in-controversy, making corporations citizens of the state in which they have their principal place of business, limiting removal to out-of-state defendants. Nonetheless, the clear trend to limit diversity stands in sharp contrast to other forms of federal jurisdiction. The history thus suggests that over time the relative importance of diversity jurisdiction relative to federal question cases has diminished considerably.

i. <u>The Case Against Diversity Jurisdiction</u>.

The simplest reason to eliminate diversity jurisdiction is suggested by the numbers above: abolishing diversity will significantly reduce the caseload problem in the federal courts. As Justice Frankfurter put it, "[a]n Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."[24] Of course, eliminating any 25% share of the federal docket would relieve the federal caseload burden just as well, and just as there should be no presumption in favor of retaining diversity, so there should be no presumption in favor of abolishing or curtailing it. Nonetheless, there are good reasons for making a cut here.

First, perhaps no other major class of cases has a weaker claim on federal judicial resources. We noted in Part II that there is no consensus on precisely how federal jurisdiction should be allocated, but that there is agreement on general priorities. One point on which there is virtual consensus is that state law cases are a lower priority than cases based on federal law. Hence, if something is to be cut in order to preserve federal judicial resources, it seems obvious that diversity should be one of the first things to go.

Advocates of diversity respond that some federal question cases are less important than many diversity cases and could be shifted to the states; favorite examples include the federal odometer act and personal injury claims under the FELA and the

24. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 651 (1949)(dissenting opinion).

Jones Act.[25] But whether some federal questions are less "important" than some state law questions is beside the point. Even assuming that there is an objective measure of "importance," federal judicial resources are not reserved for the "most important" cases: they are reserved for the cases in which a federal forum is most appropriate. The proper question, then, is whether some federal questions are less important for federal courts to decide, and the answer to that question is clear. The federal government already imposes a substantial burden on state courts by requiring them to hear federal question cases concurrently with federal courts. Given this burden and the constraints of federalism generally, it is inappropriate for Congress to enact a substantive law and require the states to devote judicial resources to administering it without also making federal resources available.

Moreover, while the illustrations offered by the proponents of diversity are good ones, they account for only a tiny fraction of the total federal caseload. Hence, even if their proposals were implemented, it would not significantly reduce the caseload of the federal courts. Certainly adopting these proposals would not do anywhere near as much to reduce the federal caseload as abolishing diversity. The same response applies to the related claim that federal caseload pressures can be reduced in ways that do not require cutting back on federal jurisdiction.[26] We agree

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25. See, e.g., Brieant, supra note 9, at 22.

26. See, e.g., Brieant, supra note 9, at 22.

and recommend that Congress adopt many of these proposals. But these steps are not enough -- any more than just eliminating diversity is enough. At the same time, we reiterate, no other single step will do anywhere near as much to relieve the federal courts' current caseload burden as abolishing diversity.

Second, beyond questions of federalism and the general preference for having federal courts decide federal questions and state courts decide state questions lies a simpler point concerning expertise and the efficient use of resources. Judge Friendly claimed that the "greatest single objection" to diversity "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."[27] Federal courts are certainly capable of deciding state law questions, but they offer no special advantages in such cases; on most issues, and especially when it comes to interpreting state statutes, the state courts have greater expertise and are probably better. By the same token, federal jurisdiction does offer special advantages in federal question cases, where the benefits of experience and expertise undoubtedly lie in the federal courts. Hence, diversity jurisdiction imposes a significant burden on federal courts to decide issues on which they have no special expertise at the expense of tasks they can perform significantly better than the state courts.[28]

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27. Friendly, Federal Jurisdiction, supra note 1, at 141.

28. This point has been made many times over the years. In

Furthermore, federal diversity decisions are less valuable on the whole than either state court decisions or federal decisions in federal question cases. After Erie Railroad v. Tompkins,[29] the opinion of a federal court sitting in diversity does not constitute precedent within the state system. Federal opinions may, of course, persuade state courts, and the picture of the federal judge as nothing more than a ventriloquist's dummy is thus probably overdrawn.[30] But diversity rulings "are in the nature of an advisory opinion whose contribution to establishing the law is at best uncertain."[31] Diversity most resembles arbitration in that its primary value is limited to resolving the particular dispute before the court. And while it is important to resolve these disputes, it makes more sense to do so in a forum whose rulings provide guidance to other parties, so that these other parties can avoid involvement in similar disputes. In other words, diversity squanders federal judicial resources by consuming more than a quarter of judges' time on cases that make little contribution to developing any organized body of law.[32]

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addition to Judge Friendly, see, e.g., Bork Report, supra note 15, at 14; Butler, supra note 15, at 61; Wilfred Feinberg, Is Diversity Jurisdiction An Idea Whose Time Has Passed?, New York State Bar Journal 14, 16 (July, 1989).

29. 304 U.S. 64 (1938).

30. See Posner, The Federal Courts, supra note 15, at 144.

31. Butler, supra note 15, at 61.

32. This point also has been made many times over the years. See, e.g., Charles A. Wright, Arthur R. Miller & Edward Cooper, Federal Practice and Procedure §3601 at 353 (2d ed. 1984)(citing authorities). As we discuss below, to the extent that federal

Third, diversity jurisdiction is frequently a source of friction between state and federal courts.[33] In addition to the tensions resulting from obvious and subtle disagreements in interpreting state law, it is not uncommon for a party to commence an action based on diversity jurisdiction that is identical to an action already commenced in the state court, or vice-versa. This leads to a variety of problems as courts in two independent judicial systems strive to preserve the integrity of their own decisionmaking process without unduly trampling on the perogatives of the other.

Fourth, the desire to minimize these frictions and to avoid federal interference with the development of state substantive law generates complex procedural problems that make it more expensive and time-consuming to litigate diversity cases. Some of these problems are familiar. Most commentators, for example, concede that administering the Erie doctrine is difficult. Similarly, most commentators recognize the problem faced by a federal court when state law is unclear: "[w]hereas the highest court of the state can 'quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,' a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest court would ultimately decide."[34]

decisions in diversity cases do still "make" common law, this is a disadvantage that supports abolishing diversity. See infra note 39 and accompanying text.

33. See Roger J. Miner, The Tensions of a Dual Court System and Some Prescriptions for Relief, 51 Albany L. Rev. 151, 154 (1987); Bork Report, supra note 15, at 14.

34. Friendly, Federal Jurisdiction, supra note 1, at 142

Diversity cases also frequently raise intricate problems of abstention and managing concurrent litigation.[35] More important, the need to prevent excessive federal usurpation of state jurisdiction led to the "complete diversity" rule of Strawbridge v. Curtiss.[36] Professor Rowe has documented the "pernicious effects" of this rule, including: (1) disputes in determining citizenship; (2) problems associated with determining the proper alignment of parties; (3) litigation required to determine whether diversity has been created improperly through collusive assignment of claims or appointment of a representative; (4) problems in adjudicating questions of "indispensable," "necessary" and "proper" parties under Federal Rule of Civil Procedure 19, and what to do when joining these parties will destroy diversity; (5) similar problems in litigating questions of permissive intervention and intervention of right; (6) questions raised by attempts to remove "separate and independent" claims under 28 U.S.C. §1441; and (7) the wide variety of problems that arise in sorting out difficult issues of pendent and ancillary jurisdiction.[37] To these one may add the need to

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(quoting J. Skelly Wright, The Federal Courts and the Nature and Quality of State Law, 13 Wayne St. L. Rev. 317, 321 (1967)).

35. See, e.g., Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). See generally Miner, supra note 33, at 156-57.

36. 7 U.S. (3 Cranch) 267 (1806).

37. See Thomas D. Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963 (1979). See also Miner, supra note 33, at 154-58; David P. Currie, The Federal Courts and the American Law Institute (Part I), 36 U. Chi. L. Rev. 1 (1968).

administer the judge-made exceptions for domestic relations and probate cases.

Fifth, diversity jurisdiction operates as a safety valve that relieves pressure to improve the states' judicial systems. Diversity provides litigants who satisfy its requirements a choice of forums, enabling them to pick the court that is "better" for them in any particular case. As such, the continued existence of diversity "diminishes the incentives for state court reform by those influential professional groups who, by virtue of diversity jurisdiction, are able to avoid litigation in the state courts."[38]

Sixth, while it would be an overstatement to say that there are no benefits from diversity jurisdiction, most of the original justifications for diversity jurisdiction no longer exist. Commercial interests still appreciate the option of bringing or removing a case into the federal courts, but the interstate market no longer requires this protection. Similarly, even if the advent of Erie has not eliminated the role of the federal courts in making common law, the contribution these courts make is significantly less than it was in the nineteenth century. Indeed, to the extent that the federal courts do still make and shape common law after Erie, this should be regarded as a disadvantage of retaining diversity.[39]

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38. Wright, Miller & Cooper, supra note 32, §3601 at 354 & n.63 (citing authorities).

39. One recent study notes that federal courts cite their own

One benefit of diversity jurisdiction undoubtedly remains: as the bar's overwhelming support for this jurisdiction demonstrates, diversity provides a forum that litigants (or at least their lawyers) find desirable and satisfactory. In addition to the tactical advantages a federal forum may offer in some kinds of cases in some states, out-of-state attorneys may be more familiar with the federal rules of procedure and may desire the benefits these procedures provide. Proponents of diversity frequently claim that the fact that lawyers desire the option of choosing an appropriate forum is a strong reason for retaining diversity jurisdiction.[40] But "[t]he value of giving lawyers a tactical choice they would not otherwise have, and of affording lawyers a greater opportunity to litigate in federal court, cannot in itself warrant so great a commitment of federal resources. Yet these advantages might well encourage trial lawyers to cling to the jurisdiction regardless of other considerations."[41] Forum shopping is regarded as an undesirable form of strategic behavior in every other context because it

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precedent rather than state court decisions in diversity cases at rates approaching pre-Erie levels. This, in turn, suggests the possible reemergence of pre-Erie problems of non-uniform subtantive law and forum-shopping. Posner, The Federal Courts, supra note 15, at 145-46; William M. Landes & Richard A, Posner, Legal Change, Judicial Behavior, and the Diversity Jurisdiction, 9 J. Leg. Stud. 367, 380-82 (1980). Erie it turns out, may not have gone far enough, and fully satisfying the policies that led the Court to overrule Swift v. Tyson may require abolishing diversity jurisdiction altogether.

40. See, e.g., Frank, The Case for Diversity, supra note 23, at 408-09; Frank, Let's Keep It, supra note 8, at 82.

41. David L. Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal, 91 Harv. L. Rev. 317, 327-28 (1977).

encourages both parties and courts to invest resources wastefully.[42] It is no less undesirable here. Lawyers may appreciate the tactical benefits of being able to choose the best forum for their clients (those who benefit from such options usually do), but we agree with Professors Wright, Miller and Cooper that "[t]o the extent this type of forum shopping exists, as it surely does, it seems more an abuse of concurrent jurisdiction than an argument for the retention of diversity jurisdiction."[43]

ii. The Case for Diversity Jurisdiction.

Advocates of diversity have advanced many arguments over the years, a number of which merit serious consideration. Before turning to these, we can dismiss some makeweight arguments. For instance, proponents of diversity jurisdiction sometimes characterize it as a social service, akin to the school lunch program or the federal highway program, and suggest that opponents of diversity are hypocrites for not advocating the abolition of other social services as well.[44] But even if federal jurisdiction is seen as a social service, the utility of this particular part of that service ranks low among services the

42. See, e.g., William F. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 9-10 (1963).

43. Wright, Miller & Cooper, supra note 32, §3601 at 360.

44. See, e.g., Frank, The Case for Diversity, supra note 23, at 405-06; Frank, Let's Keep It, supra note 8, at 79.

federal government should provide. As Congressman Kastenmeier has pointed out, a major share of the benefits of diversity jurisdiction go to attorneys on contingent fees and to large corporations; if the question is which social services should be cut, "programs" like this should be among the first.[45]

Another argument sometimes advanced in support of diversity jurisdiction is that it is useful in "keeping federal judges from becoming narrow technicians, specializing in esoteric federal statutes and occasional constitutional questions, and in helping them to maintain closer touch with the mainstream of common law tort and contract litigation."[46] But whatever force there may have been to this argument when it was first advanced in the early 1960's,[47] and in our view there was never much force to it, a glance at the caseload that routinely comes before federal judges today should dispel this illusion.[48] Moreover, many areas of federal law -- labor, securities, ERISA and civil rights law come immediately to mind -- rely on common law principles of tort or contract and thus keep judges abreast of developments in these fields.

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45. Kastenmeier & Remington, supra note 7, at 314 & n.60; Friendly, Federal Jurisdiction, supra note 1, at 146-47. See also infra note 99 and accompanying text (45% of diversity cases involve corporations).

46. Shapiro, supra note 41, at 322.

47. Moore & Weckstein, supra note 9, at 23.

48. Feinberg, supra note 28, at 18; Friendly, Federal Jurisdiction, supra note 1, at 144.

Finally, advocates of diversity jurisdiction say that there is great educational value in having two systems in interaction. Lawyers bring experience gained in one system back to the other, where it may be the basis for beneficial reforms; that many states adopted rules of procedure and evidence modeled after the federal rules is cited as an example of this successful interaction.[49] The state and federal systems probably have much to learn from one another, but their education does not require diversity jurisdiction. First, even without diversity, lawyers whose practice is primarily local have myriad opportunities to litigate in federal court. "Ordinary lawyers" appear frequently as assigned counsel in federal criminal cases and state and federal habeas corpus cases, and are retained in all sorts of cases governed by federal law relating to securities, labor, consumer protection and many other subjects.[50] Thus, a few lawyers may no longer have much reason to litigate in federal court, but a substantial portion of the bar -- including probably its most influential members -- will maintain practices in both systems. In addition, even if diversity is restricted or abolished, a substantial number of cases involving state matters will still be adjudicated in federal courts.[51] Finally, there are many other media for exchange and education, such as law

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49. See, e.g., Frank, The Case for Diversity, supra note 23, at 409; Shapiro, supra note 41, at 324-26; Statement of Robert D. Raven, supra note 23, at 5-6.

50. Friendly, Federal Jurisdiction, supra note 1, at 144-45.

51. Wright, Miller & Cooper, supra note 32, §3601 at 361.

reviews, judicial conferences, the National Center for State Courts and the State Justice Institute. Hence, abolishing diversity will not impede the exchange of ideas between state and federal systems.

Having disposed of these weak arguments for retaining diversity jurisdiction, we turn to three, more substantial arguments: (1) that abolishing diversity merely shifts the caseload burden from the federal to the state system; (2) that diversity should be retained because the quality of justice provided by federal courts is superior to that provided by state courts; and (3) that diversity jurisdiction is necessary to protect out-of-state parties from local bias.

Abolition Merely Shifts the Caseload Burden to the States. Proponents of diversity argue that there is no virtue in lessening the burden on federal courts by dumping these cases into equally crowded state courts. John Frank likens the abolition of diversity to a "jurisdictional variation of the old three-shell game" in which the 68,000 diversity cases disappear from under the shell of the federal walnut only to reappear under a state court shell.[52] Furthermore, Mr. Frank suggests, the practical result of this shift is unfair to state courts because it increases their already substantial caseload burden and unfair to litigants because it produces additional delay in the disposition of their cases.

52. Frank, The Case for Diversity, supra note 23, at 412.

One point should be kept in mind in evaluating these claims. Whatever the burden of deciding diversity cases, that burden is reduced when these cases are decided in state rather than federal courts. This is because, as suggested above, much time and effort now expended in diversity cases is spent on procedural issues that would no longer exist if these cases were in state courts.[53] It is thus more efficient to return these cases to the state courts.

The argument still merits serious consideration, however, for even the reduced burden of handling these cases may be substantial. Of course, the claim that abolishing diversity jurisdiction unfairly burdens state courts would have more force if it were made by the state court judges themselves, rather than by members of the bar interested in preserving a valuable tactical option. But state court judges are not opposed to the abolition of diversity jurisdiction. On the contrary, the Conference of Chief Justices has long taken the position that the state courts "are able and willing to provide needed relief to the federal court system [by] the assumption of all or part of the diversity jurisdiction presently exercised by federal courts."[54]

Moreover, once the difference in size between state and federal judicial systems is taken into account, it turns out that

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53. See supra notes 34-37 and accompanying text. See also Butler, supra note 15, at 64.

54. See Butler, supra note 15, at 64-65 (quoting a 1977 resolution of the Conference of Chief Justices and statements to Congress on behalf of the Conference in 1982 and 1983).

the burden on state courts from assuming this jurisdiction is small. For instance, a 1978 study conducted by the National Center for State Courts found that total abolition of diversity would increase the state court caseload by an average of only 1.03%.[55] This is compared to a 25% decrease in the caseload of the federal courts. In Mr. Frank's terms, the diversity "pea" may remain the same, but since the size of the state shell dwarfs the federal shell, the pea is less of a problem.

While this statistic is suggestive, Congress must also be concerned with the possibility that diversity cases are distributed unevenly so that abolishing diversity would impose an unmanageable burden on some states. A more recent study conducted by the National Center for State Courts, however, lays this concern to rest.[56] Using 1987 data, researchers analyzed the affects of abolishing diversity on a state-by-state basis. They found that the more populous states would receive the most diversity cases; for example, the eight states of California, New York, Texas, Pennsylvania, Florida, Illinois, Ohio and Michigan, which have 48% of the population of the United States, would receive 48% of the diversity cases.[57] Table 1 lists the states according to population and indicates the state-by-state distribution of diversity cases in the event of abolition.

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55. Flango & Blair, The Relative Impact of Diversity on State Trial Courts, 2 State Ct. J. 3 (Summer, 1978).

56. Flango & Boersema, How Would Proposed Changes in Jurisdiction Affect State Courts?, National Center for State Courts (April 30, 1989)[hereinafter Flango & Boersema, Proposed Changes].

57. Flango & Boersema, Proposed Changes, supra note 56, at 51.

TABLE 1[58]

FEDERAL DIVERSITY CASES BY STATE

States	State Populations (in thousands)	Total Number of Federal Diversity Filings
California	27663	4182
New York	17825	5482
Texas	16789	5537
Florida	12023	1787
Pennsylvania	11936	5642
Illinois	11582	5532
Ohio	10784	1503
Michigan	9200	2117
New Jersey	7672	2025
North Carolina	6413	644
Georgia	6222	1961
Virginia	5904	1480
Massachusetts	5855	1233
Indiana	5531	1179
Missouri	5103	1449
Tennessee	4855	1252
Wisconsin	4807	430
Washington	4538	568
Maryland	4535	1037
Louisiana	4461	2759
Minnesota	4246	491
Alabama	4083	1416
Kentucky	3727	803
South Carolina	3425	1073
Arizona	3386	417
Colorado	3296	512
Puerto Rico	3292	299
Oklahoma	3272	2024
Connecticut	3211	1289
Iowa	2834	377
Oregon	2724	496
Mississippi	2625	1630
Kansas	2476	606
Arkansas	2388	882
West Virginia	1897	604
Utah	1680	392
Nebraska	1594	343
New Mexico	1500	459
Maine	1187	185

58. Source: Flango and Boersema, Proposed Changes, supra note 56, at 49.

Hawaii	1083	606
New Hampshire	1057	238
Nevada	1007	537
Idaho	998	185
Rhode Island	986	310
Montana	809	396
South Dakota	709	180
North Dakota	672	119
Delaware	644	200
District of Columbia	622	1053
Vermont	548	132
Alaska	525	139
Wyoming	490	216

While population is one way to measure the relative burden imposed on states from abolishing diversity jurisdiction, the existing caseload of the state courts provides a better measure. How large an increase in the business of the state courts does abolition of diversity entail? Unfortunately, data from the state courts are incomplete. The National Center for State Courts examined what data there were, and the data suggest that, on a per state basis, the increase is spread fairly evenly. Limiting themselves to tort and contract cases, researchers were able to generate for 22 states the percentage increase in such cases that would result from abolishing diversity. With one exception, the increase in state court caseload was less than 10% and generally ranged between 3% and 6%. These data are presented in Table 2.

TABLE 2[59]

POTENTIAL INCREASE IN TORTS AND CONTRACTS PER STATE

States	State Torts and Contracts	Percent Increase in Torts and Contracts
New York	116188	5
Texas	97599	6
Florida	92529	2
North Carolina	13805	5
Massachusetts	18245	7
Missouri	18054	8
Tennessee	21854	6
Wisconsin	51868	1
Washington	22359	3
Maryland	20261	5
Minnesota	19499	2
Arizona	37940	1
Colorado	22645	2
Puerto Rico	9755	3
Connecticut	36561	3
Kansas	12893	4
Arkansas	32506	3
New Mexico	15771	3
Maine	2868	6
Hawaii	3475	17
Montana	6026	6
North Dakota	4145	3

Perhaps the best measure of the burden imposed on the states from abolishing diversity is the increase in cases per judge. As Table 3 illustrates, the increase in filings/judge from abolishing diversity ranges from a low of two in Wisconsin and Minnesota to a high of 35 in South Carolina. In most states, and especially in the most populous states, the increase in filings per judge is in the low teens.

59. Source: Flango and Boersema, Proposed Changes, supra note 56, at 66.

TABLE 3[60]

DIVERSITY FILINGS PER JUDGE BY POPULATION

States	Number of General Jurisdiction Judges	Total Diversity Cases	Total Cases Per Judge
California	724	4182	6
New York	387	5482	14
Texas	375	5537	15
Florida	362	1787	5
Pennsylvania	330	5642	17
Illinois	363	5532	15
Ohio	339	1503	4
Michigan	196	2117	11
North Carolina	72	644	9
Georgia	135	1961	15
Virginia	122	1480	12
Massachusetts	61[61]	1233	20
Indiana	206	1179	6
Missouri	133	1449	11
Tennessee	128	1252	10
Washington	133	568	4
Maryland	109	1037	10
Louisiana	192	2759	14
Alabama	124	1416	11
Kentucky	91	803	9
South Carolina	31	1073	35
Arizona	101	417	4
Colorado	121	512	4
Puerto Rico	92	299	3
Oklahoma	71	2024	29
Iowa	100	377	4
Oregon	85	496	6
Mississippi	79	1630	21
Kansas	146	606	4
Arkansas	70	882	13
West Virginia	60	604	10
Utah	29	392	14
Nebraska	48	343	7
New Mexico	59	459	8
Maine	16	185	12
Hawaii	24	606	25
New Hampshire	25	238	10
Nevada	35	537	15
Idaho	33	185	6

60. Source: Flango and Boersema, Proposed Changes, supra note 56, at 58.

61. Superior Court Department judges only.

Rhode Island	19	310	16
Montana	41	396	10
South Dakota	35	180	5
North Dakota	26	119	5
Delaware	17	200	12
Alaska	29	139	5
Wyoming	17	216	13
States with Non-Comparable Judge Figures[62]			
New Jersey	321	2025	6
Wisconsin	197	430	2
Minnesota	224	491	2
Connecticut	139	1289	9
District of Col.	51	1053	21
Vermont	25	132	5

Of course, these data are also incomplete without some sense of what these new cases will mean to state judges. We may hesitate to abolish diversity if adding 14 cases doubles the work of state judges, but not if it increases their load by only a fraction. Once again, this determination is difficult since state court data are incomplete. However, the figures compiled by the National Center for State Courts enable us to make a comparison in 22 states. These data are collected in Table 4, which provides the percentage increase per judge in the workload of state judges if diversity is abolished. In fact, these figures exaggerate the size of the increase because the state figures reflect only tort and contract cases, while the federal figures reflect all diversity cases. Hence, the actual increase

62. In these states, it was not possible to distinguish between general jurisdiction judges, who are likely to be assigned former diversity cases, and judges in courts of limited or special jurisdiction. Accordingly, the effects of abolishing diversity on individual judges may be underestimated. Flango & Boersema, Proposed Changes, supra note 56, at 44-45.

in the per judge burden would be considerably smaller. Even so, only in Hawaii, where state judges have a relatively light caseload, is the increase above 10%. In other states, abolishing diversity jurisdiction would increase the workload of judges by approximately 2-6% and generally by less than 5%.

TABLE 4[63]

POTENTIAL INCREASE IN FILINGS PER JUDGE

States	State Torts and Contracts	Number of General Jurisdiction Judges	Total Cases per Judge	Diversity Cases to Be Added per Judge	Percent Increase
New York	116188	387	300	14	4.6
Texas	97599	375	260	15	5.7
Florida	92529	362	256	5	1.9
N. Carolina	13805	72	192	9	4.6
Massachusetts	18245	61	299	20	6.7
Missouri	18054	133	136	11	8.1
Tennessee	21854	128	167	10	5.9
Washington	22359	133	168	4	2.3
Maryland	20261	109	186	10	5.4
Arizona	37940	101	376	4	1.1
Colorado	22645	121	187	4	2.1
Puerto Rico	9755	92	106	3	2.8
Kansas	12893	146	88	4	4.5
Arkansas	32506	70	464	13	2.8
New Mexico	15771	59	267	8	3.0
Maine	2868	16	179	12	6.7
Hawaii	3475	24	145	25	17.2
Montana	6026	41	147	10	6.8
North Dakota	4145	26	159	5	3.1
States with Non-Comparable Judge Figures[64]					
Wisconsin	51868	197	263	2	0.7
Minnesota	19499	224	87	2	2.3
Connecticut	36561	139	263	9	3.4

63. Compiled from data presented in Flango and Boersema, Proposed Changes, supra note 56, at 58, 66.

64. See supra note 62.

These data should allay fears that shifting federal diversity cases to the state courts will impose a substantial new burden on the states. On the contrary, the burden imposed appears to be quite small -- especially in comparison to the relief abolishing diversity jurisdiction provides for federal courts.

What about the question of unfairness to litigants from added delay in the disposition of cases? Note that we are not talking about delaying the disposition of these cases longer than it presently takes to dispose of such cases in the state courts. The magnitude of the increase in the state court dockets from abolishing diversity jurisdiction is too small to create a noticeable increase in disposition times. Rather, the added delay feared by proponents of diversity refers to the delay if state courts are slower than federal courts.[65] Of course, while federal courts are faster than state courts in some places, in other places the interval from filing to disposition is faster in the state courts.[66] Nonetheless, in some states depriving litigants of a federal forum definitely translates into a longer time to disposition.

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65. See, e.g., Frank, The Case for Diversity, supra note 23, at 412-13.

66. Compare 1988 AO Report, supra note 11, at Table C-5 (filing to disposition time intervals for federal courts) with Barry Mahoney, Changing Times in Trial Courts app. B (1988)(filing to disposition time intervals for state courts in 17 cities).

The question is, why is this unfair to these litigants? If anything, what is unfair is that existing law gives some litigants the benefit of a federal forum that is denied to their neighbors solely because these litigants have the good fortune to face an adversary from another state. Put otherwise, there is nothing unfair about placing all parties with state law claims on an equal footing. Abolishing diversity jurisdiction does nothing more than take a windfall benefit away from a class of litigants with no claim to special treatment. Moreover, conferring this benefit delays the disposition of cases filed by claimants who have federal claims and therefore are clearly entitled to the benefit of a federal forum. If justice in the state courts is too slow, the solution is for state lawmakers to improve the state courts, not to select a class of favored litigants (a class that consists disproportionately of large corporations) and give them the benefits of faster federal courts. Indeed, as noted above, a number of commentators argue that diversity jurisdiction should be abolished because it diminishes incentives for state court reform.[67]

Federal Courts Provide a Superior Quality of Justice. Another argument advanced in support of retaining diversity jurisdiction is that the quality of justice in federal courts is superior to that in state courts.[68] This claim is difficult or

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67. See supra note 38 and accompanying text.

68. See, e.g., Shapiro, supra note 41, at 328-29; Frank, The Case for Diversity, supra note 23, at 410; Wright, Miller & Cooper, supra note 32, §1601 at 359.

impossible to prove, in part because the subject is too touchy to yield a very robust debate. Some commentators flatly deny that there is a difference in the quality of justice provided by state and federal courts, while others express at least tentative support for the proposition.[69] The quality of judges and courts undoubtedly varies over time as well as from place to place. Indeed, this is precisely why the bar regards it as so important to preserve its forum shopping options.

In any event, even if federal courts are on average better than state courts, it is hard to see why this is a reason for retaining diversity jurisdiction. The response made to the argument that federal courts are faster applies here as well: if state courts are inadequate, improve the state courts. Diversity jurisdiction simply confers an unwarranted privilege on some state law claimants while leaving others to bear the costs of this supposedly inadequate justice. As such, and especially because the claimants able to obtain diversity consist disproportionately of the powerful and influential, the existence of diversity reduces pressures to reform the state system. Finally, since it increases the federal docket by at least 25%, retaining diversity jurisdiction diminishes the quality of justice received by federal claimants, who clearly are entitled to the benefits of a federal forum. Diversity jurisdiction may

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69. Compare Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981)(state courts are as good), with Posner, The Federal Courts, supra note 15, at 144 (some evidence suggests that federal courts are better), and Wright, Miller & Cooper, supra note 32, §3601 at 359 (same).

be one way to let off steam, but the federal system can no longer afford to provide this outlet.

A variation on this argument is that it is one thing to tell litigants to use their votes and lobbying power to improve the quality of justice in their state courts, but that out-of-state litigants should not be saddled with the shortcomings of another state's courts.[70] This argument at best suggests only that out-of-state parties should be able to invoke diversity jurisdiction, an alternative we discuss below. But the superficial appeal of this argument is misleading. Once the out-of-state party sues in another state's federal courts, the federal court must apply that state's substantive law (including its choice of law rules) -- however much this disadvantages the out-of-state plaintiff.[71] Yet the out-of-state party had no say in making that law. This, of course, is the usual rule: a state need only treat out-of-state parties no worse than it treats its own citizens, and we rely on virtual representation for protection. Why handle this one question differently?

The Problem of Bias Against Out-of Staters. The "traditional, and most often cited, explanation of the purpose of diversity jurisdiction" is that it protects outsiders from state court discrimination.[72] While many commentators have treated this as the only historical justification for diversity,

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70. See Shapiro, supra note 41, at 329.

71. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

72. Wright, Miller & Cooper, supra note 32, at 338.

twentieth century scholarship suggests that bias may have been less important in the creation of diversity jurisdiction than the desire to protect commercial interests from pro-debtor state courts.[73] In any event, advocates of diversity jurisdiction argue that bias is a problem and that it necessitates diversity jurisdiction, and many of their opponents regard this as the strongest argument for diversity jurisdiction.[74]

Like the argument about the quality of justice, the argument about bias is difficult to evaluate. The empirical data are sparse and inconsistent; it suggests that lawyers in some (mostly rural) areas still fear bias, while lawyers in other areas do not.[75] But the studies test only lawyers' fears -- not the reality of bias or even the fears of their clients. Opponents of diversity jurisdiction assert that such bias no longer exists, having been replaced by other biases.[76] Advocates concede that

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73. See, e.g., Friendly, The Historic Basis, supra note 3 (arguing that protection of commercial interests was an important consideration); Posner, The Federal Courts, supra note 15, at 141-42 (same).

74. Among advocates of diversity jurisdiction, see, e.g., Frank, The Case for Diversity, supra note 23, at 409-10; Statement of Robert D. Raven, supra note 23, at 5; Brieant, supra note 9, at 21. Among opponents of diversity jurisdiction, see, e.g., Friendly, Federal Jurisdiction, supra note 1, at 146 (the only justification with "the slightest substance"); Currie, supra note 37, at 4 (the "most respectable argument").

75. See John J. Cound, Jack H. Friedenthal, Arthur R. Miller & John E. Sexton, Civil Procedure 260 (5th ed. 1989)[hereinafter Cound, Friedenthal, Civil Procedure]; Flango & Boersema, Proposed Changes, supra note 56, at 2-3; Posner, The Federal Courts, supra note 15, at 142-43.

76. See, e.g., Friendly, Federal Jurisdiction, supra note 15, at 146; Cound, Friedenthal, Civil Procedure, supra note 75, at 261-62.

xenophobia is less of a problem today than it was in the nineteenth century, but contend that "anyone who believes that there is no local chauvinism in the state courts is hiding his head somewhere."[77] Opponents respond that bias may appear in a few cases, but that these are the exceptions that prove the rule.

Moreover, it seems clear that many other types of bias are far more prevalent today and far more likely to influence litigation than bias against citizens of other states. Judge Friendly has argued persuasively, for example, that in cases between corporations or where the in-state party is a corporation, prejudice against the out-of-state party qua out-of-stater is probably non-existent. And even in personal injury cases between individuals, any prejudice against an out-of-state defendant more likely stems from the jury's suspicion that he or she is insured than from his residence. Hence, while there may be cases in which prejudice against an out-of-stater plays a role, the class of such cases is probably small.[78]

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77. See Brieant, supra note 9, at 21.

78. Friendly, Federal Jurisdiction, supra note 1, at 147-48. One point that is probably lost in today's debate over diversity jurisdiction is the difference in the quality and degree of the bias feared by the framers of the diversity clause. In his autobiography, for example, Benjamin Franklin describes his first arrival in Philadephia from Boston. One has the feeling of hearing the description of a visit to a foreign nation. It took Franklin three days to make this short trip. The clothing was different, the accents were different, the money was different. In one humorous passage, Franklin relates how he:

> ask'd for Bisket, intending such as we had in Boston, but it seems they were not made in Philadephia, then I ask'd for a threepenny Loaf, and was told they had none such: so not considering or knowing the Difference of

Moreover, the aid a federal court can or is likely to give in this small class of cases is exceedingly limited. Federal and state juries are usually drawn from the same lists. The federal district is likely to be larger than a county in rural areas, but this should make little difference if the premises about bias against out-of-staters are true. Furthermore, in urban areas, state and federal juries are drawn from basically the same population. And in any event, the power of a federal judge to protect an out-of-stater by directing a verdict or by setting one aside is not great. The argument must therefore be that the federal judge will more freely exercise the powers that he has -- assuming, as will not always be the case, that the federal judge is less biased than his state court counterpart. Perhaps. But we agree with Judge Friendly that:

> 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 an out-of-

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> Money and the greater Cheapness nor the Names of his Bread, I bad him give me three penny worth of any sort. He gave me accordingly three great Puffy Rolls. I was surpriz'd at the Quantity, but took it, and having no room in my Pockets, walk'd off, with a roll under each Arm, and eating the other.

The Autobiography of Benjamin Franklin 75-76 (L. Labaree, ed. 1964). Differences among states and regions still remain, and these are occasionaly the source of prejudice. But between mass communications and our long common history, such problems are reduced by an order of magnitude from the eighteenth century. Indeed, the fear of bias and the need to foster unity that motivated the diversity clause is so much smaller today as to be a different kind of problem altogether.

stater may exist, a federal court might be of some help in a few.[79]

c. Recommendation: Abolition of Diversity With Three Exceptions.

On balance, the case for abolishing diversity jurisdiction is clear. We stress the phrase "on balance," for our conclusion is not that there is no reason to retain diversity jurisdiction. Some of the arguments for diversity jurisdiction have merit, and in a world of unlimited resources, a case could be made for keeping these cases in the federal courts. Even in such a world the case would be an exceedingly weak one, though, and in this world it is clear that the federal system can no longer afford to retain diversity jurisdiction.

While we recommend abolition of general diversity jurisdiction, we suggest that Congress delay the effective date of any legislation abolishing diversity for several years to give the states a chance to prepare to receive these cases. We also recommend that Congress recognize three exceptions to general abolition. These exceptions are uncontroversial and accepted by even the staunchest opponents of diversity.

i. Suits Involving Aliens.

79. Friendly, Federal Jurisdiction, supra note 1, at 149.

A recent study by the Federal Judicial Center estimates that perserving diversity jurisdiction in suits between a citizen of the United States and a foreign state or its citizens would still reduce the number of diversity cases by 92%.[80] Here, where the burden is slight, we agree that:

> 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.[81]

The federal government is responsible -- and is sometimes required by treaty -- to provide aliens access to justice according to standards recognized in international law. Under international law, moreover, the federal government is responsible for any denial of justice by a state court, even though the federal government has no direct authority over these tribunals. The State Department takes the position that while the federal government "has great confidence in the competence, integrity and impartiality of the state court systems, the availability of civil jurisdiction in federal courts under a single nationwide system of rules tends to provide a useful reassurance to foreign governments and their citizens."[82]

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80. Partridge, Budgetary Impact, supra note 20, at 23-24.

81. ALI Study, supra note 2, at 108.

82. Diversity of Citizenship Jurisdiction, 1982: Hearings on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Comm. on the Judiciary, 97th Cong. 2d Sess. 336-37 (1982)(letter from

We recommend, however, that Congress modify the provisions for alienage jurisdiction in several respects. First, as explained by Professor Rowe, the need for complete diversity in suits involving aliens is small compared to the costs this requirement entails.[83] Accordingly, we recommend that Congress require only minimal diversity in such cases. Second, the 1988 amendments to §1332 make any alien "admitted to the United States for permanent residence" a citizen of the state in which the alien is domiciled for diversity purposes. While it makes sense to treat aliens domiciled in the United States as citizens for these purposes, the provision overlooks aliens who are United States domiciliaries but who have not been formally admitted for permanent status, such as refugees, aliens residing here under amnesty, aliens here on temporary visas who are applying for permanent status, and illegal aliens. There is no reason to exclude these aliens, and we therefore recommend that Congress amend §1332(a) to refer to an alien's domicile with no reference to his or her status under the immigration laws. Third, by making aliens who are domiciled in the United States citizens for diversity purposes, the new provision arguably allows these aliens to sue or be sued by other aliens -- a jurisdiction not allowed by Article III. Similar constitutional problems have been raised in connection with foreign corporations whose principal place of business is in the United States: §1332(c)

State Department dated August 9, 1982).

83. Rowe, supra note 37, at 966-68.

arguably permits these corporations to sue or be sued by another foreign national or foreign corporation.[84] We recommend that Congress remove these ambiguities by adding a provision to §1332 stating that no foreign state, national, or corporation may invoke jurisdiction under §1332 against another foreign state, national or corporation.

ii. Interpleader.

We also recommend retaining federal jurisdiction over actions in the nature of an interpleader, as currently provided in 28 U.S.C. §1335. The Federal Judicial Center's study on diversity jurisdiction found the impact of these cases to be negligible,[85] and commentators agree unanimously that the federal courts provide a service in these cases that state courts may not be able adequately to provide.[86]

iii. Complex Multistate Litigation.

Limitations on the in personam jurisdiction of state courts and on state rules governing service of process may preclude joining in a single state all parties necessary to resolve

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84. See Note, Alien Corporations and Federal Diversity Jurisdiction, 84 Colum. L. Rev. 177 (1984); Note, Diversity Jurisdiction Over Alien Corporations, 50 U. Chi. L. Rev. 1458 (1983).

85. Partridge, Budgetary Impact, supra note 20, at 8-9.

86. Butler, supra note 15, at 71.

certain complex cases. The federal courts have filled this gap well, and various projects are currently underway to improve the capacity of the federal courts to handle these cases. The American Law Institute is in the process of examining the problem of complex litigation, while a proposal made to the American Bar Association was recently voted down. It is still too early to take a position on any particular solution, but we recommend that Congress consider preserving federal jurisdiction in some class of complex, multistate cases. A federal forum can reduce repetitive litigation and facilitate obtaining uniform results for similarly situated claimants. Indeed, Congress may want to broaden jurisdiction from its present boundaries in these cases by eliminating the complete diversity requirement.

d. Alternative Recommendations.

If Congress is not inclined to abolish diversity jurisdiction, we recommend that it take steps to reduce the number of cases brought under this head of jurisdiction. Many proposals have been advanced, but we limit ourselves to three that make the most sense and are likely to have a significant impact.

i. Measure the Jurisdictional Amount in Actual Damages.

Public Law 100-702, which was enacted in 1988, raised the amount-in-controversy requirement for diversity cases from

$10,000 to $50,000. The law's sponsors urged that this increase would reduce the diversity workload by 40%.[87] While it is still too soon to measure the actual impact of the legislation, this estimate seems hopelessly optimistic. The Federal Judicial Center Study, for example, predicts that raising the jurisdiction amount to $50,000 will have no effect on approximately 60% of the cases filed but will eliminate only 11% of the cases.[88] In the remaining cases, the available information was too inconclusive to make predictions.

In fact, even 11% may be optimistic. Under present law, punitive damages may be included in the amount-in-controversy. So may "non-economic" damages, such as pain and suffering, mental anguish, loss of consortium, and the like. In addition, if attorneys' fees are provided by statute or, as is more common, by contract, these may also be figured into the jurisdiction amount.[89] All these figures are easily manipulated. As Judge Mikva explained in testimony before the House subcommittee, the $50,000 threshold is "kind of a puffing game that you play with the lawyers ...."[90] Given the malleability of the elements that

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87. See 134 Cong. Rec. 7453 (statement of Rep. Kastenmeier); 134 Cong. Rec. 16295 (statement of Sen. Heflin).

88. Partridge, Budgetary Impact, supra note 20, at 13-14.

89. 14A Wright, Miller & Cooper, supra note 32, §3712 at 176-78. Attorneys' fees were demanded in 141 of the 403 cases studied by the Federal Judicial Center and were unliquidated in 125 of these cases. Partridge, Budgetary Impact, supra note 20, at 13. Presumably, these were mostly contract cases.

90. Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Committee on the Judiciary, 100th Cong. 1st & 2d Sess. pt. 1 at

make up the amount-in-controversy, many lawyers will find it easy to inflate their clients' claims to meet the $50,000 threshold.[91] The principal exception is suits for the contract price (in which the price is liquidated and there is no provision for a reasonable attorneys' fee), but these are a small fraction of the total.

Restricting the way in which the jurisdictional amount is calculated would put some teeth into the amount-in-controversy requirement, thereby limiting diversity jurisdiction along the lines contemplated by Congress when it enacted P.L. 100-702. For example, the Federal Judicial Center estimates that excluding punitive damages, non-economic damages and attorneys' fees from the calculation of the jurisdictional amount would increase the percentage of cases in which jurisdiction was eliminated to 25%.[92] The author of the study adds that, based on impressions formed from reading the complaints, "there is strong reason to suspect" that many of the cases in the "information inconclusive" column (which constituted 45% of the cases) would fail to satisfy the $50,000 limit.[93]

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313 (testimony of Hon. Abner Mikva).

91. We thus give little weight to a study conducted by the National Center for State Courts suggesting that a much higher proportion of present diversity cases would be eliminated. See Victor E. Flango & B. Darren Burns, The Effect of Recent Changes in Federal Diversity Jurisdiction on the State Courts, St. Ct. J. 4 (Spring 1989). The study was concerned with the distributional affects of raising the jurisdictional amount, and the researchers made the unwarranted assumption that each case in which less than $50,000 was pleaded under the old law would revert to the state courts.

92. Partridge, Budgetary Impact, supra note 20, at 19-20.

The House Report accompanying the bill that became P.L. 100-702 indicates that Congress wanted district courts to use Rule 11 sanctions to prevent attorneys from meeting the $50,000 threshold by exaggerating.[94] It will be difficult, however, to hold a lawyer or client responsible for seeking punitive damages or damages for pain and suffering in amounts greater than $50,000. Sanctions would be more effective if the jurisdictional amount was calculated as we suggest. Past and probable future damages are generally computable, assessment of the value of non-monetary losses would be unnecessary, and exaggerated claims could be more easily identified.

ii. Prohibit In-State Plaintiffs From Invoking Diversity Jurisdiction.

The only argument for diversity jurisdiction that emerges from the general discussion with any credibility is the argument about bias -- which means that there is no reason to allow an in-state plaintiff to invoke diversity jurisdiction. 28 U.S.C. §1441(b) already bars out-of-state defendants from removing a case based on diversity jurisdiction. A provision that mirrors this by denying plaintiffs the right to bring diversity claims in their home state seems both sensible and fair.

At first blush, the potential impact of this reform looks

93. Partridge, Budgetary Impact, supra note 20, at 20.

94. H.R. Rep. No. 100-889, 100th Cong., 2d Sess., pt. 1, at 45 (1988).

significant. A study by the National Center for State Courts estimates that barring in-state plaintiffs would eliminate diversity jurisdiction in 49% of the cases;[95] a less comprehensive study by the Federal Judicial Center places the figure at 44%.[96] The Federal Judicial Center Study also notes that tort cases constitute a disproportionate number of the cases filed by in-state plaintiffs. Since these cases tend to be more burdensome than contract and property cases, the raw percentages may understate the full relief adopting this proposal will provide the federal courts.[97]

Further consideration suggests that these estimates are probably optimistic. The plaintiff who still wants a federal forum can simply file in another state. To be sure, this kind of forum shopping is obviously more costly than inflating an ad damnum clause to meet the $50,000 threshold, but many plaintiffs may still choose the option of suing in a federal court in defendant's home state. Moreover, even if the plaintiff stays at home and sues in state court, many cases will be removed into federal court by the defendant. Nonetheless, some diversity cases will surely be eliminated, and since there is no colorable argument for giving in-state plaintiffs a federal forum, we

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95. Flango & Boersema, Proposed Changes, supra note 20, at 76-78.

96. Partridge, Budgetary Impact, supra note 20, at 34.

97. Partridge, Budgetary Impact, supra note 20, at 34-35. Partridge reports that the cases eliminated had an average weight of 1.3158 as compared with 1.2439 for the cases that were not affected. Id.

recommend that Congress adopt this reform.

iii. Make Corporations Citizens of Every State in Which They Are Licensed to Do Business.

Under present law, a corporation is treated as a citizen of any state in which it is incorporated, and the state in which it has its principal place of business.[98] But the fact that a company is formally incorporated in another state is not likely to generate bias if the corporation has local offices or employees, or if it transacts substantial business in the state. In addition, Judge Charles W. Joiner points to the unfair advantage diversity jurisdiction gives multistate corporations vis-a-vis their local competitors by giving the multistate corporation a choice of forums that is denied to the local business.[99]

The most extreme proposal to restrict corporate access to federal courts in diversity cases is to make corporations "citizens" of any state in which they do business. Unfortunately, this proposal has the disadvantage of requiring the court to make what will often be a difficult determination just to rule on jurisdiction -- a problem that might be especially troublesome in suits between corporations, where the

98. 28 U.S.C. §1332(c)(1). In direct actions against insurance companies, the insurer is also made a citizen of any state in which the insured is a citizen.

99. Charles W. Joiner, Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction, 70 Judicature 291 (February-March 1987).

need to determine every state in which both corporations may have done business could become a discovery nightmare. A standard like "doing business" is not easily verifiable and poses significant risks of wasting judicial resources if the parties do not learn of a state in which both do business until late in the litigation. One way to avoid such problems would be to require that the corporation do "substantial" business in the state, but that standard is inherently ambiguous and simply invites still more trouble.

To avoid these problems, Judge Joiner proposes making a corporation a citizen of every state in which it is licensed to do business.[100] This bright-line rule, which eliminates the problems associated with the first proposal, is supported by both the Judicial Conference and the Department of Justice. Moreover, the licensing proposal still appears substantially to reduce litigation based on diversity. The Federal Judicial Center's study estimates that treating corporations as citizens of every state in which they are licensed to do business would reduce the number of diversity cases by 45%.[101]

Several aspects of this proposal must be clarified before it can be implemented. First, there is the question of federally chartered corporations, which do not require state licenses to do business. The permissible activity of such corporations is typically set out either in the authorizing federal statute or in

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100. Joiner, supra note 99, at 291-92.

101. Partridge, Budget Impact, supra note 20, at 30-31.

the charter. The Amtrak statute, for example, provides that Amtrak "shall be deemed to be qualified to do business in each State in which it performs any activity authorized under this chapter."[102] The appropriate treatment of federally chartered companies under the proposal, then, would be to make them citizens of any state in which they are authorized to do business.[103] While this resembles the original proposal to make corporations citizens of any state in which they do business, the number of federally chartered corporations is sufficiently small to prevent this from becoming a problem.

Second, there is the concern that the proposal may reward corporate violations of state licensing laws. Presumably, however, a corporation would not be permitted to obtain diversity jurisdiction by denying citizenship in a state in which it had not complied with state licensing laws. Nor would a corporation be permitted to defeat diversity jurisdiction by claiming citizenship in such a state. In this way, no corporation could benefit from non-compliance with state licensing laws. A system of cost and fee shifting could then be implemented to deter litigation about whether a corporation has complied with state licensing laws. It is impossible to estimate the volume of litigation that would ensue over such questions, but it is likely to be small.

Finally, there is the question of the so-called "forum

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102. 45 U.S.C. §546(m).

103. See Partridge, Budgetary Impact, supra note 20, at 31.

doctrine," which makes a plaintiff corporation that is a citizen of the forum state a citizen of only that state for purposes of diversity jurisdiction. Thus, if a New York corporation licensed to do business in New York and Pennsylvania sues an Illinois corporation licensed to do business in Illinois and Pennsylvania, there would be diversity jurisdiction if the New York corporation sued in New York or Illinois, but no where else.

Two reasons have been advanced for using the forum doctrine with the proposed expansion of corporate citizenship. First, applying the forum doctrine would further reduce any discovery problems. With the forum doctrine in place, a corporation suing in a state in which it is a citizen need only determine whether a defendant corporation is licensed to do business in that state; without the forum doctrine, the plaintiff must determine whether both corporations are licensed to do business in any of the fifty states or in the territories. But determining where a corporation is licensed to do business should be quite simple, so this is not a very powerful objection.

A second rationale for applying the forum doctrine is that it is unfair to deny diversity jurisdiction in a suit between two corporations just because they both happen to be licensed in some state that has absolutely nothing to do with the case. But such cases appear to be extremely rare. In the Federal Judicial Center's sample, for example, there were apparently no cases in which jurisdiction would have been denied on the ground of shared citizenship in a third state.

Moreover, adopting the forum doctrine makes access to

federal court easier for corporations that are citizens of the forum state and do not suffer from local bias than for corporations that are not citizens of the forum state but that may do business in some shared third state. Thus, the forum doctrine encourages corporations to invoke diversity jurisdiction in states where they are citizens.

For these reasons, we recommend that Congress simply reject the forum doctrine.[104] If Congress decides that the justifications for the forum doctrine are persuasive, it can choose a middle course that addresses these concerns without encouraging suits by in-state plaintiffs. This solution is to supplement the existing definition of corporate citizenship by making a corporation a citizen of (1) any state in which it is incorporated, (2) the state in which the corporation has its principal place of business, and (3) the forum if the corporation is licensed to do business in that state. This middle ground puts multistate corporations on an equal footing with local businesses without encouraging suits by in-state corporations.

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104. Actually, the best resolution of this question would be to adopt the proposal precluding in-state plaintiffs from invoking diversity jurisdiction, since this would automatically render the forum doctrine question moot.

2. Habeas Corpus Cases.

a. The Need for Reform.

The scope of federal habeas corpus is one of the most politically divisive questions of federal jurisdiction. Advocates of reform say that habeas corpus was an exceptional remedy that served a narrow purpose until the restraints were loosened by the Warren Court. Since then, we are told, federal courts have been staggered by an ever-increasing flood of habeas corpus petitions from state prisoners: the 537 habeas corpus petitions filed in 1945 grew to 9,867 in 1988 -- an increase of 1,840%. During this same period, total civil filings in the district courts increased by only 393%.[1] Because relief is denied in the vast majority of these cases, advocates of reform contend that the time has come to restrict federal habeas corpus relief and to restore the writ to its original, limited station.[2]

But caseload statistics do not support this account of the growth in habeas corpus cases. For example, many commentators mark the beginning of the explosion in habeas corpus filings with the Supreme Court's 1953 decision in Brown v. Allen,[3] which held

1. See 1945 and 1988 Annual Reports of the Director of the Administrative Office of the United States Courts.

2. See, e.g., Hopkins, Federal Habeas Corpus: Easing the Tension Between State and Federal Courts, 44 St. John's L. Rev. 660, 667 (1970); Weick, Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?, 21 DePaul L. Rev. 740, 745-51 (1972). See generally Resnik, Tiers, 57 S. Cal. L. Rev. 837, 942 (1984).

3. 344 U.S. 443 (1953).

that state court determinations were not binding in federal habeas corpus proceedings. But the number of new filings grew slowly between 1952 and 1960, from 541 to 872.[4] The spurt in habeas corpus cases did not begin until the early 1960s: 984 new habeas corpus petitions were filed in 1961; 1,249 in 1962; and 1,904 in 1963.[5] Interestingly, this trend predates the trilogy of cases most often cited as revolutionalizing habeas corpus -- Townsend v. Sain, Fay v. Noia, and Sanders v. United States -- which were decided in March 1963. There was a steady rise in filings until 1970, a decrease from 1971 to 1977, and then a steady increase to the most recent year.[6]

These statistics actually reveal little about the proclivity of state prison inmates to engage in federal litigation, for state prison populations have also increased dramatically. Between 1944 and 1987, the number of sentenced prisoners in state institutions grew by 469%, from 114,317 to 536,135, with major increases preceding the growth in habeas corpus filings in the late 1950s and mid-1970s.[7] Figure 1 provides a more informative

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4. Compare 1952 Annual Report of the Director of the Administrative Office of the United States, Table C-2 with 1960 Annual Report of the Director of the Administrative Office of the United States, Table C-2.

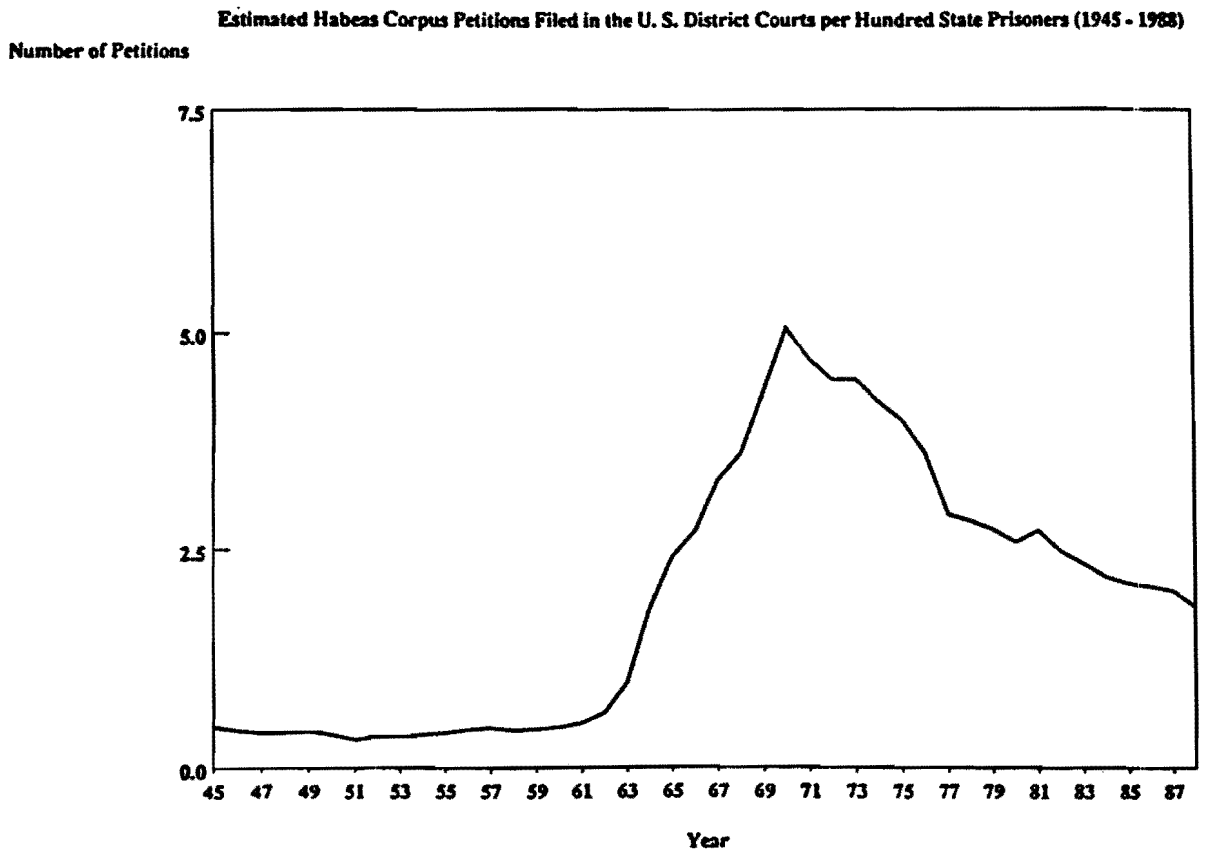
5. See 1961, 1962 and 1963 Annual Reports of the Director of the Administrative Office of the United States, Table C-2.

6. 8,963 habeas corpus petitions were filed by state prisoners in 1970; 8,282 petitions were brought in 1971; 6,862 in 1977; and 9,867 in 1988. See 1970, 1971, 1977 and 1988 Annual Reports of the Director of the Administrative Office of the United States Courts, Table C-2.

7. See P. Langan, J. Fundis, L. Greenfeld and V. Schneider, Historical Statistics on Prisoners in State and Federal

measure of habeas corpus litigation, the number of petitions filed in the district courts per every hundred state prisoners.[8]

FIGURE 1.



As the chart shows, habeas corpus filings per state prisoner remained fairly constant from 1945 to 1962, rose dramatically

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Institutions Yearend 1925-86 (Bureau of Justice Statistics, May 1988)(Table 1); Bulletin: Prisoners in 1988 (Bureau of Justice Statistics, April 1989)(Table 2).

8. Statistics on prison population reflect prisoners in custody at the end of each calendar year, while the Administrative Office's data are calculated by fiscal year (i.e. the period ending June 30). Figure 1 attempts to adjust for the discrepancy by matching filings in fiscal year "x" to prisoners in custody at the end of year "x-1" (i.e. fiscal year 1988 and prisoners in custody at the end of 1987). In addition, the statistics underestimate the state prison population by excluding inmates whose sentence begins after the first of the year and end before December 31.

until 1970, and have declined steadily ever since. In 1945, there were 0.47 federal habeas corpus petitions filed per every hundred state prisoners; in 1961, 0.52; in 1970, 5.05; and 1.85 in 1988.

The reasons for the increase in filings prior to 1970 are easy to understand. For the most part, as the advocates of reform have suggested, habeas corpus petitions probably increased in response to Supreme Court decisions expanding both the substantive protections of the Constitution and the scope of the habeas corpus statute.[9] In addition, the Supreme Court's docket grew so large that the Court was forced to leave review of all but a tiny fraction of state criminal convictions to the lower federal courts.[10] It is well known that the Court often denies certiorari on direct review because mistakes can be corrected in habeas corpus proceedings in the lower federal courts.

What, then, explains the steady decrease in filings per inmate after 1970? A large part of this trend is probably attributable to Supreme Court decisions making habeas corpus more difficult to obtain.[11] In addition, state court absorption of Supreme Court criminal procedure decisions may have speeded (in

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9. See R. Posner, The Federal Courts: Crisis and Reform 51-53 (1983); Meador, Straightening Out Federal Review of State Criminal Cases, 44 Ohio St. L.J. 273, 274 (1983).

10. See Meador, supra note 9, at 274; Friedman, A Tale of Two Habeas, 73 Minn. L. Rev. 247 (1988).

11. See, e.g., Stone v. Powell, 428 U.S. 465 (1976) (removing certain Fourth Amendment issues from the scope of habeas corpus); Rose v. Lundy, 455 U.S. 509 (1982) (district courts must dismiss petitions containing a mix of exhausted and unexhausted claims).

part because there were fewer expansions of constitutional protections), and liberalizing §1983 may have deflected some energies from habeas corpus petitions to civil rights suits. It may also be that state prisoners have come to view the federal courts as hostile to their petitions, discouraging at least some inmates from seeking relief.[12] But whatever its cause, the important point is that this trend exists, for it refutes the claim that reform is necessary to stem the flood of petitions created by Supreme Court doctrinal innovation. The number of petitions per prisoner has increased since 1945, but the increase is modest and most caseload growth in this area is attributable to growth in prison population.

Nonetheless, the number of prisoners is not likely to decrease. Indeed, if current public attitudes persist, both prison population and average sentence length are likely to grow. It follows that the burden of state prisoner habeas corpus litigation -- which last year accounted for 4% of the civil docket in the district courts and 9.5% of the total docket of the courts of appeals[13] -- is likely to remain substantial. In addition, quite apart from questions of caseload, federal habeas corpus touches the most sensitive aspects of federal/state relations. It is therefore appropriate to consider whether we can improve judicial administration in this area.

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12. Resnik, supra note 2, at 947-48.

13. 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-1A, C-2.

Several advisors suggested that we examine problems arising in capital cases. It is hard to dispute the proposition that the death penalty causes doctrinal distortion in habeas corpus law.[14] But these issues are before the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, appointed in June, 1988, by Chief Justice Rehnquist, and chaired by Justice Powell; and the American Bar Association's Task Force on Death Penalty Habeas Corpus. Accordingly, we make no recommendations for capital cases other than to add our voices to others who suggest that separate rules be developed for these cases.

We began instead by examining two aspects of habeas corpus practice that have been the subject of numerous proposals for reform -- successive petitions for relief and evidentiary hearings. We conclude that the problems in both areas have been overstated and that reform is unnecessary. Our consideration of successive petitions, however, led us to review two important Supreme Court decisions from last Term -- Teague v. Lane,[15] and Penry v. Lynaugh.[16] We believe that the Court's holdings in these cases do require congressional action.

b. Successive Petitions.

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14. See Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus, Toward a More Just and Effective System of Review in Death Penalty Cases 31-36 (October 1989).

15. 109 S. Ct. 1060 (1989).

16. 109 S Ct. 2934 (1989).

If a prisoner files an unsuccessful federal habeas corpus petition, when should he be permitted to file another federal petition raising new or repeating old grounds for relief? At first blush, the answer seems obvious: claimants typically get one full and fair opportunity to present their claims, and failing to plead issues that could have been raised precludes raising them from doing so in subsequent proceedings. But the law of res judicata is generally inapplicable to habeas corpus,[17] and the Supreme Court has never applied ordinary preclusion principles even to successive petitions raising issues actually litigated in prior habeas corpus proceedings.[18] The Court has emphasized the practical problems facing a prisoner seeking habeas corpus relief: "Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession ...."[19] To some extent, the force of this reasoning has been blunted by provisions authorizing the appointment of counsel in habeas corpus cases. But the rules provide for appointment only after the district judge has determined that an evidentiary hearing is necessary.[20] Many issues that are

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17. See Brown v. Allen, 344 U.S. 443 (1953).

18. See, e.g., Salinger v. Loisel, 265 U.S. 224 (1924); Wong Doo v. United States, 265 U.S. 239 (1924); Price v. Johnston, 334 U.S. 266 (1948).

19. Price v. Johnston, 334 U.S. at 292.

20. Habeas Corpus Rule 8(c).

cognizable in habeas corpus proceedings may not require a hearing, and in any event the determination whether a hearing is necessary is itself based on the pleadings. Hence, the rules for appointment of counsel do not fully alleviate the Court's concern.

The present rules governing successive petitions in federal court were established in Sanders v. United States.[21] The Court distinguished between petitions presenting grounds actually adjudicated in previous federal habeas corpus proceedings and petitions presenting grounds that were not but could have been presented in such proceedings. With respect to grounds previously decided, the Court held that "[c]ontrolling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if ... the ends of justice would not be served by reaching the merits of the subsequent application."[22] Rather than provide an exhaustive list of circumstances in which the "ends of justice" would be served by relitigation, the Court offered several illustrations. In cases of disputed fact, relitigation is necessary if the petitioner can demonstrate that the prior hearing was not "full and fair" within the meaning of Townsend v. Sain.[23] In cases turning on legal questions, relitigation is required if the petitioner identifies an "intervening change in the law" or "some other justification"

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21. 373 U.S. 1 (1963).

22. Sanders, 373 U.S. at 15.

23. 373 U.S. 293 (1963).

for having failed to raise a "crucial point or argument" in the prior proceeding. In either case, the petitioner has the burden of showing that rehearing is necessary.[24]

With respect to petitions raising issues that were not but could have been raised, the Court said:

> [F]ull consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.
>
> [] Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> We need not pause over the test governing whether a second or successive application may be deemed an abuse by the prisoner of the writ or motion remedy. The Court's recent opinions in Fay v. Noia and Townsend v. Sain deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions [the "deliberate bypass" test] govern equally here.[25]

Sanders was controversial from the start, and repeated efforts have been made to overturn it. Critics agreed with Justice Harlan's argument in dissent that the Court had ignored valid state interests in the finality of convictions and that its approach would generate a flood of successive petitions; they argued that petitioners should be deemed to forfeit claims that could have been raised in earlier federal proceedings.[26] Within a short time, a proposal was made in Congress to replace Sanders with a procedural default rule. Instead, Congress reworked the

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24. 373 U.S. at 17.

25. 373 U.S. at 17-18 (citations omitted)(emphasis added).

26. See 373 U.S. at 25-29 (Harlan, J., dissenting).

proposal, and in 1966 it codified the result reached by the Sanders majority.[27]

A second attempt to limit Sanders was made when the Habeas Corpus Rules were adopted in 1976. The initial version of Rule 9(b), developed by the Judicial Conference and promulgated by the Supreme Court, authorized the judge to dismiss a petition raising a new claim if "the failure of the petitioner to assert those grounds in a prior petition is not excusable."[28] This apparent departure from Sanders produced a storm of protest, and Congress rewrote the rule to track the language in Sanders permitting dismissal only if there has been an "abuse of the writ."

The most recent effort to overrule Sanders came from within the Supreme Court. In Kuhlmann v. Wilson,[29] a prisoner filed a second petition alleging that evidence introduced at his trial was illegally obtained and that the ends of justice would be served by rehearing this issue because petitioner's claim had been substantially bolstered by a recent Supreme Court decision. In an opinion written by Justice Powell, a majority of the Court reached the merits of petitioner's claim and denied relief. In a part joined only by Chief Justice Burger and Justices Rehnquist and O'Connor, Justice Powell offered as an

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27. While the language of the 1966 amendment to §2244 differs from Sanders in several respects, courts have uniformly read the amendment as a codification of the Court's opinion. See Rose v. Lundy, 455 U.S. 509 (1982); Larry W. Yackle, Postconviction Remedies §154 at 560 & n.23 (1981)(citing cases).

28. Rule Governing Section 2254 Cases in the United States District Court 9(b) (1976).

29. 477 U.S. 436 (1986).

alternative ground for this judgment that the second petition should have been dismissed under §2244 and Rule 9(b). According to Justice Powell, the "ends of justice" permit federal courts to entertain successive petitions "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[30] It is probably just as well that this portion of Justice Powell's opinion did not obtain a majority. However much one wants to limit the scope of habeas corpus, importing a requirement of factual innocence in the particular case is a bad idea, for it requires the district court in every case to review the entire factual record and reconsider all the evidence.[31]

To the extent that proposals to overrule Sanders rest on the assumption that the problems foretold by Justice Harlan have been realized, we believe that they are unfounded. To be sure, many prisoners file more than one petition for habeas corpus. A 1984 study by the Bureau of Justice Statistics reported that 30% of state prisoners who filed federal habeas corpus petitions had filed at least one previous federal petition.[32] But the chief source of these petitions -- changes in law that give rise to new claims or strengthen old ones -- was eliminated by the Supreme

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30. 477 U.S. at 454.

31. See Kuhlmann, 477 U.S. at 454-55 n.17 ("the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence" (emphasis in original)).

32. Bureau of Justice Statistics, Special Report: Federal Review of State Prisoner Habeas Corpus Petitions 6 (1984).

Court's holdings in Teague v. Lane and Penry v. Lynaugh that a prisoner cannot base a claim for habeas corpus on law made after his conviction became final.[33] More important, courts appear to have little difficulty disposing of the successive petitions that do come before them. The absence from the books of many decisions applying the Sanders criteria suggests (and anecdotal evidence confirms) that successive petitions are usually disposed of summarily and without reported opinions. The rules governing successive petitions are applied in practice as if they incorporated a res judicata principle, and successive petitions that appear meritless are routinely turned aside without significant expenditure of judicial effort.[34] At the same time, the broad formulations in terms of the "ends of justice" and "abuse of the writ" provide judges with sufficient flexibility to reach the merits in cases that do appear to warrant further examination.

c. Evidentiary Hearings in Habeas Corpus Cases.

Fact-finding procedures in habeas corpus cases have also been a frequent source of proposals for reform. The Supreme Court established the rule for evidentiary hearings in Townsend v. Sain.[35] According to the Court, while district judges can

33. 109 S. Ct. 1060, 2934 (1989). These cases are considered at length below.

34. Yackle, supra note 27, §155 at 565.

35. 372 U.S. 293 (1963).

always make independent findings of fact, there are some circumstances in which a hearing must be held:

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[36]

When Congress amended the federal habeas corpus statute in 1966, it added certain procedures to guide the district courts in conducting evidentiary hearings.[37] Currently codified at 28 U.S.C. §2254(d), the 1966 amendments provide that when an evidentiary hearing is held, state court factual findings shall be presumed correct unless one of eight conditions is present. These conditions replicate the six circumstances articulated by the Court in Townsend, except that the statute makes no reference to newly discovered evidence. However, that condition can be read into §2254(d)(3), which provides that the presumption of correctness does not apply if the material facts were not adequately developed in the state courts. In addition to the six Townsend factors, §2254(d) provides that the presumption of correctness shall not apply if the state court lacked subject-matter jurisdiction or deprived the defendant of the right to counsel or due process.[38]

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36. 372 U.S. at 312.

37. Act of November 2, 1966, § 2, 80 Stat. 1105-06.

As a technical matter, Townsend and §2254(d) address different questions: the six criteria of Townsend determine whether a habeas corpus petitioner is entitled to an evidentiary hearing, while the eight factors enumerated in §2254(d) determine whether, if such a hearing is held, the state courts' findings must be presumed correct. The difference is important only to understand that §2254(d) "does not convert Townsend's identification of those situations in which a district court must hold a hearing ... into a limitation on when the court may hold a hearing."[39] Collapsing the tests together may deprive a petitioner of the opportunity to prove his or her claim, for even if the "presumption of correctness" applies, §2254(d) still permits the petitioner to introduce "convincing evidence" that overcomes it.[40]

The impetus for reform in this area seems to be the belief that federal courts should not waste valuable time redoing

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38. 28 U.S.C. §2254(d)(4), (5), (7).

39. J. Liebman, Federal Habeas Corpus Practice and Procedure 269 (1988)(emphasis in original).

40. See United States ex rel. Oliver v. Vincent, 498 F.2d 340, 344 (2d Cir. 1974). Although the Supreme Court has sometimes blurred the distinction between Townsend and §2254, see, e.g., LaValle v. DelleRose, 410 U.S. 690 (1973)(per curiam)(stating that Townsend is the "precursor" of §2254(d)), the courts of appeals have generally observed the difference. See, e.g., Maddox v. Lord, 818 F.2d 1058, 1061 (2d Cir. 1987); Guice v. Fortenberry, 661 F.2d 496, 500-01 (5th Cir. 1981)(en banc); United States ex rel. Gorham v. Franzen, 675 F.2d 932, 937 (7th Cir. 1982); Warden v. Wyrick, 770 F.2d 112 (8th Cir. 1985); Richmond v. Ricketts, 774 F.2d 957, 961-62 (9th Cir. 1985); Maxwell v. Turner, 411 F.2d 805 (10th Cir. 1969); Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983). Contra Fowler v. Jago, 683 F.2d 983, 988 (6th Cir. 1982).

something that has already been done. Thus, many commentators propose restricting the availability of federal evidentiary hearings to cases in which the state court hearing was not full and fair.[41] Other, more radical commentators propose abolishing federal fact-finding and making federal habeas corpus into a purely appellate procedure.[42]

In fact, evidentiary hearings are held in very few habeas corpus cases. In both 1987 and 1988, only 1.1% of the petitions filed were terminated after a trial.[43] One reason so few hearings are held is that, in practice, most judges already grant hearings only when the state court proceedings were not "full and fair." As a result, habeas corpus cases fare considerably worse than other civil cases in terms of the likelihood of trial. Figure 2 compares the percentage of state prisoners' habeas corpus petitions that receive evidentiary hearings with that of other civil cases.[44]

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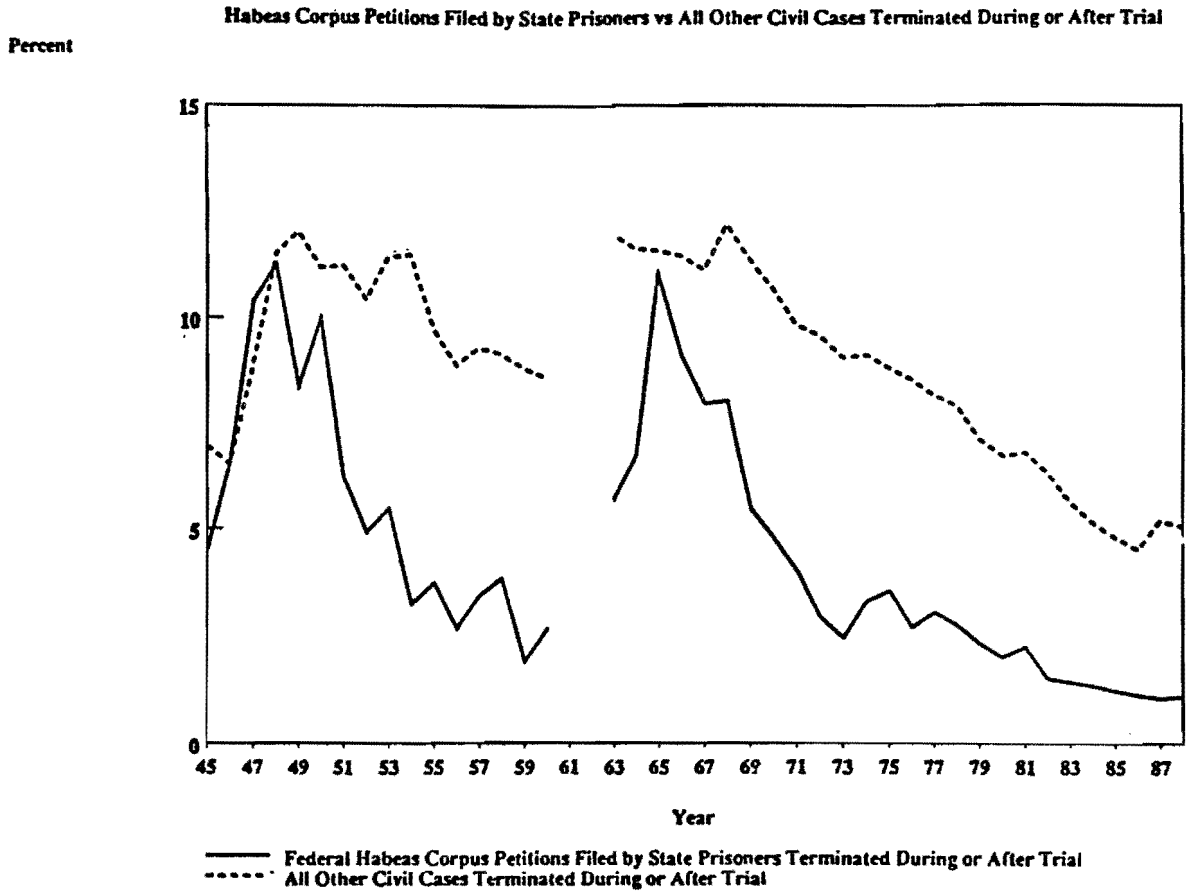
41. See, e.g., Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 521-23 (1963); Deukmejian, "Justice Denied: Habeas Corpus Appeals Have Been Misused to Thwart the People's Will," L.A. Daily J., June 21, 1989, at 6, col. 3; United States ex rel. Jones v. Franzen, 676 F.2d 261, 267-69 (7th Cir. 1982) (Posner, J., concurring).

42. See, e.g., Meador, supra note 9.

43. 1987 and 1988 Annual Reports of the Director of the Administrative Office of the United States Courts, Table C-4. These figures do not reflect how little court time is necessary to dispose of most habeas corpus petitions. Thus, in 1987 and 1988 all but 2.8% and 2.1%, respectively, of the habeas corpus petitions were disposed of before reaching even the stage of pretrial discovery.

44. The data were obtained from the Annual Reports of the Director of the Administrative Offices of the United States Courts, Table C-4. No figures were available for the years 1961 and 1962.

FIGURE 2.



The data are revealing on at least three levels. First, it appears that trends in the frequency of evidentiary hearings mirror trends in the frequency of trials. There is a sharp increase in both statistics until about 1949 or 1950, a general decline until the early 1960s, an increase until the mid-1960s and a general decline thereafter. If one assumes that the frequency of trials is a function of such variables as the number of district judges, caseloads, and changes in procedural rules, it seems that these pressures affect both categories in similar ways.

Second, since at least since 1948, habeas corpus petitioners have received evidentiary hearings in a significantly smaller proportion of the cases than other civil litigants. For example, in 1954, shortly after Brown v. Allen was decided, only 3.25% of state prisoners' habeas corpus cases were terminated during or after trial; during that same year, approximately 11.5% of all other civil cases went to trial. The closest the percentage of hearings in habeas corpus cases came to the percentage of hearings in other civil cases was in 1965, in the immediate wake of Townsend, when 11.03% of habeas corpus cases and 11.6% of other cases went to trial. By 1988, however, only 1.1% of habeas corpus petitioners received a trial, compared to 5.03% of other civil cases.

Third, the 1966 amendments appear to have had a substantial impact on federal habeas corpus. The percentage of state prisoners' habeas corpus cases that received hearings plummeted after 1965 -- a decline that is both earlier and sharper than the general decline in the percentage of civil cases terminated during or after trial, which begins around 1970. Since approximately 1971, the frequency of evidentiary hearings in habeas corpus cases has been about the same as in the years prior to Townsend and Fay v. Noia.

In sum, the district courts afford evidentiary hearings to state prisoners in an exceedingly small proportion of cases. The "presumption of correctness" contained in the 1966 amendments has sharply curtailed the incidence of evidentiary hearings. We therefore see little need for congressional intervention at this time.

d. Retroactivity in Habeas Corpus Cases.

In recent years, the debate over habeas corpus reform has centered on when to defer to state interests in the finality of criminal convictions. One especial sore spot concerns the question of retroactivity: if the state provides a trial that protected a defendant's constitutional rights as then understood, but a federal court later decides that the Constitution requires new or different procedures, should the state have to release the prisoner and hold a second trial that complies with the new law?

i. Recent Developments: Teague and Penry.

The Supreme Court addressed this issue last Term in a pair of cases. In Teague v. Lane,[45] a black defendant was convicted by an all-white jury. He challenged his conviction on the ground that the prosecutor's use of peremptory challenges to remove prospective black jurors violated his Sixth Amendment right to a jury representing a fair cross-section of the community. The state appellate courts affirmed the conviction, and the Supreme Court denied certiorari. The defendant then petitioned the federal district court for a writ of habeas corpus, repeating his fair cross-section claim and adding an equal protection claim. The district court denied relief, a Seventh Circuit panel

45. 109 S. Ct. 1060 (1989).

reversed, and the case was taken en banc. The en banc decision of the court was postponed pending the Supreme Court's resolution of the equal protection issue in Batson v. Kentucky.[46] Although Batson held that an equal protection claim could be based on improper use of peremptory challenges in a single case, the en banc Seventh Circuit ruled that petitioner could not benefit from this holding because Batson did not apply retroactively in habeas corpus cases. The court then rejected petitioner's fair cross-section claim on the merits.[47]

The Supreme Court granted certiorari, presumably to decide whether the fair cross-section requirement of the Sixth Amendment should limit the use of peremptory challenges. When the decision was handed down, however, a majority of the Court declined to reach the merits of this claim, using the case instead to decide "how the question of retroactivity should be resolved for cases on collateral review."[48] There was no opinion for the Court, but six justices expressly agreed that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[49] The Court thus finally abandoned the Linkletter test, which required

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46. 476 U.S. 79 (1986).

47. 820 F.2d 832 (7th Cir. 1987)(en banc).

48. 109 S. Ct. at 1069 (plurality opinion).

49. See 109 S. Ct. at 1075 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.), 1080 (Stevens, J., joined by Blackmun, J.). See also id. at 1093 (Brennan, J., dissenting)("A majority of this Court's members now share the view that cases on direct and collateral review should be handled differently for retroactivity purposes").

a complicated three-part analysis to determine whether a new constitutional rule would apply retroactively.[50] Although the Court had already abandoned this test for cases on direct review (in which it held that new constitutional rules would always be applied),[51] the status of retroactivity doctrine in habeas corpus cases had remained unclear. By holding that new constitutional rules should not be applied retroactively in habeas corpus proceedings, the Court embraced a position advanced by Justice Harlan in the late-1960s: criminal defendants may rely on any decisions rendered before their convictions become final but may not obtain retroactive benefits in collateral proceedings.[52]

In her plurality opinion, Justice O'Connor offered several reasons for a general rule of non-retroactivity in habeas corpus proceedings. First, the Linkletter test had produced inconsistent and confusing results. More important, the primary function of federal habeas corpus review of state convictions is to deter state courts from ignoring federal constitutional protections. As Justice Harlan had noted in Desist v. United States, "[i]n order to perform this deterrence function, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[53]

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50. See Linkletter v. Walker, 381 U.S. 618 (1965).

51. See, e.g., Shea v. Louisiana, 470 U.S. 51 (1985); Griffith v. Kentucky, 479 U.S. 314 (1987).

52. See Desist v. United States, 394 U.S. 244, 256-69 (1969)(Harlan, J., dissenting); Mackey v. United States, 401 U.S. 667, 675-702 (1971)(Harlan, J., concurring and dissenting).

In a part of her opinion joined only by the Chief Justice and Justices Kennedy and Scalia, Justice O'Connor discussed the meaning of "new law" for purposes of retroactivity analysis. She concluded that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government.... To put it differently, a case announces a new rule if the result was not dictated by existing precedent at the time the defendant's conviction became final."[54] Justice O'Connor cited as examples the Court's decisions in Rock v. Arkansas,[55] which held that per se exclusion of hypnotically refreshed testimony violates a defendant's right to testify on his own behalf; and Ford v. Wainwright,[56] which held that the Eight Amendment prohibits the execution of insane persons. These examples indicate the plurality's intent to make the non-retroactivity doctrine a broad one, for Rock applied a well-established principle that per se exclusions of a defendant's testimony are constitutionally suspect,[57] and Ford merely confirmed that the Eighth Amendment required something that was already required in all 50 states and that represented an unbroken common law practice since the time of Lord Coke.[58]

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53. 394 U.S. at 262-63 (Harlan, J., dissenting).

54. 109 S. Ct. at 1070 (plurality opinion)(emphasis in original).

55. 483 U.S. 44 (1987).

56. 477 U.S. 399 (1986).

57. See, e.g., Washington v. Texas, 388 U.S. 14 (1967)(rule prohibiting persons charged as principals, accomplices or accessories in the same crime from testifying for one another).

Writing for the same plurality, Justice O'Connor recognized two exceptions to the non-retroactivity principle. First, following Justice Harlan's earlier example, she adopted an exception for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[59] Under this exception, anyone whose conviction became final before the Supreme Court ruled that states could not make the sale of contraceptive devices illegal could rely on the new decision in petitioning for habeas corpus. The plurality rejected Justice Harlan's second exception for new rules "implicit in the concept of ordered liberty" on the ground that it is "unnecessarily anachronistic."[60] Instead, relying on recent decisions emphasizing the importance of factual innocence, Justice O'Connor recognized an exception for new rules "without which the likelihood of an accurate conviction is seriously diminished."[61]

Finally, the plurality declared that courts should address the question of retroactivity before considering the merits of a claim. According to Justice O'Connor, announcing a new constitutional rule without applying it on behalf of the

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58. See Ford, 477 U.S. at 406-10. Indeed, the Court in Ford stated that "[t]oday we have explicitly recognized in our law a principle that has long resided there." Id. at 417.

59. 109 S. Ct. at 1075 (plurality opinion)(quoting Mackey v. United States, 401 U.S. at 692 (Harlan, J., concurring and dissenting)).

60. 109 S. Ct. at 1075-76 (plurality opinion).

61. 109 S. Ct. at 1076-77 (plurality opinion).

petitioner is tantamount to issuing an advisory opinion; but if the court applies the new rule, it must either do the same for other habeas corpus applicants or violate the principle that like cases be treated alike.[62]

Applying these principles to Teague's case, the plurality concluded that Teague's claim required the adoption of a new rule and that it did not fall within either of the Court's exceptions. Because Teague would not be entitled to relief on his fair cross-section claim even if his interpretation of the law were to prevail, his petition was denied. Justices White, Stevens, and Blackmun concurred in the judgment. Justices Brennan and Marshall dissented.

Four months later, in Penry v. Lynaugh,[63] Justice O'Connor was able to obtain a fifth vote for some of the views expressed in her Teague opinion. Convicted of murder and sentenced to death, Penry challenged his sentence on two grounds: that the Eight Amendment prohibits executing mentally retarded persons and that the Texas death penalty scheme improperly limited the jury's consideration of mitigating circumstances. After exhausting his direct appeals, Penry raised the same two claims in a federal habeas corpus petition. The federal district court denied relief, and the Fifth Circuit affirmed.

The Supreme Court granted Penry's petition for certiorari. After holding that Teague applies to capital sentencing, the

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62. 109 S. Ct. at 1077-78 (plurality opinion).

63. 109 S. Ct. 2934 (1989).

Court was faced with two different retroactivity issues. Penry's claim that the jury was unable fully to consider his mitigating evidence was based on the Court's decisions in Lockett v. Ohio[64] and Eddings v. Oklahoma,[65] both decided well before Penry's trial and both holding that the Eighth Amendment prohibits the exclusion of a defendant's mitigating evidence. But in other decisions also predating Penry's conviction, the Court had upheld the validity of the Texas death penalty scheme, noting that it permitted appropriate consideration of mitigating circumstances despite the absence of specific reference to such circumstances in the instructions to the jury.[66] The first retroactivity issue was whether Penry's mitigating circumstances claim required the Court to make "new law" on his behalf.

Writing for a majority of five (including Justices Brennan, Marshall, Blackmun, and Stevens), Justice O'Connor reiterated that a "new rule" is one not "dictated by precedent existing at the time the defendant's conviction became final."[67] She noted that the Court's decisions upholding the Texas death penalty were premised on specific assurances from the State of Texas that its system allowed full consideration of mitigating circumstances. Penry's claim was that these "assurances were not fulfilled in

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64. 438 U.S. 586 (1978).

65. 455 U.S. 104 (1982).

66. See, e.g., Jurek v. Texas, 428 U.S. 262 (1976); Adams v. Texas, 448 U.S. 38 (1980).

67. 109 S. Ct. at 2944 (quoting Teague, 109 S. Ct. at 1070)(emphasis in original).

his particular case."[68] Since Penry was not seeking to "impose a new obligation" on the state, the Court could consider his claim on its merits.

The second retroactivity issue in Penry dealt with his claim that the Eighth Amendment bars imposing the death penalty on mentally retarded persons. Speaking for a unanimous Court, Justice O'Connor reiterated that Teague precludes the retroactive application of new rules in collateral proceedings, that the retroactivity issue should be addressed as a threshold matter before reaching the merits, that a rule prohibiting capital punishment of mentally retarded persons would require the Court to adopt a "new rule," and that the Court therefore could not consider Penry's claim on its merits unless it fell within one of the exceptions recognized in Teague.[69] Turning to the exception for rules that prohibit the state from making certain primary conduct unlawful, the Court ruled that this includes "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[70] The Court would therefore consider this claim on its merits as well. A majority of the Court then rejected Penry's argument that the Eighth Amendment precludes imposing the death penalty on mentally retarded persons -- although Justice O'Connor split with Chief Justice Rehnquist and Justices White, Scalia, and Kennedy on the

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68. 109 S. Ct. at 2946 (emphasis in original).

69. 109 S. Ct. at 2952.

70. 109 S. Ct. at 2953.

reasons for this holding. Consequently, the Court reversed Penry's death sentence and ordered a new sentencing hearing on the basis of his mitigating circumstances claim, with Justices Brennan, Marshall, Blackmun, and Stevens joining the portion of Justice O'Connor's opinion announcing and explaining the reversal.

ii. The Non-Retroactivity Principle.

The first case expressly to address habeas corpus retroactivity was Linkletter in 1965. This is because, for a number of practical reasons, the issue seldom arose prior to the 1960s.[71] During the late 19th and early 20th centuries, the Supreme Court interpreted the Habeas Corpus Act of 1867 according to established common law usages.[72] When the Court later extended the writ to claims of constitutional error, these could be heard on the merits only if the defendant had not been afforded a "fair opportunity" to litigate in state court. Brown

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71. Prior to Linkletter, the Court had applied new law retroactively without comment in a few habeas corpus cases, though even these cases mostly arose in the 1960s. See McNerlin v. Denno, 378 U.S. 575 (1964); Doughty v. Maxwell, 376 U.S. 202 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958). In addition, there was the old idea that judicial decisions could never be prospective because they did not make law but rather discovered what the "true law" had always been. See 1 W. Blackstone, Commentaries* 69. As explained in text, however, this principle -- repudiated by Austin long before the Habeas Corpus Act of 1867 -- had not been tested prior to Linkletter.

72. See Friedman, supra note 10, at 262-63; Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965).

v. Allen[73] removed this limitation in 1953, but even after Brown habeas corpus petitioners received a hearing on the merits only if they had raised their claims in the state court. As Justice Harlan explained in Desist, "[i]t was the rare case in which the habeas petitioner has raised a 'new' constitutional argument both at his original trial and on appeal."[74]

Retroactivity in habeas corpus cases became an issue with the convergence of three developments in the early 1960s. First, the Court's stepped up supervision of the criminal justice system in the early 1960s generated many new constitutional rules. Second, at about the same time the Supreme Court began aggressively to pursue a strategy of selective incorporation of the Bill of Rights, thus further speeding the development of new rules and making these rules applicable to the states. Third, the Supreme Court's holdings in Fay v. Noia[75] that federal courts could hear claims that had been procedurally defaulted in the state court, and in Sanders v. United States[76] that prisoners could file successive petitions based on changes in law, greatly expanded the ability of state prisoners to raise new constitutional claims in federal habeas corpus proceedings.

This point is important only because the Court in Teague sought to resolve the retroactivity issue by reference to the

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73. 344 U.S. 443 (1953).

74. 394 U.S. at 261 (Harlan, J. , dissenting).

75. 372 U.S. 391 (1963).

76. 373 U.S. 1 (1963).

historical purpose of the writ. Justice O'Connor argued that new law should not be applied retroactively because the purpose of federal habeas corpus is to force state judges "to conduct their proceedings in a manner consistent with established constitutional principles."[77] Justice Brennan responded that new law should be retroactive because the writ is intended to vindicate constitutional rights and must therefore be available "whenever a person's liberty is unconstitutionally restrained."[78] But one cannot decide the retroactivity question by trying to differentiate between these two purposes as an historical matter. Prior to Linkletter, the typical habeas corpus case involved a claim that the state court had ignored or misapplied existing law, and in such cases federal habeas corpus serves both purposes: granting relief vindicates the petitioner's federal rights and, in doing so, deters the state courts from ignoring those rights in the future.[79] The dispute over the historical purpose of the writ is misguided because the

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77. 109 S. Ct. at 1073 (plurality opinion)(quoting Desist, 394 U.S. at 262-63 (Harlan, J., dissenting)).

78. 109 S. Ct. at 1084 (Brennan, J., dissenting).

79. Nor would the Congress that adopted the Act of 1867 have distinguished between protecting defendants' rights and deterring state court misconduct. As Justice Brennan noted in Fay v. Noia, 372 U.S. at 415, 424, the Act of 1867 was adopted in part to ensure that state courts would faithfully enforce Congress's Reconstruction measures. This is consistent with Justice Brennan's view that federal habeas corpus is intended to protect federal rights, but it is equally consistent with Justice O'Connor's view that federal habeas corpus is designed to make sure that state judges "toe the constitutional mark." Mackey, 401 U.S. at 687 (Harlan, J., concurring and dissenting). From the perspective of Congress in 1867, these two positions would have been functionally equivalent.

retroactivity cases are the first cases to raise the question whether federal habeas corpus should be granted to vindicate current interpretations of the Constitution where this serves no deterrent purpose because the state court decided the case properly under the law as it existed at the time.

That there are benefits from applying "new" constitutional rules to all defendants -- including those whose convictions have already become final -- is undeniable. As Justice Harlan acknowledged in Mackey, retroactive application of new constitutional rules through habeas corpus "tends to assure a uniformity of ultimate treatment among prisoners; provides a method of correcting abuses now, but not formerly perceived as severely detrimental to societal interests; and tends to promote a rough form of justice, albeit belated, in the sense that current constitutional norms, it may be hoped, ring more 'correct' or 'just' than those they discarded."[80] Taken to its logical conclusion, this argument suggests that all decisions should be applied retroactively both on direct appeal and in habeas corpus proceedings. But few judges or commentators take this position, for there are significant costs associated with retroactive application. Basically, all the usual costs of habeas corpus -- disruption of state criminal justice processes; upsetting valid state interests in the finality of convictions; the difficulty of retrying defendants after a case has been closed; and friction between state and federal governments -- are

80. 401 U.S. at 689 (Harlan, J., concurring and dissenting).

exacerbated when federal courts make states retry defendants who received a proper trial the first time around because the federal courts have reconsidered what ought to be done. Thus, even under Linkletter, only some new constitutional rules were given retroactive effect in habeas corpus proceedings.

The question, then, is not whether it is appropriate to distinguish between claims for retroactivity purposes, but rather what kind of distinction should be drawn. Linkletter adopted an ad hoc balancing approach in each case but generally favored retroactivity. Teague substitutes a presumption against retroactivity in habeas corpus cases, but with important exceptions. For the reasons below, we think that Teague's general approach is sound but that the Court's translation of this approach into a specific rule is flawed. We recommend that Congress correct these problems.

Deliberate deprivations of constitutional rights present the strongest case for federal habeas corpus. Federal relief is necessary both to vindicate the rights of the prisoner and to deter state courts. At the same time, the states' finality interests are at their weakest if the state court knowingly ignored the prisoner's rights at trial or on appeal. Indeed, if Justice Brennan's description of the reasons for enacting the Habeas Corpus Act of 1867 is correct, these cases were uppermost in the minds of the members of the 40th Congress.

Habeas corpus relief also makes sense if the state courts inadvertently misread established law. The prisoner's interest in vindicating his federal rights remains as strong as in cases

of deliberate violation. And while one may argue that deterrent interests are not served if the state court's mistake was truly in good faith,[81] this is an overstatement, for federal habeas corpus serves the useful purpose in these cases of encouraging state courts to observe constitutional principles with care. In effect, the availability of federal habeas corpus imposes a duty on state courts to learn the law by allocating the risk of error to the state rather than to the defendant. For this reason, the state's finality interests -- while perhaps weightier than in cases of deliberate violation -- remain relatively weak.

The argument for habeas corpus is considerably weaker in cases where the state court correctly applied law that has since been changed. One may argue that the prisoner's interest in vindicating his federal rights remains about the same as in the other cases, although there is an intuitive sense in which this claim certainly seems weaker. But the deterrence interest is non-existent, for one cannot realistically deter the failure to predict a change in direction. By the same token, the state's interests in finality are at their strongest since the state court has done all that can fairly be asked of it by properly applying the law as it stood during the trial and appeal.

Teague and Penry draw a line between the second and third categories -- denying habeas corpus only in cases involving "new law," where the prisoner's interests are at their weakest and the states' interests at their strongest. But while sensible in

81. Cf. Leon v. United States, 468 U.S. 897 (1984).

theory, the utility of this approach ultimately depends on how one distinguishes "misreading existing law" from "new law." These categories blend gradually together, yet this line determines the scope of the state courts' duty faithfully to interpret and enforce the Constitution by engaging in the process of interpreting existing precedent. We believe that the Supreme Court has drawn this line in a way that is underprotective of federal rights. In addition, the Court's decisions in Teague and Penry are unclear in several respects, but useful guidance appears unlikely to come from the badly divided Court.

iii. Defining the Scope of the Non-Retroactivity Principle.

The Definition of New Law. Because there were no majority opinions, Teague and Penry left the precise meaning of "new law" unclear. The definition that seemed to represent the Court's middle was Justice O'Connor's: "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[82] As noted above, read in light of Justice O'Connor's illustrations -- Ford v. Wainright and Rock v. Arkansas -- this definition would significantly restrict the scope of federal habeas corpus.[83] This is because

82. Teague, 109 S. Ct. at 1070 (plurality opinion)(emphasis in original). Justice O'Connor reiterated this statement in Penry. 109 S. Ct. at 2944.

83. See, e.g., Sawyer v. Butler, 881 F. 2d 1273 (5th Cir. 1989)(en banc)(reading Teague this way).

in both Ford and Rock the Supreme Court had yet to announce a rule, but the likely results were easy to predict. Basically, then, Justice O'Connor's position suggested that state courts must follow the precise holdings expressed in Supreme Court decisions, but that they have no obligation to interpret these decisions or to consider arguments being made in the lower federal courts or other state courts. And this is precisely the definition adopted by the Court in two recent cases, Butler v. McKellar and Saffle v. Parks.[84] In both these cases, a clear majority of the Supreme Court read Teague and Penry to hold that a rule is "dictated" by prior precedent only if the precedent clearly and unambiguously announces a rule; a decision that requires interpreting existing precedent constitutes "new law" that cannot be raised in collateral proceedings.

We believe that federal habeas corpus should be available in a broader spectrum of cases. Recognizing that state courts have an incentive to interpret constitutional protections narrowly does not impugn those courts' integrity. This incentive, together with the Supreme Court's inability to hear more than a handful of cases on direct review,[85] makes federal habeas corpus essential to ensure proper enforcement of constitutional rights. There will often be sufficient uncertainty about the

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84. Butler v. McKellar, 58 U.S.L.W. 4294 (March 5, 1990); Saffle v. Parks, 58 U.S.L.W. 4322 (March 5, 1990).

85. See United States v. Johnson, 457 U.S. 537, 560 (1982)(noting that it often takes years before the Supreme Court rules on unsettled questions of criminal procedure); Friedman, supra note 10.

implications of particular decisions to insulate narrow state interpretations from federal habeas corpus review under Teague and Penry. And even after the Supreme Court eventually addresses the issue on direct review, unless the Court expressly condemns particular state court interpretations -- something that is unlikely to become a regular practice -- enough ambiguity will often remain to insulate state decisions from federal habeas corpus review. State courts should have to do more than read Supreme Court headnotes and wait to be overruled: they too should have a duty fairly to interpret the Constitution and the Supreme Court's precedents.

On the other hand, the Supreme Court's approach to non-retroactivity has the virtue of being relatively easy to apply in most cases. There will still be difficult cases (as the split in Penry illustrates), but the requirement that the result have been "dictated by prior precedent" will make most cases relatively easy to settle. Unfortunately, once one abandons this fairly bright line, it becomes evident that other such lines are hard to find.

One alternative is to move to the opposite end of the spectrum. For example, Congress could say that habeas corpus should be available unless a new decision constitutes a "clear break with the past"[86] -- a relatively clear rule that would preclude only habeas corpus petitions based on decisions that overrule past precedent or establish previously unrecognized

86. See, e.g., Solem v. Stumes, 465 U.S. 638, 644 (1984).

substantive rights. But a "clear break" standard goes too far in the other direction. The Court frequently modifies existing rules in ways that are substantial but would not qualify as "clear breaks." Moreover, most courts -- including the Supreme Court -- are reluctant to admit that they are departing from past precedent and downplay the extent to which a rule represents a change. Yet such decisions are no easier to anticipate than decisions that do make a clear break, and it is thus no less unreasonable to require states to retry defendants for having failed to do so.

We thus find it necessary to recommend a standard somewhere between "clearly dictated by prior precedent" and "clear break with the past." We recognize that such a standard forgoes part of the clarity and simplicity of the Teague approach, but some uncertainty is preferable to the standards that can be expressed in bright-line rules. We suggest that Congress direct federal courts to hear a habeas corpus petition only if it presents a claim that was either controlled or "clearly foreshadowed" by existing Supreme Court precedent. This standard should require state courts to attend to caselaw developments without penalizing them for failing to be prescient. At the same time, we believe that this standard will not be too difficult to administer. Defining its precise contours will require further development through adjudication, but the important point is to make clear that Teague is not sufficiently protective of federal rights and that a more moderate balance should be struck.

Finally, Teague says nothing about the importance of precedent from the lower federal courts and other state courts. On the one hand, because such decisions have no formal binding effect in the courts of any state, our recommendation refers to the Supreme Court's precedents. On the other hand, the decisions of coordinate courts are certainly relevant in trying to interpret the Supreme Court's opinions, and state courts should look to such decisions as persuasive authority. In addition, contrary to the implication of Justice O'Connor's citation of Ford v. Wainwright in Teague,[87] a habeas corpus petitioner should be able to state a claim for which there was no Supreme Court authority at the time his conviction became final if there was substantial consensus among state and lower federal courts.

Retroactivity as a Threshold Question. In both Teague and Penry, Justice O'Connor stated that retroactivity should be determined before the court addresses the merits of a petitioner's claim, but it is unclear whether a majority of the Court accepts this proposition. In Teague, Justice O'Connor spoke for a plurality of four. In Penry, all nine justices joined a part of her opinion making reference to retroactivity as a threshold question.[88] It would be a mistake, however, to attribute much significance to these votes. This portion of Justice O'Connor's opinion touched on a number of preliminary matters, and given the way the Court split in Teague and Penry,

87. See 109 S. Ct. at 1070; supra notes 55-58 and accompanying text.

88. 109 S. Ct. at 2952.

the fact that it was unanimous suggests that the justices did not understand their votes to signify acceptance of this holding. Indeed, despite joining this part of Justice O'Connor's opinion, Justice Stevens, joined by Justice Blackmun, wrote a separate concurrence taking exactly the opposite position.[89]

Justice O'Connor apparently expects lower courts hypothetically to assume the rule relied on by petitioner and to ask whether this rule is new. Sitting en banc, the Fifth Circuit in Sawyer v. Butler explained that this is difficult if the analysis of whether petitioner's claim is new depends on how that claim is characterized. Reasoning that "[s]uch a conjectural analysis of possible rules would ... entail considerable awkwardness, do nothing to clarify the substantive law, and defeat rather than serve judicial economy ...,"[90] the court held that it had discretion to discuss the merits first. The court explained that it was not holding that "Teague never bars inquiry into the constitutional merits of a petitioner's claim. It remains possible that an application of Teague to a conjectural rule may be appropriate in cases where the Teague issues do not turn ... upon a highly precise specification of the rule in question."[91]

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89. 109 S. Ct. at 2963 (Stevens, J., concurring and dissenting)("As I stated in my separate opinion in Teague v. Lane ... it is neither logical nor prudent to consider a rule's retroactive application before the rule itself is articulated.")

90. 881 F.2d at 1281.

91. 881 F.2d at 1281.

We agree with the Fifth Circuit that it will often be difficult to separate the retroactivity issue from the merits. Indeed, Justice O'Connor's discussion in Penry of whether the petitioner's challenge to the Texas death penalty scheme involved "new law" effectively resolved the merits of this claim.[92] Sawyer presents an even clearer example of a case in which the question of retroactivity could not be addressed without also addressing the merits. Sawyer claimed that the prosecutor misled the jurors about their role in capital sentencing by telling them that their decision was only a recommendation that would be reviewed. The Supreme Court had held that this violated the Eighth Amendment in Caldwell v. Mississippi,[93] which was decided after Sawyer's petition became final. Sawyer argued that Caldwell did not break new ground and that it merely read Donnelly v. DeChristoforo,[94] which subjected the prosecutor's closing argument to a general "fundamental fairness" standard, in light of the special respect for jury discretion in capital sentencing recognized in McGautha v. California.[95] The state agreed that Caldwell should be understood as a mere application of Donnelly -- although in the state's view this was why Sawyer's

92. See 109 S. Ct. at 2944-46. See also 109 S. Ct. at 2964 (Scalia, J., dissenting)("[t]he merits of the ... issue, and the question of whether, in raising it on habeas, petitioner seeks application of a 'new rule' within the meaning of Teague, are obviously interrelated.")

93. 472 U.S. 320 (1985).

94. 416 U.S. 637 (1974).

95. 402 U.S. 183 (1971).

claim was meritless. The Fifth Circuit noted that whether Sawyer was seeking a "new rule" turned on the extent to which Caldwell modified Donnelly by reading it in light of McGautha.[96] That question was sufficiently close that it was impossible to determine Caldwell's status as a "new rule" without discussing the merits of these arguments.

We expect the kind of problem encountered in Sawyer to arise more frequently under our proposal to bar review only of decisions that were not "clearly foreshadowed" at the time petitioner's conviction became final. In addition, because the pleadings in habeas corpus cases are usually prepared by the inmate, they often require considerable interpretation by the reviewing court; issues that have been cleanly formulated when the case reaches the Supreme Court were seldom so in the lower courts. Therefore, like the Fifth Circuit, we recommend that the decision whether to address the merits first be left to the court's discretion. It should be understood that exercising this discretion depends on whether the merits can be separated from the retroactivity question. There is no reason for a federal court to decide a constitutional question if it is clear that the petitioner is not entitled to relief. Courts therefore should not address the merits unless necessary to resolve the status of petitioner's claim for purposes of the retroactivity analysis.

Exceptions to the Retroactivity Bar. The Court in Teague recognized two exceptions to the general principle of non-

96. 881 F.2d at 1282-1291.

retroactivity in habeas corpus cases, i.e., two classes of claims that should be heard even though they are based on law made after the petitioner's conviction became final. First, the Court held that habeas corpus should be available to challenge a conviction on the ground that subsequent decisions prohibit the state from making the conduct on which petitioner's conviction was based illegal. In Penry, the Court extended the exception to decisions "prohibiting a certain category of punishment for a class of defendants ...."[97] This exception recognizes that there is no reason to leave someone in custody after his conduct has been held constitutionally protected or his sentence constitutionally prohibited, and there appears to be little disagreement over that quite sensible principle.[98]

The Court's second exception is more controversial. After rejecting Justice Harlan's argument to exclude rules "implicit in the concept of ordered liberty," the plurality in Teague limited

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97. 109 S. Ct. at 2953.

98. The extension of this first exception to substantive limitations on the state's power to impose particular punishments is included in our proposal because it may apply outside the context of capital cases. We express no view on whether the basic rule of non-retroactivity should apply in capital cases other than to note that it is a difficult question. The Court in Penry applied Teague to capital cases on the ground that the state's finality interests are the same. 109 S. Ct. at 2944. While this may be true, the prisoner's interest on the other side of the balance are of a different order when the penalty is death. See Ford v. Wainright, 477 U.S. 399, 411 (1986). The decision whether to give capital defendants the benefit of our best and most recent judgment as to what kind of procedures the Constitution requires thus calls for a different balancing. As explained at the beginning of this section, we believe that Congress should adopt separate habeas corpus rules for capital cases, but we make no recommendations as to what these rules should be.

the second exception "to those new procedures without which the likelihood of an accurate conviction is seriously diminished."[99] The plurality apparently envisioned a very narrow exception. Justice O'Connor explained that the kind of procedures that fit this description are "so central to the accurate determination of innocence or guilt" that it is "unlikely that many [of them] have yet to emerge."[100] Examples of claims that could be raised retroactively under this exception, she continued, include the mob trial, knowing use by the prosecutor of perjured testimony, and a confession obtained by beating the defendant; the prosecutor's use of peremptory challenges to exclude members of a particular race, by contrast, was not deemed sufficiently important to accurate fact-finding to qualify.[101] In dissent, Justice Stevens argued that he would retain Justice Harlan's second exception because "factual innocence is too capricious a factor by which to determine if a procedure is sufficiently 'bedrock' or 'watershed' to justify application of the ... exception."[102]

Although the Court has appeared headed in recent cases toward requiring habeas corpus petitioners to show that they have a colorable claim to factual innocence,[103] the plurality in

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99. 109 S. Ct. at 1076-77 (plurality opinion).

100. 109 S. Ct. at 1077 (plurality opinion).

101. 109 S. Ct. at 1077 (plurality opinion).

102. 109 S. Ct. at 1081 (Stevens, J., dissenting).

103. See, e.g., Murray v. Carrier, 477 U.S. 478 (1986); Kuhlmann v. Wilson, 477 U.S. 436 (1986). As noted above, we believe that such an approach has serious drawbacks. See supra notes 30-31

Teague did not speak in terms of innocence in the particular case. Rather, its second exception focuses on whether a challenged procedure tends to undermine the reliability of verdicts. We believe that this is a sensible approach. To be sure, the Bill of Rights reflects values in addition to obtaining reliable verdicts, but reliability is a central concern of these provisions. Moreover, the prisoners whose convictions were obtained through procedures that were not only "unfair" in the abstract but that undermined the reliability of the process have the strongest claim to release or retrial. An exception directed toward reliability is thus likely to capture the most important constitutional concerns.

We believe that little is gained by framing this exception in terms of "ordered liberty" or, as Justice Stevens would apparently have it, "fundamental fairness."[104] Most procedures that are "implicit in the concept of ordered liberty" also reduce the likelihood of unreliable verdicts. For example, Justice Harlan illustrated his second exception by citing Gideon v. Wainwright.[105] Yet it is hard to think of a procedure more essential to obtaining reliable verdicts in an adversarial system than the right to counsel. Justice Harlan apparently abandoned a focus on reliability on the ground that such an exception was too broad since some procedures improve the fact-finding process too

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and accompanying text.

104. See, e.g., 109 S. Ct. at 1080 (Stevens, J., concurring and dissenting).

105. Mackey, 401 U.S. at 693-94 (Harlan, J., dissenting).

marginally to override the state's finality interests.[106] Like Justice O'Connor, however, we believe that it makes more sense to limit the exception to procedures that substantially enhance reliability than to abandon the focus on reliability altogether. For (contrary to Justice Stevens' assessment), we can think of few more capricious standards than impressionistic, case-by-case determinations of which procedures are "fundamentally unfair." At the same time, we are less sanguine than Justice O'Connor that all such procedures have been identified, but that question must await future litigation.

Finally, we believe that Congress should recognize a third exception to the non-retroactivity rule. Teague and Penry limit the ability of lower federal courts to develop "new law" in habeas corpus proceedings. But some claims are unlikely to be raised on direct appeal. For example, the attorney who represents the defendant will rarely raise a claim of ineffective assistance of counsel, and it may not even be possible to raise a claim of ineffective appellate assistance on appeal. If such claims are raised at all, it is usually in later habeas corpus proceedings. This is true as well for other claims that are typically based on facts that are not discovered until after appeal, such as Brady violations.[107] An exception to the rule of non-retroactivity is needed here for the same reason the Supreme

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106. See Mackey, 401 U.S. at 694-95 (Harlan, J., dissenting)(citing Coleman v. Alabama, 399 U.S. 1 (1970)).

107. See Brady v. Maryland, 373 U.S. 83 (1963)(prosecutor must disclose potentially exculpatory evidence to defendant upon request).

Court has recognized an exception to the mootness doctrine for claims that are "capable of repetition yet evading review": without an exception, the development of federal constitutional law in these areas is likely to stagnate.

Clarifying the Meaning of "Final". In both Teague and Penry, the Court defined "new law" in terms of rules established "at the time the defendant's conviction became final."[108] But the Court was unclear about just when this occurs. At one point in Teague, Justice O'Connor quoted Justice Powell's statement in Solem v. Stumes that the governing law is the law in effect "at the time of the conviction."[109] Later, she suggested that the test should be whether the "trials and appeals conformed to then-existing constitutional standards."[110] Finally, in Penry she declared that the petitioner's conviction became final "when [the Supreme] Court denied his petition for certiorari on direct review."[111]

As explained above, the underlying justification for the non-retroactivity rule is that the state should not have to retry a defendant if its courts correctly applied the law that existed when the case was decided. It follows that the appropriate time to "fix" the applicable law for purposes of federal habeas corpus review is when the state court of last resort affirms the

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108. See Teague, 109 S. Ct. at 1070 (plurality opinion).

109. 109 S. Ct. at 1073 (plurality opinion)(quoting 465 U.S. 638, 653 (Powell, J., concurring)).

110. Teague, 109 S. Ct at 1075 (plurality opinion).

111. 109 S. Ct. at 2944.

judgment of conviction. Bear in mind that this limits only the power of the lower federal courts in habeas corpus proceedings and has no bearing on the power of the Supreme Court on direct review.

iv. Proposal.

These recommendations can be implemented by adding the following two provisions to 28 U.S.C. §2244:

> (d) Except as provided in subsection (e) of this section, in a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, the court, justice or judge shall not consider law established after the decision of the State court of last resort affirming the judgment pursuant to which the applicant is in custody. Law established after the decision of the State court of last resort shall not include extensions or applications of decisions of the United States Supreme Court that were clearly foreshadowed when the decision of the State court of last resort was rendered. The court, justice or judge entertaining the application for a writ of habeas corpus may resolve the merits of the applicant's claim if this is necessary to determine the applicable law.
>
> (e) Notwithstanding the provisions of subsection (d) of this section, in a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, the court, justice, or judge shall consider the law in effect at the time the application is made and shall consider arguments by the applicant to change this law when the applicant's claim:
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> > (1) is that certain conduct is beyond the power of the criminal law to proscribe, or a certain kind or amount of punishment is beyond the power of the criminal law to prescribe; or
> >
> > (2) would require the adoption of procedures that substantially reduce the likelihood of an erroneous judgment or an improper sentence; or

(3) is the kind of claim that is ordinarily not feasible to raise in an appeal from the judgment under which the applicant is in custody.

v. Impact on Federal Habeas Corpus Practice.

Our proposal does not require Congress to make dramatic changes in the law of habeas corpus -- the Supreme Court has already done that in Teague and Penry. Congress can approve what the Court did by taking no action or disapprove it by overruling these decisions. We recommend a middle course. One might perhaps argue that Congress should take no action and should instead leave the courts to flesh out the issues for a while longer. But we believe that the Supreme Court has set out in the wrong direction and that congressional action is necessary to redirect the doctrine. In 1966, Congress successfully codified several important Supreme Court decisions. We believe that congressional action in this context will be equally helpful.

If followed, our recommendation may have a number of predictable effects, several of which should be mentioned. In the lower federal courts, the most direct effect of the new retroactivity doctrine may be to reduce the amount of judge time spent habeas corpus cases. Under the proposed statute, we expect either that fewer petitions will be filed or that the petitions filed will be easier to handle. It will be difficult in many cases to determine whether a petition depends on new law or fits within one of the exceptions. But we believe that the time saved in disposing of petitions that are clearly based on new law will

exceed the time necessary to determine retroactivity. Furthermore, as courts gain experience under the new statute, these savings should increase. Perhaps the most important reduction in habeas corpus litigation will be in the area of successive petitions. As noted above, many successive petitions are filed because of changes in the law since a first petition was denied. Under the new doctrine, there will be fewer such petitions, and those that are filed should be disposed of easily.

The new retroactivity doctrine will also diminish the importance of habeas corpus as a source of new constitutional principles. The reduction will not be total: the lower federal courts will develop new constitutional rules under the exceptions and in the context of determining whether a particular extension was "clearly foreseeable." But most new constitutional law will be developed by the Supreme Court on direct review, by the lower federal courts in federal criminal cases, and by the state courts. Federal habeas corpus will become principally a means of ensuring that the state courts followed established procedures. At the same time, because the proposal reduces the friction created by federal decisions that upset state convictions for failing to observe rules that did not exist at the time of the trial and appeal, the role of the federal courts in enforcing existing constitutional rules may be enhanced.

Adopting this proposal will also reduce the number of habeas corpus cases that are reviewed by the Supreme Court. The Court seldom reviews lower court decisions that misapply existing law. Since there will be fewer habeas corpus decisions making

new constitutional law in the courts of appeals, there will be fewer such cases for the Supreme Court to review. This decrease may be offset to some extent by cases that require the Court to decide whether the retroactivity doctrine was correctly applied, but as noted above we expect the number of cases in this regard to decrease as the doctrine develops.

Finally, our proposal may affect some other habeas corpus doctrines. It will, for example, render Reed v. Ross[112] irrelevant in most cases. Reed held that the novelty of a claim may establish "cause" for excusing a procedural default in the state court. After Teague and Penry, claims that are novel enough to excuse a lawyer's failure to raise them will no longer be cognizable in habeas corpus proceedings unless the petitioner's claim meets one of the exceptions.

112. 468 U.S. 1 (1984).

3. Removal

As the "master of his or her claim," the plaintiff ordinarily chooses the forum.[1] The statutory provisions allowing defendants to "remove" a case from state to federal court in certain circumstances are an exception to this rule. Defendants have been permitted to remove since the first Judiciary Act,[2] and the doctrine has existed in something like its present form for more than a century.[3] Generally speaking, the rules governing removal have been applied by the courts without much difficulty. There are, however, several anomalies in removal practice that are worth examining. Therefore, after a brief description of the law of removal, we consider the most controversial of these. Based on this examination, we recommend that Congress: (1) allow defendants to remove on the basis of a federal counterclaim (but not a federal defense), (2) repeal 28 U.S.C. §1441(c), and (3) make orders to remand reviewable by petition for a writ of mandamus.

a. The Law of Removal.

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1. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

2. 1 Stat. 73.

3. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552; Act of Aug. 13, 1888, 25 Stat. 433. See generally Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 7-8 (1983); Collins, The Unhappy History of Federal Question Removal, 71 Iowa L. Rev. (1986).

28 U.S.C. §1441(a) allows a defendant to remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Because removal turns on whether the plaintiff could have brought the case in federal court, a defendant may remove a diversity case only if diversity is complete, and the removability of a federal question case depends on whether the well-pleaded complaint rule has been satisfied. A plaintiff who does not want to litigate in federal court may thus avoid federal jurisdiction by exclusive reliance on state law or by joining nondiverse parties.[4]

Removal is more limited than original jurisdiction in one respect. 28 U.S.C. §1441(b) limits removal of diversity cases to those in which "none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought." Thus, while the plaintiff can sue in either his own or the defendant's home state, the defendant can remove only when sued away from home.

4. Caterpillar Inc. v. Williams, 482 U.S. at 392. The plaintiff's control in this regard is subject to important exceptions. The court may realign the parties in response to a request for removal. See 14A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure §3721 at 207-212 (2d ed. 1985). More important, a plaintiff may not defeat removal by refusing to plead a federal claim if Congress has "so completely pre-empt[ed] a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63-64 (1987). See Franchise Tax Board, 463 U.S. at 22-23; Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981). The Court has thus far found this test satisfied only with respect to claims arising under §301 of the Labor Management Relations Act and §502(a) of ERISA. See Metropolitan Life Ins. Co., 481 U.S. at 65-66. Finally, a declaratory judgment action is removable only if the federal issue would have been part of the claim if no declaratory relief was available. Franchise Tax Board, 463 U.S. at 14; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

Courts have interpreted the "civil action" that can be removed under §1441(a) and (b) as co-extensive with the "civil action" over which jurisdiction is conferred in §1331 or §1332 -- meaning that removal includes pendent and ancillary state law claims.[5] In addition, §1441(c) provides that whenever a "separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action," the entire case may be removed. If a case is removed under this provision, the district court may remand the portion that is not within its original jurisdiction. In its lone encounter with §1441(c), the Supreme Court held that claims are not "separate and independent" if "there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions."[6] As the discussion below elaborates, this interpretation has severely limited the usefulness of §1441(c).[7]

Several other provisions authorize removal in special circumstances. Sections 1442 and 1442a permit federal officers and members of the armed forces (or persons acting under them) to remove civil actions or criminal prosecutions that challenge acts

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5. See Steinman, Removal, Remand, and Review in Pendent Claim and Pendent Party Cases, 41 Vand. L. Rev. 923, 931-43 (1988).

6. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14 (1951).

7. See infra notes X-X and accompanying text; 14A C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 367; Cohen, Problems in Remand of a "Separate and Independent Claim or Cause of Action", 46 Minn. L. Rev. 1, 13-17 (1961); Note, Third Party Removal Under Section 1441(c), 52 Fordham L. Rev. 133, 156-158 (1983).

taken under color of office if the federal official raises "a colorable defense arising out of [his] duty to enforce federal law."[8] In addition, §1443 allows removal of a civil action or criminal prosecution "[a]gainst any person who is denied or cannot enforce in the courts of [a] State a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof."[9] The Court has interpreted this provision narrowly, holding that "the vindication of the defendant's federal rights is left to the state courts except in the rare situations in which it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights inevitably will be denied by the very act of bringing the defendant to trial in the state court."[10]

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8. Willingham v. Morgan, 395 U.S. 402, 406-407 (1969); Maryland v. Soper (No. 1), 270 U.S. 9 (1926). 28 U.S.C. §2679(d) permits a federal employee sued for a traffic accident under the Federal Tort Claims Act to remove the case if the Attorney General certifies that the employee "was acting within the scope of his employment at the time of the incident out of which the suit arose." A federal employee may not, however, remove a criminal prosecution for a traffic violation unless the employee advances a federal defense. Mesa v. California, 109 S.Ct. 959 (1989).

9. 28 U.S.C. §1443(1). See also id. §1443(2) (providing for removal of civil actions or prosecutions "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.")

10. City of Greenwood v. Peacock, 384 U.S. 808, 827-828 (1966); Georgia v. Rachel, 384 U.S. 780 (1966); Kentucky v. Powers, 201 U.S. 1 (1906); Virginia v. Rives, 100 U.S. 313 (1880). See generally Dittman, Removal in Civil Rights Cases Under Section 1443(2), 31 Loyola L. Rev. 855 (1986); Redish, Revitalizing Civil Rights Removal Jurisdiction, 64 Minn. L. Rev. 523 (1980).

Finally, a handful of provisions scattered throughout the U.S. Code permit removal of specified categories of cases,[11] including quiet title or foreclosure actions brought against the United States;[12] suits relating to foreign arbitration agreements[13] or to the regulation of international banking;[14] and cases involving foreign sovereigns,[15] the FDIC,[16] the International Monetary Fund or International Bank,[17] and the Postal Service.[18] Conversely, 28 U.S.C. §1445 provides that certain categories of claims are not removable, including actions under the FELA and Jones Act,[19] suits for less than $10,000 against common carriers under the Interstate Commerce Act,[20] and suits based on state worker's compensation laws.[21]

The procedures for removal are straightforward. The defendant must file a notice of removal with the district court within 30 days after receiving the complaint. Removal is

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11. See generally 1A J. Moore & B. Ringle, Moore's Federal Practice ¶0.155[1] at 2 n.5 (1989).

12. 28 U.S.C. §1444.

13. 9 U.S.C. §205.

14. 12 U.S.C. §632.

15. 28 U.S.C. §1441(d).

16. 12 U.S.C. §1819(4).

17. 22 U.S.C. §286(g).

18. 39 U.S.C. §409.

19. 28 U.S.C. §1445(a).

20. 28 U.S.C. §1445(b).

21. 28 U.S.C. §1445(c).

effective as soon as the plaintiff and the state court are notified, at which point the state court proceedings are stayed.[22] A case that is not initially removable may become so if a federal claim is added or a nondiverse party dropped, but diversity cases must be removed within one year of the initiation of suit.[23]

Once a case has been removed, the district court may remand to the state court in only two circumstances: (1) when a "separate and independent" claim was removed under §1441(c), and (2) when removal was improper because of a "defect in removal procedure" or because the district court lacks jurisdiction.[24] While the Supreme Court has generally respected these strict statutory limits -- making clear, for example, that district judges lack discretion to remand because their dockets are overcrowded[25] -- the Court has recognized that remand may be appropriate when all federal claims are dismissed after removal and only pendent state law claims remain in the case.[26]

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22. 28 U.S.C. §1446(a), (e). An ongoing criminal trial may continue in state court until the removal petition is acted upon, but a conviction may not be entered unless the petition is denied. 28 U.S.C. §1446(c)(3).

23. 28 U.S.C. §1446(b). Once an action is removed, however, the plaintiff cannot force a remand to state court by adding a nondiverse party or dropping a federal claim. See St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938); 14A C. Wright, A. Miller & E. Cooper, supra note X, §3721 at 212-213.

24. 28 U.S.C. §1447(c). A motion to remand based on defects in removal procedure must be made within 30 days of the filing of the notice of removal; a motion based on lack of subject-matter jurisdicion may be made at any time prior to final judgment.

25. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 344-345 (1976).

Orders remanding cases to state court are expressly made unreviewable in 28 U.S.C. §1447(d), which provides that (except for remands in civil rights cases removed under §1443) "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In Thermtron Products, Inc. v. Hermansdorfer,[27] the Supreme Court ruled that "only remand orders issued under §1447(c) and involving the grounds specified therein -- that removal was improvident and without jurisdiction -- are immune from review under §1447(d)." The Court therefore permitted review by mandamus when a district court remanded because its docket was overcrowded, a ground not specified in §1447(c).[28] Apart from the rare obvious abuse like Thermtron, this exception is seldom used.[29] Some courts permit appeal from substantive decisions entered by the district court prior to a remand order[30] and from a district court's discretionary refusal to exercise pendent jurisdiction over a removed state law claim.[31]

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26. Carnegie-Mellon University v. Cohill, 108 S. Ct. 614, 619-620 (1988).

27. 423 U.S. 336, 346 (1976).

28. 423 U.S. at 351-353.

29. Remand orders under §1441(c), which permits district courts to remand state claims while retaining jurisdiction of "separate and independent" federal (or diverse) claims, are apparently reviewable under the Thermtron rationale. But as we explain below, few cases are properly removable under §1441(c). See infra notes X-X and accompanying text.

30. See The Clorox Co. v. District Court, 779 F.2d 517 (9th Cir. 1985). See generally Herrmann, Thermtron Revisited: When and How Federal Court Remand Orders Are Reviewable, 19 Ariz. St. L.J. 395, 410-411, 416 (1987).

b. Recommendations.

Certain aspects of removal practice are questionable. Why, for example, should the plaintiff have guaranteed access to a federal court for his federal claim while the defendant has no correlative right to a federal forum in which to present his federal defense? And what justifies the rule, applicable in both diversity and federal question cases, that permits defendants to remove an entire case when the federal and nonfederal claims are unrelated? Finally, why should orders remanding claims that have been removed be unreviewable? We address these issues, as well as several narrower removal controversies, in turn.

i. Federal defense and counterclaim removal.

By far the most important issue with respect to existing removal doctrine -- both as a practical and a theoretical matter -- is the unavailability of removal on the basis of a federal defense. The rule that the defendant can remove when the plaintiff's claim rests on federal law but not when his defense is federal results from defining removal in terms of original jurisdiction, since this transposes the well-pleaded complaint rule to the removal setting. The well-pleaded complaint rule sometimes produces "awkward results" even in the context of

31. Scott v. Machinists Automotive Trade Lodge No. 190, 827 F.2d 589, 592 (9th Cir. 1987).

original jurisdiction, as when "both parties admit that the only question for decision is raised by a federal preemption defense."[32] But in that setting at least the rule has the virtue of efficiency -- settling the jurisdictional question at the outset by reference to a single document and avoiding the possibility that the case might have to be dismissed at a later date because an anticipated federal defense fails to appear.[33] This efficiency rationale is not applicable in the removal context, because the question of jurisdiction arises only after a notice of removal has been filed. It adds little to the jurisdictional inquiry to allow the court at that point to consider the defendant's answer as well as the complaint. Indeed, the irrelevance of the efficiency rationale in the removal setting is underscored by §1446(b), which permits the defendant to remove within 30 days of any development in the plaintiff's case that makes the suit removable.

Certainly Congress could provide for federal defense removal. Removal on this basis was in fact permitted between 1875 and 1887.[34] The superior expertise of federal judges in interpreting federal law, which in part justifies federal question jurisdiction, is equally valuable when it comes to federal defenses. And the value of federal courts as protectors

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32. Franchise Tax Board, 463 U.S. at 12.

33. See Currie, The Federal Courts and the American Law Institute -- Part II, 36 U. Chi. L. Rev. 268, 270 (1969).

34. Franchise Tax Board, 463 U.S. at 10 n.9. See Act of March 3, 1875, §2, 18 Stat. 470; Collins, supra note X, at 724-726.

of federal rights is no less important when those rights are advanced in the form of defenses.[35] State courts are, if anything, more likely to give unduly cramped constructions to federal defenses to state causes of action than they are to construe federal claims too broadly (the only reason to allow defendants to remove based on the federal nature of the plaintiff's claim). Moreover, making removal turn on the status of the party raising the federal issue has peculiar effects since the alignment of the parties is often fortuitous, as when the federal issue is raised in a compulsory counterclaim or the action is for a declaratory judgment.[36]

These points led Professor Wechsler to comment more than 40 years ago that:

> it would be far more logical to shape the rule precisely in reverse, granting removal to defendants when they claim a federal defense against the plaintiff's state-created claim and to the plaintiff when, as the issues have developed, he relies by way of replication on assertion of a federal right. The need is to remember that the reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously. That reason is quite plainly absent in the only situation where, apart from federal officers, removal now obtains: the case where the defendant may remove because the plaintiff's case is federal.[37]

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35. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tent. Draft No. 6 at 95 (1968) (hereinafter ALI Draft No. 6).

36. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 189 (1969) (hereinafter ALI Official Draft).

37. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 L. & Contemp. Probs. 216, 233-234 (1948) (emphasis in original). Professor Wechsler advocated eliminating removal except by federal officers. See id. at 234.

This passage overstates the problems with existing removal provisions in that it is possible to imagine circumstances in which a plaintiff hopes to benefit from a state court's misapplication of federal law. But this means only that there may be some justification for allowing the defendant to remove on the basis of plaintiff's federal claim. Granting that, it seems clear that federal defense removal would serve purposes at least as valuable -- a conclusion that accounts for the "long line of uncharitable commentary" on the existing system.[38]

We nevertheless conclude that the existing statute should not be modified to permit federal defense removal. In making this recommendation, we are moved principally by concerns about the federal caseload -- concerns that are compounded by the relative ease with which federal defenses may be concocted.

The American Law Institute recommended more than 20 years ago that Congress authorize federal defense removal. It dismissed caseload concerns in large part because only 165 federal question cases had been removed during the years 1959-1960.[39] Even apart from their age, however, these figures offer little information on the likely caseload effects of federal

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38. Collins, supra note X, at 717. See, e.g., Fraser, Some Problems in Federal Question Jurisdiction, 49 Mich. L. Rev. 73, 84, 88-89 (1950); Hornstein, Federal Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis, 56 Ind. L.J. 563, 608-609 (1981); M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 72-73 (1980).

39. ALI Draft No. 6, supra note X, at 99. No figures have been published since 1964. Id.

defense removal. Because federal courts generally tend to interpret federal law more generously than state courts, the fact that defendants infrequently remove plaintiff's federal claims says little about whether defendants would choose to remove when they have federal defenses. For this reason, there was strong sentiment in the ALI to exclude constitutional defenses from the recommendation in favor of federal defense removal.[40] The difficulty of drawing a principled line between constitutional and other federal defenses ultimately led the ALI to reject that proposal,[41] but the Institute's final recommendation did address caseload concerns (albeit in a somewhat hit-or-miss manner) by excluding federal defenses that were not dispositive of the entire case, or that were grounded on res judicata, choice of law, or challenges to personal jurisdiction -- i.e., defenses that were viewed as either collateral to the merits or likely to be insubstantial.[42]

In our view, the caseload impact of federal defense removal is likely to be significant. There are already a substantial number of removed cases in federal court, which suggests that defendants are not reluctant to remove when doing so offers a tactical advantage. And while there are no empirical data on the

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40. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tent. Draft No. 5, at 100-104 (1967) (ALI Draft No. 5). Proponents of this view also expressed concern that it is relatively easy to devise nonfrivolous constitutional defenses.

41. See ALI Draft No. 6, supra note X, at 105-108.

42. ALI Official Draft, supra note X, §1312(b); Currie, supra note X, at 272-274.

number of state court suits in which federal defenses are advanced, we have little doubt that the number is large.[43] There is, unfortunately, no way to predict in what percentage of cases defendants would seek to remove, but the sense that federal courts are more sympathetic than state courts to arguments based on federal law or on the Federal Constitution (especially preemption) would surely make removal an attractive option in a large number of the cases.[44]

We also believe that defendants are more likely than plaintiffs to offer marginal arguments based on federal law. A plaintiff who hinges federal jurisdiction on a questionable federal claim risks dismissal of the action on jurisdictional grounds and the associated delay of having to refile in state court (or having an aggravated federal judge retain jurisdiction over the remaining state law issues). A defendant, in contrast, loses nothing by listing any defense that is credible.[45] This may account for the sense that it is easier to devise a

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43. Federal defenses are offered as a matter of course in some categories of cases, such as privacy and defamation actions, evictions from public housing, actions to terminate public benefits, and civil commitments. See generally H. Friendly, Federal Jurisdiction: A General View 125 (1973); Collins, supra note X, at 772.

44. Cf. Marvel, The Rationales for Federal Jurisdiction: An Empirical Examination of Student Rights Litigation, 1984 Wis. L. Rev. 1315, 1351, 1371-1372; Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977); Neuborne, Toward Procedural Parity in Constitutional Litigation, 22 Wm. & Mary L. Rev. 725, 726 (1981); Wells, Habeas Corpus and Freedom of Speech, 1978 Duke L.J. 1324.

45. This consideration led Judge Posner to conclude that "[i]t would be a serious mistake to make all cases in which a federal defense was asserted removable as a matter of right." R. Posner, The Federal Courts: Crisis and Reform 190 (1985).

nonfrivolous constitutional defense than a substantial federal claim.[46]

The federal judicial system has gotten along without defense removal for more than 100 years, and given current caseloads we are loath to recommend a change solely for the sake of theoretical or conceptual consistency. Given the steady growth in the size of the federal docket throughout the 1970s and 1980s, what Judge Friendly said in 1973 is even truer today: "[w]e cannot predict what the added burden from removal on the basis of a federal constitutional defense would be, and we cannot afford to take risks that some might have regarded as not unreasonable in 1968."[47]

We do believe, however, that removal should be allowed if the defendant pleads a nonfrivolous federal counterclaim that arises from the same transaction or occurrence as the plaintiff's state law claim. When a federal counterclaim is "compulsory,"[48] there is no reason to allow the plaintiff's choice of forum to force the defendant to litigate it in state court. By precluding

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46. Cf. ALI Draft No. 5, supra note X, at 103-104.

47. H. Friendly, supra note X, at 125. Judge Friendly was more receptive to the possibility of removal based on federal statutory defenses, which he suggested could be limited to three categories: those that, had they been claims, would have been in the exclusive jurisdiction of the federal courts; those involving claims of federal preemption; and those resting on treaties. Id. at 125-126.

48. Fed. R. Civ. Proc. 13(a) provides that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." This provision is similar to most state compulsory counterclaim provisions.

removal in such cases, however, existing law forces the defendant either to litigate his federal claim in state court or to pursue duplicative litigation in two courts -- in the process running the risk that his counterclaim will be barred if the state suit comes to judgment first.

The reasons for allowing removal under these circumstances are straightforward. Since the counterclaim is based on federal law, the justifications for original federal question jurisdiction apply with full force. And since a counterclaim is a claim (and not simply a defense), the functional concern underlying the well-pleaded complaint rule that possibly supports the limitation on federal defense removal -- the chance that the federal issue may never be reached -- is absent. Moreover, if the claim and counterclaim arise from a single transaction, efficiency suggests that they be resolved in a single forum. Since such a case by definition has a significant federal component, it is sensible to make the entire controversy removable to federal court.

If this analysis has a familiar ring, it is because our reasons for recommending counterclaim removal are essentially identical to our reasons for recommending that Congress restore the doctrines of pendent party and ancillary jurisdiction. Pendent jurisdiction is desirable because many federal claims concern transactions or occurrences that also give rise to claims based on state law. Unless these claims can be litigated together in one federal action, the plaintiff must either bring his federal claims in state court or conduct duplicative

litigation in two judicial systems. A broad doctrine of pendent jurisdiction solves this problem. But while pendent jurisdiction may protect the plaintiff's ability to litigate in a federal forum, the defendant faces precisely the same choice with respect to his federal claim due to restrictions on removal: he must either bring this claim as a counterclaim in state court or begin a separate lawsuit. All the justifications for pendent jurisdiction are thus equally applicable to counterclaim removal. The risk that defendants will raise frivolous federal counterclaims in an attempt to obtain federal jurisdiction is limited by the fact that it is harder to manufacture a substantial counterclaim arising from the same transaction or occurrence as plaintiff's claim than it is to concoct a nonfrivolous defense, and any added burden on the federal courts is outweighed by the general interest in preserving a federal forum for federal claims -- whether these claims are asserted by a claimant or a counterclaimant.

ii. Separate claim removal.

Section 1441(c) authorizes the removal of an entire case whenever a "separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action." While this provision has relatively little practical importance, it has proved extraordinarily confusing to courts and was for this reason singled out by a leading scholar as "one of the most unfortunate provisions in the entire Judicial Code."[49]

Section 1441(c) was intended to prevent plaintiffs from destroying diversity jurisdiction -- and with it defendants' removal rights -- by joining nondiverse parties to otherwise removable claims.[50] As interpreted by the Supreme Court in American Fire & Casualty Co. v. Finn,[51] however, the provision fails to serve this purpose. Finn holds that claims are not "separate and independent" within the meaning of §1441(c) if they grow out of "a single wrong to plaintiff ... arising from an interlocked series of transactions."[52] Finn itself was a suit by a Texas plaintiff for the proceeds of several insurance policies. There were three defendants -- the insurance agent, also a resident of Texas, and two out-of-state insurance companies. The Court observed that "[t]he allegations in which [the agent] is a defendant involve substantially the same facts and transactions as do the allegations in the first portion of the complaint against the foreign insurance companies."[53] Consequently, the Court concluded, "[i]t cannot be said that there are separate and independent claims for relief as §1441(c) requires."[54]

49. Currie, The Federal Courts and the American Law Institute - Part I, 36 U. Chi. L. Rev. 1, 22 (1968). See Harper v. Sonnabend, 182 F.Supp. 594, 595 (S.D.N.Y. 1960) ("it is not an exaggeration to say that at least on the surface the field luxuriates in a riotous uncertainty").

50. See Pullman Co. v. Jenkins, 305 U.S. 534 (1939); Cohen, supra note X, at 25-26; Lewin, The Federal Courts' Hospitable Back Door - Removal of "Separate and Independent" Non-Federal Causes of Action, 66 Harv. L. Rev. 423, 426 (1953).

51. 341 U.S. 6 (1951).

52. 341 U.S. at 14.

53. 341 U.S. at 16.

Given this interpretation, "few, if any, diversity cases can be properly removed under section 1441(c)."[55] Virtually all state joinder rules allow multiple parties to be joined in a single proceeding only if their claims involve common questions of law and fact.[56] As a result, the factor that makes aggregation of parties in a single proceeding possible -- commonality of facts and law -- makes removal under §1441(c) inappropriate. Moreover, even if state joinder rules were broad enough to permit the joinder of claims that are "separate and independent" within the meaning of §1441(c), the suit could not be maintained in federal court, since Federal Rule of Civil Procedure 20(a) permits joinder only if the right to relief asserted against each defendant arises "out of the same transaction, occurrence, or series of transactions or occurrences ...."

The unsurprising result is that §1441(c) hardly ever comes into play in diversity cases. One study found only 27 reported diversity cases removed pursuant to §1441(c) between 1951 and 1961.[57] And while there have been occasional decisions permitting removal under this statute in subsequent years, they are rare and often seem inconsistent with decisions rejecting removal in similar circumstances.[58]

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54. 341 U.S. at 16.

55. 14A C. Wright, A. Miller & E. Cooper, supra, §3724 at 367.

56. See 14A C. Wright, A. Miller & E. Cooper, supra, §3724 at 367-368.

57. Cohen, supra note X, at 15 n.60.

It seems clear that when Congress revised the removal statute in 1948, it did not think that §1441(c) would apply in federal question cases.[59] But courts have not interpreted the provision this way, and §1441(c) has a curious effect in the federal question setting. If state and federal claims share a common nucleus of operative fact, they are part of the same "civil action" under 28 U.S.C. §1331 and therefore part of the

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58. The largest category of decisions permitting §1441(c) removal involves third party claims for indemnification, where the party obligated to indemnify was not responsible for the injury to the plaintiff. See, e.g., Carl Heck Engineers v. Larouche Parish Police, 622 F.2d 133, 135-136 (5th Cir. 1983); Connecticut Savings Bank v. Savers Federal Savings & Loan Ass'n, 670 F. Supp. 1549, 1551 (S.D. Fla. 1987); Marsh Investment Corp. v. Langford, 494 F. Supp. 344, 349-350 (E.D. La. 1980), aff'd, 652 F.2d 583 (5th Cir. 1981). Other courts have held that third party claims do not give rise to a right to remove under §1441(c). See 14A C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 370-378 & nn. 37-42 ("the lower federal courts repeatedly have denied removal in scores of cases involving torts, contracts, combinations of these two theories of recovery, securities matters, insurance policies, and a variety of other matters") (citing cases); Gibson, Removal of Claims Relating to Bankruptcy Cases: What is a "Claim or Cause of Action"? 34 U.C.L.A. 1, 37 (1986) ("section 1441(c) has been virtually eliminated as a significant basis for removal of cases to district court"). Wright, Miller and Cooper suggest that §1441(c) may come into play in a diversity case only when a resident plaintiff sues a resident defendant and a nonresident defendant, and then adds an unrelated claim against the nonresident defendant. 14A C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 369.

59. The predecessor to §1441(c) did not allow for separate claim removal in federal question cases. See Cohen, supra note X, at 3. The avowed purpose of the 1948 revision was to narrow the scope of separate claim removal, a purpose that the statute plainly achieved in the diversity area. See Finn, 341 U.S. at 9-11 & n.2. There is no evidence that Congress recognized that the changes in statutory language would make separate claim removal available in federal question cases. See Thomas v. Shelton, 740 F.2d 478, 483 (7th Cir. 1984); Charles D. Bonanno Linen Service, Inc. v. McCarthy, 708 F.2d 1, 9-10 (1st Cir.), cert. denied, 464 U.S. 936 (1983).

"civil action" made removable by §1441(a) and (b). But if the claims do not share a common nucleus of fact they are "separate and independent" within the meaning of §1441(c), and once again the entire case is removable.[60] In other words, between Gibbs and Finn, §1441(c) apparently makes both the federal and the state law portion of every federal question case removable, although §1441(c) does permit the district judge to remand the state-law portion of the case to state court.

In addition, §1441(c) appears to leave a hiatus in cases involving state law claims that are related to the federal claim but nonetheless outside the court's statutory pendent jurisdiction.[61] Until recently this concern was largely hypothetical because Finn and Gibbs were understood to be reverse sides of a single test turning on whether the federal and state claims derived from the same transaction.[62] That changed last

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60. In contrast to restrictions on joinder of parties, state rules typically permit joinder of unrelated claims, as do the federal rules. See 14A C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 399; Fed. R. Civ. Proc. 18(a).

61. See 14A. C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 399; Lewin, supra note X, 430-431, 437-442.

62. See 14A. C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 400-401. The Court had recognized a few areas in which pendent jurisdiction was limited and therefore in which this hiatus was real, but these were relatively narrow exceptions. See, e.g., Aldinger v. Howard, 427 U.S. 1 (1976) (28 U.S.C. §1343(3) excludes assertions of pendent claims against municipalities in connection with litigation under 42 U.S.C. §1983). There are significant reasons to doubt the correctness of cases interpreting Finn as co-extensive with Gibbs. The Finn Court made no reference to a "common nucleus of operative fact," instead asking whether there was "a single wrong." 341 U.S. at 14. This language is reminiscent of Hurn v. Oursler, 289 U.S. 238 (1933), which defined pendent jurisdiction more narrowly than Gibbs, and which Gibbs in fact overturned.

Term with the Supreme Court's decision in Finley v. United States.[63] As discussed in greater detail in the section on pendent jurisdiction, Finley held that, under existing jurisdictional statutes, a state claim is not part of the same "civil action" as a federal claim if it is against a separate party, even if the claims are transactionally related. Because such claims are not within the federal court's original jurisdiction, they are not removable under §1441(a) or (b); at the same time, because these claims arise out of the same transaction as the plaintiff's federal claim, they are not "separate and independent" and thus cannot be removed under §1441(c).[64] As a result, §1441(c)'s only function in federal question cases is to allow the defendant to bring into federal court state law claims that are wholly unrelated to the federal action. State claims that are related to the federal action and that might appropriately be tried along with the federal claim as a matter of judicial economy are excluded.[65]

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63. 109 S.Ct. 2003 (1989).

64. This problem was anticipated by Judge Breyer in Charles D. Bonanno Linen Service, Inc. v. McCarthy, 708 F.2d 1 (1st Cir. 1983). That case involved federal and state claims against a union, as well as state tort claims against individual union members arising from the same series of transactions. The court held that the statute conferring subject matter jurisdiction, 29 U.S.C. §187, did not permit pendent party jurisdiction over the claims against the individuals. But the court also found that it could not take jurisdiction under §1441(c) because these claims were "too closely related to the [federal claims] to satisfy Finn's requirements." 708 F.2d at 9.

65. "What sense does it make, after all, to have a tertium quid of certain state claims -- those too distant to be pendent, too close to be 'separate and independent' -- that alone, in an

Some readers will undoubtedly have noticed that this interpretation of §1441(c) casts substantial doubt on its constitutionality. Gibbs extends the authority of the federal courts "to the full extent permitted by the Constitution."[66] Therefore, if the only claims sufficiently "separate and independent" to satisfy §1441(c) are claims that do not satisfy Gibbs, then the only claims covered by the statute are claims that the federal courts cannot constitutionally hear.[67] Some commentators suggest that this constitutional difficulty is limited to federal question cases, apparently assuming that since complete diversity is not constitutionally required,[68] there is room for play in §1441(c) in diversity cases.[69] But even under minimal diversity, the claims must still arise from the same "transaction or occurrence." Consequently, so long as the test for removal under §1441(c) is defined in the same terms as pendent jurisdiction under Gibbs, the statute has no constitutional applications.[70]

'arising under' case, the federal court would have no statutory power to hear?" Charles D. Bonanno Linen Service, Inc. v. McCarthy, 708 F.2d 1, 9 (1st Cir. 1983).

66. Finley, 109 S.Ct. at 2006. See Gibbs, 383 U.S. at 725.

67. See Lewin, supra note X, at 431-437. But see Moore & VanDercreek, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section 1441(c), 46 Iowa L. Rev. 489, 506 n.81 (1961).

68. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

69. See, e.g., Steinman, supra note X, at 934-35; Cohen, supra note X, at 24-25.

70. It is noteworthy in this connection that the most celebrated

If §1441(c) is to be saved, lower court decisions treating it as coextensive with Gibbs must be overturned. As noted above,[71] there are substantial reasons to doubt this interpretation. Gibbs was not decided until 15 years after Finn, and the Court in Finn used language reflecting the then-prevailing understanding of pendent jurisdiction, which was narrower than Gibbs. In other words, to the extent that Gibbs expanded the pendent jurisdiction of the federal courts, cases that satisfy the Gibbs test but would not have been within the court's pendent jurisdiction prior to Gibbs may be removable under §1441(c).

In any event, §1441(c) plainly has serious, possibly fatal, flaws. As interpreted in Finn, it is virtually never available in diversity cases, and it is flatly inapplicable in the cases in which an out-of-state defendant is most likely to suffer prejudice -- cases like Finn itself, which involve alternative liability between in-state and out-of-state defendants. Despite this, or maybe because of it, §1441(c) has produced a large volume of litigation[72] and has spawned considerable uncertainty about a host of subsidiary issues.[73] If separate claim removal

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case in which removal under §1441(c) was permitted, Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965), was recently disapproved by the Second Circuit. Gardner & Florence Call Cowles Foundation v. Empire, Inc., 754 F.2d 478, 482 n.5 (2d Cir. 1985).

71. See supra note X.

72. The latest editions of the leading federal courts treatises devote 56 and 76 pages to §1441(c) litigation. 14A C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 358-414; 1A J. Moore & B. Ringle, supra note X, at 298-373.

serves useful purposes, the statute should be made effective -- as the ALI suggested 20 years ago.[74] If, on the other hand, separate claim removal is not desirable, as most commentators apparently believe, the existing statute should be eliminated.

On balance, we side with those commentators who advocate outright repeal of §1441(c).[75] Particularly if Congress adopts our recommendation respecting pendent jurisdiction and overrules Finley, removal of pendent claims under §1441(a) and (b) should render §1441(c) unnecessary. The only situation in which such a provision might be necessary would be where the plaintiff has related, nonfederal claims against both diverse and nondiverse defendants (i.e., the situation §1441(c) was originally intended to cover). At present, §1441(c) is inapplicable in such cases due to Finn, but one can argue that the diverse defendant should be able to remove and, for reasons of efficiency, to bring the nondiverse defendant along. On the other hand, the complete

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73. Examples include whether claims by several plaintiffs against a single defendant are removable under §1441(c), and whether third-party claims, cross-claims and counterclaims are removable. See Thomas v. Shelton, 740 F.2d 478, 487 (7th Cir. 1984); Carl Heck Engineers v. Larouche Parish Police, 622 F.2d 133, 135-136 (5th Cir. 1983); Ford Motor Credit Co., Inc. v. Aaron Lincoln Mercury, Inc., 463 F. Supp. 1108, 1110-1117 (N.D. Ill. 1983); 14A C. Wright, A. Miller & E. Cooper, supra note X, §3724 at 386-392; Note, Third-Party Removal Under Section 1441(c), 52 Fordham L. Rev. 133, 134-136 (1983).

74. ALI Official Draft, supra note X, §1304. The ALI proposed to make an entire case removable whenever a single defendant could have removed if sued alone. Of course, this proposal has its own problems, including the failure to address the constitutional concerns discussed above and the potential of greatly expanding the number of diversity cases.

75. See, e.g., Cohen, supra note X, at 41; Currie, supra note X, at 25-26 n.20. Cf. Lewin supra note X, at 442.

diversity rule of Strawbridge v. Curtiss[76] is based on the assumption that out-of-state defendants will be protected from local bias by the presence of a resident defendant. If one accepts that assumption, there is, as Professor Currie has noted, no need for separate claim removal.[77]

Our conclusion is buttressed by our skepticism that diversity jurisdiction is necessary at all. It would be preferable to dispense with §1441(c) (and its associated litigation) than to expand the federal caseload by partially repealing the complete diversity rule for the benefit of defendants.[78]

iii. Reviewability of Remand Orders.

Another troublesome question concerns the reviewability of orders remanding claims that have been removed. 28 U.S.C. §1447(d) makes a district court's decision to remand a case to state court unreviewable. In Thermtron Prods., Inc. v. Hermansdorfer,[79] the Supreme Court held that this bar is limited to remands for the reasons specified in §1447(c) -- that removal was "improvident" or that the district court lacked

76. 7 U.S. (3 Cranch) 267 (1806).

77. See Currie, supra note X, at 22.

78. In making precisely such a recommendation, the ALI acknowledged that its proposal if accepted was likely to cause a significant increase in the federal caseload. ALI Official Draft, supra note X, at 144.

79. 423 U.S. 336 (1976).

jurisdiction. Lower court decisions to remand for other reasons were held subject to ordinary appellate review. As a practical matter, this exception is quite narrow in that any citation to §1447(c) in the remand order -- or, for that matter, any indication that the district court remanded the case because it believed itself to be without jurisdiction -- insulates a remand decision from review.[80]

This bar on review is intended "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues."[81] While that is certainly a laudable goal, we question whether it is necessary to expedite state proceedings at the cost of refusing to correct the wrongful exclusion of defendants from a federal forum. Such a rule is not entirely consistent with other aspects of removal doctrine. For one thing, removal reviewability rules are not symmetrical, since the decision not to remand is subject to review. Indeed, if a decision to retain jurisdiction is set aside on appeal and the case remanded, an entire federal trial may be rendered nugatory.[82] Conversely, removal is permitted regardless of how

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80. See Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723, 723-724 (1977) (per curiam); Volvo of America Corp. v. Schwarzer, 429 U.S. 1331, 1332-1333 (1976) (Rehnquist, J., in chambers).

81. Thermtron, 423 U.S. at 351. See also id. at 354-356 (Rehnquist, J., dissenting).

82. This was the case, for example, in Finn. See 341 U.S. at 7-8. See generally 14A C. Wright, A. Miller & E. Cooper, supra note X, §3740 at 596-599. An appellate remedy may be available in this setting to ensure that federal courts do not hear cases over which they lack jurisdiction. But a plaintiff may seek a remand under §1447(c) on non-jurisdictional grounds by pointing to defects in remand procedures so long as the request is made

far along the state proceedings are if developments during the course of litigation create federal jurisdiction (such as the dismissal of a nondiverse party or the addition of a federal claim).[83]

If protecting federal interests is important enough to warrant removal in the first place -- and certainly if protecting those interests warrants removal even after proceedings are underway in state court -- removal rights should not be frustrated by a district court's erroneous decision to remand.[84] At the same time, we are cognizant of the need to avoid undue delay in the disposition of this threshhold jurisdictional question. We therefore recommend making remand decisions reviewable by petition for a writ of mandamus. This will allow for expeditious review and the setting aside of plainly unlawful remands, while discouraging frivolous appeals and avoiding the prospect of full-scale appeals that could delay the resolution of every case that is returned to state court.

iv. Miscellaneous removal problems.

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within 30 days of filing of the notice of removal, and the statute affords an appellate remedy to challenge the denial of this sort of request as well.

83. Diversity removals are permitted only if dismissal of the nondiverse party occurred within one year of initiation of the suit. 28 U.S.C. §1446(b).

84. See generally Steinman, supra note X, at 923, 1007-1009; Myers, Federal Appellate Review of Remand Orders: Expansion or Eradication?, 48 Miss.L.J. 741, 748-749 (1977).

Although less significant than the problems discussed above, several additional removal issues deserve brief consideration.

Civil Rights Removal. The Court's decisions in City of Greenwood v. Peacock[85] and Georgia v. Rachel[86] made civil rights removal virtually impossible by holding §1443 applicable only in the rare case in which a state statute on its face denies defendants equal protection in state court. When they were rendered, these decisions -- and the subject of civil rights removal generally -- attracted considerable attention.[87] But improvements in the administration of justice in the state courts during the intervening years may have made the case for expanding civil rights removal less compelling than it was then. Under the circumstances, we agree with the ALI that "if fundamental changes are to be made in that [federal-state] relationship in the area of civil rights, such changes would more appropriately come in a ~~civil rights~~ bill than in a jurisdictional study."[88]

85. 384 U.S. 808 (1966).

86. 384 U.S. 780 (1966).

87. See, e.g., Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U.Pa.L.Rev. 793 (1965); Johnson, Removal of Civil Rights Cases From State to Federal Court: The Matrix of Section 1443, 26 Fed.B.J. 99 (1966); Morse, Civil Rights Removal: "The Letter Killeth, But the Spirit Giveth Life", 11 How.L.J. 149 (1965); Note, Federal Removal and Injunction to Protect Political Expression and Racial Equality: A Proposed Change, 57 Cal.L.Rev. 694 (1969); Note, Federal Jurisdiction: The Civil Rights Removal Statute Revisited, 1967 Duke L.J. 136; Comment, A Reexamination of the Civil Rights Removal Statute, 51 Va.L.Rev. 950 (1965).

88. ALI Tentative Draft No. 6, supra note X, at 113. Problems relating to the denial of federal rights in state court may also be addressed by enjoining defective proceedings, an option that would be more widely available under our proposed revision of the Anti-Injunction Act.

Non-Removable Claims. Finally, commentators occasionally suggest that particular categories of cases, typically those involving "a widows-and-orphans type of plaintiff,"[89] be added to the list of non-removable cases now contained in §1445. The ALI, for example, proposed that actions for wages under the Fair Labor Standards Act be made non-removable,[90] and the Judicial Conference has recommended the same treatment for actions under ERISA involving claims that a pension or benefits plan has been interpreted improperly.[91] In addition, consultants to the Committee suggested that §1983 claims could be made nonremovable on the ground that state officials cannot complain about having to litigate in state courts. We have decided to recommend against adding to the list of nonremovable claims. It is difficult to draw principled distinctions between categories of routine cases. Moreover, there are counterarguments for retaining federal jurisdiction over all of these cases, and it is not clear that any particular type of action has proven sufficiently burdensome to the federal courts to warrant singling it out for special treatment. Making a class of cases non-removable assumes that the federal interests are correlated with those of the plaintiff, yet there is no reason to assume that

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89. Currie, supra note X, at 275.

90. A few courts have suggested that the FLSA already precludes removability. See 14A C. Wright, A. Miller & E. Cooper, supra note X, §3729 at 495-497.

91. See Memorandum to Federal/State Jurisdiction Committee Members from Judge Stanley Marcus dated June 21, 1989 (recommending that cases under 29 U.S.C. §1132(a)(1)(B) be made non-removable).

this is truer of these than of other federal claims. An overriding theme of this Report is that docket pressures warrant reducing the number of cases brought into federal courts. But we believe that there are more rational ways to do this. In such circumstances, the prudent course is to do nothing.

4. Pendent and Ancillary Jurisdiction.

The doctrines of pendent and ancillary jurisdiction -- together called supplemental jurisdiction -- enable a federal court to hear state law claims for which there is no independent statutory basis of jurisdiction. Pendent jurisdiction refers to claims that are joined in the plaintiff's complaint. Pendent claim jurisdiction allows a plaintiff to join to a federal claim a factually related state claim despite the absence of diversity. Pendent party jurisdiction permits a plaintiff to join to a federal claim a factually related state claim involving an additional, non-diverse party. Ancillary jurisdiction refers to additional claims that are joined after the complaint is filed. For some reason, courts do not distinguish between ancillary claim and ancillary party jurisdiction. Thus, ancillary jurisdiction enables defendents and intervenors to join additional claims and parties without an independent basis for jurisdiction if these claims arise out of the same transaction or occurrence as plaintiff's claim. Moreover, additional claims by the plaintiff may also be described as ancillary if these claims are made against intervenors or against parties joined by a defendant after the complaint was served.

We begin with this vocabulary only because the courts use these terms. In fact, the distinction between pendent and ancillary jurisdiction has no functional significance and merely confuses matters. Our proposal at the end of this section makes no use of these terms.

Supplemental jurisdiction facilitates the joinder in litigation of all claims arising out of the same transaction. The benefits in judicial economy and in party and witness convenience are apparent.

This past Term, the Supreme Court held in Finley v. United States that a federal court may not exercise pendent party jurisdiction over an additional, nondiverse defendant in suits against the United States under the Federal Tort Claims Act.[1] While technically limited to suits based on the FTCA, the Court's rationale may prohibit any exercise of pendent party jurisdiction and threatens to eliminate pendent claim and ancillary jurisdiction as well. We recommend that Congress overrule Finley by codifying the doctrines of pendent and ancillary jurisdiction. By undermining these doctrines the Supreme Court has impeded the efficient use of judicial resources and made the federal courts a less attractive forum in which to bring federal claims. This recommendation may seem to cut against the grain of the Committee's Report. But in our view abolishing supplemental jurisdiction would not be a sensible means of limiting the federal courts' work, because the cases eliminated would include many that should be heard by a federal tribunal.

a. The Development and Refinement of Supplemental Jurisdiction.

1. 109 S.Ct. 2003 (1989).

Before the decision in United Mine Workers v. Gibbs,[2] the federal courts exercised only a limited pendent jurisdiction. In Hurn v. Oursler, the Supreme Court drew a distinction between claims arising out of a "single primary right" and claims based on distinct rights, and limited pendent jurisdiction to the former.[3] This analysis was consistent with the then-prevailing understanding of the scope of a "cause of action." In the years after Hurn, however, this understanding was abandoned in favor of focus on the facts out of which a lawsuit arose. Gibbs brought the doctrine of pendent jurisdiction into conformity with this modern understanding:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ...," U.S. Const., Art. II, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." ... The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.[4]

Gibbs abandons the difficult, abstract inquiry into the scope of a legal right called for by Hurn. Separate claims are part of the same "case" and may be heard together if they are based on related facts. However, pendent jurisdiction is not mandatory.

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2. 383 U.S. 715 (1970).

3. 289 U.S. 238, 245-47 (1933).

4. 383 U.S. at 725 (emphasis in original).

The district court may decline to hear pendent claims if considerations of judicial economy or fairness to the litigants do not favor trying the federal and state claims together, or if the state claims predominate over the federal claims, or if the novelty or complexity of the state law issues favor state court adjudication.[5]

The Court's opinion in Gibbs did not discuss whether pendent jurisdiction in that case was conferred by 28 U.S.C. §1331, the statute on which jurisdiction of the plaintiff's main claim was based. Precisely because the Court simply assumed that §1331 authorized supplemental jurisdiction, most courts inferred from Gibbs that jurisdictional statutes should be presumed to confer supplemental jurisdiction. This understanding was buttressed by the Court's discussion of the importance of disposing of related claims in a single proceeding.[6]

The Supreme Court allowed the presumption to be rebutted in Aldinger v. Howard.[7] Aldinger was fired from her position in the county treasurer's office and filed suit against the county treasurer and commissioners under 42 U.S.C. §1983. She was not able to state a federal claim against the county because municipal corporations were at the time immune from liability under §1983. So Aldinger sued the county on a state law theory and argued that the federal court had pendent jurisdiction.[8]

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5. 383 U.S. at 726-27.

6. 383 U.S. at 724-25.

7. 427 U.S. 1 (1976).

8. 427 U.S. at 4-5.

Aldinger presented a question of pendent party jurisdiction, not expressly addressed in Gibbs, but the Court remarked that pendent party jurisdiction served the same policies of fairness and judicial economy and was supported by precedent respecting ancillary jurisdiction. Consequently, as a constitutional matter, the Court found no reason to distinguish between pendent claim and pendent party jurisdiction,[9] but it nonetheless affirmed the dismissal of plaintiff's claim against the county. Plaintiff's main claim was based on 28 U.S.C. §1343(3), which confers federal jurisdiction over claims arising under specified civil rights statutes, including §1983. The Court had earlier held that Congress had immunized municipalities from §1983 liability because of doubts about the propriety and constitutionality of requiring local governments to defend themselves in federal court. It was hardly likely, therefore, that Congress had given federal courts jurisdiction to judge these entities under state law.[10]

The Supreme Court applied a similar analysis in Owen Equipment and Erection Co. v. Kroger,[11] a case involving ancillary jurisdiction. Kroger, a citizen of Iowa, sued OPPD, a Nebraska company, for allegedly causing the wrongful death of her

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9. 427 U.S. at 6-15. On the contrary, the Court suggested in dictum that pendent party jurisdiction would sometimes be appropriate, such as when "the grant of jurisdiction is exclusive." 427 U.S. at 16-19.

10. 427 U.S. at 16-19.

11. 437 U.S. 365 (1978).

husband. OPPD then impleaded Owen, an Iowa corporation, and Kroger amended her complaint to state a claim against Owen. This amendment destroyed diversity jurisdiction, but Kroger argued that the court could exercise ancillary jurisdiction over her claim against Owen because Owen was made a party by OPPD's third-party complaint.[12]

While recognizing that the Constitution permits federal courts to exercise jurisdiction over any pendent or ancillary claim that satisfies Gibbs, the Court held that Congress had not conferred this jurisdiction in the diversity statute, 28 U.S.C. §1332. To take ancillary jurisdiction over a claim by a plaintiff against a non-diverse third-party defendant would enable the plaintiff to circumvent the requirement of complete diversity: the plaintiff could defeat the statutory requirement by "the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[13]

The Court distinguished other situations in which ancillary jurisdiction was permitted. These situations, the Court observed, involve "claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."[14] Impleader, cross-claims,

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12. 437 U.S. at 369.

13. 437 U.S. at 374.

14. 437 U.S. at 376. The Court also noted that, in contrast to impleader claims, Kroger's claim against Owen was not logically dependent upon the resolution of Kroger's claim against the

compulsory counterclaims, and intervention of right involve less danger that claimants have connived to sidestep the complete diversity rule; the ordinary presumption in favor of supplemental jurisdiction applies.

b. Finley v. United States.

In Finley v. United States, the Supreme Court turned this framework established by Gibbs, Aldinger, Owen, and a vast number of lower court decisions on its head. Finley's husband and children were killed when a plane in which they were flying struck electric transmission wires during its approach to a San Diego, California, airfield. Plaintiff sued the utility company in the state court, but when she learned that the Federal Aviation Administration may have been responsible, she brought an action against the United States under the Federal Tort Claims Act. Moreover, because 28 U.S.C. §1346(b) provides that federal courts have exclusive jurisdiction over such actions, plaintiff brought this action in the federal court, and sought to append her state law tort claim against the utility company.

The Supreme Court held that plaintiff must bring her state law claim in the state court -- even though this meant that she

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original defendant. But compulsory counterclaims or cross-claims are not necessarily logically dependent on resolution of the plaintiff's claim, yet are recognized as being within the federal courts' ancillary powers. See Freer, A Principled Statutory Approach to Supplemental Jurisdiction, 1987 Duke L.J. 34, 70; Matasar A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction, 17 U.C. Davis L. Rev. 103, 171-72 (1983).

could sue both defendents only by bringing two lawsuits. According to the Court, Gibbs' presumption in favor of supplemental jurisdiction has things backwards: because federal courts are courts of limited jurisdiction and possess only powers given to them by the Constitution and Congress, these courts require an affirmative grant of authority from Congress to exercise jurisdiction, including jurisdiction over supplemental claims.[15]

The Court recognized a tension between this principle and Gibbs, but resolved it by reinterpreting Aldinger and Owen and drawing a distinction between pendent claim and pendent party jurisdiction. According to the Court, while Gibbs states the law with respect to pendent claims, Aldinger and Owen show "that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and we will not read jurisdictional statutes broadly."[16] The Court recognized two exceptions covering "a narrow class of cases,"[17] but apart from these held that pendent party jurisdiction is improper unless expressly authorized by Congress. The Court found no such authority in the Federal Tort Claims Act.[18]

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15. 109 S.Ct. 2005-06.

16. 109 S.Ct. at 2007.

17. 109 S.Ct. at 2008. The exceptions are when "an additional party has a claim upon contested assets within the court's jurisdiction," and "when necessary to give effect to the court's judgment." Id.

In closing, the Court dropped a hint concerning the scope of its opinion. Gibbs, the Court repeated, had taken a different approach that was "a departure from prior practice."[19] But while the Court would not overrule Gibbs, neither would it adhere to Gibbs' reasoning:

> Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts. All our cases--Zahn, Aldinger, and Kroger--have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule; the opposite would sow confusion.[20]

Finley's implications extend beyond the holding that federal courts may not assert pendent party jurisdiction in suits under the Federal Tort Claims Act. The rationale of Finley would seem to preclude federal courts from ever asserting pendent party jurisdiction, since none of the existing jurisdictional statutes expressly confers such authority. Finley's language also undermines the federal courts' ancillary jurisdiction over third-party claims, compulsory counterclaims and cross-claims against additional parties, and claims raised by intervenors of right, since apart from the two exceptions recognized by the Court Finley says that jurisdiction over these claims also requires express authorization from Congress, and no existing

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18. 109 S.Ct. at 2008-10.

19. 109 S.Ct. at 2010.

20. 109 S.Ct. at 2010.

jurisdictional statute expressly authorizes federal courts to assert ancillary jurisdiction.

This leaves only pendent claim jurisdiction. The Court acknowledged that statutory authorization is technically necessary for joinder of claims as well as for joinder of parties, but declined to overrule Gibbs.[21] There appears to be no principled basis for drawing this line.[22] Finley assumes that adjudicating a jurisdictionally insufficient claim against a new party is a more serious extension of federal jurisdiction than adjudicating a jurisdictionally insufficient claim against an existing party, but does not explain why. Whether exercising pendent claim, pendent party, or ancillary jurisdiction, a federal court is adjudicating a claim for which there is no independent basis for federal jurisdiction.[23] With one exception,[24] there is no more basis in Congress' jurisdictional enactments for pendent claim jurisdiction than there is for pendent party or ancillary jurisdiction.

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21. 109 S.Ct. at 2010.

22. See, e.g., Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809-11 (2d Cir. 1971) (Friendly, J.); David Currie, Pendent Parties, 45 U. Chi. L. Rev. 753 (1978); Freer, supra note 14; Matasar, supra note 14, at 167-69; Redish, Book Review, 85 Colum. L. Rev. 1378, 1396 (1985). See also Finley, 109 S.Ct. at 2019 (Stevens, J., dissenting).

23. Matasar, supra note 14, at 169 n.326.

24. 28 U.S.C. §1338(b) was amended in 1948 to codify Hurn by conferring jurisdiction over "any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws."

Thus, all that sustains pendent claim jurisdiction is stare decisis -- and that provides little insurance in this context. As the Court explained in Patterson v. McLean Credit Union, stare decisis does not preclude overruling a prior decision when an intervening change in law -- either the growth of judicial doctrine or further action by Congress -- removes "the conceptual underpinnings from the prior decision" or renders the decision "irreconcilable with competing legal doctrines or policies."[25] Finley does both. Moreover, Finley creates this tension with regard to subject-matter jurisdiction, an area in which the Supreme Court usually is scrupulous about not exceeding the lawful limits of judicial authority. If Finley is correct, the federal courts are engaging in a systematic, unlawful grabbing of subject-matter jurisdiction that goes to the heart of our federal structure.

c. The Need for Reform.

Abolishing supplemental jurisdiction -- the path on which the Court may be embarked -- will reduce the federal caseload, but not in a desirable manner. Unable to join state and federal claims in federal court, a litigant faces unhappy alternatives. He can split his case, bringing state law claims in state court and federal claims in federal court. This will still reduce the federal workload somewhat, since the federal case is smaller and

25. 109 S.Ct. 2363, 2370-71 (1989).

simpler to handle and may be less attractive to file in the first place, but it will waste litigants' time and money as well as at least one judicial system's resources. Moreover, claim splitting will generate substantial friction between state and federal courts by creating pressures for a rush to judgment and by generating complex problems of issue preclusion.

Alternatively, the cost of maintaining two lawsuits may compel the plaintiff to file the entire case in the state court. State courts have concurrent jurisdiction over many claims arising under federal law, and since many states have liberal joinder rules, litigants will often be able bring the entire controversy in state court. But this is not a sensible way to reduce the workload of the federal courts. As explained in Part II, federal jurisdiction serves important federal interests, particularly in federal question cases. Supplemental jurisdiction furthers these interests by making it easier for federal claimants to litigate their claims in a federal court. Not all federal questions are equally important, but if a federal forum is unnecessary for some federal cases, the proper solution is to identify those cases and limit the federal courts' jurisdiction accordingly. Abolishing supplemental jurisdiction will force litigants to bring a wide variety of federal claims into state courts, and there is no reason to believe that the cases removed from the federal docket are those in which a federal forum is not useful or appropriate.[26]

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26. In fact, a plaintiff who chooses due to cost considerations to bring his entire case in the state court may nonetheless be forced to split the claim if defendant removes the federal claim

Moreover, some federal questions cannot be brought in state courts. Not all states have liberal joinder rules, and a significant number of federal claims are (like claims under the FTCA) within the exclusive jurisdiction of the federal courts.[27] Here, Finley produces its harshest results. Litigants who are unable to join their state and federal claims in state court have two options. They can split their case between federal and state court, which, as noted above, is costly to the judicial system, the litigants and the witnesses. Or they can sue in only one forum and abandon either their federal or state claims.

True, supplemental jurisdiction allows federal courts to intrude on state jurisdiction by deciding claims that should be heard in state courts.[28] While eliminating supplemental jurisdiction may cause more federal claims to be brought in state courts, it will also return more state law issues there by eliminating any incentive to use a federal claim to shoehorn

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under 28 U.S.C. §1441. Prior to Finley, the Supreme Court had held that the district courts had discretion to refuse jurisdiction over pendent and ancillary claims that were removed to federal court with a federal claim. Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988). After Finley, dismissal of such claims would appear to be required -- thus inviting a new form of gamesmanship by defendants, who can either increase the plaintiff's litigation costs or force him to sacrifice some of his claims.

27. Among these are claims under the federal antitrust laws, 15 U.S.C. §§ 15, 26, bankruptcy laws, 28 U.S.C. § 1334, patent and copyright laws, 28 U.S.C. § 1338(a), and securities law, 15 U.S.C. § 78aa.

28. See Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262, 265-66 (1968).

state claims into federal court. But this concern can be addressed, without abolishing supplemental jurisdiction altogether, by directing federal district courts to refuse jurisdiction over novel or complex state law claims or where state law issues clearly predominate. Indeed, they have power to do so already, under Gibbs. Responsible use of that power should enable federal judges to preserve both comity and the availability of a federal forum in appropriate cases.

d. Recommendation.

We recommend that Congress expressly authorize the federal courts to exercise supplemental jurisdiction. As discussed below, this is not problematic in most cases but complications arise in some diversity cases because of the requirement of complete diversity. Hence, unless Congress abolishes diversity jurisdiction, special provision must be made for these cases. In addition, we recommend that Congress direct the courts to decline to exercise jurisdiction more often than they do at present.

i. Codifying Supplemental Jurisdiction.

Gibbs held that Article III permits federal courts to exercise supplemental jurisdiction over a state law claim whenever the plaintiff has pleaded a "substantial" federal question and the state claim arises from the same "nucleus of operative fact" as the federal question. Although one can find

aberrations, the courts have been reasonably consistent in applying these requirements.[29] Following Bell v. Hood, courts hold that a federal question is "substantial" for purposes of supplemental jurisdiction if it is not "clearly ... immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous."[30] As for the "common nucleus" test, courts typically require only that the claims arise out of the same transaction or occurrence.[31] If this test is satisfied, most federal courts permit joinder even if the new claim adds an additional, non-diverse party.[32]

We recommend that Congress codify this case law by authorizing federal courts to hear any claim arising out of the same "transaction or occurrence" as a claim within federal jurisdiction, including claims that require the joinder of additional parties. Proposed language to this effect is set out at the end of this section. Notice that this language is broad enough to encompass pendent claim, pendent party, and ancillary jurisdiction. The proposal thus supplies a general background rule favoring supplemental jurisdiction. It would not apply if

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29. 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3567.1 at 117 (2d ed. 1984).

30. 327 U.S. 678, 682-83 (1946). See also Matasar, supra note 14, at 127-28 (most courts today rarely use insubstantiality to limit pendent jurisdiction).

31. 13B Wright, Miller & Cooper, supra note 29, § 3567.1 at 117. The courts have treated Gibbs' language regarding the expectation that the state and federal claims would be litigated together as surplusage. See Matasar, supra note 14, at 138.

32. See J. Friedenthal, M. Kane & A. Miller, Civil Procedure §2.13 at 72 (1985).

Congress specified a contrary rule with respect to any particular grant of jurisdiction. The proposal basically restores the law as it existed prior to Finley.[33]

ii. Discretion to Dismiss Supplemental Claims.

As noted above, Gibbs held that federal courts were not required to exercise supplemental jurisdiction. Indeed, the Court explained:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.[34]

Except when the federal claim is dismissed before trial, this advice has basically been ignored. If that claim withstands

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33. The exception is that our proposal would overrule the Supreme Court's decision in Zahn v. International Paper Co., 414 U.S. 291 (1973), which held that each plaintiff in a diversity action must meet the amount in controversy requirement. Although Zahn did not discuss pendent jurisdiction, the lower courts have correctly understood it to preclude the joinder of claims for less than the requisite amount in controversy to a claim that satisfies the requirement. See, e.g., Hixon v. Sherwin-Williams Co., 671 F.2d 1005, 1009 (7th Cir. 1982). From a policy standpoint, this decision makes little sense, and we therefore recommend that Congress overrule it. See generally D. Currie, supra note 22, at 755-67 (analyzing cases on pendent jurisdiction and complete diversity and concluding that "Zahn is the bad apple.")

34. 383 U.S. at 726-27.

pretrial challenge, most courts retain jurisdiction over state claims regardless of their complexity, novelty, or predominance in the litigation.[35]

The danger that supplemental jurisdiction will strain state-federal relations can be minimized by directing federal courts to relinquish pendent state claims when these claims predominate or when they present novel, complex questions of state law. This may sometimes lead the plaintiff to bring an entire case in state court. But the effect on the federal courts' role in developing federal law should be minimal if the significant claims raised are based on state law. Indeed, the federal procedural system should encourage litigating such actions in state court.

We recognize that balancing the relevant factors may sometimes be difficult. But the determination is not qualitatively more demanding than other decisions district judges routinely make, such as whether to allow a party to intervene or whether to dismiss an action because the court cannot join a party under Rule 19. Moreover, while this adds a note of uncertainty to the determination of jurisdiction, the court should usually make this determination at the outset of the litigation before much time or expense has gone into the case.

Because the district court is ordinarily better situated

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35. Friedenthal, Kane & Miller, supra note 32, §2.13 at 72. Gibbs also suggests that federal courts may dismiss pendent claims if this would further "judicial economy, convenience and fairness to litigants." 383 U.S. at 726. Federal courts have not been shy in exercising this power upon finding differences in the elements or proof required to establish the state and federal claims. Nothing in our proposal is intended to or should affect this practice.

than the court of appeals to balance the relevant factors, the exercise of trial court discretion should be -- as it is now -- subject to very limited review for abuse of discretion. This standard of review will further reduce the extent to which disputes over the threshold question of jurisdiction delay reaching the merits.

iii. The Problem of Diversity Cases.

In some diversity cases, courts have held that they lack supplemental jurisdiction even though the exercise of such jurisdiction would be constitutional. Owen, for example, held that the court could not take jurisdiction over a plaintiff's claim against a non-diverse, third-party defendant. Similarly, courts have held that they lack jurisdiction in diversity suits over claims by plaintiffs against parties joined on defendant's motion under Federal Rule of Civil Procedure 19 and over counterclaims brought by permissive intervenors.[36]

These limitations are said to be necessary to preserve §1332's implied requirement of complete diversity. The same rationale has been advanced for refusing jurisdiction over counterclaims by permissive intervenors:[37] two claimants with

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36. Friedenthal, M. Kane & A. Miller, supra note 32, § 2.14, at 78.

37. Because permissive intervenors may intervene if their claims or defenses raise a common question of fact, their interests often arise out of the same transaction or occurrence as plaintiff's claim. See Friedenthal, Kane & Miller, supra note 32, § 2.14 at 78.

related claims -- one of them diverse from the defendant, the other not -- can avoid the requirement of complete diversity by having the diverse plaintiff sue and the nondiverse plaintiff intervene on grounds that its claim raises a common factual question.[38]

Finally, concern for the complete diversity rule is what justifies denying ancillary jurisdiction over claims by parties to be joined under Rule 19. In Acton Co. v. Bachman Foods,[39] for example, Acton made an agreement under which Acton or its subsidiary, ACIM, would purchase Bachman Foods. Acton reneged, and ACIM subsequently brought a diversity action against Bachman seeking a declaration that the agreement was unenforceable. Bachman moved to dismiss under Rule 19, arguing that Acton was an indispensable party who could not be joined as a plaintiff without destroying diversity jurisdiction. ACIM responded that the court could join Acton as a co-plaintiff and assert ancillary jurisdiction over Acton's claim against Bachman. The First Circuit held that allowing Acton as co-plaintiff to sue a non-diverse defendant would permit ACIM and Acton jointly to create diversity by omitting Acton from the original complaint and then waiting for Acton to be joined under Rule 19.[40]

But while concern for the complete diversity rule may

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38. 7C Wright, Miller & Kane, supra note 29, §1917 at 468.

39. 668 F.2d 76 (1st Cir. 1982).

40. 668 F.2d at 79-80. See also Clinton v. International Organization of Masters, Mates & Pilots, 254 F.2d 370 (9th Cir. 1954).

explain many of these cases, there are cases in which these limits on supplemental jurisdiction are disadvantageous. For example, in Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.,[41] a shopping center operator, Valley West, leased space to Helzberg. Subsequently, Valley West leased space in the same shopping center to Lord, a competitor of Helzberg. Helzberg sued Valley West in federal court, alleging that the lease to Lord violated a clause in its lease with Valley West.

Rather than wanting Lord's participation in the suit, Helzberg may be opposed for fear that Lord's involvement will make settling with Valley West more difficult. Valley West and Lord, in contrast, have a strong interest in Lord's participation and may be significantly disadvantaged if Lord cannot be joined. Here, then, we have a situation in which the plaintiff is not seeking to evade the complete diversity requirement, and in which the lack of ancillary jurisdiction is unfair to the parties and inefficient for the courts.

Some commentators suggest that this is the typical situation, since few plaintiffs will risk laying back and waiting for defendants to implead or join additional parties.[42] But there is little risk in waiting. The defendant has a strong incentive to join potential co-defendants, both to avoid a second trial and to make it easier to win this one (by giving the jury

41. 564 F.2d 816 (8th Cir. 1977).

42. See, e.g., Garvey, The Limits of Ancillary Jurisdiction, 57 Tex. L. Rev. 697, 703-05 (1979).

an alternative defendant to sanction). Moreover, if the defendant fails to join the proper third parties, the plaintiff may dismiss the action voluntarily and begin again in state court (in the meantime having had the benefit of federal discovery procedures).[43] Hence, without some limitations, supplemental jurisdiction will indeed provide an easy means to avoid the complete diversity rule. At the same time, there will also be cases like Helzberg, in which the unavailability of supplemental jurisdiction may be costly and unfair.

Of course, the simplest way to avoid these problems is to eliminate diversity jurisdiction, as we recommend elsewhere in this Report. (Indeed, complications arising from the complete diversity rule are one reason to take this step.) Assuming, however, that diversity jurisdiction is retained, Congress has three alternatives. First, Congress may simply ignore these problems and allow the complete diversity rule to be circumvented in these cases. We do not recommend this alternative, for despite its complications, the complete diversity rule serves important federal and federalist interests by limiting the scope of diversity jurisdiction. If diversity is retained, this limitation should be preserved.

Second, Congress could instruct federal courts to deny jurisdiction whenever the court determines that the plaintiff has filed a claim in order to evade the complete diversity

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43. This manuever will seldom be sanctionable under Federal Rule of Civil Procedure 11, because the plaintiff can simply explain that his evaluation of the importance of having the non-diverse party in the case has changed.

requirement.[44] This option is less desirable, because such a determination will usually be impossible to make -- especially since the plaintiff need not collude directly with other parties in order to achieve this end.

Finally, Congress can simply codify the law as it existed prior to Finley, instructing the courts not to exercise ancillary jurisdiction in diversity actions over claims by non-diverse permissive intervenors, or by plaintiffs against non-diverse third-party defendants or defendants joined under Rule 19. This solution has the virtue of simplicity, though (like all rules) it may be both overinclusive and underinclusive in particular cases. This is the best option under the circumstances, and we recommend that Congress adopt it with an exception that allows the court to hear a pendent claim if refusing jurisdiction will be unfair to a defendant or third-party.

iv. Proposal.

Congress can carry this proposal into effect by adopting a statute providing as follows:

> (a) Except as provided in subsections (b) and (c) or in another provision of this Title, in any civil action on a claim for which jurisdiction is provided, the district court shall have jurisdiction over all other claims arising out of the same transaction or occurrence, including claims that require the joinder of additional parties.
>
> (b) In civil actions under §1332 of this Title,

44. Cf. 28 U.S.C. §1359 (deny jurisdiction for collusive creation of diversity of citizenship).

jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, provided, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.

(c) The district court may decline to exercise jurisdiction over a claim under subsection (a) if the claim presents a novel or complex issue of state law, state law issues predominate, or there are other appropriate reasons (including judicial economy, convenience, and fairness to litigants) to refuse jurisdiction.

5. The Anti-Injunction Act.

The Anti-Injunction Act was enacted in 1793 as one of several incidental provisions to relieve the Supreme Court justices of some of the burdens of circuit-riding.[1] It was straightforward and unambiguous: "nor shall a writ of injunction be granted to stay proceedings in any court of a state."[2] In practice, however, this formulation proved too rigid, and the courts developed a variety of exceptions. Congress later recognized several of these exceptions when it revised the Anti-Injunction Act in 1948, and the Act now reads:

> 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.[3]

Why enact such a provision? Even without a statute, federal courts would not ordinarily enjoin ongoing state court proceedings. Like any injunction, an anti-suit injunction may not issue unless the activity to be enjoined threatens irreparable injury and there is no adequate remedy at law.[4]

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1. Act of Mar. 2, 1793, ch. 22, §5, 1 Stat. 333. For a detailed examination of the legislative history of the act, see William T. Mayton, Ersatz Federalism Under the Anti-Injunction Statute, 78 Colum. 330 (1978); Charles Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345 (1930); Comment, Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent, 38 U. Chi. L. Rev. 612 (1971).

2. 1 Stat. 335.

3. 28 U.S.C. § 2283.

4. See Donovan v. City of Dallas, 377 U.S. 408, 412-13 (1964).

Moreover, actual practice in the state courts with respect to the courts of other states and in the federal courts among themselves -- where no statute restrains injunctions -- indicates that anti-suit injunctions are especially rare. The explanation is probably that, even without a statute, comity among courts generates a natural disinclination to issue this particular kind of injunction.

According to the Supreme Court, the need for special sensitivity in federal/state relations nevertheless justifies this additional measure of protection from federal injunctions against state court proceedings.[5] The Anti-Injunction Act's purpose is thus "to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court."[6] The underlying assumption is that the discretion inherent in the ordinary rules of equity creates too great a risk of unwarranted federal injunctions.

Of course, the Anti-Injunction Act is only one of numerous devices that allocate judicial business between state and federal courts, including statutes limiting the subject-matter jurisdiction of the federal courts, the removal power, the doctrines of pendent and ancillary jurisdiction, the various abstention doctrines, the Rooker-Feldman doctrine,[7] and the rules

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5. Chick Kam Choo v. Exxon Corp., 108 S.Ct. 1684, 1689 (1988).

6. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630 (1977) (Rehnquist, J.).

7. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

of intersystem preclusion. Unlike these other devices, however, the Anti-Injunction Act does not dictate or give precedence to a particular forum: §2283 merely prevents federal courts from interfering with state courts exercising concurrent jurisdiction. The Anti-Injunction Act thus discourages litigation over forum selection: state courts are already prohibited from enjoining federal proceedings,[8] and the Anti-Injunction Act places a corresponding restriction on the federal courts. The results may be inefficient, but Congress apparently preferred these costs to the frictions caused by cross-system injunctions.[9]

Unfortunately, the usefulness of this device has been eroded by its exceptions. The federal courts have asserted power to enjoin state courts in a variety of circumstances in addition to the three express exceptions. This development is to some extent inevitable, for the situations in which an injunction appears warranted are too varied to be captured in a short list of exceptions. The result is a confusing and often inconsistent body of law. After reviewing this law, we propose amending the Anti-Injunction Act to improve its clarity and rationality.

a. The Scope of the Anti-Injunction Act.

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8. See Donovan v. City of Dallas, 377 U.S. 408 (1964); General Atomic Co. v. Felter, 434 U.S. 12 (1977); Ableman v. Booth, 59 U.S.(18 How.) 479 (1856).

9. Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986).

i. Cases Within the General Prohibition.

The Supreme Court has interpreted §2283's basic prohibition broadly, holding that all doubts should be resolved against issuing injunctions.[10] The fact that state and federal proceedings are concurrent will not justify an injunction; no matter how dire the need for consolidation or coordination, efficiency concerns do not warrant overriding §2283's limitation on federal judicial power.[11] Nor does the form of the request make any difference. A party cannot avoid the Anti-Injunction Act, for example, by asking the federal court to enjoin opposing parties from litigating in state court rather than enjoining the state court directly.[12] And most courts have held that the Anti-Injunction Act also precludes federal courts from issuing declaratory judgments that particular state court proceedings are invalid.[13] A few courts have distinguished declaratory judgments

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10. See, e.g., Chick Kam Choo v. Exxon Corp., 108 S.Ct. at 1689; Atlantic Coast Line v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 297 (1970); Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 554 (1954).

11. See, e.g., Jennings v. Boenning & Co., 482 F.2d 1128, 1132 (3d Cir. 1973); St. Paul Fire and Marine Ins. Co. v. Lack, 443 F.2d 404, 407 (4th Cir. 1971); Alton Box Board Co. v. Esprit de Corp., 682 F.2d 1267, 1271-1273 (9th Cir. 1982); Hyde Construction v. Koehring Co., 388 F.2d 501, 508-509 (10th Cir. 1968).

12. See, e.g., Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9 (1940); Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970); Los Angeles Memorial Coliseum v. City of Oakland, 717 F.2d 470, 473 (9th Cir. 1983).

13. See, e.g., Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d

on the ground that they intrude less into state judicial processes.[14] But a declaratory judgment that would have the same practical effect as an injunction -- and if necessary would be enforced by injunction[15] -- would seem logically to fall within the Act's general prohibition.

ii. The Statutory Exceptions to §2283.

The seemingly broad sweep of the prohibition on anti-suit injunctions has been tempered by judicially created exceptions that were recognized even under the unqualified language of the 1793 Act. These developments were cast into doubt by the Supreme Court's 1941 decision in Toucey v. New York Life Ins. Co.,[16] which rejected an exception allowing federal courts to enjoin relitigation in state courts. So Congress revised the Act in 1948 to restore "the basic law as generally understood and interpreted prior to the Toucey decision."[17] Congress recognized three exceptions, authorizing a federal court to enjoin state court proceedings: (1) when "expressly authorized" by a

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491, 496, 504-508 (5th Cir. 1988) (en banc); Thiokol Chemical Corp. v. Burlington Industries, Inc., 448 F.2d 1328, 1332 (3d Cir. 1971). See generally C. Wright, Federal Courts § 47 at 285 (4th ed. 1983).

14. This was, for example, the position of the panel that was overruled in Texas Employers' Inc. Ass'n v. Jackson, 820 F.2d 1406 (1987), rev'd en banc, 862 F.2d 491.

15. 28 U.S.C. §2202.

16. 314 U.S. 118 (1941).

17. 28 U.S.C. §2283 Revisor's Note.

particular substantive law, (2) "in aid of its jurisdiction," and (3) "to protect or effectuate its judgment." Most of the caselaw under the Anti-Injunction Act concerns the proper way to interpret these three provisions.

"Expressly Authorized." Many commentators have observed that the words "expressly authorized" have been read to mean "impliedly authorized."[18] The best known example is the Supreme Court's decision in Mitchum v. Foster,[19] which recognized federal power to enjoin state court proceedings under 42 U.S.C. § 1983. Explaining that a law need not "expressly authorize an injunction of a state court proceeding in order to qualify as an exception,"[20] the Court held that this exception is satisfied if Congress:

> created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding....
>
> The test ... is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.[21]

Although this analysis is at odds with the language of §2283, it is consistent with judicial decisions predating the

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18. See, e.g., David Currie, The Federal Courts and the American Law Institute (Part II), 36 U. Chi. L. Rev. 268, 322 (1969); Martin Redish, The Anti-Injunction Act Reconsidered, 44 U. Chi. L. Rev. 717, 733-39 (1977).

19. 407 U.S. 225 (1972).

20. 407 U.S. at 237.

21. 407 U.S. at 237-38. See also Amalgamated Clothing Workers of America v. Richman Bros., 348 U.S. 511, 516 (1954).

1948 codification, and a plausible argument can thus be made that Mitchum is consistent with Congress's goal of restoring the law as it existed prior to Toucey.[22] In any event, injunctions have been permitted under this exception despite the absence of express authorization in three distinct circumstances: (1) when a purpose of a federal law is to consolidate litigation into a single proceeding, (2) when the state litigation itself violates federal law, and (3) when the results of a state proceeding may "frustrate" the operation of a federal statute.

The Court's broad reading of the "expressly authorized" exception is least objectionable in the first of these situations, when a purpose of a federal law is to eliminate duplicative proceedings. Statutory interpleader and bankruptcy cases, for example, two of the oldest exceptions to the anti-injunction rule, rest on this rationale.[23] Insofar as the whole purpose of interpleader and a central purpose of bankruptcy jurisdiction is to consolidate litigation in one forum, it makes sense to recognize a power to prevent duplicative state court litigation despite the absence of explicit authorization.[24]

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22. But see D. Currie, Federal Courts 703 (3d ed. 1982)(arguing that in all but one of the pre-1948 cases Congress had made clear that it wanted to prevent proceedings in other courts).

23. See, e.g., Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) (interpleader); Holcomb v. Aetna Life Ins. Co., 228 F.2d 75, 79-80 (10th Cir. 1955) (same). The bankruptcy exception was recognized by statute -- the only such express exception prior to 1948 -- in the Act of March 3, 1911, ch. 231, §265, 36 Stat. 1162.

24. These proceedings may appear better suited for the exception for injunctions "in aid of jurisdiction," but tradition and the

Courts have treated the removal statute as another federal law that says nothing about injunctions but can be read to authorize enjoining concurrent state court proceedings.[25] The rationale is similar to the rationale of the interpleader and bankruptcy cases: the value of removal will be lost if the state court can continue adjudicating a case after it has been removed. The problem is that Congress does not appear to have been overly concerned with insuring one proceeding in the removal context, since the removal statute itself authorizes partial remands.[26]

The second category -- cases in which state proceedings themselves violate federal substantive law -- is best illustrated by antitrust cases in which the mere pendency of state court proceedings can affect a competitor's ability to survive in the market.[27] In these cases, the power to enjoin state proceedings is inferred from the power to enforce the statute. In like fashion, the Seventh Circuit has read Mitchum to permit a federal

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Supreme Court's narrow reading of that exception, see infra notes 35-41 and accompanying text, place them in the "expressly authorized" category.

25. See, e.g., French v. Hay, 89 U.S. 250 (1875); Kline v. Burke Constr. Co., 260 U.S. 226 (1922); Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837 (1st Cir. 1988); Lowe v. Jacobs, 243 F.2d 432 (5th Cir. 1957); Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971).

26. See 28 U.S.C. § 1441(c); Carnegie-Mellon University v. Cohill, 108 S.Ct. 614 (1988).

27. See, e.g., Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977); Kurek v. Pleasure Driveway & Park District, 574 F.2d 892 (7th Cir. 1981); Los Angeles Memorial Coliseum v. City of Oakland, 717 F.2d 470 (9th Cir. 1983).

anti-suit injunction only when the state court proceedings themselves violate §1983, such as when the state courts are fundamentally biased against certain litigants.[28]

The third category -- cases in which the result in the state proceedings may frustrate the operation of a federal law -- is the broadest. To cite just a few examples, §21(e) of the Securities Exchange Act of 1934,[29] §1(20) of the Interstate Commerce Act,[30] ERISA,[31] and the National Environmental Policy Act,[32] have all been treated as "expressly authorized" exceptions to the Anti-Injunction Act. Unfortunately, it is not clear how one should distinguish these statutes from other statutes that have not been read to authorize anti-suit injunctions. For example, while injunctions have been authorized under §21(e) of the 1934 Securities Exchange Act, similar treatment has been denied to other aspects of the Act.[33] More important, §2283 has

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28. Hickey v. Duffy, 827 F.2d 234, 240-242 (7th Cir. 1987). The language of Mitchum is broader than this, and most other courts have interpreted Mitchum more broadly to permit an injunction in any §1983 case. See, e.g., Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 562-563 (6th Cir. 1982); Henry v. First National Bank of Clarksdale, 595 F.2d 291, 300 (5th Cir. 1979). It does not follow that these courts routinely issue injunctions in §1983 cases, for they must still consider whether Younger abstention is required. But the Anti-Injunction Act does not limit the courts' options.

29. Studebaker Corp. v. Gittlin, 360 F.2d 692, 696-698 (2d Cir. 1966).

30. Tampa Phosphate R.R. Co. v. Seaboard Coast Line R.R. Co., 418 F.2d 387 (5th Cir. 1969).

31. General Motors Corp. v. Buha, 623 F.2d 455 (6th Cir. 1980).

32. Stockslager v. Carroll Elec. Cooperative Corp., 528 F.2d 949 (8th Cir. 1976).

33. See, e.g., Vernitron v. Benjamin, 440 F.2d 105 (2d Cir.

been read to prohibit federal injunctions against state proceedings even though federal jurisdiction is exclusive or the state law claims are preempted by federal law.[34]

"Necessary in Aid of Its Jurisdiction." This exception, in contrast to the first one, has been construed with 19th century formalist rigor. It is limited principally to concurrent in rem or quasi in rem state proceedings that involve the same tangible property as a federal case. The Supreme Court's 1943 opinion in Mandeville v. Canterbury is still an accurate summary of the law:

> [I]f two suits pending, one in a state and the other in a federal court, are in rem or quasi in rem, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other....
>
> [A] federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of § [2283]....
>
> But where the judgment sought is strictly in personam for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other.[35]

Despite developments in other areas that have exposed the artificiality of the in rem/in personam distinction,[36] the lower

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1971); Jennings v. Boenning & Co., 482 F.2d 1128 (3d Cir. 1973).

34. See, e.g., Piambino v. Bailey, 610 F.2d 1306, 1333 (5th Cir. 1980).

35. 318 U.S. 47, 48-49 (1943).

36. See, e.g., Shaffer v. Heitner, 433 U.S. 186 (1977); Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

federal courts must continue to struggle with it under this exception to the Anti-Injunction Act.[37]

The Supreme Court turned back an effort to read this exception more broadly in Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers.[38] The plaintiffs alleged that a pending state court injunction against union picketing impaired the federal court's ability to enforce federally protected workers' rights. The Supreme Court rejected the argument that the federal court could issue an injunction "in aid of its jurisdiction," on the ground that this exception applies only when

> federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.[39]

Atlantic Coast Line has had the practical effect of confining the exception for injunctions "in aid of the court's jurisdiction" primarily to the in rem and quasi-in-rem cases. A few, more venturesome courts have used this exception to help them manage complex litigation. In one phase of the Swann v. Charlotte-Mecklenburg Board of Education school desegregation litigation, for example, the district court enjoined certain parties from prosecuting an action in the North Carolina state

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37. See, e.g., Signal Properties, Inc. v. Farha, 482 F.2d 1136 (5th Cir. 1973); In re Federal Skywalk Cases, 680 F.2d 1175, 1183 (8th Cir. 1982); Jett v. Zink, 474 F.2d 149, 156 (5th Cir. 1973); Hyde Construction Co. v. Koehring Co., 388 F.2d 501, 508-509 (10th Cir. 1968).

38. 398 U.S. 281 (1970).

39. 398 U.S. at 295.

courts.[40] The state suit dealt with the assignment of exceptionally talented students to a special program and was likely to affect the federal court's continuing jurisdiction over the assignment process. The court of appeals justified the injunction as necessary in aid of its jurisdiction, emphasizing that federal supervision was continuous. Similarly, in Battle v. Liberty National Life Insurance Co.,[41] the Eleventh Circuit relied on this exception to justify an injunction against state court proceedings that threatened a complex agreement settling three antitrust class actions.

Cases like Swann and Battle are unusual, however, and the exception for injunctions "in aid of the court's jurisdiction" finds little use. More use could easily be made of this exception. For example, injunctions in aid of special federal devices for handling complex litigation seem appropriate. Unfortunately, the tradition of reading the exception for injunctions "in aid of the court's jurisdiction" narrowly seems to preclude this result -- however sensible it may seem and even though it is more consistent with the language of the statute than, say, Mitchum is.

"Protect or Effectuate Its Judgments." Sometimes called the "relitigation" exception, this exception enables a federal court to "prevent state litigation of an issue that previously was presented to and decided by the federal court."[42] It is

40. 501 F.2d 383 (4th Cir. 1974).

41. 877 F.2d 877 (11th Cir. 1989).

42. Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988). From

frequently invoked, having been saved by Congress after the Supreme Court's decision in Toucey v. New York Life Insurance Co.[43] But federal courts do not automatically enjoin a state court action simply because the federal court would hold some or all of the claims barred by res judicata; state courts are trusted properly to credit the federal judgment in at least some cases. The problem is deciding which ones. The simplest solution might have been to read this exception as making §2283's prohibition on anti-suit injunctions inapplicable and to rely on ordinary equitable concepts of irreparable injury and no adequate remedy at law. Instead, the Supreme Court in Atlantic Coast Line gave the relitigation exception the same narrow reading as the exception for injunctions "in aid of the court's jurisdiction," authorizing injunctions only when the state court proceeding threatens to impair federal authority seriously.[44]

Curiously, there is no requirement that a party seeking a federal injunction first exhaust his state remedies. On the contrary, the Supreme Court encouraged precisely the opposite course in Parsons Steel, Inc. v. First Alabama Bank.[45] The defendant bank prevailed in a federal case, and in a concurrent state court action filed after entry of the federal judgment the

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the standpoint of comity, this exception is difficult to justify: why do the federal courts have greater need to police their judgments in a state than the courts of other states?

43. 314 U.S. 118 (1941); supra notes 16-17 and accompanying text.

44. See supra note 39 and accompanying text.

45. 474 U.S. 518 (1986).

plaintiffs sought relief on basically the same allegations. The state court rejected the bank's res judicata and collateral estoppel defenses, at which point the bank sought to protect its victory with an injunction from the federal court. The district court granted relief and the court of appeals affirmed. The Supreme Court reversed, holding that the district court violated the full faith and credit statute[46] by issuing an injunction after the state court had considered and rejected a claim of res judicata. The Court thus resolved an apparent conflict between these two statutes by limiting the relitigation exception:

> to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.[47]

After Parsons, if a party presents an affirmative defense of res judicata or collateral estoppel to a state court and the state court rejects the defense in a final judgment, the party cannot obtain de novo federal review of the issue. If, however, the party avoids the state court and goes straight to federal court for an injunction, the federal court is free to decide without regard to state preclusion rules. Parsons thus encourages parties to go directly to federal court for an injunction -- a result hardly conducive to the comity that it is the object of the Anti-Injunction Act to protect.

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46. 28 U.S.C. §1738.

47. 474 U.S. at 524.

Another issue much litigated in recent years concerns the application of the relitigation exception to federal consent decrees. Most courts have held that they can enjoin state court proceedings to protect such decrees.[48] The Seventh Circuit, in contrast, has held that "[c]onsent decrees are contracts" that "do not have the same effect for purposes of §2283 ... as do fully litigated judgments."[49] In our view, this question cannot be resolved by classifying consent decrees as "contracts" or "judgments."[50] From a functional perspective, if a negotiated decree that terminates federal litigation may be frustrated by state litigation, it seems reasonable to permit protective injunctions. Among other benefits, this will compel the disaffected parties to bring their complaints to the federal court with continuing jurisdiction over the suit.[51]

The Meaning of "Proceedings". Although not technically an exception to the Anti-Injunction Act, limitations on which "proceedings in a state court" are subject to the Act's prohibition have the same effect. The Supreme Court has never read the Anti-Injunction Act to cover all court proceedings, and

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48. See, e.g., Brooks v. Barbour Energy Corp., 804 F.2d 1144 (10th Cir. 1986); Thomason v. Cooper, 254 F.2d 808 (8th Cir. 1958); Battle v. Liberty National Life Insurance, 877 F.2d 877 (11th Cir. 1989); United States v. District of Columbia, 654 F.2d 802 (D.C. Cir.); United States v. ASCAP, 442 F.2d 601 (2d Cir. 1971).

49. Dunn v. Carey, 808 F.2d 555, 559 (7th Cir. 1986).

50. See Larry Kramer, Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. 321, 324-31 (1988).

51. See Kramer, supra note 50, at 331-38.

the lower federal courts have used the ambiguity of this word to extend their power to enjoin certain state court actions.

Most important, non-judicial state court activities are not protected by the Anti-Injunction Act. Thus, statutory vote count procedures may be enjoined,[52] as may administrative ratemaking that is conducted by state courts[53] and garnishment proceedings that are ancillary to court proceedings but do not require direct participation by the state courts.[54] These decisions are at odds with the literal language of §2283, especially when read in light of concerns for protecting comity. But without drawing some such line, federal courts might find themselves unable to restrain a wide variety of state administrative activities.

The Seventh Circuit has extended its power to issue injunctions by interpreting when a state court proceeding has begun for purposes of the anti-injunction bar. The Anti-Injunction Act has never been applied to threatened, as opposed to pending, state court proceedings.[55] In Barancik v. Investors Funding Corp., the Seventh Circuit allowed a federal injunction to issue if state court proceedings had not begun when the injunction was requested, even if they were underway by the time

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52. Roudebush v. Hartke, 405 U.S. 15 (1972).

53. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). See also American Motors Sales Corp. v. Runke, 708 F.2d 202, 204-205 (6th Cir. 1983).

54. Lynch v. Household Finance Corp., 405 U.S. 538, 553 (1972).

55. See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Wooley v. Maynard, 430 U.S. 705, 712 (1977); David P. Currie, Federal Courts 737-740 (3d ed. 1982).

the injunction was issued.[56] The Eighth Circuit followed Barancik;[57] the Sixth Circuit declined to do so.[58] Supporting the Sixth Circuit's result is the fact that a federal court wishing to preserve the status quo pending its decision can always issue a temporary restraining order or a preliminary injunction to prevent the commencement of state proceedings. On the other hand, it is often difficult for the federal court to foresee that an injunction will be necessary until after concurrent state court litigation has been commenced.

Finally, federal courts have held that they can sometimes enjoin particular aspects of a state proceeding. A federal court may, for example, restrain a party from offering as evidence in state proceedings information obtained through discovery in federal proceedings.[59] Such an injunction can be almost as serious an interference with state litigation as a prohibition against litigation. But some conflict is inevitable when complex cases concerning the same transaction are pending in federal and state court, overlapping class actions have been certified, or other complicating factors exist.

iii. Non-Statutory Exceptions to §2283.

56. 489 F.2d 933 (7th Cir. 1973)(Stevens, J.).

57. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1127-1128 (8th Cir. 1982).

58. Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978).

59. See Sperry Rand Corp. v. Rothlein, 288 F.2d 245 (2d Cir. 1961).

The three express exceptions in the Anti-Injunction Act are not the only ones courts recognize. At least four additional exceptions, none of which fits neatly into the language of the Act, have been identified.

The United States as Plaintiff. Speaking for the Court in Leiter Minerals, Inc. v. United States,[60] Justice Frankfurter reasoned:

> The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. §2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. §2283 alone.[61]

When the government is itself the plaintiff, the predominance of the federal interest is so clear that the inability to issue an injunction is more likely to create friction. This exception is so well established that it generally occasions little or no discussion.[62] Indeed, some lower courts have extended Leiter Minerals. In United States v. Wood, for example, the Fifth Circuit held that Leiter Minerals

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60. 352 U.S. 220 (1957).

61. 352 U.S. at 225-26.

62. See, e.g., United States v. Composite State Board of Medical Examiners, 656 F.2d 131, 134 (5th Cir. 1981).

controlled when the government was suing on behalf of a class of individuals.[63]

United States Agencies. In NLRB v. Nash-Finch Co., the Supreme Court held that a federal agency is entitled to the same status as the United States for purposes of the Anti-Injunction Act.[64] The Ninth Circuit followed Nash-Finch on behalf of the Securities Exchange Commission in SEC v. Wencke.[65] Critics of Nash-Finch argue that the interests of the United States and those of particular agencies are not necessarily congruent, especially when it comes to agencies with independent litigating authority. Moreover, allowing injunctions in every suit brought by an executive branch or independent agency greatly expands the scope of this judge-made exception. But the paramountcy of the federal interest vis-a-vis the states is just as clear when Congress has entrusted enforcement to an agency as when enforcement authority remains in the Department of Justice.

Private Attorneys General. "Private attorneys general" enforce the antitrust laws, the securities laws, environmental laws, employment discrimination laws, and many others. The Second Circuit initially embraced the idea that what was good for

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63. 295 F.2d 772, 779 (5th Cir. 1961). See also Henry v. First National Bank of Clarksdale, 595 F.2d 291, 308 (5th Cir. 1979)(United States as intervenor).

64. 404 U.S. 138, 146 (1971). The Court had avoided this question in Capital Service, Inc. v. National Labor Relations Board, (347 U.S. 501 (1954)) by relying on the "in aid of jurisdiction" exception to sustain an injunction requested by the NLRB.

65. 577 F.2d 619 (9th Cir. 1978).

the agency must also be good for the private suitor suing in the public interest, holding that a private attorney general could obtain an injunction against state court proceedings in a suit under §21(c) of the Securities Exchange Act of 1934.[66] But the court distinguished this ruling in subsequent decisions,[67] and no other court has pushed this non-statutory exception so far.

Different Parties. A party that cannot obtain an injunction to stop a state action may nonetheless seek a federal injunction to prohibit similar proceedings against other parties. In Hale v. Bimco Trading Co.,[68] the State of Florida initiated state court proceedings to enforce a law requiring the inspection of imported cement. While these proceedings were pending, Bimco -- which was not a party to the state suit -- brought a federal action to enjoin the state from enforcing the law. The Court rejected the state's argument that relief was precluded by the Anti-Injunction Act, noting that, if it were correct, "no proceedings [would be] available to [challenge the constitutionality of the state statute] once the state court directed its enforcement."[69] This holding enables a group interested in test litigation to evade the Anti-Injunction Act by having different members bring a separate suit.

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66. Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966).

67. See, e.g., International Controls Corp. v. Vesco, 490 F.2d 1334, 1348-1349 (2d Cir. 1974); Vernitron v. Benjamin, 440 F.2d 105, 108 (2d Cir. 1971).

68. 306 U.S. 375 (1939).

69. 306 U.S. at 377-78.

The Supreme Court may narrow this exception. In County of Imperial v. Munoz,[70] the county sued to prohibit McDougal from selling water for consumption outside the county. The county prevailed in the state court despite the participation of McDougal's buyers as amici curiae before the California Supreme Court. Twelve days after the state supreme court issued its decision, the buyers sued to enjoin the county from enforcing its judgment. In keeping with related developments in the law of privity and adequacy of representation, the Supreme Court showed a greater willingness to examine the real interests behind related litigation and remanded for a determination of whether the buyers were "strangers."[71] In suggesting that the buyers might possibly be bound by the state court decision, the Court moved toward a more realistic assessment of representation that could make this non-statutory exception considerably narrower.

iv. Rejected Exceptions.

So far, we have discussed only ways in which federal courts have expanded the exceptions to the Anti-Injunction Act. But there is another side to this story. For while many judges have been willing to expand federal power to enjoin state courts, other judges have declined to do so because of the language of the Anti-Injunction Act. Yet many of these rejected exceptions are indistinguishable from exceptions that have been adopted.

70. 449 U.S. 54 (1980).

71. 449 U.S. at 59-60.

Lack of State Court Jurisdiction. Nothing in the Anti-Injunction Act permits a federal court to enjoin a state court suit that violates basic jurisdictional limitations, such as where federal jurisdiction is exclusive. One might expect that cases of exclusive federal jurisdiction would be brought within the exception for injunctions "in aid of the court's jurisdiction," but the Supreme Court's Atlantic Coast Line decision apparently killed that possibility.[72] In any event, the lower federal courts have held that an injunction cannot issue in such cases.[73] It is difficult to reconcile this result with the removal cases: by making federal jurisdiction exclusive, Congress has expressed a policy with respect to the proper forum for adjudication that is at least as strong and probably stronger than in the removal context.

Federal Preemption Cases. The question of cases in which federal law preempts state law is closely related to that of exclusive federal jurisdiction. Here too, despite a strong federal interest, the federal courts have held that they lack the power to enjoin state court proceedings. A litigant must present his federal defense of preemption to the state court. Judge Rubin expressed great frustration with this limitation in his separate opinion in the en banc decision in Texas Employers' Insurance Association v. Jackson.[74] The question there was

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72. See supra notes 38-39 and accompanying text.

73. See, e.g., Piambino v. Bailey, 610 F.2d 1306, 1333 (5th Cir. 1980).

74. 862 F.2d 491, 509 (5th Cir. 1988)(en banc).

whether the federal court could enjoin a state court worker's compensation suit that was clearly preempted by federal law. The court agreed that an injunction was barred by §2283. Judge Rubin wrote:

> It is time . . . for Congress to reconsider the statute that we are obliged to follow, for it is no longer adequate to assure the protection of federal rights.
>
> There can be little doubt that the [Longshoremen's and Harbor Workers' Compensation Act] preempts state jurisdiction over suits involving failure to pay compensation under the Act. Yet we rely on state courts to enforce the employer's federal right not to have this claim litigated in state court, stating that, if state courts do not protect that right, the employer may seek relief from the United States Supreme Court. While the state courts once had exclusive original jurisdiction over claims arising under federal law, federal-question jurisdiction is now vested in the federal district courts with appeal to the circuit courts of appeal. State trial and appellate courts are therefore no longer as familiar with these questions as they were a century ago. The state court judgments in such cases are subject to final review by the Supreme Court, but this remedy is no longer available by appeal, for as a result of recent legislation virtually eliminating the Court's mandatory appellate jurisdiction, litigants must seek relief by application to the Court for a writ. Such writs are only sparingly granted.... Thus both in cases governed by the Anti-Injunction Act and in those controlled by rules requiring federal abstention, the promised ultimate review by the Supreme Court is apt to be illusory. The remedy, of course, lies with Congress ....[75]

There are reasons to question the desirability of an exception for federal preemption defenses, but they are difficult to square with the results in the removal cases or in other cases in which an exception to the Anti-Injunction Act has been justified by the need to protect federal interests.

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75. 862 F.2d at 509-510.

Vexatious and Duplicative Litigation. As noted above, the courts have long held that the Anti-Injunction Act forbids a federal injunction to prevent concurrent state court proceedings when these proceedings are in personam. Given the often enormous transactional costs that accompany litigation,[76] one must ask whether this rule still makes sense. Both state and federal courts operate under heavy workload pressures. We believe that the federal courts could, without undue harm to comity interests, be empowered to enjoin duplicative litigation under constraints similar to those already observed with respect to concurrent federal court actions. Thus, the propriety of an anti-suit injunction is uncontroversial when a federal court finds that a second federal suit has been filed for purposes of harassment,[77] and this rule could easily be extended to the federal/state context. More important, however, the federal courts have asserted power to enjoin needlessly duplicative federal litigation.[78] This does not mean that the court that was "first-

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76. For cases pertinent to this point, see Alton Box Board Co. v. Esprit de Corp., 682 F.2d 1267 (9th Cir. 1982) (complex multi-district case; no injunction may issue to protect some other federal court's judgment); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982); Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978); Pacific Indemnity Co. v. Acel Delivery Service, Inc., 432 F.2d 952 (5th Cir. 1970); Hyde Construction Co. v. Koehring Co., 388 F.2d 501 (10th Cir. 1968).

77. See, e.g., Medtronic, Inc. v. Intermedics, Inc., 725 F.2d 440, 442 (7th Cir. 1984); Triparti v. Beaman, 878 F.2d 351 (10th Cir. 1989)(per curiam); Donovan v. Dallas, 377 U.S. 408, 415-18 (1964)(Harlan, J., dissenting).

78. This power -- less a traditional equitable power than a new power asserted in order to facilitate the economical management of litigation -- is assumed in Kerostat Mfg. Co. v. C-O-Two Fire Equipment Co., 343 U.S. 180 (1952). It has been exercised in numerous lower court decisions, of which the following are merely

in-time" routinely enjoins subsequently filed proceedings; recognizing that an anti-suit injunction is an extraordinary remedy, the courts have followed a more complicated calculus. But if litigation in a federal court is well advanced and there are no special reasons for beginning new proceedings in a second forum, it makes sense to enjoin the initiation of a duplicative lawsuit. This is true, moreover, whether the second suit is in state or federal court. Our proposed substitute for the Anti-Injunction Act therefore contains language that is flexible enough to permit federal courts to issue injunctions in such cases.

The considerations underlying such injunctions are not confined to cases in which litigation is begun in the federal courts. Indeed, the analysis applies equally to state courts faced with vexatious or duplicative federal proceedings. As a result, expanding federal power to enjoin duplicative state proceedings may cause friction unless federal courts are willing to defer to state courts in similar circumstances. In fact, the federal courts have already recognized such a duty under the

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illustrative: Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257, 1363-65 (7th Cir. 1977); Martin v. Graybar Elec. Co., 266 F.2d 202 (7th Cir. 1959); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1202-04 (2d Cir. 1970)(Friendly, J.); Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843-44 (9th Cir. 1986); Schauss v. Metals Depository Corp., 757 F.2d 527, 538 (6th Cir. 1978); National Equipment Rental, Ltd. v. Fowler, 287 F.2d 43 (2d Cir. 1961); Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852 (9th Cir. 1981); 6 C. Wright & A. Miller, Federal Practice and Procedure §1418 (1971). There is talk in the older opinions about "protecting" the court's jurisdiction, but under the prevailing interpretation of this exception to the Anti-Injunction Act, jurisdiction is not threatened by a parallel proceeding in another court.

Colorado River doctrine.[79] This doctrine is discussed more fully in the section on abstention, but our proposed codification of Colorado River recognizes its role as the flip-side of federal power to enjoin duplicative state proceedings.

Rule 23 Class Actions. While some courts and commentators have suggested that federal courts should be able to enjoin state court proceedings that interfere with class actions,[80] efforts to shoehorn class actions into the exception for injunctions "in aid of the court's jurisdiction" have failed. The Federal Rules of Civil Procedure do not "extend ... the jurisdiction of the United States district courts."[81] Since the federal courts could not enjoin duplicative state proceedings that were not combined into a class action, they cannot acquire this power by combining these suits into a class action under Federal Rule of Civil Procedure 23.

Yet injunctions to preserve the integrity of at least some class actions against competing lawsuits do seem warranted. In structural class litigation brought under Rule 23(b)(2), for example, complex settlements and institutional arrangements can be thrown into chaos by side-litigation. It is possible to

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79. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

80. Kansas City Skywalk Litigation, 680 F.2d 1175 (8th Cir. 1982); Larimore, Exploring the Interface Between Class Actions and The Anti-Injunction Act, 18 Ga. L. Rev. 259 (1984). See also Note, Federal Class Actions versus the Anti-Injunction Act -- In re: Federal Skywalk Cases, 31 U. Kan. L. Rev. 467 (1983); Sherman, Class Actions and Duplicative Litigation, 62 Ind. L.J. 507 (1987).

81. Fed. R. Civ. Proc. 82.

obtain an injunction under the exception allowing federal courts to protect or effectuate their judgments after the decree is entered. But an injunction may be needed before that time to bring about a settlement in the first place. Similarly, an anti-suit injunction may be appropriate in a mandatory class action under Rule 23(b)(1), since the justification for such suits is that litigation must proceed in only one forum. Despite the similarity between these cases and bankruptcy or interpleader cases, however, the availability of a federal anti-suit injunction remains unclear. One problem is that the bankruptcy and interpleader cases fall within the exception for injunctions "expressly authorized" by Congress, and it is hard to apply this exception to a judicially promulgated rule.

Multi-District Litigation. The reasons that justify federal power to issue injunctions in class actions also apply to cases assigned by the Judicial Panel on Multi-District Litigation to one district court for comprehensive pre-trial management. This obviously does not mean that the multi-district court should indiscriminately issue anti-suit injunctions in all such cases. It means only that proper case management may occasionally require enjoining a competing state court proceeding.

Arbitration. The Eleventh Circuit's opinion in Ultracashmere House, Ltd. v. Meyer[82] raises the question whether anti-suit injunctions should be available to protect federally sanctioned arbitration proceedings. Federal law provides that

82. 664 F.2d 1176 (11th Cir. 1981).

private arbitration agreements affecting interstate commerce must be recognized and enforced even if a state's policy is hostile to arbitration.[83] If the party seeking to compel arbitration had gone to the federal court and secured an order to that effect, a later state court proceeding could probably be enjoined to "protect or effectuate" the federal judgment. But what if the party resisting arbitration began a state court proceeding on the controversy before the federal court order was issued? Could the federal court enjoin the pending state court proceeding to protect the arbitral tribunal? If the arbitration were part of the federal courts' court-annexed arbitration plan, it could be protected by injunctions "in aid of the court's jurisdiction" -- assuming, as may not be the case, that the courts were willing to read this exception to include such cases. But what about other cases? As a practical matter, arbitration is an alternative to a federal forum and trial whether or not it is part of a formal arbitration program. A strong argument can thus be made that the arbitration should be protected, particularly if state law is hostile to arbitration and the state court rejects a request for a stay pending arbitration.

Fraud. A final rejected exception concerns state proceedings tainted by fraud. In some instances, the loser has turned to the federal courts and tried both to relitigate and to enjoin enforcement of the state judgment. Injunctions against enforcement are generally treated no differently from injunctions

83. Southland Corp. v. Keating, 465 U.S. 1 (1984); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

directed to any other phase of a state court proceeding.[84] However, two early Supreme Court cases suggested that injunctions could issue upon a showing of fraud, the theory being that fraudulent proceedings are not entitled to be called "proceedings" at all.[85] Most commentators have expressed doubt about this exception and its rationale.[86] On the one hand, refusing to permit injunctions against fraudulent state court proceedings forces parties to present these claims to the state courts themselves. On the other hand, the need for an objective review of the earlier proceeding by a court outside the system may be especially great, especially where the underlying claim is based on federal law.

b. Recommendation.

Several conclusions emerge from this review of decisions interpreting the Anti-Injunction Act. Most important is the extent to which the language of the Act has tended to obscure analysis and is itself a cause of inconsistency in the decisions. Many courts have been unable to resist the pressure to consider factors not accounted for by the statutory language,

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84. Atlantic Coast Line v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970).

85. See Marshall v. Holmes, 141 U.S. 589 (1891); Simon v. Southern Ry., 236 U.S. 115 (1915).

86. See, e.g., C. Wright, supra note 13, at §47; P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System, 1322, 1329 (3d ed. 1988).

and as a result the express exceptions have been stretched well beyond their "plain" meaning and additional exceptions have been recognized. At the same time, other courts have maintained greater fidelity to the wording of §2283. Unwilling entirely to ignore relevant factors not found in the statute, these courts often waste a great deal of time trying to squeeze problems into one of the express exceptions. And some injunctions have been refused despite their functional similarity to injunctions that have been allowed because they cannot be fit into the language of the Act. The result is a crazy quilt of inconsistent decisions. These problems are exacerbated by the Supreme Court's inconsistent guidance, especially its expansive reading of the first exception and its narrow interpretation of the second.

There is wide agreement that results under the present Anti-Injunction Act are unsatisfactory.[87] There is less agreement on a solution. One possibility is to repeal §2283. Rather than give federal courts unfettered power to enjoin state court proceedings, this would leave such matters to be worked out entirely as a matter of equity. In other words, repeal would restore discretion to issue injunctions on a case-by-case basis. This proposal would eliminate litigation over which exception -- statutory or non-statutory -- applies to a particular case. More important, it would help focus courts'

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87. See, e.g., Currie, supra note 18, at 320-335; American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts commentary to §1372 (Official Draft 1969)(hereafter ALI Study). See generally P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, supra note 86, at 1320-31.

attention on the relevant considerations in particular cases, which should actually lead to greater consistency in this area of law.

But the Anti-Injunction Act is an important statement of respect for the state courts, and it has more than symbolic value: it is a reminder to federal judges to tread especially carefully in this area, and undoubtedly has a worthwhile restraining effect. Federal court injunctions against state court proceedings often amount to a direct declaration that the state proceedings are inadequate and may well cause state judges to resent and resist federal authority. This is a consequence to be avoided in a system that necessarily relies to a substantial degree on state courts to enforce federal rights.

A second possibility is to rewrite the Act with a better list of exceptions for when injunctions against state proceedings are appropriate. This approach was recommended by the American Law Institute in its 1969 study of the allocation of jurisdiction between state and federal courts; under the ALI's proposal, the present three exceptions became seven.[88] The problem is that circumstances will inevitably arise that do not fall cleanly within the express exceptions but in which an injunction seems warranted. The courts will then face the same choice between stretching the exceptions, creating new ones, or reaching what they view as improper results in particular cases. Different courts will respond differently to these temptations, and a similarly inconsistent pattern of decisions will emerge.

88. ALI Study, supra note 87, at §1372.

The option we find most attractive is to rewrite the Anti-Injunction Act not as an outright prohibition, but as a reminder that anti-suit injunctions should issue only in extraordinary circumstances. Because the statute would not specify any particular equation or calculus, the federal courts would be free to exercise discretion and to explain the reasons an injunction is or is not appropriate. As with repeal, removing the need to fit every result into specific exceptions should actually produce greater uniformity and rationality in the decisions. At the same time, it is useful to specify some of the circumstances in which injunctions may issue, if only to make clear which existing precedents no longer need be followed. We propose to do this by adding a list of illustrative examples to the statute; framing the provision this way should discourage courts from focusing too much attention on the illustrations. Such a statute might read as follows:

> A court of the United States may grant an injunction to stay proceedings in a state court only when necessary to prevent irreparable harm to the parties or to federal interests, giving due regard to the interests of the state.
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> Circumstances in which an injunction may be appropriate include, but are not limited to, the following:
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> (1) when expressly authorized by, or necessary to effectuate the purpose of, an Act of Congress;
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> (2) when requested by the United States or by one of its officers or agencies;
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> (3) when necessary to protect the jurisdiction of the court over property in its control or subject to its custody;
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> (4) when requested in aid of a claim for interpleader;

(5) when necessary to ensure the effectiveness of a judgment or consent decree entered by the court, but only if relief has first been sought in the state court;

(6) when necessary to ensure the effectiveness of a class action, or multidistrict litigation ordered pursuant to 28 U.S.C. §1407, or court-ordered arbitration;

(7) when requested to prevent duplicative proceedings in the state court, if the federal proceedings are far advanced and no special circumstances counsel adjudication in a state forum.

6. Abstention.

The rules governing abstention determine when federal courts should refuse to decide cases over which they have jurisdiction. Because these rules have been created by the federal courts on a case-by-case basis over the past 50 years, the contours of abstention -- including even the number of separate abstention doctrines -- remain ill-defined. The Supreme Court refers sometimes to two and sometimes to three abstention doctrines,[1] while a leading treatise refers to four forms of abstention and the related doctrine of "Our Federalism."[2] For present purposes, it is convenient to discuss abstention under five headings, each of which draws its name from the case in which it was established: Pullman abstention, Burford abstention, Thibodaux abstention, Colorado River abstention, and Younger abstention.

Critics of abstention charge that a federal court's failure to exercise jurisdiction conferred by Congress is "a judicial usurpation of legislative authority, in violation of the principle of separation of powers."[3] The Supreme Court has justified abstention -- notwithstanding its own description of

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1. Compare, e.g., Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 475-478 (1977), with Colorado River Water Conservation District v. United States, 424 U.S. 800, 814-815 (1976).

2. C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure §4241 at 28-29 (2d ed. 1988).

3. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 76 (1984).

"the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"[4] -- by pointing to the equitable nature of the decision not to exercise jurisdiction. The Court explained in New Orleans Public Service, Inc. v. Council of the City of New Orleans (NOPSI) that the unqualified language of the statutes conferring jurisdiction does "not call into question the federal courts' discretion in determining whether to grant certain types of relief -- a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted."[5] Consistent with this principle, the federal courts have frequently given narrowing interpretations to broad grants of jurisdiction to take into account circumstances in which exercising jurisdiction appears questionable. Professor Shapiro has documented the many situations in which courts have recognized a discretionary element to their jurisdiction, including the doctrine of forum non conveniens; pendent and ancillary jurisdiction; prudential restrictions on standing, ripeness, and mootness; and certain aspects of the Supreme Court's original jurisdiction.[6] The abstention doctrines fit comfortably within this tradition of declining jurisdiction when doing so serves policies of

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4. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). See also New Orleans Public Service, Inc. v. Council of the City of New Orleans, 109 S.Ct. 2506, 2513 (1989); Deakins v. Monaghan, 484 U.S. 109, 203 (1988); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

5. 109 S.Ct. 2506, 2513 (1989).

6. Shapiro, Jurisdiction and Discretion, 60 N.Y.U.L. Rev. 543, 552-561 (1985).

federalism, separation of powers, or sound judicial management. As such, abstention represents a legitimate form of statutory interpretation. And, as with all statutory interpretation, there is an implicit invitation to Congress to overrule or modify the courts' decisions if Congress determines that they are wrong. We review the abstention doctrines with this principle in mind. The first four categories of abstention, which involve related issues, are discussed under one heading; Younger abstention, which presents special problems, is discussed separately.

a. Traditional Forms of Abstention.

i. Justifications for Abstention.

In explaining why federal courts should not decide particular categories of cases, the Supreme Court often has contented itself with conclusory statements about the desirability of avoiding "needless federal conflict with state policy,"[7] advancing "harmonious federal-state relations,"[8] and safeguarding "sound judicial administration."[9] These general formulations are an inadequate substitute for an in-depth examination of the evils that might follow from exercising

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7. Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943).

8. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959).

9. Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968).

federal jurisdiction in a particular case or class of cases. It is therefore useful briefly to review the functional considerations that bear on the decision to abstain.

First, it is difficult to justify abstention when the issue in the case is one of federal law. From the perspective of competence and expertise, federal courts are presumably better (and at a minimum no worse) than state courts in adjudicating federal issues. More important, Congress intended federal courts to be a primary vehicle for enforcing federal law, and in the absence of extraordinary circumstances, speculative dangers to "harmonious federal-state relations" should not outweigh the interest in the effective enforcement of that law.

Second, it is similarly difficult to find a functional justification for abstaining in cases that turn on the interpretation of settled state law. Where there is no serious dispute about the meaning of the dispositive law, any consequences that follow from application of that law are a result of the state's own legislative judgment.

Third, abstention may serve a substantial purpose when the meaning of dispositive state law is unclear. A state court may be better qualified to ascertain, and plainly is in a better position definitively to resolve, the meaning of state law. But there are countervailing considerations, and the Supreme Court consistently has held that lack of clarity in state law, standing alone, does not warrant abstention.[10] For example, the presence

10. See, e.g., Meredith v. City of Winter Haven, 320 U.S. 228 (1943).

of an unsettled federal question counsels against abstention, since both courts have concurrent jurisdiction over both types of claims, and the same factors that support leaving state law to the state court support retaining jurisdiction to decide the federal issue. Similarly, in diversity cases, the need for an impartial or less partial federal forum may make abstention inappropriate. Of course, as discussed above, we believe that the problem of bias toward nonresidents is overstated. But if Congress disagrees and concludes that diversity jurisdiction is necessary to protect out-of-state litigants, the need for this safeguard counsels against abstention. As a general matter, then, abstention is appropriate only when an issue of unsettled state law is combined with some other factor that justifies refusing to exercise federal jurisdiction.

ii. Pullman Abstention.

The oldest and most clearly defined of the abstention doctrines, which takes its name from Railroad Commission v. Pullman,[11] comes into play whenever resolution of a federal constitutional issue turns on an unsettled issue of state law: Pullman authorizes federal courts to abstain so that the state law issue may be decided by a state court. The doctrine is well illustrated by Pullman itself, in which the Court ruled that the lower federal courts should have refrained from deciding a

11. 312 U.S. 496 (1940).

challenge to an assertedly unconstitutional order of the Texas Railroad Commission so that the state courts could decide whether the Commission lacked authority to issue the order under state law.[12] Under Pullman, the federal proceedings are stayed pending resolution of the state issue in state court. The plaintiff may reserve the right to return to federal court for a decision on the federal issue once the state proceedings are terminated.[13]

In the classic Pullman setting, the rationale for abstaining is plain. To avoid an unnecessary decision of constitutional import, the federal court should decide the state law question first. At least in non-diversity cases, however, litigants have no substantial interest in having the federal courts resolve unsettled issues of state law. If the court wrongly concludes that the case can be resolved as a matter of state law, there is some potential for federal/state friction.[14] If, on the other hand, the federal court wrongly concludes that the case cannot be

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12. 312 U.S. at 500.

13. See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Because the federal case remains on the docket, some state courts have refused to entertain a state suit on the ground that it constitutes a request for an advisory opinion. See, e.g., United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). In such cases, the Supreme Court has authorized federal district courts to dismiss the federal action "without prejudice so that any remaining federal claim may be raised in a federal forum after the [state] courts have been given the opportunity to address the state law questions...." Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88-89 (1975).

14. One should not, however, exaggerate this risk. The state courts are not bound by the federal decision and may simply clarify state law in a later case, meaning that only this one case will be wrongly decided -- a risk that is equally present in every diversity case.

resolved as a matter of state law and reaches the federal constitutional issue, "a constitutional determination is predicated on a reading of the statute that is not binding on the state courts and may be discredited at any time -- thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless."[15] As Judge Friendly noted, such a decision "not only is a waste of judicial resources but provokes a needless collision between state and federal power."[16] Pullman abstention is thus analogous to the doctrine of primary jurisdiction in the administrative law context: because state courts have primary responsibility for interpreting state law, because we do not want federal courts striking laws down as unconstitutional unless this course is unavoidable, and because "the state court may interpret [the] challenged statute[s] so as to eliminate, or at least to alter materially, the constitutional question presented,"[17] resolution of the state law issue is shifted to the preferred state forum.

It follows that abstention is appropriate only if there is substantial uncertainty as to the meaning of state law and a reasonable possibility that clarifying this law might avoid the need for a federal constitutional ruling.[18] The Supreme Court

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15. Moore v. Sims, 442 U.S. 415, 428 (1979).

16. H. Friendly, Federal Jurisdiction: A General View 93 (1973).

17. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477 (1977).

18. Erwin Chemerinsky, Federal Jurisdiction §12.2 at 599 (1989). See also Kusper v. Pontikes, 414 U.S. 51, 54 (1973); Baggett v. Bullitt, 377 U.S. 360, 375 (1964). Given this

has offered relatively little guidance about how unclear the state law must be or how likely it must be that the state court ruling might render a federal constitutional decision unnecessary. And other issues -- like whether abstention is mandatory, what to do if federal jurisdiction is exclusive, and whether to consider the adequacy of state remedies -- are unresolved. There is, consequently, considerable uncertainty in the lower federal courts regarding when abstention is appropriate.[19]

There are also costs associated with Pullman abstention. Litigants may be forced to contest two entirely separate lawsuits in two sets of courts to resolve claims arising out of a single transaction. Beyond the obvious costs of duplication, Pullman abstention may have what Professor Currie described 20 years ago as a "Bleak House aspect" that produces inordinate delay in the resolution of federal claims: a plaintiff contests his claim in federal court to the point where the district judge determines that the case involves a potentially dispositive issue of state law; the plaintiff must then initiate a state court action and litigate it through the entire state system; only then can the

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rationale, the court may raise the issue of abstention even if the parties have not.

19. See Chemerinsky, supra note 18, §12.2 at 599-604 (citing cases). These problems are compounded by the Supreme Court's occasionally wavering statements about the circumstances in which Pullman abstention is appropriate. Compare, e.g., Hawaii Housing Auth. v. Midcliff, 467 U.S. 229, 236 (1984)(state law must be unquestionably unsettled) with Forneris v. Ridge Tool Co., 400 U.S. 41, 44 (1970)(abstention appropriate if state law is conceivably subject to differing interpretations).

plaintiff return to federal court and obtain an adjudication of his federal claim.[20] There are occasional horror stories of this process taking ten years or more, and the prospect of such delay may discourage some litigants from asserting their rights in federal court at all or from preserving them after abstention has been ordered.

More subtle problems flow from the discretionary nature of the judgment whether abstention is appropriate. In theory, Pullman comes into play only when state law is unsettled. As noted above, however, there is no simple formula to determine when state law is sufficiently unclear to warrant deference to the state. As a result, federal judges may be tempted to abstain even in cases where the substance of state law is easily determined simply to clear their dockets of difficult or time-consuming cases that happen to have a state law component. These considerations have led several leading analysts to advocate eliminating Pullman abstention.[21] The American Law Institute, focusing on the costs of delay and duplicative proceedings, has recommended that England be overruled and that litigants be precluded from returning to federal court once abstention has been ordered.[22]

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20. Currie, The Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 268, 317-318 (1969).

21. See Currie, supra note 20, at 317-318; Field, The Abstention Doctrine Today, 125 U.Pa.L.Rev. 590, 602-609 (1977); Field, The Uncertain Nature of Federal Jurisdiction, 22 Wm. & Mary L. Rev. 683, 698 (1981).

22. American Law Institute, Study of the Division of

While these are serious criticisms, we recommend against eliminating Pullman abstention. There are no data on either the typical delay in a case involving Pullman abstention or the number of cases that return to federal court because the resolution of the state issue did not moot the constitutional claims. In addition, federal courts have -- and have sometimes exercised -- discretion not to abstain if delay would make preserving federal rights impossible.[23] Finally, the use of state certification procedures, which permit federal courts to send unsettled questions of state law directly to the state courts for a relatively quick resolution, may significantly reduce the expense and delay associated with obtaining authoritative interpretations of state law.[24] We urge states that have not yet developed effective certification procedures to do so as an efficient substitute for traditional Pullman abstention.

Pullman should, we think, be limited to cases in which state law is so unsettled that the federal court is unable confidently to interpret it. In addition, federal courts should consider the effects of delay on the parties in deciding whether to

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Jurisdiction Between State and Federal Courts 48-51 (1969).

23. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Nissan Motor Corp. v. Harding, 739 F.2d 1005, 1011 (5th Cir. 1984).

24. At least 36 states and Puerto Rico have certification procedures. Of particular relevance to Pullman abstention, 26 states allow certification by federal district courts. See C. Wright, A. Miller & E. Cooper, supra note 2, §4248 at 167-68 nn.30-31.

abstain.[25] These considerations are incorporated into the abstention statute proposed below.

In applying Pullman, courts have not distinguished between the typical case in which federal jurisdiction to decide the state issue is based solely on pendent or ancillary jurisdiction and cases in which there is also diversity jurisdiction. The argument for abstention is strongest with respect to pendent and ancillary claims, which cannot stand alone in federal court. Federal judges resolve such claims simply as a matter of judicial economy, and this practical consideration may be overridden by the systemic interest in avoiding unnecessary decisions of constitutional law. In contrast, when a case meets the statutory requirements for diversity jurisdiction there is, at least nominally, an independent federal interest in having the state law question resolved by the federal court. Given that the federal court would decide either the state law issue or the federal constitutional question if it were presented separately, it is odd for the court to abstain -- and possibly decide neither issue -- just because the two are presented together.

This observation suggests that Pullman abstention should be unavailable where federal jurisdiction is based on the existence of both a federal question and diversity. Of course, we believe that Congress should abolish diversity jurisdiction. But if Congress disagrees with that assessment and determines that

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25. The deprivation of some federal rights, for example, is exacerbated by delay in the disposition of a case -- voting and free speech rights are good examples. See Chemerinsky, supra note 18, §12.3 at 603.

diversity jurisdiction serves an important federal interest, abstention in such cases is unwarranted.

iii. Burford Abstention.

Two years after deciding Pullman, the Court created a second abstention doctrine in Burford v. Sun Oil Co.[26] The Court there abstained from deciding a challenge to an order of the Texas Railroad Commission awarding oil drilling rights. The case involved both federal and state law issues, but the Court made only passing reference to the federal issues and treated the case as though it turned entirely on state law.[27] The Court emphasized that Texas had created a unified system of review of the Commission's orders that permitted courts not only to review those orders de novo but to propose regulatory standards for the Commission's consideration.[28] Texas had thus made the state courts "working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry."[29] According to the Court, "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy" would be "the inevitable product" of a federal court decision.[30] Abstention was therefore appropriate to forestall

26. 319 U.S. 315 (1943).

27. See 319 U.S. at 319-325, 327-328, 331, 334.

28. 319 U.S. at 325-326.

29. 319 U.S. at 326.

30. 319 U.S. at 327.

federal interference with a complex state scheme of regulation.[31] In contrast to Pullman, the Court ordered the federal action dismissed rather than merely stayed.[32]

The Court has ordered abstention on Burford grounds in only one other case, Alabama Public Service Comm'n v. Southern Ry. Co.[33] Once again the Court emphasized that federal intervention was likely to disrupt a uniform system of administrative review.[34] In contrast to Burford, however, there were no unsettled issues of state law in Alabama Public Service Commission, and the only ground on which the order was challenged in federal court was its asserted inconsistency with the Due Process Clause. The Court nonetheless concluded that the case turned on "local factors" because resolution of the constitutional claim required a weighing of costs and benefits to the state and held that "[a]s adequate state court review of an administrative order based upon predominatly local factors is available to [the plaintiff], intervention of a federal court is not necessary for the protection of federal rights."[35]

Subsequent decisions have left the scope of Burford abstention unclear. Read for all it is worth, the decision in

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31. 319 U.S. at 334.

32. 319 U.S. at 327. See C. Wright, The Law of Federal Courts §52 at 308 (4th ed. 1983).

33. 341 U.S. 341 (1951).

34. 341 U.S. at 347-348.

35. 341 U.S. at 349.

Alabama Public Service Commission could justify abstention whenever a federal constitutional challenge to a state administrative decision could be reviewed in state court.[36] To be sure, the Court distinguished Burford in McNeese v. Board of Education[37] on the ground that McNeese involved "no underlying issue of state law"[38] -- entirely disregarding the contrary holding of Alabama Public Service Commission. But the Court has elsewhere described Burford and Alabama Public Service Commission as broadly authorizing abstention "when the exercise of jurisdiction by the federal court would disrupt a state administrative process" or "otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies."[39] This sort of expansive language has led many courts of appeals dramatically to expand the Burford doctrine by ordering abstention simply because state administrative action was challenged.[40]

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36. Chemerinsky, supra note 18, §12.2.3 at 610.

37. 373 U.S. 668 (1973).

38. 373 U.S. at 673-74.

39. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). See also Colorado River, 424 U.S. at 815-816; Zwickler v. Koota, 389 U.S. 241, 256 (1967) (Harlan, J., concurring in the judgment).

40. See C. Wright, A. Miller & E. Cooper, supra note 2, §4244 at 95-98 n.18 (citing cases); Comment, Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the Burford Doctrine, 46 U. Chi. L. Rev. 971, 980-988 (1979). Other lower courts have read Burford more narrowly, and require a showing that federal review would disrupt a coordinated state regulatory scheme. See, e.g., Rancho Palor Verdes Corp. v. City of Laguna Beach,, 547 F.2d 1092, 1096 (9th Cir. 1976).

Last Term in its NOPSI decision, the Supreme Court cut back on the expansive application of Burford by the lower courts. Reversing a Fifth Circuit decision to abstain in a case challenging a state administrative order, the Court emphasized that Burford abstention is appropriate only when resolution of the case requires consideration of state law factors that are necessary for the development of uniform state policy.[41] The Court held abstention inappropriate because decision of the federal issue in NOPSI did not "demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies."[42]

In our view, the courts have carried Burford abstention too far. Abstention is plainly unjustified when, as in Alabama Public Service Commission, the case involves only federal law. Abstention is said to be justified in such cases to avoid "disrupting state policy" or "creat[ing] needless friction by unnecessarily enjoining state officials from executing domestic policies." But friction is hardly needless (or an injunction unnecessary) if a state agency is violating federal law. Federal courts routinely "disrupt" state policy by invalidating state legislation or the actions of state executive officials.[43] We

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41. 109 S.Ct. at 2515.

42. 109 S.Ct. at 2515. The Court left unclear whether, if these conditions are met, the outcome of the case must also turn on state law for abstention to be appropriate.

43. Cf. Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978) ("there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.")

see no reason to limit federal power just because the policy at issue was formulated by an administrative agency rather than by the legislature or executive.

In most cases, moreover, the same conclusion applies even though the case contains a state law issue. Even if state law is unsettled, no compelling policy is served by abstention in the usual Burford setting. As noted above, abstention is usually inappropriate even in cases presenting unsettled and important issues of state law. If deciding the unsettled state law issue will possibly avoid a federal constitutional issue, abstention will be proper under Pullman. But it is difficult to see the justification for abstaining simply because the case involves the validity of an agency order rather than some other form of executive action.

There is a kernel of sense in the Burford doctrine, however. Abstention may be justified when -- as was apparently true in Burford itself -- the case turns on debatable issues of state law and the state courts have a quasi-administrative, policy-making role. To the extent that state courts may choose among a range of acceptable options in establishing a state policy that will have general applicability, inserting a federal court into the process may well result in the simple substitution of a federal judge's policy preferences for those of legitimate state decisionmakers. In such circumstances, considerations of federalism support leaving the decision to the state courts. But we would restrict Burford abstention to this limited category of cases. Moreover, while the initial decision of state law should

be left to the state courts, there is no reason to leave these courts with the final decision of federal law. Instead, we recommend using the same procedures that are used in connection with Pullman abstention -- including the option to reserve a federal forum for any claims and the use of certification procedures where available.

iv. Thibodaux Abstention.

A closely related form of abstention was recognized in Louisiana Power & Light Co. v. Thibodaux.[44] A diversity action was brought challenging a city's exercise of its eminent domain power. The Court found abstention appropriate because the controlling state law was unclear and abstaining would advance "harmonious federal-state relations in a matter close to the political interests of the state."[45] The Court emphasized that the exercise of eminent domain "is intimately involved with sovereign prerogative" and concluded that "[t]he special nature of eminent domain justifies the district judge, when his familiarity with the problems of local law so counsels him, to ascertain the meaning of the disputed state statute from the only tribunal empowered to speak definitively -- the courts of the

44. 360 U.S. 25 (1959). Thibodaux is sometimes described as an example of Burford abstention, see Colorado River, 424 U.S. at 814, and sometimes said to be virtually identical to Pullman abstention, see Field, supra note 21, 122 U. Pa. L. Rev. at 1151-1152.

45. 360 U.S. at 29.

state under whose statute eminent domain is sought to be exercised."[46]

In County of Allegheny v. Frank Mashuda Co.,[47] another eminent domain case decided the same day as Thibodaux, the Court declined to order abstention. Rather surprisingly in light of Thibodaux, the Court in Mashuda declared that "the fact that a case concerns the State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty."[48] Unlike the state law at issue in Thibodaux, the law in Mashuda was "clear and certain," and the Court therefore concluded that "[t]he propriety of a federal adjudication ... follows a fortiori from the established principle that Federal District Courts should apply settled state law without abstaining from the exercise of jurisdiction even though this course would require decision of difficult federal constitutional questions."[49] Mashuda thus seemingly confined Thibodaux to cases in which a challenge to the state's exercise of eminent domain is grounded on unsettled state law.

The Supreme Court has applied Thibodaux only once, in Kaiser Steel Corp v. W.S. Ranch Co.[50] Kaiser was a diversity action

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46. 360 U.S. at 29.

47. 360 U.S. 185 (1959).

48. 360 U.S. at 191-92.

49. 360 U.S. at 196.

50. 391 U.S. 593 (1968) (per curiam). It is not entirely clear whether Kaiser applied Thibodaux or not. The Court's opinion cited no authority at all, and its analysis bears some similarity to the subsequent opinion in Colorado River. Justice Brennan's concurrence cited both Burford and his Thibodaux dissent.

over water rights between private parties that turned on the meaning of the takings clause of the New Mexico state constitution. In a brief per curiam opinion, the Court held abstention appropriate, describing the state law issue as "a truly novel one" that is "of vital concern in the arid State of New Mexico."[51] The Court added that an identical issue was presented in a declaratory judgment action then pending in state court, and observed that "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners."[52]

The best understanding of the Thibodaux doctrine -- one that reconciles Thibodaux and Mashuda and is consistent with Kaiser -- is that abstention may be justified in a diversity case if there is uncertain state law and an important state interest that is "intimately involved" with the exercise of "sovereign prerogative." But the unclarity of this formulation (anything the sovereign may do is one of its prerogatives) has caused considerable uncertainty in the lower courts.[53]

If the Thibodaux doctrine is supportable at all, it must be because the risk of error inherent in a federal court's application of unsettled state law -- which normally does not require abstention -- becomes unacceptable when the state is

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51. 391 U.S. at 594.

52. 391 U.S. at 594.

53. See Chemerinsky, supra note 18, at 608.

involved in an eminent domain proceeding or, under Kaiser, when the state law issue is of unusual importance to the state. But notwithstanding this almost mystical reverence for the state's sovereign prerogatives, it is hard to see why abstention is compelled by the possibility that a federal court might erroneously prevent a state from exercising its eminent domain power. We perceive no meaningful distinction between eminent domain proceedings and other matters in which state or local governments are involved and as to which the Court has never suggested that abstention is appropriate.

It follows that Kaiser's apparent expansion of Thibodaux to cases involving important, recurring issues of state law is also unwarranted. If an issue is a recurring one, the state courts will soon have an opportunity to settle it. While there is a danger of inconsistent federal and state court judgments in the interim, that problem is inherent in diversity jurisdiction. And if diversity jurisdiction has value at all, it surely should be available in cases where the rights at stake are substantial. Accordingly, except to the extent that Thibodaux overlaps with Burford, we recommend abolishing this doctrine.[54]

v. Colorado River Abstention.

The newest form of abstention takes its name from Colorado

54. Of course, the Thibodaux doctrine can also be eliminated if Congress accepts our recommendation to abolish diversity jurisdiction.

River Water Conservation District v. United States,[55] the first -- and, thus far, the only[56] -- case in which the Court has found such abstention appropriate. In a nutshell, Colorado River stands for the proposition that in "exceptional" circumstances federal courts may abstain in favor of pending state proceedings between the parties to the federal action for reasons of "'[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'"[57]

Colorado River itself involved parallel suits in federal and state court to settle water rights. The United States, a party to both suits, had been sued in the state court pursuant to the McCarran Amendment, which authorized state court actions against the federal government in water rights cases. Although the Court avoided the term "abstention," it held that the case presented "circumstances permitting the dismissal of [the] federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration."[58] The most important consideration was the McCarran Amendment itself, which the Court

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55. 424 U.S. 800 (1976).

56. In Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978), the Court set aside the court of appeals' decision not to abstain. But abstention had been ordered on a writ of mandamus, and the Supreme Court split 4-1-4, with Justice Blackmun casting the deciding vote in favor of a remand partly because of the case's procedural posture. Will therefore provides little guidance on the scope of the Colorado River doctrine.

57. 424 U.S. at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952).

58. 424 U.S. at 818.

read to express a "clear federal policy" of "avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property."[59] The Court then listed several additional factors bearing on its decision to dismiss the federal action: the inconvenience of the federal forum, the order in which jurisdiction was obtained, the general desirability of avoiding piecemeal litigation, and the extent to which the federal action had progressed.[60]

Largely because the Court listed multiple factors contributing to its decision to order abstention, Colorado River caused considerable confusion in the lower courts.[61] The Court attempted to resolve this confusion in Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,[62] in which it held abstention inappropriate, emphasizing that "[o]nly the clearest of justifications will warrant dismissal" under Colorado River.[63] While this sent a clear signal that abstention on Colorado River grounds should be rare, the Court did little to clarify when these rare cases exist, explaining unhelpfully that

59. 424 U.S. at 819.

60. See 424 U.S. at 818, 820.

61. 437 U.S. 655 (1978). This confusion was compounded by the split decision in Will v. Calvert Fire Ins. Co., discussed supra note 56.

62. 460 U.S. 1 (1983).

63. 460 U.S. at 16 (quoting Colorado River, 424 U.S. at 818-819) (emphasis in original).

"the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance weighted heavily in favor of the exercise of jurisdiction."[64] To the considerations listed in Colorado River, the Court added that abstention is likely to be inappropriate when "federal law provides the rule of decision on the merits" and when state court proceedings may be inadequate to protect federal rights.[65] The Court left unresolved the question whether, if Colorado River abstention is appropriate, the federal action should be dismissed or stayed.

Since the decision in Moses H. Cone, the Supreme Court has consistently repeated that Colorado River abstention is limited to "exceptional cases."[66] Despite this, many lower courts have ordered abstention merely because parallel proceedings are pending in state court.[67] The frequency with which abstention on this ground is ordered reflects continuing uncertainty over what constitutes "exceptional circumstances" justifying abstention.

The Colorado River doctrine may justly be criticized on the ground that, as currently formulated, it is confusing and internally inconsistent. On the one hand stands the Court's bold admonition that federal courts have a "virtually unflagging"

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64. 460 U.S. at 16.

65. 460 U.S. at 23, 26.

66. See, e.g., Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

67. Chemerinsky, supra note 18, §14.3 at 668-69 (citing cases).

obligation to exercise jurisdiction conferred by statute -- an admonition that no one takes completely seriously and that if taken seriously would eliminate virtually all abstention doctrines. On the other hand, the Court's listing of factors relevant to the decision to abstain contains no suggestion of a rationale and therefore conveys no sense of what makes a case sufficiently "extraordinary" to warrant abstention.

As suggested in our discussion of the Anti-Injunction Act, however, we believe that the Colorado River doctrine has a useful, if limited, role to play in helping both state and federal courts avoid duplicative, piecemeal litigation. We recommended above that Congress authorize federal courts to enjoin state litigation that is initiated after a federal action on the same matters is well advanced. This is not a blanket rule: the court must be sure that no special concerns or advantages of the other forum justify the additional litigation. But when a second lawsuit appears merely repetitive, the federal court should be empowered to stop it. By the same token, when roles are reversed -- when a federal lawsuit that is duplicative of state litigation is begun and there is no apparent necessity for the federal court to hear the case -- jurisdiction need not be mandatory. As in the federal/federal or federal/state context, insuring that litigation proceeds in a single forum is not absolutely required. But where the circumstances suggest that the principal result of the federal litigation is to waste time and resources redoing what has been or is being done in the state courts, the federal courts should

dismiss. The factors identified by the Supreme Court in Colorado River and Moses Cone should be relevant to making this determination.

vi. Recommendations.

This review suggests that existing abstention doctrines are overbroad. In our view, the Thibodaux doctrine, much of the Burford and Colorado River doctrines, and certain applications of Pullman abstention (most importantly its use in diversity cases) cannot persuasively be justified. Abstention seems warranted only where (1) resolution of an unsettled issue of state law might obviate consideration of a federal constitutional claim; (2) state courts have a policy-making, quasi-administrative role in reviewing agency decisions; or (3) exercising federal jurisdiction unnecessarily duplicates ongoing state proceedings.

Whether it is sensible to impose such limits legislatively is a separate question. There are substantial arguments in favor of leaving the development of abstention doctrine to the courts. After having at first favored a legislative solution, Judge Friendly ultimately came "to question the wisdom of trying to codify abstention" because, he concluded, "the courts can work this out better on a case-by-case basis."[68] Judge Friendly explained that case-by-case analysis allows for flexibility and facilitates a realistic assessment in individual cases of the

68. H. Friendly, supra note 16, at 94.

strength of competing state and federal interests.[69]

Nonetheless, we believe that, on balance, what the system loses in flexibility from clear abstention rules it will more than make up in increased predictability and rationality. Under present law, the decision to abstain is largely fortuitous; it is laden with value judgments about the importance of ethereal interests such as "sovereign prerogative" that lead to inconsistent decisions and, in turn, to extensive litigation about whether abstention is required. In addition, many federal judges seem inclined to make abstention still broader and are thus unlikely to strike the proper balance without legislative redirection.[70]

Our recommendation can be implemented by the adoption of a statute along the following lines:

> §1. Abstention.
>
> (a) A federal court may, in its discretion, abstain from deciding a case otherwise within its jurisdiction if:

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69. H. Friendly, supra note 16, at 95: "Much may depend on the strength of the federal interest involved; I would be considerably more willing to abstain in a case, even not within well-marked traditional categories, where the issue was the permissible length of hair of high school students than where it concerned the right of black citizens to equal education, housing, or employment opportunity."

70. While narrowed abstention rules could marginally increase the number of decisions that federal courts render on the merits, there are too few abstention cases for this effect to be statistically significant. Moreover, any increase would be counterbalanced by the elimination of wasteful litigation over the propriety of abstention -- on the whole, a desirable tradeoff for the federal courts.

(1) there is substantial uncertainty regarding the meaning or applicability of a state law that is fairly subject to an interpretation that will render unnecessary a ruling on a federal constitutional issue; or

(2) the case involves a challenge to an order or other action of a state administrative agency and the state courts have a policymaking, quasi-administrative role in reviewing agency decisions; or

(3) exercising jurisdiction will unnecessarily duplicate ongoing state proceedings that are far advanced and no special circumstances necessitate adjudication in a federal forum.

(b) In exercising its discretion under subsection (a) of this section, the court shall consider the nature of the federal claim and the likelihood that abstaining will produce excessive delay in its determination.

(c) The court shall, whenever possible, certify a question of state law upon which abstention is ordered to an appropriate state court for prompt resolution. The plaintiff may reserve the right to return to federal court to have any federal issues adjudicated.

(d) Subsections (a)(1) and (2) shall not apply if jurisdiction over the state law issue is based on 28 U.S.C. §1332.

b. Younger Abstention.

i. The Scope of the Younger doctrine.

The remaining category of abstention has ancient antecedents but draws its name and current vitality from the Supreme Court's decision in Younger v. Harris.[71] Despite relatively modest

71. 401 U.S. 37 (1971). Younger relied on a long line of decisions in which the Court had expressed reluctance to interfere with state criminal prosecutions. See 401 U.S. at 45-46 (citing Douglas v. City of Jeannette, 319 U.S. 157 (1943), and Fenner v. Boykin, 271 U.S. 240 (1926)). The Younger Court

beginnings, Younger has come to stand for the proposition that federal courts will not assert jurisdiction when doing so interferes with certain categories of ongoing state judicial proceedings. While this proposition sounds innocuous enough, "[t]here is no more controversial, or more quickly changing, doctrine in federal courts today than the [Younger] doctrine."[72]

Younger rests, in Justice Black's famous words, on "basic doctrine[s] of equity jurisprudence," and on

> an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[73]

Although the Court has applied Younger in numerous cases, it rarely does more than repeat Younger's general explanation of the doctrine,[74] and even when it attempts to reexplain Younger, the

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declared that it was simply applying "settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions." 401 U.S. at 53. See also Huffman v. Pursue, 420 U.S. 592, 614 (1975) (Brennan, J., dissenting). Commentators have suggested that prior to Younger the Court was in fact willing to enjoin state criminal proceedings. See, e.g., Field, supra note 21, 22 Wm. & Mary L. Rev. at 703-705.

72. C. Wright, A. Miller & E. Cooper, supra note 2, §4251 at 180.

73. 401 U.S. at 43-44. This notion of comity and the need for a proper respect between state and federal governments is captured in Justice Black's inelegant phrase "Our Federalism." Id. at 44.

74. See, e.g., NOPSI, 109 S.Ct. at 2515-2516; Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10 (1987); Dayton Christian Schools, 477 U.S. at 626-627; Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982); Juidice v. Vail, 430 U.S. 327, 334 (1977); Huffman v. Pursue, 420 U.S. 592, 601 (1975).

discussion invariably has a conclusory ring. The Court has suggested, for example, that federal court interference with state proceedings "can readily be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles,"[75] and it has referred to "the threat to our federal system posed by the displacement of state courts by those of the National Government."[76]

The problem is that these generalized expressions of comity and federalism provide no clear stopping point for the application of Younger. And the Younger doctrine has accordingly grown like Topsy. Younger itself held only that a federal court could not enjoin an ongoing state criminal prosecution, a holding consistent with traditional equity doctrines. But simultaneously with Younger, the Court held that federal courts should also abstain when the party seeking federal relief requests a declaratory judgment, since "the declaratory relief alone has practically the same practical impact as a formal injunction would."[77] The Court also applied Younger to bar injunctions that are collateral to the merits of a prosecution, such as those that would exclude evidence.[78] Moreover, while the Supreme Court has

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75. Juidice v. Vail, 430 U.S. 327, 336 (1977).

76. Moore v. Sims, 442 U.S. 415, 423 (1979). See also Huffman v. Pursue, 420 U.S. 592, 604 (1975).

77. Samuels v. Mackell, 401 U.S. 66, 72 (1971). The Court later clarified that where no criminal prosecution is pending both declaratory and injunctive relief may be ordered. See Steffel v. Thompson, 415 U.S. 452 (1974); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Wooley v. Maynard, 430 U.S. 705 (1977).

78. Perez v. Ledesma, 401 U.S. 82 (1971).

yet to decide the issue, two justices and a plurality of the courts of appeals have indicated that Younger should also bar federal actions for damages because "[a] judgment on the federal damages action may decide several questions at issue in the state criminal proceeding."[79]

More important, the Court has expanded the types of state proceedings protected by Younger. Younger itself was confined to the criminal setting, but the Court soon applied it to what the Court termed "quasi-criminal" civil enforcement actions[80] and contempt proceedings.[81] From there, the Court made the Younger doctrine applicable to civil actions "brought by the state in its sovereign capacity" if they involve important state

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79. Deakins v. Monaghan, 108 S.Ct. at 532-533 (White, J., joined by O'Connor, J., concurring). At least five courts of appeals have applied Younger to damages actions. Landrigan v. City of Warwick, 628 F.2d 736, 743 (3d Cir. 1980); McCurry v. Allen, 606 F.2d 795, 799 (8th Cir. 1979), rev'd on other grounds, 449 U.S. 90 (1980); Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1986); Parkhurst v. State of Wyoming, 641 F.2d 775, 777 (10th Cir. 1981); Doby v. Strength, 748 F.2d 1405, 1406 (11th Cir. 1985). Three courts of appeals have approved staying damages actions pending the outcome of state proceedings for "prudential" reasons. Suggs v. Brannon, 804 F.2d 274, 279 (4th Cir. 1986); Giulini v. Blessing, 654 F.2d 189, 193 (2d Cir. 1981); Crane v. Fauver, 762 F.2d 325, 329 (3d Cir. 1985). Only two courts of appeals have held abstention improper in damages actions. Thomas v. Texas State Board of Medical Examiners, 807 F.2d 453, 457 (5th Cir. 1987); Caras v. Williams, 807 F.2d 1286, 1291-1292 (6th Cir. 1986).

80. Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975). In Huffman, state officials obtained a civil judgment closing an adult theater for one year on the ground that the exhibition of obscene films constituted a nuisance. Such a judgment, the Court reasoned, is "more akin to a criminal prosecution than are most civil cases." 420 U.S. at 604.

81. Juidice v. Vail, 430 U.S. 327, 335-336 (1977).

interests.[82] Interests held important enough to satisfy this requirement include protection of the fiscal integrity of state programs,[83] settlement of child custody issues,[84] imposition of bar discipline,[85] elimination of sex discrimination,[86] and settlement of utility rates[87] -- a pattern of results suggesting that virtually any state interest may suffice. Along the way, the Court announced that federal courts also should not interfere with state administrative proceedings if they are "judicial in nature."[88]

The Court seemingly took the last logical step in this progression in Pennzoil Co. v. Texaco Inc.,[89] which applied Younger to a dispute between private parties and held that a federal court could not entertain a challenge to the use of lien and bond requirements in an ongoing proceeding in the Texas courts. The Court explained that, "[n]ot only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the

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82. Trainor v. Hernandez, 431 U.S. 434, 444 (1977).

83. Trainor, 431 U.S. 434.

84. Moore, 442 U.S. at 42.

85. Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 434-435 (1982).

86. Dayton Christian Schools, 477 U.S. at 627.

87. NOPSI, 109 S.Ct. at 2516.

88. Dayton Christian Schools, 477 U.S. at 627; Middlesex County Ethics Comm'n, 457 U.S. at 432.

89. 481 U.S. 1 (1987).

very process by which those judgments were obtained."[90] Although the Court claimed not to be holding that Younger abstention is always appropriate when a civil proceeding is pending in state court, that is precisely what its logic suggests: enjoining a state lawsuit "challenge[s] the very process by which [state] judgments [are] obtained" every bit as much as enjoining the judgment's execution. Moreover, since Younger arguably applies to all types of federal actions (including those for monetary relief) and may come into play even when the state action is filed after the initiation of the federal suit, Pennzoil potentially meant that federal courts could lose jurisdiction whenever a parallel action was brought in state court.[91]

Last Term, the Court retreated from the broader implications of Pennzoil in NOPSI. NOPSI grew out of a ratemaking proceeding conducted by the New Orleans City Council. After rejecting a utility's request for a rate increase, the Council brought an action in state court seeking a declaratory judgment to settle the validity of its order. The utility contested this suit on state law grounds while bringing an action in federal court to challenge the order on federal law grounds. The lower federal courts abstained. The Supreme Court reversed:

> Although our concern for comity and federalism has led us to expand the protection of Younger beyond state criminal prosecutions, to civil enforcement proceedings [citing Huffman, Trainor, and Moore], and even to civil proceedings involving certain orders that are uniquely

90. 481 U.S. at 14.

91. See 481 U.S. at 27-28 (Blackmun, J., concurring in the judgment).

> in furtherance of the state courts' ability to perform their judicial functions [citing Juidice and Pennzoil], it has never been suggested that Younger requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.[92]

The Court added: "[i]t is true, of course, that a federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future -- or, as in the present circumstances, even a pending state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts."[93]

Several aspects of NOPSI are puzzling, even apart from the tension with Pennzoil. In fact, the Court has applied principles derived from Younger in refusing to interfere with state executive action.[94] More important, NOPSI left unclear how courts should decide which civil proceedings involve orders "that are uniquely in furtherance of the state courts' ability to perform their judicial functions" -- a description that could easily fit ordinary trials. Nonetheless, the tenor of the NOPSI opinion suggests that the Court means to confine Pennzoil to its facts and generally to limit Younger to federal suits that interfere with state criminal and civil enforcement proceedings.

There are several other limitations on Younger abstention in

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92. 109 S.Ct. at 2517-2518.

93. 109 S.Ct. at 2520.

94. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 111-113 (1983); Rizzo v. Goode, 423 U.S. 362 (1976).

addition to the line drawn in NOPSI with respect to the covered proceedings. Abstention is inappropriate, for example, if state enforcement authorities are acting in bad faith, if the case involves a challenge to a statute that is "flagrantly and patently violative of express constitutional prohibitions," and in other undefined "extraordinary" circumstances.[95] While the Supreme Court has never actually applied these exceptions -- underscoring just how narrow they are -- they have occasionally been invoked by the lower courts.[96] Younger also has no application if no adequate state forum is available, because, for example, the federal plaintiff cannot raise his constitutional claim as a defense in the state proceeding.[97] Finally, Younger comes into play only when a state proceeding is pending, which means that a plaintiff may seek declaratory or injunctive relief to forestall a threatened state prosecution.[98] The Court has

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95. Younger, 401 U.S. at 45, 53-54; Moore, 442 U.S. at 424.

96. See, e.g., Rowe v. Griffin, 676 F.2d 524, 525-526 (11th Cir. 1982); Heimbach v. Village of Lyons, 597 F.2d 344, 346-347 (2d Cir. 1979); Wilson v. Thompson, 593 F.2d 1375, 1381-1387 (5th Cir. 1979); Wichart v. Walter, 606 F. Supp. 1516, 1521-1522 (D.N.J. 1985). See Collins, The Right to Avoid Trial: Justifying Federal Court Intervention Into Ongoing State Proceedings, 66 N.C.L. Rev. 49, 61-69 (1987).

97. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975); Dayton Christian Schools, 477 U.S. at 626. The Younger rules may cause problems for state-court defendants who assert that they have a federal right to engage in the conduct that gave rise to the prosecution, and who wish to engage in that conduct during the pendency of the state proceedings; while the constitutional claim provides a defense to the prosecution, assertion of that claim in the state criminal proceeding cannot get the defendant interlocutory or prospective relief. See Laycock, Federal Interference With State Prosecutions: The Need for Prospective Relief, 1977 Sup. Ct. Rev. 193; Collins, supra note 96, 66 N.C.L. Rev. at 58.

limited this limitation, however, holding that Younger protects state criminal proceedings begun after a federal complaint is filed if no "proceedings of substance on the merits have taken place in the federal court."[99]

ii. Critique of Younger.

There is an anomaly at the heart of the Younger doctrine: in most cases, federal courts are already barred from enjoining state judicial proceedings by the Anti-Injunction Act, which prohibits such injunctions unless one of several exceptions is found to exist. The Younger Court decided the case the way it did only because the Court assumed for the sake of decision that the Anti-Injunction Act did not preclude federal anti-suit injunctions in cases under 42 U.S.C. §1983 -- an assumption that subsequently became the holding of Mitchum v. Foster.[100] In effect, then, Younger is a judicial gloss on the Anti-Injunction Act. But this is an odd doctrine: it hardly seems likely that Congress authorized injunctions in cases brought under §1983 while at the same time precluding federal courts (by means of Younger abstention) from exercising jurisdiction to decide these cases. In any event, the Younger cases are probably best understood as reflecting the Court's doubts about Mitchum and its

98. See supra note 77.

99. See Hicks v. Miranda, 422 U.S. 332, 349 (1975); Weinberg, The New Judicial Federalism, 29 Stan. L. Rev. 1191, 1223 (1977).

100. 407 U.S. 225 (1972).

desire for a clearer statement from Congress that such injunctions really are authorized.

The tension between what Younger prohibits and what the Anti-Injunction Act permits has led to considerable criticism of this form of abstention. The holding in Mitchum (and other cases interpreting §1983[101]) rests on the premise that Congress enacted the statute because it believed state courts unable or unwilling to enforce federal rights. Dissenters on the Court have argued that, "[i]n enacting §1983, Congress 'created a specific and unique remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state proceeding,'"[102] and they have criticized the Court's expansion of the Younger doctrine "as deliberate and conscious floutings of a decision Congress was constitutionally empowered to make."[103]

Those members of the Court who support the expansive use of Younger abstention have not squarely responded to arguments based on congressional intent, arguing instead that "[m]inimal respect for the state processes ... precludes any presumption that the

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101. See, e.g., Patsy v. Florida Board of Regents, 457 U.S. 496, 502-507 (1982); Monroe v. Pape, 365 U.S. 167 (1961).

102. Pennzoil, 481 U.S. at 20 (Brennan, J., concurring in the judgment) (quoting Mitchum, 407 U.S. at 237.)

103. Juidice, 430 U.S. at 343 (Brennan, J., dissenting). See also Trainor, 431 U.S. at 455-456 (Brennan, J., dissenting); Hicks, 422 U.S. at 355-356 (Stewart, J., dissenting); Huffman, 420 U.S. at 616-618 (Brennan, J., dissenting); Redish, supra note 3, at 111; Field, supra note 21, 22 Wm. & Mary L. Rev. at 685-686; Zeigler, A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction, 1983 Duke L. J. 987 (1983).

state courts will not safeguard federal constitutional rights."[104] Probably for reasons of delicacy, the dissenting justices have not directly disputed these empirical assertions about the behavior of state judges.[105] But commentators who do not labor under the same constraints have argued that federal judges are both more sympathetic to and more likely to rule in favor of plaintiffs asserting federal constitutional claims than are state judges.[106] Other commentators respond that state courts are constitutionally adequate and that, in any event, the proper reading of the Constitution is not necessarily the one that most expansively applies individual rights.[107] Needless to say, the two sides approach this debate with fundamentally different premises.[108] As noted in Part II, this dispute turns on controversial political and empirical claims, and we doubt

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104. Middlesex County Ethics Comm'n, 457 U.S. at 431 (emphasis in original). See also Deakins, 108 S.Ct. at 530; Moore, 442 U.S. at 430-431; Huffman, 420 U.S. at 611.

105. See Wells, Is Disparity A Problem?, 22 Ga. L. Rev. 283, 297-298 (1988). There are exceptions, however. See, e.g., Juidice, 430 U.S. at 339, n.2 (Stevens, J., concurring in the judgment) (Mitchum "is a recognition of the unfortunate fact that state proceedings are sometimes inadequate to vindicate federal rights").

106. The reasons for this assertion are set out by Professor Neuborne, who points to constitutional provisions assuring the independence of federal judges, the "psychological set" of federal judges, and the generally higher quality of federal judges and law clerks. Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977).

107. See, e.g., Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981); Wells, supra note 105, at 324-336.

108. See Fallon, Ideologies of Federal Courts Law, 74 Va. L. Rev. 1167 (1988).

that it can be settled.[109] Anyway, neither side offers much in the way of a practical guide to legislative action.

Carried to their extreme, criticisms of Younger grounded on the inferiority of the state courts suggest that abstention is never appropriate. But the comity safeguarded by Younger has more than symbolic significance. Federal interference with ongoing state proceedings may indeed "result in duplicative legal proceedings or disruption of the state criminal justice system."[110] And in contrast to the airy concerns about "friction" underlying cases like Alabama Public Service Commission and Thibodaux, a federal court's decision to enjoin state proceedings -- which amounts to a direct assertion that the state proceeding is defective -- may well cause state authorities to resent and resist federal authority. This is especially true of cases brought by state executive officials to implement state policies. As noted in our discussion of the Anti-Injunction Act, a system that of necessity relies to a substantial degree on state courts to enforce federal rights should avoid such friction insofar as is consistent with other federal interests. Indeed, the controversy over Younger's offspring obscures the general consensus that Younger itself serves valuable purposes. Eight justices agreed that federal intervention in that case was inappropriate; only Justice Douglas dissented. Justices Brennan

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109. See supra Part II-C; Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 U.C.L.A. L. Rev. 233 (1988).

110. Steffel, 415 U.S. at 452.

and Marshall, two of the foremost proponents of an expansive federal jurisdiction, concurred in the result.

At the same time, unthinking reliance on the policy described in Younger also proves too much, for that policy suggests that any federal interference with any state proceeding is inappropriate. As the Court noted in NOPSI, "[s]uch a broad abstention rule would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States."[111] We agree: taking Younger to such an extreme unjustifiably disregards Congress's decision to make lower federal courts available to entertain federal constitutional claims.

So when is Younger abstention appropriate? The NOPSI Court compromised by limiting Younger to civil and criminal enforcement actions brought by the state. One can justify this holding on the ground that the state's interest in being free from direct federal interference is greatest in cases brought by the state in its own courts. This is consistent with the principle that a sovereign must be able to litigate in its own courts (the same principle used to justify federal jurisdiction over claims by or against the United States). Nor does NOPSI ignore the competing federal interest in affording private claimants a federal forum for their federal claims. Under NOPSI, however, the claimant must either seek declaratory or injunctive relief before violating state law and exposing himself to a coercive

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111. 109 S.Ct. at 2517-2518.

enforcement proceeding brought by the state or show that the state court does not provide an adequate opportunity to litigate the federal issue.[112]

This balance of interests is subject to several objections. One can, for example, argue that NOPSI's concern for protecting the policy choices of state executive officials is misplaced. Both Younger's roots in equity practice and the Supreme Court's previous explanations of the doctrine indicate that Younger was designed to safeguard the integrity of state judicial proceedings in order to avoid disruption, duplication of effort, and demoralization of state judges. From this perspective, it is essentially irrelevant that the state proceeding is an enforcement action or, for that matter, that the state is a party to the litigation at all. More important, NOPSI is arguably underprotective of federal interests. It is one thing to require a party who believes that a state law is unconstitutional to bring an action for declaratory or injunctive relief (rather than violating the state law, waiting for the state to seek enforcement and then disrupting the enforcement process with a concurrent federal action). In many cases, however, a party believes that he has complied with state law, only to learn otherwise when the state initiates enforcement proceedings. Abstention is harder to justify in such cases because the party may not have learned of the need to challenge the state law until after the state brought its action.

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112. See Illinois v. General Elec. Co., 683 F.2d 206, 212-13 (7th Cir. 1982); supra note 95, 97.

Several advisors to the Committee recommend limiting Younger to pending state criminal proceedings. Restricting Younger to criminal cases finds support in history, since "courts of equity have traditionally shown greater reluctance to interfere in criminal prosecutions than in civil cases."[113] In addition, the sheer number of state criminal prosecutions and relative frequency with which federal constitutional claims are asserted suggests that the prospect of disruption and duplication is most pronounced in the criminal setting. Finally, and most important, criminal cases differ from civil cases in that the individual usually has ultimate access to a federal forum through habeas corpus, which reduces the need for an immediate federal adjudication.[114]

But this alternative may give too little protection to state interests. Younger's original rationale is based on principles of comity between courts, but why should the doctrine stop there if its underlying concerns have broader implications? More important, even assuming that Younger is designed solely to protect state judicial interests, why do these interests end with criminal cases? From the state's perspective, civil litigation is often more important, suggesting that Younger should reach to at least some of these cases.

A third version of the Younger doctrine, drawn by

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113. Younger, 401 U.S. at 55 n.2 (Stewart, J., concurring).

114. Habeas corpus is not available in criminal cases that do not result in custody. There is no habeas corpus remedy, for example, where the defendant is a corporation or where only a fine is imposed.

implication from Justice Stevens' concurring opinion in Pennzoil,[115] treats Younger as a sort of reverse-Pullman doctrine. On this view, abstention is appropriate unless the federal issue will definitely be reached and could be dispositive. The problems with this alternative, however, include its broad applicability to all state court proceedings -- civil or criminal, public or private -- and the difficulty in determining whether the conditions precedent to exercising federal jurisdiction exist.

iii. Recommendation.

There is considerable uncertainty about the proper scope of Younger abstention, and the subcommittee failed to reach a consensus on how best to define this doctrine. Accordingly, we recommend that Congress allow the courts to continue developing the law in this area. Our recommendation might have been different if the Court's last word on the subject was Pennzoil. But NOPSI limited Pennzoil's more questionable implications and thereby reduced the need for any immediate action by Congress.

The abstention statute proposed above makes no provision for Younger, and its adoption would therefore preclude Younger abstention. As noted above, however, Younger is a gloss on the Anti-Injunction Act: there would be no need to abstain if the law respecting anti-suit injunctions were changed. For example,

115. 481 U.S. at 29-34 (Stevens, J., concurring in the judgment).

our proposal to replace the Anti-Injunction Act with a more discretionary provision leaves adequate room for the federal courts to continue developing the principles underlying Younger. Thus, adopting our proposed statute for anti-suit injunctions together with our proposed abstention statute would transform Younger from an abstention doctrine to a limitation on remedies without restricting the power of the federal courts to experiment in this area. One benefit of this approach is that it would make clear that Younger is inapplicable to federal suits for damages.[116] We favor this one change in the law because the concerns underlying Younger abstention -- that direct federal interference with state court proceedings will generate resentment and cause undue disruption -- are only marginally implicated by a federal court's exercise of jurisdiction in a damages action arising out of the same set of facts as a state criminal prosecution. Indeed, the only possibility of disruption occurs if the damages suit outraces the criminal prosecution and results in the preclusion of litigating related issues in the state court. This is extremely unlikely because criminal litigation invariably proceeds faster than civil litigation and because many states have their own speedy trial provisions for criminal cases. Besides, the risk of preclusion is always present when there are parallel federal and state proceedings, but that risk alone has never been thought sufficient to require either court to abstain.

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116. As noted above, two Supreme Court justices and a plurality of courts of appeals have indicated that Younger should also bar federal damages actions. See supra note 79.

APPENDIX

The following appendix describes the development of employment discrimination litigation under Title VII of the Civil Rights Act of 1964. It was prepared for the subcommittee by Professor John Donohue of Northwestern University.

Employment Discrimination Cases[1]

I. The Pattern of Employment Discrimination Litigation over Time

While federal civil litigation has grown considerably over the last two decades, one area that has grown significantly faster than the average rate of growth is employment discrimination litigation. Figure 1 depicts the number of employment discrimination cases filed each quarter in the federal courts beginning in mid-1969. It is immediately apparent that during this period there has been very substantial growth in this caseload--from less than 350 cases per year in FY 1970 to a peak of about 9,000 in 1983.[2] Moreover, Figure 2, which compares the pattern of employment discrimination cases filed in the federal courts with all other federal civil litigation, reveals two phenomena: (1) employment discrimination cases have grown far faster than the general federal civil caseload -- the employment discrimination caseload grew by 2166 percent, while all other federal civil cases grew by only 159 percent;[3] and (2) the variation around the general upward trend is far greater for

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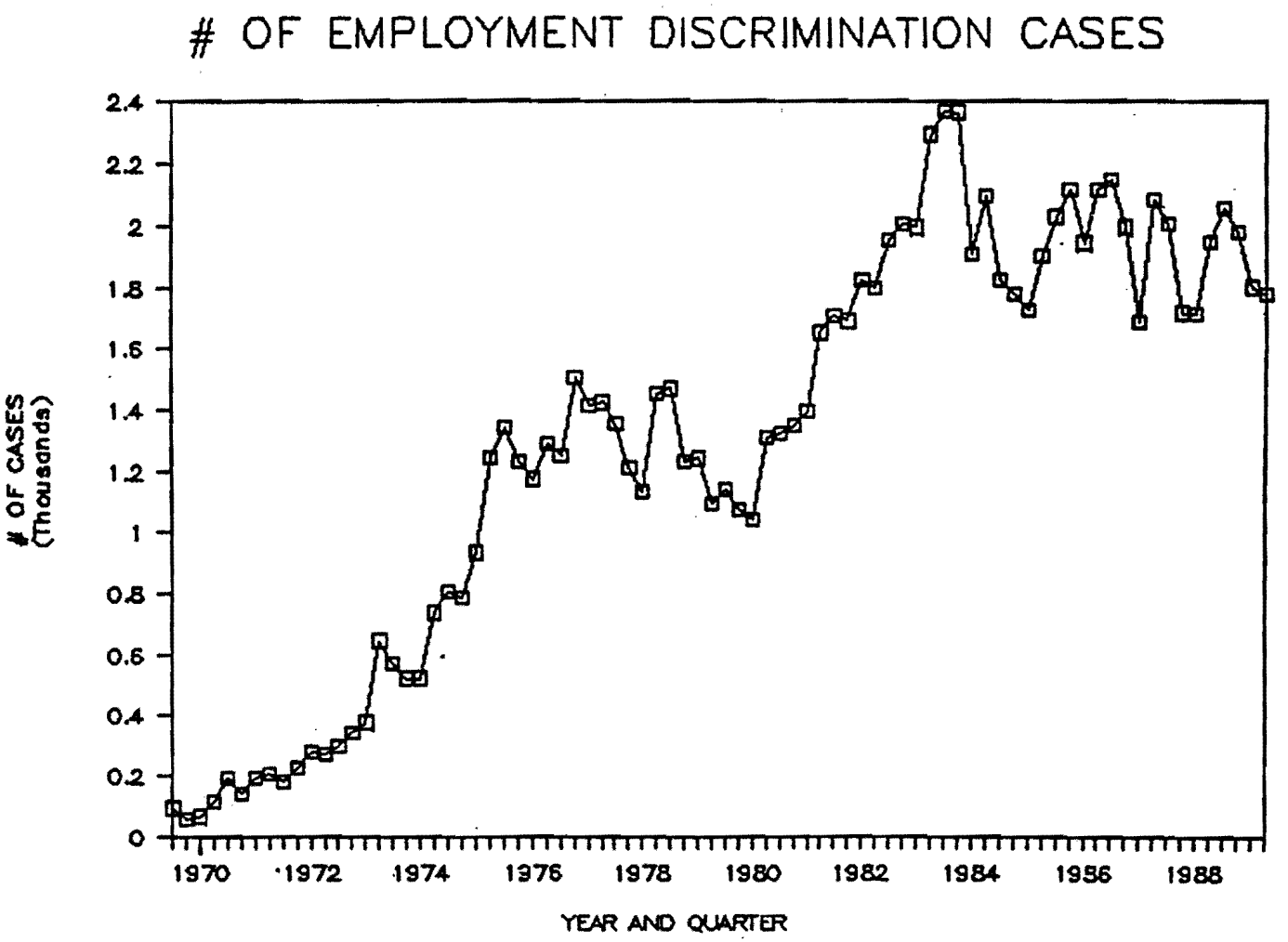
[1]This section draws upon work by Siegelman, "An Economic Analysis of Employment Discrimination Litigation," Ph.D. dissertation, Yale University (1990); and Donohue and Siegelman, "The Changing Nature of Title VII Litigation," (1989).

[2]Data on the volume of employment discrimination suits filed were obtained through analysis of a data tape supplied by the Administrative Office of the U.S. Courts (AO). The tape includes all suits classified as "Civil Rights, Employment" (AO code 442), and runs between 1969:III and 1989:II. The "Civil Rights, Employment" category encompasses not only Title VII cases--roughly 80 percent of the total--but also cases brought under the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), the Rehabilitation Act, §§ 1981 and 1983, as well as due process employment cases brought by public employees. About 10 percent of the cases on the AO data tape are either duplicate docket numbers (with similar or identical plaintiff and defendant names and filing dates) or non-original jurisdiction cases. These cases have been deleted from the case counts in Figures 1 and 2. Further information about this dataset is set forth in Siegelman, supra note .

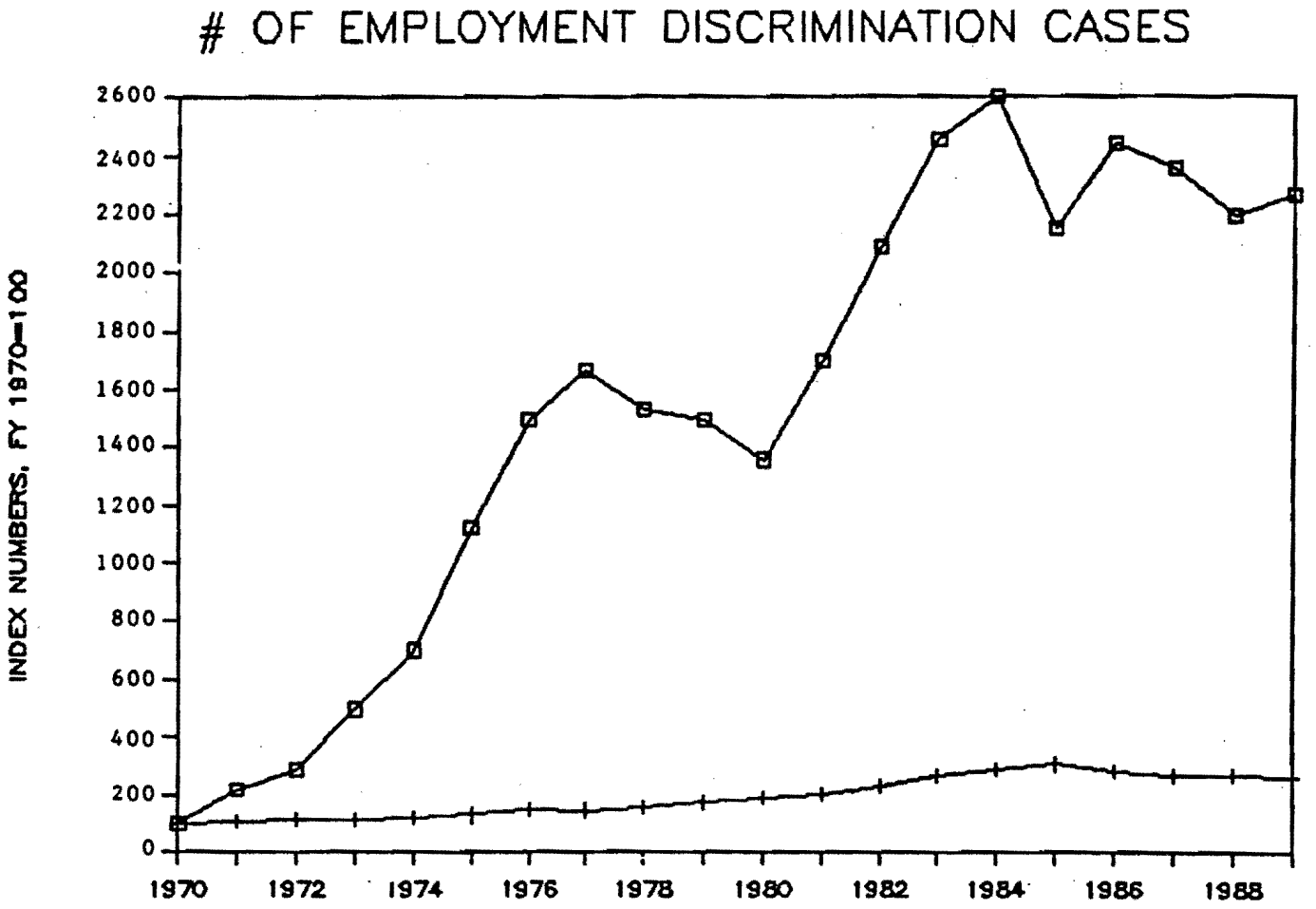
[3]This puts employment discrimination cases among the fastest-growing portions of the federal civil docket. From a simple regression with a quarterly time trend and the unemployment rates as the only explanatory variables, we estimate that the number of suits filed grows by about 20-25 per quarter, or about 320-400 per year. Results from a somewhat more elaborate regression model are reported in footnote 4 below.

Figure 1:
Number of Employment Discrimination Suits
Filed in Federal District Courts,
by Quarter, 1969:III-1989:II
(Excluding Non-original Jurisdiction Cases and
Duplicate Docket Numbers)



SOURCE: Data Tape provided by Administrative Office of U.S. Courts. See Siegelman (1989) for further details.

Figure 2:
Employment Discrimination and Other
Civil Suits Filed in Federal District Courts, FY 1973-1987:
Index Numbers, 1969 = 100
(Excluding Non-original Jurisdiction Cases and
Duplicate Docket Numbers)



I = Employment Discrimination Cases + = All Other Civil Cases

SOURCES: Administrative Office of the U.S. Courts, Annual Reports (various years), and Figure 2.

employment discrimination cases than for the general civil caseload, which shows very little deviation from its more modest upward trend. One element of obtaining a complete picture of the costs and benefits of this component of the federal civil caseload is to understand the reasons for both these findings. We begin with a look at the issue of variability.

A. The Variation Around the Trend

Virtually all of the variation around the steep upward trend in case filings is explained by one variable: the unemployment rate. Employment discrimination cases fell during the Carter years -- see Figure 2 -- because the unemployment rate was falling, and they jumped at the beginning of the Reagan administration because of the deep recession of 1980 - 1983. In fact, a simple regression equation, using a time trend plus lagged values of the unemployment rate, can explain 95 percent of the variance in the number of suits filed.[4]

The important effect of the general health of the economy, as captured in the unemployment rate, raises the question of whether high unemployment makes employers more likely to discriminate or makes employees more likely to sue.[5] Two factors influence the behavior of employers. Presumably, employers will have a greater ability to act on their biases when the economy is slack. For example, an employer who dislikes blacks will have an easier time effectuating his discriminatory preferences when lots of unemployed white workers are looking for jobs. Therefore, owing to this labor shortage effect, tight labor

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[4]The estimated relationship, which includes a correction for serial correlation in the residuals, was (t-statistics in parentheses):

$$\text{NBCASE} = \underset{(-5.24)}{-678.3} + \underset{(13.56)}{21.2}*\text{TIME} + \underset{(6.40)}{110.7}*\text{UNEMP}_{-1} + \underset{(3.21)}{55.4}*\text{UNEMP}_{-2}.$$

Adjusted $R^2 = 0.95$, Durbin-Watson Statistic = 1.97, Rho = 0.63, Standard Error = 149.7. NBCASE equals the number of suits file per quarter, TIME represents a quarterly time trend, and UNEMP_{-1} is the unemployment rate lagged one quarter.

[5]A formal economic model of these various effects can be found in Siegelman, "An Economic Analysis of Employment Discrimination Litigation," supra note 2.

markets should tend to reduce discrimination and slack labor markets should facilitate it. At the same time, there is a countervailing influence on the behavior of employers during periods of high unemployment that will tend to restrain discriminatory behavior. Since compensatory and punitive damages are barred in Title VII cases, backpay is the primary component of damages in the typical employment discrimination case. This implies that when the economy is in recession, workers who are fired or not hired for discriminatory reasons may find themselves unemployed for longer periods of time than would be the case if the economy were booming. Alternatively, in boom times, the costs of discriminating in terms of damages will be reduced. Thus, high unemployment increases the ability of employers to discriminate because they can pick and choose from the surplus of labor--the labor shortage effect--but it increases the costs of discriminating if they end up having to pay damages--the damages effect. Since as an empirical matter the labor shortage effect dominates the damages effect, the instances of discriminatory behavior tend to go down as the economy gets tight.

The effect of a recession on the behavior of workers is fairly obvious. Workers who confront discrimination during a boom may find it easier to deal with the problem by simply walking across the street and taking another available job. On the other hand, if unemployment is high, other jobs will not be available, the amount of time a worker is unemployed will be greater (implying that the damages to be earned are greater), and the likelihood of filing a lawsuit will tend to rise.[6] Moreover, most of the increase in

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[6]This discussion is related to the issue of the optimal level of damages when unemployment compensation has been received by the wrongfully discharged employees. The circuit courts have split over the question of whether an employee's backpay award should be reduced by the amount the employee receives in unemployment compensation. Compare , e.g., Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1462 (11th Cir. 1983); Kaufman v. Sidereal Corp., 695 F.2d 343 (9th Cir. 1983)(not deducting the unemployment compensation receipts) with EEOC v. Enterprise Ass'n of Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), cert. denied, 430 U.S. 911 1977)(deducting the employment compensation receipts). See also P. Cox, Employment Discrimination 23-2 (1987); Special Report, "Back Pay in Employment Discrimination Cases," 35 Vanderbilt L. Rev. 893-1039 at 1009.

Neither approach is optimal: allowing employees to collect full backpay on top of

unemployment as the economy goes into recession is caused by workers losing their jobs, and as it turns out, workers are much more likely to sue when they lose their job than when they are simply denied employment.[7]

B. The Growth in the Caseload

The discussion thus far has resolved the issue of the variation in employment discrimination case filings but leaves us with the very difficult question of what can explain the tremendous growth in employment discrimination cases. The question is important because the growth in case filings is immediately susceptible to either of two conflicting explanations: one that is essentially benign--that social justice is being enhanced as victims who previously suffered in silence are being empowered to assert their rights--and one that is essentially malign--that an increasing number of undeserving litigants pursue employment discrimination suits as a means of generating rents for themselves. In either event, the phenomenon is perplexing because the social science and survey literature suggests that, by most measures of the underlying attitudes of the population towards women and minorities in the workplace, prejudice has been declining for decades.[8] Additional evidence from fair

(cont'd)
their unemployment compensation confers windfall gains on plaintiffs; on the other hand, reducing the employer's damage payment by the unemployment compensation received by the worker provides windfall gains to employers.

The optimal method of assessing damages would make the employer liable for the full backpay award but pay the unemployment compensation amount back to the state unemployment compensation fund rather than to the plaintiff. At least one state has responded to the inadequacy of federal law by adopting such a procedure: Colorado's unemployment compensation laws require a prevailing plaintiff to repay the state unemployment fund out of an award of back pay. See, Colorado Employment Security Act, COLO. REV. STAT. § 8-73-110(2) (1973), cited in Special Report, p. 1009.

[7]See footnote 53, and accompanying text.

[8]P. Burstein, Discrimination, Jobs, and Politics (1985) and H. Schuman, C. Steeh and L. Bobo, Racial Attitudes in America: Trends and Interpretations analyze survey data on racial attitudes. Both conclude that discriminatory beliefs (e.g., "blacks are inferior to whites") have been steadily declining in the population at large over the past 40 years. See also, Sutton and Moore, "Executive Women - Twenty Years Later," Harvard Business Review 42, 48 (Sept./Oct. 1985)(In 1965, 27 percent of male business executives said they would feel comfortable working for a woman, and in 1985 the percentage had risen to 47 percent. The comparable figures for female executives were 75 percent in 1965 and 82

housing audits--in which teams of black and white "testers" attempt to buy houses in certain neighborhoods--indicates that housing discrimination against blacks has followed a pattern of decline similar to that reflected in the attitudinal surveys.[9] Finally, there is indirect evidence that the amount of discrimination in labor markets--as measured by the trends in the black-white and male-female earnings ratios--has decreased, albeit modestly.[10]

With the underlying problem getting better, how then can it be that the volume of employment discrimination cases has increased by almost 2200 percent? As a general matter the number of cases will depend on the following factors:

$$(1) \qquad N = (P_d * D_d) + (P_m * D_m) + (P_n * E_n),$$

where N = the number of employment discrimination cases filed in federal district court

P_d = probability of bringing an action given the fact that a discriminatory event occurred

D_d = the number of discriminatory events, such as instances of discriminatory hiring or firing

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(cont'd)
percent in 1985.) Of course, surveys cannot get at the important question of whether this trend simply represents an increase in hypocrisy or is actually translated into behavior.

[9]Unlike the survey data, the fair housing audits generate direct measures of discriminatory behavior. Sander, "Individual Rights and Demographic Realities: The Problem of Fair Housing," 82 Northwestern University Law Review 876 (1988) reviews this evidence and concludes that there has been a decline in housing discrimination since the early 1960s. Whether this results from better enforcement of fair housing laws or changes in attitudes is not clear.

[10]The numerous studies of black/white or female/male wage ratios provide some evidence about discrimination, although most of these studies use cross sectional rather than time-series data. Cain, "The Economic Analysis of Labor Market Discrimination: A Survey" in O. Ashenfelter and R. Layard, eds. Handbook of Labor Economics (1986) (tables 13.6 and 13.7) offers a detailed summary of this literature and also discusses the time series data. For present purposes, the findings of these studies can be summarized as follows: black/white and female/male wage ratios (adjusted for differences in human capital) have remained constant or increased slightly over the past 20 years. None of the studies suggests an increase in discrimination.

P_m = probability of bringing an action given one's honest--albeit inaccurate--perception that a discriminatory event occurred

D_m = the number of events erroneously perceived to be discriminatory

P_n = probability of bringing an employment discrimination "nuisance suit"[11]

E_n = number of nondiscriminatory events that give rise to employment discrimination nuisance suits.

Equation (1) merely states that suits can occur either because of actual or imagined instances of discriminatory conduct or because of rent-seeking on the part of litigants. The number of suits will rise as the number of events that can provide the basis for suit increases or as the probability of litigation given these events increases.[12]

The Curran report on the legal needs of the American public, based on interviews in March 1974, shows that perceived instances of job discrimination were not uncommon, but that the number of individuals perceiving the problem who then consulted a lawyer was trivial compared with other types of common legal problems.[13] Figure 3, which is reprinted from the Curran report, shows that of 29 commonly encountered legal problems, the one least likely to lead to consultation with an attorney was job discrimination: only 1 percent of those experiencing this problem consulted a lawyer.[14] It is not surprising that many

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[11]By "nuisance suit," we mean rent-seeking litigation that is designed to produce an award for the plaintiff, but which is not based on actual or perceived discrimination.

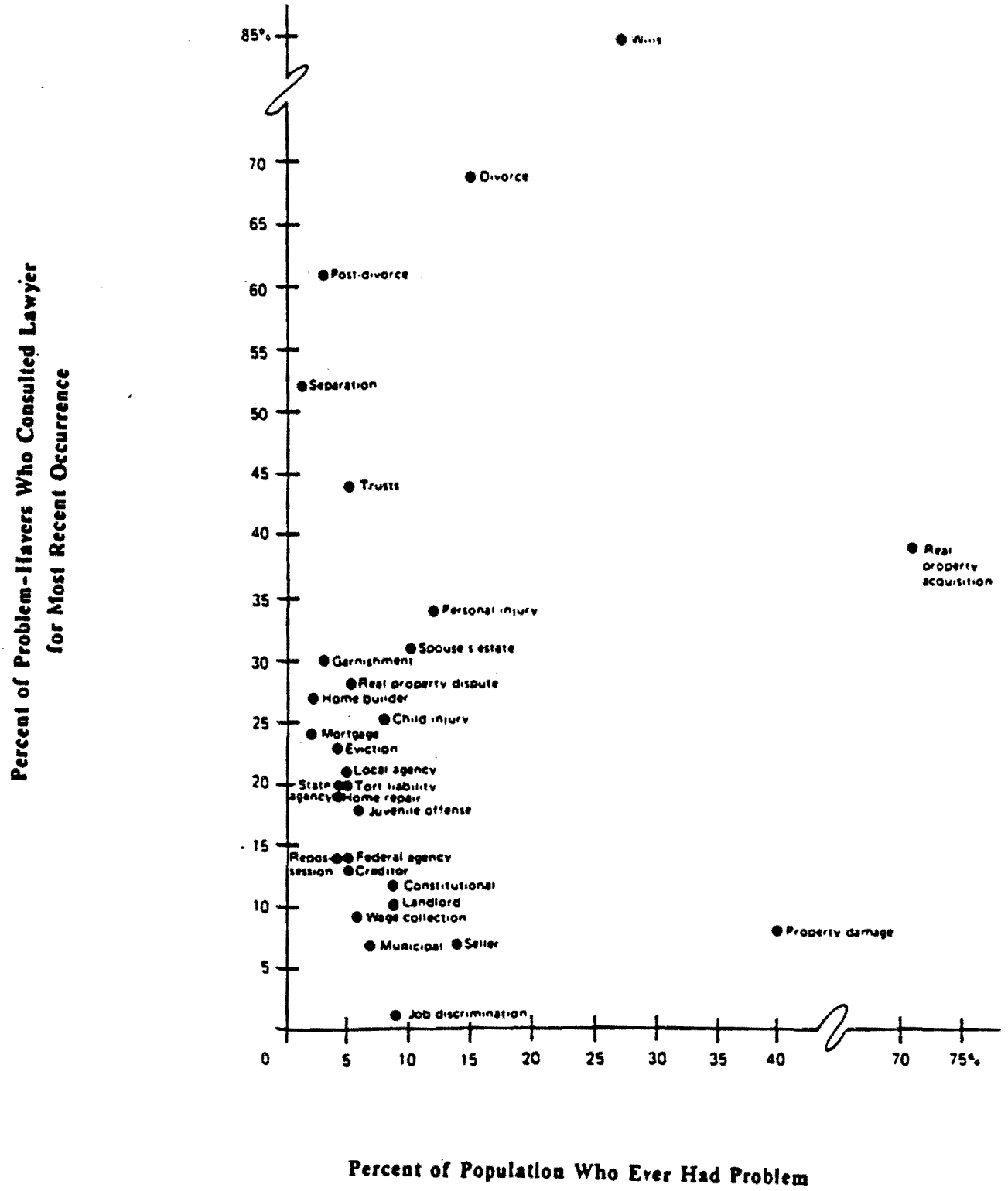
[12]Note that the likelihood that a discriminatory event occurs will be influenced by the probability that the potential victim will sue. One would expect that initial increases in the probability of litigation would cause the number of suits to rise, but after some point further increases would induce adjustments by employers that resulted in a decreasing amount of litigation. The evidence suggests that, as with the original Laffer curve, the direct effects outweigh the behavioral responses.

[13]B. Curran, The Legal Needs of the Public 135 (1977).

[14]Respondents who had encountered one of these 29 legal problems were also asked if they had taken any action in response thereto for the most recent occurrence. Again the lowest percentage--here 30 percent--was reported for those experiencing job discrimination. Id. at 137.

One should evaluate the results of the Curran study in light of the evidence in Figure 1 that late 1973 and early 1974 were below trend in the number of employment

Figure 3:
Lawyer Use for Most Recent Occurrence of Each of 29 Problems



SOURCE: Reproduced from B. Curran, The Legal Needs of the Public (1974), p. 135.

perceived instances of discrimination will be overlooked, so long as one retains one's job, because the costs of suing one's present employer can be high. Nonetheless, the Curran report shows that the growth of the employment discrimination caseload growth of the federal courts since 1973 could be entirely explained if the willingness to pursue legal remedies for perceived employment discrimination were to increase to the level of the next lowest item on the list--problems with municipal services (7 percent).[15]

II. What Has Caused the Growth in Employment Discrimination Cases?

The above discussion demonstrates that, even if the number of instances of discrimination is falling, there is plenty of room for the probability of suing over a perceived incident of employment discrimination to increase by an amount that will not only offset the decline in discrimination but fully account for the 2166 percent increase in case filings. Subsection (A) reveals how much of the caseload growth is, and is not, explained by readily quantifiable factors. Subsection (B) considers and rejects some alternative

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discrimination cases filed -- largely because of the healthy economy. In part, the effect of the robust economy on the likelihood of pursuing legal action will depend on the nature of the complaint: a discriminatory firing or refusal to hire is less likely to generate a complaint during a boom than during a downturn, when market remedies may provide insufficient remedies; on the other hand, workers who perceive discrimination while on the job might be more likely to take some action during a boom, which reduces the possibility of and the harm attendant to losing their jobs. The evidence in Figure 1 suggests that the first effect dominates, which is not surprising, given that relatively few individuals sue their current employers. Evidence suggests that less than one quarter of all suits are brought against plaintiffs' current employers, and this number would be considerably smaller if government employees were excluded. Donohue and Siegelman, supra note .

[15]In January 1980, a survey of 1000 households from five judicial districts around the country conducted for the Civil Litigation Research Project (CLRP) found that only 3.9 percent of those involved in a dispute over discrimination in housing, employment, or education actually brought a lawsuit. Again, the probability of suit was far lower for discrimination than for any other type of perceived injury. Miller and Sarat, "Assessing The Adversary Culture," 15 Law and Society Review 525 (1980) While this 1980 survey evidence suggests a possible large increase in the litigation rate of those perceiving employment discrimination, the aggregation of housing and education discrimination cases with employment discrimination cases makes comparisons with the Curran report difficult.

explanations for the remaining growth, and subsection (C) demonstrates that as job opportunities for women and minorities improve, their likelihood of suing for employment discrimination can increase.

A. Some Readily Quantifiable Factors

A number of readily quantifiable factors have influenced all or some of the probability and event variables listed above, and thereby have contributed to the growth of the employment discrimination caseload. Table 1 summarizes the contribution of (1) the upward trend in the unemployment rate since 1970; (2) the increase in the "minority" (or "protected") population--both due to demographic increases and expansions in the law's coverage; and (3) the growth of the population of younger workers who are more sensitized to discrimination and therefore more likely to sue.[16]

(1) The Upward Trend in Unemployment. The unemployment rate contributes not only to the cyclical variation in case filings, but also to the upward trend, since there was a secular increase in the unemployment rate of roughly 40 percent from the end of 1969 to 1989. The effect of this growth in the unemployment rate was to increase the number of lawsuits filed in 1989 by roughly 1572.[17] To the extent that one of the events that leads to lawsuits--whether based on real or imagined discrimination or pure rent-seeking--is an

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[16]If, contrary to fact, the growth in employment discrimination cases had exactly paralleled the growth in the federal civil caseload, one might conclude that there is some common element that is explaining the growth in all federal cases, and there might be no need to look for an explanation that was specific to the area of employment discrimination. But the growth of discrimination cases has been so much greater and more variable than that of other federal civil cases. Therefore, the complete explanation for this phenomenon must include some factors that are specific to employment discrimination cases, although it may also include some common factors operating on all federal cases.

[17]The effect of the secular increase in unemployment on the number of cases filed was estimated in the following manner: first, the size of the secular increase in the unemployment rate was determined to be 2.27 percentage points; and, second, the increase in the number of employment discrimination cases flowing from this secular increase was computed using regression analysis. The details are presented in Donohue and Siegelman, supra note .

Table 1:

A Decomposition of the Sources of Growth in the Volume of Federal Employment Discrimination Cases, 1970-1989

NUMBER OF EMPLOYMENT DISCRIMINATION CASES, 1989	7613
LESS: NUMBER OF EMPLOYMENT DISCRIMINATION CASES, 1970	336
EQUALS: TOTAL INCREASE TO BE EXPLAINED	7277 cases (2166 percent)
LESS: Effect from Secular Growth In Unemployment (2.27 percentage points)	1572 cases
LESS: Effect from Increase in "Eligible" Workforce	196 cases
LESS: Effect from replacement of Older by Younger Cohorts	326 cases
TOTAL	2094 cases
EQUALS: "UNEXPLAINED" INCREASE	5183 cases

EQUALS: 71 PERCENT OF THE TOTAL INCREASE OF 7277 CASES

SOURCES: See text.

increase in the number of job losers and rejected applicants, the increasing unemployment rate will represent more "opportunities" for grievances to be leveled.[18] At the same time, the higher unemployment rate should increase the probability of bringing a suit since market remedies for discrimination--i.e., getting an alternative job--are diminished and the benefits of suing are increased as the duration of unemployment spells goes up. Finally, income and wealth effects suggest that the probability of all types of suits being filed will also rise as the duration of unemployment spells increases.[19]

(2) The Increasing "Minority" Population. Increases in the number of women and minority workers in the labor force will contribute to the growth in employment discrimination suits. Even if there has been no change in the propensity to sue, the mere fact that more "protected" workers are working or pursuing jobs implies that D_d, D_m, and E_n will rise.[20] The number of women workers has indeed grown substantially, as Figure 4 makes clear. But the numbers of other protected groups have not increased substantially.

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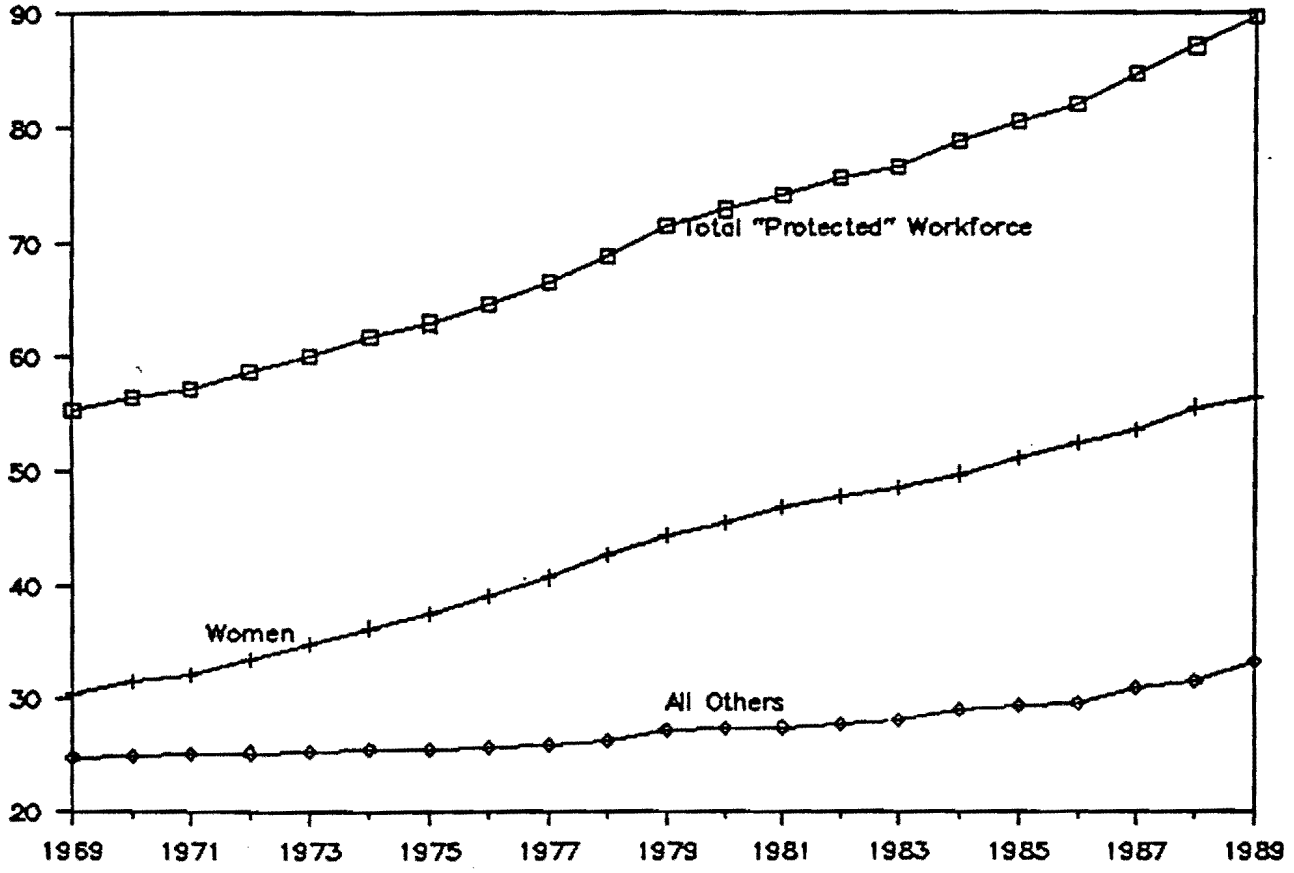
[18]That is, increases in unemployment will lead to increases in D_d, D_m, and E_n in equation (1), above.

[19]This "income effect" resulting from lengthy spells of unemployment is conceptually distinct from the "damages effect" of longer spells of unemployment. The latter implies that the expected benefits of litigation rise because the expected damage award will increase. The income effect posits that the expected cost--measured in terms of willingness to forego benefits to avoid litigation--will fall as one's spell of unemployment lengthens and one's wealth is depleted. This might be the case if bringing a lawsuit is an unpleasant event that can be avoided as long as one has the resources to "purchase" the freedom from this unpleasantness. In other words, litigation may be an inferior good: as income falls, ceteris paribus, consumption of litigation rises. See Galanter, "The Day After the Litigation Explosion," 46 Md. L. Rev. 3, 8-9 (1986)(litigants find litigation to be an unpleasant experience). This behavior may also be influenced by the jurisdiction's treatment of unemployment compensation benefits in computing damages.

[20]The only major class of workers that is not specifically considered as protected by Title VII is white male workers under age 40, who make up roughly 30 percent of the labor market. Because even white males can sue under Title VII claiming that they are the victims of reverse discrimination, one might consider all workers to be protected implicitly by Title VII. But since the number of Title VII suits by white, male workers is relatively small, they have been excluded from the computation of potential plaintiffs.

Figure 4:
"Protected" Population under Federal Antidiscrimination Legislation, 1969-1989



"Total Protected Workforce" comprises all women and non-white males, and white males between the ages of 40-65 (through 1978), 40-70 (1979-1986) and 40-$ (1987 on).

SOURCES: U.S. Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics (1985); Employment and Earnings (various years);

Overall, the main constituencies that antidiscrimination laws are designed to protect grew by about 58.2 percent between 1970 and 1989, which would explain an increase of about 196 cases filings in 1989.

(3) The Changing Age Composition of the Workforce. If the amount of discrimination suffered by a group of workers could be accurately measured as the difference between marginal product and actual wages, it is likely that younger women and blacks would be found to experience less wage discrimination than their older counterparts. Because of their higher levels of education and higher expectations of equal treatment, they may nevertheless be more able/willing to categorize their experiences as discriminatory. Thus, there may be a cohort effect that will influence the probability of bringing legal action: as older, less-educated cohorts of women leave the workforce and are replaced by younger cohorts with different expectations and higher levels of schooling, one might expect the number of suits to rise, even if the overall numbers of women in the workforce remains constant.[21] A similar pattern could be hypothesized for blacks and other ethnic minorities.[22]

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[21]See generally Kuhn, "Sex Discrimination in Labor Markets: The Role of Statistical Evidence" 77 American Economic Review 567 (1987).

[22]In addition to Kuhn's work there are a number of other studies suggesting that discrimination suits or complaints are disproportionately concentrated among the well-to-do and the well educated. In her study of 98 district court cases alleging sex discrimination, Mills claims that white collar and professional women are over-represented (although she does not present data which allow one to assess this claim). Mills, "On The Use of Equal Employment Laws," 24 Pacific Sociological Review 196 (1981). Zeitz, "Negro Attitudes Towards Law," 19 Rutgers Law Review 288 (1965) concludes from a survey of blacks in Newark that those who complained to the state Fair Employment Practices Commission were "markedly different from... [the general black population] in socio-economic characteristics. They have much higher educational attainments and far greater incomes....They resemble the white middle class... [more than] the majority of [blacks] (p. 310)." The discussion of state FEPCs in Note, "Toward Equal Opportunity in Employment: The Role of State and Local Governments," 14 Buffalo Law Review 1 (1965) makes similar claims on the basis of more impressionistic evidence. Miller and Sarat, supra, note 15, also found important effects of income and education on: (1) grievance rates (the proportion of the population who say they have experienced a problem--in this case, discrimination); (2) the probability of a grievance becoming a claim (a request to the offending party for some kind of remedy); and (3) the probability of a claim becoming a dispute (a rejected claim).

Finally, Curran found that, while 25 percent of black and Hispanic respondents in the 18-34 age group stated that they had experienced discrimination in employment at some

To obtain a rough estimate of the importance of this factor, note that, on average, there have been about 2.5 million new entrants into the labor force per year between 1970 and 1989:[23] of the 1989 labor force of about 124 million, roughly 47.5 million workers--38 percent--were not in the labor force in 1970. There were 336 discrimination suits and 55.87 million "protected" workers in 1970, an average of roughly one suit per 166,280 "protected" workers. If the 5.33 million workers who retired from the labor market were to sue at half this rate and their younger replacements were to sue at 1.5 times that rate, then the net increase to the number of suits attributed only to the increased propensity of the younger workers to sue would be roughly 326 cases, or 97 percent.[24]

B. Rejecting Some Inadequate Explanations

Table 1 indicates that the previous analysis has been able to explain only about 29 percent of the increase in employment discrimination case filings between 1970 and 1989: the above three factors can explain an increase of 2094 in the annual number of employment discrimination cases, while the actual increase over this period was 7277 cases.

One potential explanation that might affect the increase in all federal civil litigation is the increased efficiency of law firms in processing complaints.[25] Lawyer advertising may alert potential litigants to the possibility of disputes, as well as reduce their search costs in

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(cont'd)
point in their lives, less than 8 percent answered affirmatively among those aged 55 years and over. Curran, supra note 13, at 108. Since those in the over-55 group had lived, on average, more than twice as long as those in the 18-34 age group, the pattern of responses strongly suggests that sensitivity to discrimination is higher for the younger cohorts of blacks.

[23]See, U.S. Bureau of Labor Statistics, Employment and Earnings (1989).

[24]The details of this calculation are presented in Donohue and Siegelman, supra note

[25]If lawyers have succeeded in creating additional demand for their services, it would seem that they have done so efficiently: while the population of lawyers grew by 85 percent between 1973 and 1986, the federal civil caseload grew 158 percent and the employment discrimination caseload grew 391 percent.

finding representation. Legal clinics and pre-paid legal services may also have increased the probability of suing given an unfavorable experience in the labor market. On the other hand, the increase in the number of lawyers and clinics handling employment discrimination could simply represent a response to the causally prior increase in litigant demand.[26]

Could the EEOC have contributed to the growth of federal litigation? All indications are that the EEOC has played an essentially passive role. First, it has brought relatively few cases itself.[27] Second, the ratio of federal district court cases to charges filed with the EEOC has remained roughly constant during the period from 1975 to 1986 (although it grew steadily until 1975), regardless of the health of the economy.[28] Finally, there is little support for the notion that the EEOC has attempted to "drum up trade" for itself by promoting the transformation of disputes into EEOC charges and/or federal court cases.[29]

C. Alternative Explanations

We have yet to explain over 70 percent of the 2166 percent increase in employment discrimination cases. There are two factors that, although their effects are difficult to quantify, may provide the bulk of the missing explanation. In short, there is reason to

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[26]Judge Posner has noted that "the increase in the supply of lawyers appears to have lagged behind rather than led the litigation explosion." R. Posner, The Federal Courts: Crisis and Reform 80 (1985).

[27]The EEOC was granted the right to bring suit in 1972. Between 1972 and 1987, it has been a plaintiff in about 3150 suits, or roughly 3.5 percent of the employment discrimination suits filed.

[28]The average annual ratio of federal court cases to EEOC complaints during the period from FY 1970 to FY 1987 was 5.7 percent, with a standard deviation of 1.8 percent.

[29]The Commission's substantial backlog of charges, Lehr, "EEOC Case-Handling Procedures: Problems and Solutions." 34 Alabama Law Review 241 (1983) suggests that it would have little incentive to drum up additional business for itself.

believe that (1) as blacks and women secure better jobs and (2) as workplaces become more integrated--in other words, to the extent that the primary goals of Title VII have been achieved--the likelihood that black and female workers will sue will rise.

(1) The "Better Jobs" Effect

The propensity of a rejected worker[30] to sue will typically be a positive function of the wage in the job from which she is rejected. To see why, take the case of a fired employee who is considering bringing a case under Title VII. If she wins, the damages she can collect are limited to backpay for the time during which she was unemployed.[31] Thus, the award to a prevailing plaintiff can generally be approximated by the product of her wage in the job from which she was rejected and the duration of her unemployment spell.[32] The costs of bringing suit, by contrast, are generally fixed. Now define:

w = Wage

D = Average duration of unemployment

p = Probability of plaintiff victory if there is a suit

C_p = Plaintiff's cost of bringing the suit.

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[30]By "rejected" we mean a worker who is fired, laid-off, not promoted, or not hired.

[31]"[T]itle VII provides only equitable remedies; damages other than backpay are not recoverable." P. Cox, supra note 6 at 5-17)." The same is also true for the Age Discrimination in Employment Act and the Rehabilitation Act. Reinstatement, promotion, and changes in employment practices are also available as remedies, but they are not typically awarded.

Suits under §§ 1981 and 1983 do allow for punitive damages in addition to backpay. For a lengthy survey of the legal aspects of backpay calculation, see Special Report, supra note 6. Note too that the duty to mitigate damages requires the plaintiff to look for work with reasonable diligence.

[32]This method may understate a rejected workers damages. For example, if a worker is earning rents in job A and is fired discriminatorily, she will be damaged even if she obtains another job immediately and therefore had a zero duration of unemployment.

A risk-neutral potential plaintiff who maximizes expected utility will bring suit only if the expected benefits of suit exceed expected costs of suit. Thus, under Title VII rules in which prevailing plaintiffs receive their costs from defendants (but not vice-versa, unless the suit is found to be frivolous),[33] the rule for bringing suit translates to:

$$(2) \qquad pwD > (1-p)C_p.$$

Notice that the left hand side of this expression is a function of the wage rate, but the right hand side is not. Holding other things (including p and D) equal, an increase in the wage rate will tend to increase the expected benefits of suit, while leaving the expected costs unchanged, thereby encouraging a greater number of potential plaintiffs to sue. We can rearrange inequality (2) to get an expression for the critical value of the wage rate, w^*, below which rejected workers will not sue:

$$(3) \qquad w^* = (1-p)C_p/pD$$

As an example, consider someone who is fired from her minimum wage job because of discrimination by her employer. Presumably, w is less than w^* for such a worker. If she sues and wins, she stands to collect a backpay award (at the minimum wage) for the period between her firing and her next job. Her wage is, of course, low; and since minimum wage jobs are relatively easy to find, she is unlikely to be unemployed for very long. Her total award--wD--is thus likely to be small. If she loses, moreover, she has to pay costs of C_p, which can easily be larger than her expected gains if she wins. In sum, the better paid the

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[33]Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

job, the more likely the job-holder or applicant will be to sue if rejected.[34]

(2) Integration Effects

Job-upgrading for women and minorities is also likely to have important effects on the ability of workers to detect discrimination, as well as on their incentives to bring suit once they conclude that they have been discriminated against. The reason is that job upgrading tends to bring women and blacks into jobs with more "non-statistical" (i.e., non-wage related) evidence of discrimination. White males have typically had better-paying jobs than blacks and women. But as

> ... women [and minorities enter] occupations that contain [white] men, a larger number of them will...have a readily accessible [white] male against whom they can measure their labor market success, particularly in dimensions not covered by [standard data on wages]. Thus, they will have more non-statistical evidence of discrimination, without necessarily being more discriminated against according to standard statistical measures.[35]

Not infrequently, an employment discrimination case will be filed after a worker is fired as part of a reduction in force or because of some misconduct such as tardiness. The worker alleges that other workers of the opposite race or sex were either less productive or even more guilty of the alleged offense but were not fired. If the firm had been completely

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[34]This discussion has not specifically considered another factor that can motivate employment discrimination litigation: the interest in being "vindicated" after an adverse outcome in the labor market. For example, in addition to the expected monetary award, a worker who was discharged might seek a legal determination that the employer acted improperly in order to maintain self-esteem or to show other potential employers that they were in fact good workers. While only the first effect is purely nonpecuniary, both effects might well be proportional to the level of damages set forth in the text. Moreover, is there any reason to think that the demand for vindication is rising over time? One possible factor is that the demand for vindication rises as the proportion of discriminating employers falls. The mechanism might be as follows: a black who is fired when all employers are discriminatory maintains his self-respect because everyone realizes that the employer has acted arbitrarily. As employer discrimination falls, however, the possibility that the worker is to blame for being dismissed rises, thereby elevating the need to seek vindication for discriminatory acts lest the victim be blamed for his or her own dismissal. This story is at least consistent with the observed increase in employment discrimination suits during a period of apparent decline in discriminatory attitudes.

[35]Kuhn, supra note 21, at 579.

segregated, the ability to draw upon this comparative evidence of discrimination would be missing.[36] Integrating the workforce by race and gender, then, is likely to produce more evidence and allegations of discrimination, even if discrimination itself is falling.

Both the legal and the "common sense" definitions of discrimination are relative ones: discrimination consists in treating blacks differently from whites, or women differently from men.[37] Without reference groups against which blacks or women can judge their own treatment by their employer, discrimination is more difficult to detect and to prove.

(2) Is the Theory Consonant with Observed Behavior?

The better jobs and integration effects can explain an increase in discrimination suits, despite a constant or falling level of discrimination. Suppose that there is an increase in the number of "protected" workers in (or applying for) jobs that pay more than w^*. With a constant amount of discrimination, there will be more suits filed, since more workers now

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[36]Note that the examples we have used to illustrate the effect of integration are consistent with either a story that the firing was truly based on discrimination and integration provided the compelling proof or that the firing was truly nondiscriminatory but integration provided a basis for challenging the action by raising the issue of the relative ability of the fired worker versus some retained worker of the opposite race. The first situation would occur, for example, if a black worker were fired because the white manager objects to verbal abuse from blacks even though the same conduct from whites would be acceptable. In a segregated firm, the discriminating white manager might be able to defend his action on the ground that "I fire every worker who is verbally abusive," while in an integrated firm, the discriminating white manager would be forced by law to overcome his prejudice and treat whites and blacks equally.

The effect of Title VII in the second situation--for example, when there truly is a need to fire one worker and management honestly tries to fire the least productive worker--is less benign. In a segregated environment, no claim of discrimination would arise. In an integrated environment, the fired worker can always make the claim that he or she is more productive than the weakest (retained) worker of the opposite race or sex.

[37]See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(employer's dissimilar treatment of whites and blacks is relevant to assessment of whether stated reason for terminating black employee was merely a pretext).

have "good" jobs that are worth suing for if they are fired. Even if discrimination is decreasing, the number of suits can nevertheless rise if a higher proportion of the discriminated-against workers finds it worthwhile to sue.[38]

If we assign plausible values for p, D, and C_p in equation (3) of .15, 12.5 weeks, and $1,000, this gives a value of w^* of about $450. For p = .2, w^* is $320. About 22 percent of all workers earn more than $450 per week; slightly more than 60 percent of workers earn more than $320 per week.[39]

The better jobs theory thus attributes the rise in discrimination litigation to the increasing numbers of blacks and women in (or applying for) jobs paying more than the "threshold" wage necessary to bring suit. The threshold itself need not be constant over time, moreover. As equation (3) demonstrates, the threshold wage is a negative function of the plaintiff win rate (p) and the duration of unemployment (D); by contrast, an increase in the costs to losing plaintiffs (C_p) will raise the threshold wage. Preliminary information suggests that plaintiff win rates and "real" legal costs for plaintiffs have been relatively constant over time. On the other hand, the average duration of unemployment has risen substantially over the last 20 years, thereby depressing the threshold wage. Murphy and Topel[40] note that "...between... 1971-73 and 1982-85, unemployed weeks for the average

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[38]Consider a simple algebraic example in which for convenience we focus only on the behavior of plaintiffs. Suppose that (1) the court makes perfect decisions, so that the probability of plaintiff victory is 1 if the plaintiff is actually a victim of discrimination, and zero otherwise, and (2) a rejected employee will only sue if their job was a "good" job. Let T be the total number of rejections (firings, layoffs, failures to hire, etc.) in the economy. r(t) is the proportion of "protected" workers rejected from good jobs, and d(t) is the proportion of rejections that are discriminatory, both as functions of time. Then the number of suits at time t will be $S(t) = T*d(t)*r(t)$. Now imagine that r is rising and d falling over time: S can either rise or fall, depending on whether the percentage rise in r is greater or less than the percentage fall in d.

[39]Unpublished data provided by the Bureau of Labor Statistics.

[40]Murphy and Topel, "The Evolution of Unemployment in the United States: 1968-1985." in S. Fischer, ed. The NBER Macroeconomics Annual vol. 2 (1987).

individual increased by about...66 percent. Of this increase,...93 percent [is accounted for] by persons who were unemployed for more than 15 weeks." The rising duration of unemployment, among other things, increases the number of employees who earn more than the threshold wage, and therefore raises the number of workers who find it in their interests to sue if they lose their job or are not hired for one.[41]

Some sense of the increasing access to good jobs enjoyed by blacks and women is provided in Tables 2 and 3. Table 2 reveals that over the period from 1972 through 1986 the number of black managerial and professional workers rose 93 percent and the number of female managerial and professional workers rose by 156 percent. The tremendous growth in female employment in high-paying jobs is also captured in Table 3.[42] Further verification for this phenomenon is provided by the fact that, while twenty years ago, only 5 percent of graduates from law, medical, and business schools were female, today, 25 percent of all new M.D.'s and M.B.A.'s, and 33 percent of new law school graduates are women.[43]

Finally, Table 4 provides evidence of the increasing integration of the workforce. The Duncan index of dissimilarity assumes values from zero--representing full integration--

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[41]Note that Section II(A)(1) has already calculated the effect of increased unemployment on the secular increase in employment discrimination cases. To the extent that the increased duration of unemployment is correlated with the increased unemployment rate, it has already been counted in Table 1.

[42]Note that, while there has been only modest movement by women out of the low-paying jobs, there has been immense movement by women into the high-paying jobs. If women who had previously been teachers (which presumably earned more than the average female) are shifting into upper-tier jobs, then female median earnings might not rise. This fact may in part explain why there has been relatively little improvement in the female/male ratio of median earnings even as women advance into high-paying employment.

[43]Smith and Ward, "Women in the Labor Market and in the Family," 3 Journal of Economic Perspectives 9, 17 (1989).

Table 2:

Numbers of Women and Black "Managerial and Professional" Workers, Selected Years, 1960-1986 (In Thousands)

YEAR	BLACKS	WOMEN	ALL M&P WORKERS
1960	360	2793	7336
1972[1]	825	4503	11459
	(129)	(61)	(56)
1986	1593	11524	26554
	(93)	(156)	(132)

Numbers in parentheses are percentage changes over preceding period.

SOURCE: Statistical Abstract of the United States, various years.

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[1]Categories are not strictly comparable between 1960 and 1972.

Table 3

Representation of Women in Ten High-Paying and Ten Low-Paying Occupations, 1970 and 1981

	Percent Female	
Occupation	*1970*	*1981*
High-paying		
Stock and bond sales agents	8.6	17.1
Managers and administrators, n.e.c.[a]	11.6	19.6
Bank officials and financial managers	17.4	36.5
Sales representatives, manufacturing	8.5	16.0
Designers	23.5	23.9
Personnel and labor relations workers	31.2	48.7
Sales representatives, wholesale	6.4	10.7
Computer programmers	22.7	28.4
Low-paying		
Practical nurses	96.3	97.3
Hairdressers and cosmetologists	90.4	85.3
Cooks, except private household	62.8	50.9
Health aides, except nursing	83.9	82.7
Nurses' aides	84.6	84.3
Sewers and stitchers	93.8	96.7
Farm laborers	13.2	12.3
Child-care workers, except private household	93.2	86.7
All occupations	37.7	43.0

[a]The initials n.e.c. mean "not elsewhere classified."

Source: Flanagan, Kahn, et al, Economics of the Employment Relationship 203 (1989).

Table 4

Duncan Indexes of occupational segregation by sex and race

		1960	*1980*	*Change from 1960 to 1980*
Women:Men				
white		62	57	-5
black		71	57	-14
Age 25-30		67	55	-12
35-44		63	58	-5
45-54		63	60	-3
55-64		65	61	-4
Education ≤	no high school	66	60	-6
	some high school	64	61	-3
	high school	66	62	-4
	college degree	66	50	-16
	graduate degree	56	43	-13
White:Black				
women		56	28	-28
men		50	33	-17

Source: V. Fuchs, Women's Quest For Economic Equality 34 (1988), and Fuchs, "Women's Quest For Economic Equality," 3 Journal of Economic Perspectives 25, 27 (1989).

to 100--representing complete segregation.[44] Note that, while there were considerable declines in occupational segregation between women and men in general between 1960 and 1980, the declines were the greatest at the highest education levels. Interestingly, the level of occupational segregation by race declined much more (see the last two lines of Table 4) than by sex.[45]

The evidence presented in Tables 2 and 3 suggest that, in the period following 1972, women may have had somewhat greater success than blacks in entering the "better" jobs. If the better jobs theory is correct, this factor would imply faster growth in sex discrimination rather than race discrimination cases. On the other hand, the evidence in Table 4 suggests that the integration effect would give greater impetus to race discrimination cases rather than sex discrimination cases. In fact, the percentages of race and sex discrimination cases remained fairly constant over this period, at about 50 percent and 33 percent,[46] respectively, so the better jobs and integration effects may have been in equipoise.

III. The Shift From Hiring to Firing Cases

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[44]The Duncan index is calculated by summing the absolute differences in the percent of, say, employed men (m_i) and the percent of employed women (w_i) in different occupations (indexed by i) divided by two:

$$D = \sum_i |m_i - w_i|/2$$

Fuchs, "Women's Quest For Economic Equality," 3 Journal of Economic Perspectives 25, 26 (1989).

[45]While the improvements in the Duncan index suggest increased integration by race and sex, they do not demonstrate conclusively that integration of particular workplaces is occurring. In other words, it is possible that the proportion of female lawyers could rise to exactly 50 percent, thereby causing the Duncan index to drop, but that all female lawyers work in all-female law firms, in which case no effective integration among male and female lawyers would exist.

[46]These figures reflect the proportions of complaints alleging race and sex discrimination both in the EEOC and in a sample of federal district court employment discrimination cases. See Donohue and Siegelman, supra note .

There is an ironic aspect to the better jobs and integration effects: the attainment of better and more integrated jobs for minorities is clearly a major goal of antidiscrimination law, but society's very success in meeting this goal has contributed to a sizable increase in the lawsuits alleging discrimination. Improvements in the workplace have spawned strife in the courtroom.

But the thought may have occurred to the reader that perhaps we have the story backwards: rather than the increased access of blacks and minorities causing the increase in Title VII lawsuits, it is the increased litigation that has led to the employment gains of blacks and women. While indeed at an early stage in the history of Title VII the law did open up many areas to minorities that had previously been foreclosed--such as those described in the Heckman and Payner study of the black breakthrough into the Southern textile industry beginning in 1965[47]--the progress of protected workers in terms of levels of employment was far greater during the period from 1966 through 1974 than from 1974 through 1980.

It may be useful in considering this issue to examine some recent information compiled by economist Finis Welch. Firms with at least 100 workers are required by law to file detailed annual reports -- called EEO-1 reports -- with the EEOC each year. The EEOC uses this information in conducting their enforcement activities by targeting firms that seem to have low ratios of "protected" workers in comparison to the available labor pool. Welch has shown that, between 1966 and 1980, the representation of black and female

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[47]Heckman and Payner demonstrate that for 55 years there was virtually no change in the nearly complete exclusion of black workers from the South Carolina textile industry, but that beginning in 1965--the effective date of Title VII--there was a dramatic, significant and sustained upturn in the relative number of black workers hired. Heckman and Payner conclude that federal law was responsible for the significant employment breakthrough for black workers that occurred simultaneously in 1965 in every South Carolina county--regardless of demographic characteristics and labor market tightness. Heckman and Payner, "Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina," 79 American Economic Review 138 (1989).

workers increased significantly in firms subject to the EEO-1 reporting requirement. This increased flow of protected workers to the EEO-1 firms is most dramatic for blacks but is also significant for white women, as shown in Table 5.[48]

In other words, Table 5 demonstrates that proportionally more blacks and women were going to work for the firms subject to EEO-1 reporting requirements, presumably because of the increased governmental scrutiny of the hiring of these firms. Indeed, Jonathan Leonard has shown that, even within the group of firms reporting to the EEOC, there is greater hiring of "protected" workers, the greater the federal monitoring. Thus, government contractors -- who are subject to additional enforcement activity by the Office of Federal Contract Compliance Programs -- hire a still greater percentage of blacks and women.[49] The suggestion is clear that more intense government enforcement does increase the demand for black and female labor.

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[48]Welch derived the figures in Table 5 in the following manner: In 1966, 52.7 percent of all white men working in private firms worked in firms that were subject to the EEO-1 reporting requirements. At the same time, 47.5 percent of white women workers worked in these same firms. The ratio of these two numbers -- 47.5/52.7 -- equals 90.1 percent. In other words, the proportion of white women working in these firms is 90.1 percent of the percentage of white men working in EEO-1 firms. Over time, this proportion rose to 96.7 percent in 1980.

[49]Leonard writes: "Over a 6-year period [from 1974 to 1980] the employment of members of protected groups grew significantly faster in contractor than in noncontractor establishments." Leonard, "The Impact of Affirmative Action on Employment," 2 Journal of Labor Economics 439, 451 (1984).

TABLE 5. Representation of Protected Groups in Firms Reporting to the EEOC

	1966	1970	1974	1978	1980
Black Men	91.8	112.5	123.1	128.4	126.4
Black women	91.5	118.7	141.2	144.8	154.4
White women	90.1	93.4	95.8	97.6	96.7

Note: Figures are percentages of protected workers in EEO-1 reporting firms divided by the corresponding percentages for white men. Ratios are multiplied by 100.

Source: Welch, "Affirmative Action and Discrimination," in S. Shulman and W. Darity, The Question of Discrimination 176 (1989).

Assuming that concrete improvements have occurred, one might expect to see a significant shift in the nature of employment discrimination cases as blacks and women no longer need to complain about blanket exclusions from good jobs--that battle has already been won--but now complain more commonly of being fired from these better jobs. Indeed, the evidence suggests that just such a shift from hiring to firing cases has taken place. Figure 5 graphs the number of hiring and "termination"[50] charges brought before the EEOC. Again, the import of the Figure 5 is clear: there has been a dramatic divergence in the pattern of hiring and termination charges. Hiring charges outnumbered termination charges by 50 percent in 1966; but by 1985, the ratio was reversed by more than 6 to 1. Alfred Blumrosen -- the Chief of Conciliations for the EEOC from 1965 to 1967 -- began an article in 1968 with the statement "Discrimination in recruitment and hiring is the chief measurable evil against which the modern law of employment discrimination is directed."[51] By 1985, however, even if the chief evil had remained the same, the predominant object of

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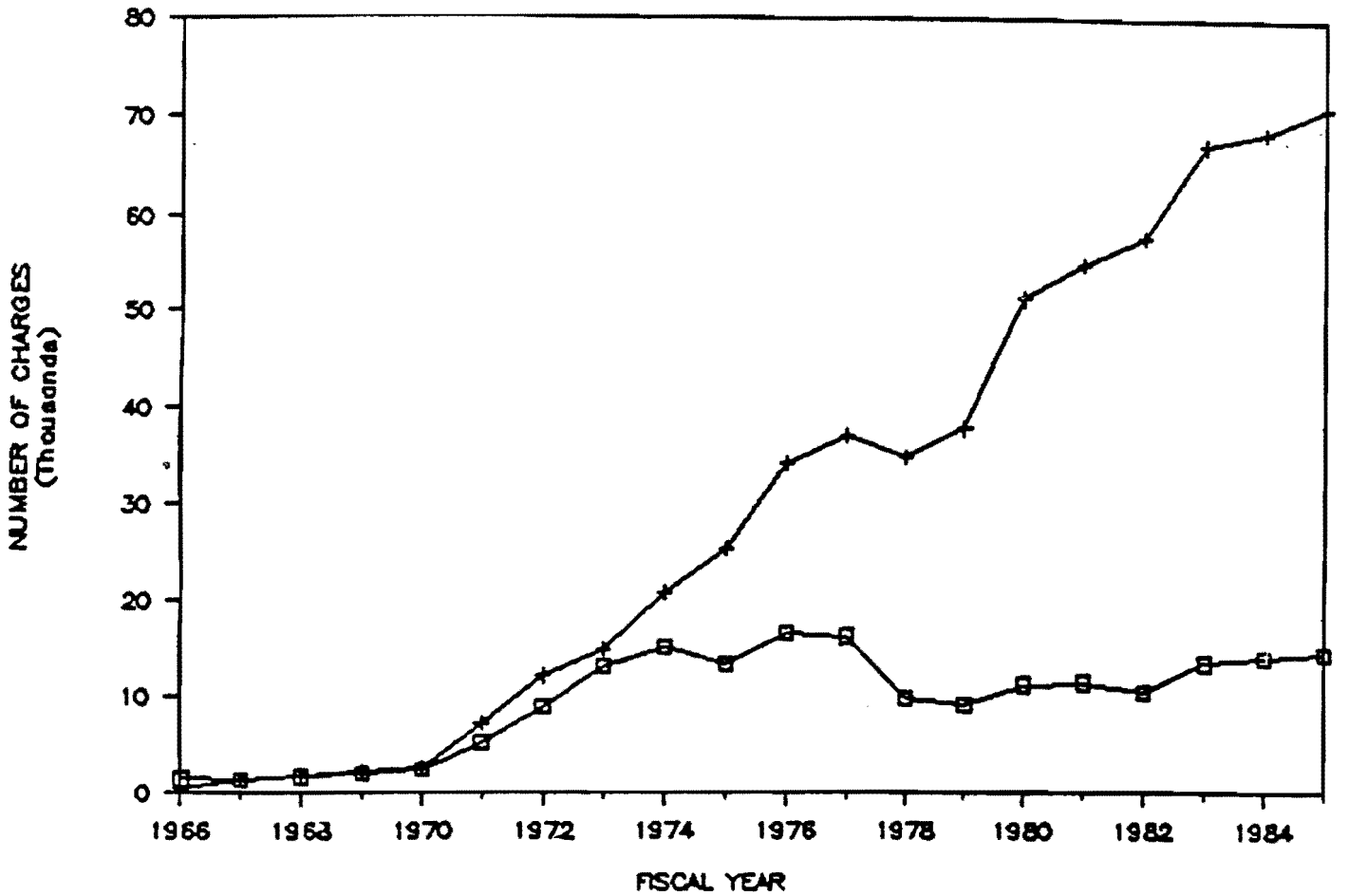
[50]We use "termination" to refer to charges alleging discriminatory discharge or layoff, categories which the EEOC treats separately.

[51]Blumrosen, "The Duty of Fair Recruitment Under the Civil Rights Act of 1964," 22 Rutgers L. Rev. 465 (1968). A further indication of the virtual absence of focus on discriminatory discharge as a major focus of employment discrimination efforts comes from the statement of one of the major forces in the develop of antidiscrimination legislation. Irving Ives of New York was a principal author of the first state fair employment practice law (the Ives-Quinn bill), which was passed in 1945. 1945 N.Y.Sess. Laws 457. When Ives became a U.S. Senator, he introduced S. 984 in 1947. Some of the language in this bill was later incorporated into the version of Title VII that was enacted. In his report on S. 984, Senator Ives wrote:

> Contrary to the general impression, discrimination is not confined to certain sections of the country, certain industries, or certain groups.... Discrimination in employment is practiced by business, by government, and by labor unions. It is manifested by a refusal to hire, by a denial of in-service training or upgrading opportunity, by wage differentials, by the formation of auxiliary unions lacking the usual benefits of union membership, or by blanket exclusion from such membership.

Cited in Gold, "Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform," 7 Industrial Relations Law Journal 429, 569-70 (1985). Discrimination in firing was not even mentioned.

Figure 5:
Numbers of Hiring and Termination Allegations in Complaints Filed With the EEOC Against Private Employers



□ = Hiring Allegations + = Termination Allegations

SOURCE: EEOC Annual Reports (Various Years).

complaint had become discriminatory firing rather than failure to hire. The evidence is at least consistent with the idea that Title VII provided a stimulus in the demand for black labor between 1965 and 1974, when the number of suits was relatively low, and this very success contributed to the subsequent explosion in Title VII cases.

A. Has Discrimination in Hiring Decreased and Discrimination in Firing Increased?

In terms of the earlier analysis then, the probability of bringing discrimination complaints--whether based on actual discrimination, perceived discrimination, or rent-seeking--will rise as women and blacks move into better and more integrated jobs. At the same time the number of actual and perceived discriminatory refusals to hire would presumably be dropping. Can we say anything about the number of actual or perceived cases of discrimination in firing?

If it is based on employer animus, discrimination in termination but not in hiring seems irrational: it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.[52] Such behavior seems doubly irrational given that the expected penalties for

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[52]One can imagine situations in which such behavior would make sense. Since 1966, any firm with 100 or more employees or any government contractor has been required to file with the EEOC a report on the status of their employment by race and sex for nine broad occupational categories. See Ashenfelter and Heckman, "Measuring the Effect of an Antidiscrimination Program," in O. Ashenfelter and J. Blum (eds.) Evaluating the Labor-Market Effects of Social Programs 46, 54 (1976). If employers wanted to "look good" on the EEOC report, they might want to hire a number of minority employees right before filing, and fire them subsequently. Presumably, though, this behavior would quickly attract attention, and therefore it is unlikely to be widespread. After examining some preliminary data on turnover rates of women and blacks, Jonathan Leonard concludes that "...establishments do not run a revolving door policy when it comes to compliance reviews." J. Leonard, The Impact of Affirmative Action 140 (1983).

Another possible explanation for increased discriminatory discharges is that new management may wish to eliminate workers hired under a previous regime. The explanation is unconvincing, though, since one would expect that new management would be likely to be less prejudiced than those it replaced, because discriminators and other non-profit-maximizers are generally thought to be the ideal takeover targets. See Donohue, "Is Title VII Efficient?" 134 U. Penn. L. Rev. 1411 (1986).

terminating a worker are probably much higher than for failing to hire her.[53]

(1) An Increase in Non-Animus Based Discrimination?

Non-animus based discrimination may, however, be consistent both with increasing discriminatory behavior in terminations and the absence of discrimination in hiring by rational employers. For example, much litigation under the ADEA involves cases in which an older worker is replaced by a younger worker who is paid a lower salary. The motivation for such discrimination is, presumably, not the employer's aversion to associating with older workers, but rather a cost savings to the firm. An employer might rationally "discriminate" in terminating older employees without discriminating in hiring at the lower salary.

The evidence suggests, however, that age discrimination cases cannot explain all of the increase in firing cases. Based on the EEOC's data on employment discrimination cases, Table 6 shows that the proportion of ADEA charges received by the EEOC has not increased since 1980 (the earliest year for which we have data).[54] Moreover, since ADEA charges comprise only about 18 percent of the total volume of charges,[55] their behavior over time is unlikely to be responsible for the dramatic increase in firing cases since 1972.

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[53]Presumably, the damages for either type of Title VII action would be roughly comparable, subject to one caveat: if workers build up significant specific human capital that enables them to earn more with their current employer than they could earn with a new employer, the damages from discriminatory discharge would be greater than for discriminatory refusals to hire. Nonetheless, the expected damages for a discriminatory discharge are far greater than for a discriminatory failure to hire because there is a far greater likelihood of being sued by a discharged employee than by a rejected applicant: even if we conservatively assume that the number of instances of discrimination in hiring equals the number of instances of discrimination in firing, then we know from Figure 5 that the probability of being sued for the latter violation is roughly 6 times as great.

[54]ADEA cases were not brought under the jurisdiction of the EEOC until 1978.

[55]The share of ADEA cases in all employment discrimination cases filed in U.S. district courts is presumably lower than 18 percent, since due process and §§ 1981 and 1983 cases are not processed through the EEOC. While it is possible that a higher proportion of ADEA filings in the EEOC end up in federal district court, the fact that the percentage of EEOC cases that ultimately are filed in federal court has remained roughly constant since 1975 makes this possibility unlikely.

Table 6:

Age Discrimination in Employment Act Allegations Filed with the EEOC, as a percent of all EEOC Allegations

YEAR	PERCENT
1980	18.7
1981	14.4
1982	17.0
1983	21.8
1984	17.5
1985	18.9
1986	20.1
1987	18.7
AVERAGE	18.4
STANDARD DEVIATION	2.0

SOURCE: Unpublished EEOC worksheet

IV. Conclusion

A number of conclusions emerge from this discussion of litigation under Title VII and other federal antidiscrimination laws. First, very few individuals who believe they have experienced discrimination actually sue, and few of those who do sue ultimately recover any damages.[56] Second, suits alleging discriminatory termination (layoff or firing) are far more common than those alleging failure to hire, although, in the past, hiring suits had outnumbered discharge suits. Third, while the secular rise in the unemployment rate and the growth in the numbers of protected workers in the workforce are contributing factors, the single most potent explanation for the increase in employment discrimination lawsuits may well be the access to better jobs that women and minorities have enjoyed over the last two decades. Thus, we are left with a paradox: there are over twenty times more employment discrimination cases in 1989 than there were in 1970, while the amount of bias against women and minorities and exclusions from jobs and occupations has almost certainly fallen.

If there were so many fewer suits 25 years ago, how can we argue that Title VII was actually more effective then than it is now? The answer is twofold. First, the flagrant and obvious violations of the pre-Title VII era--systematic refusal to hire women or blacks for certain jobs, gross disparities in pay for identical jobs, segregated workplace facilities--were much more likely to produce plaintiff victories than the subtler and less-frequent forms of discrimination practiced today. A rational employer in 1965 need not have waited until he was actually sued to change his employment practices. Second, class action suits are well-

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[56]The Curran report suggests that, in 1974, 1.2 percent of the American public had experienced job discrimination in the last year. Curran, supra note 13. Given the size of the workforce, this number translates into about 1 million perceived instances of employment discrimination, about which less than 1 in 10 complained to the EEOC, and, of these EEOC complaints, less than 1 in 10 ended up in federal court.

suited to attacking these gross violations of the law, as many discriminators learned. When these gross violations are eliminated, the possibilities for bringing class actions suits should fall. Indeed, Figure 6 shows that, from the peak of nearly 1000 class action suits in 1975 and 1976, the number of class actions dropped continuously, ultimately falling to near zero.[57]

In summary, a plausible description of the patterns set forth above is that Title VII opened up jobs and new opportunities for blacks and women in the first decade after its passage, and then, as these protected workers seized these opportunities, litigation increased dramatically when protected workers were discharged from these better jobs. As Title VII has changed from a weapon that provides access to jobs for traditional victims of discrimination, especially blacks and women, to a shield that protects those who already have jobs, it has to a large degree been transformed into an implicit tort of wrongful discharge--absent the potential for punitive damages--for virtually all workers except white males under age 40. This result has come about not through changes in the law itself or the ways that courts have interpreted it. Rather, the nature of the protection provided by antidiscrimination legislation has been shaped by the behavior of plaintiffs, defendants, and the economy at large.

The dramatic changes in the nature of employment discrimination litigation documented in this section prompt the Committee to re-examine the procedural framework that requires litigants to file with the EEOC initially, but then to pursue their federal court remedy if EEOC conciliation is ineffective. Is the legislative compromise that was struck in

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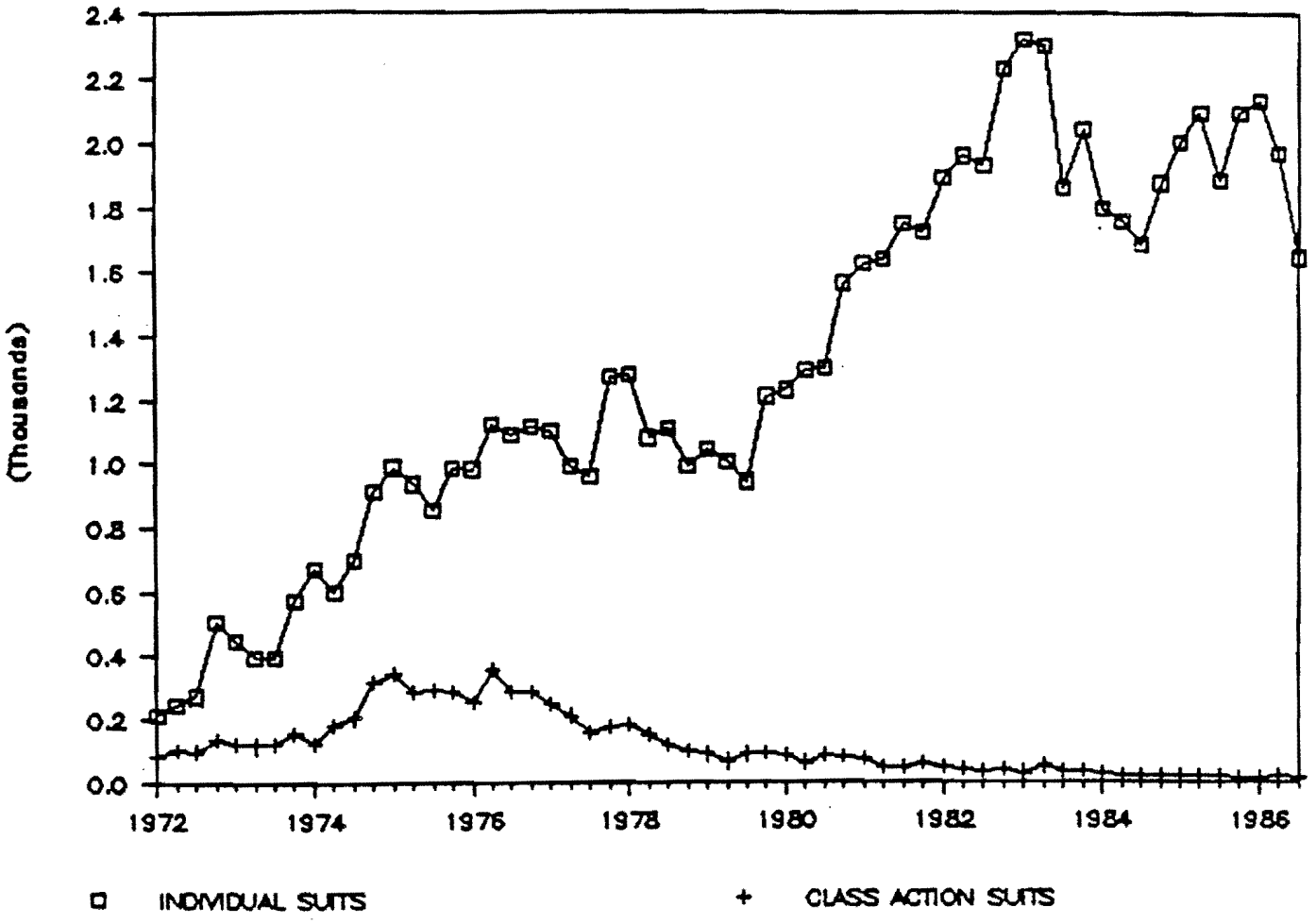
[57]Since most class action suits focus on discrimination in hiring rather than firing, the results in Figure 6 are consistent with the relative decline in significance of hiring cases. The Supreme Court also considerably tightened the standards for class action certification in employment discrimination cases in opinions in 1977 and 1982. East Texas Motor Freight Sys., Inc. v. Rodriguez, 505 F. 2d 40 (5th Cir. 1974), rev'd, 431 U.S. 395 (1977); General Telephone Co. v. Falcon, 450 U.S. 1036 (1982).

Figure 6:
Number of Class Action Requests and Individual Suits Filed,
Federal Employment Discrimination Cases,
FY 1973-1986



SOURCE: Data Tape provided by Administrative Office of U.S. Courts. See Siegelman (1989) for further details.

1964 during the consideration of Title VII still the best procedural strategy for implementing federal antidiscrimination policy in light of the fact that so many litigants who feel discriminated against do not pursue their Title VII remedies and the fact that the number of discharge cases have grown dramatically?[58]

The problem that many victims of discrimiantion do not pursue legal redress can be addressed by either reducing the cost of bringing suit or by increasing the level of damages. One mechanism of reducing litigation costs for plaintiffs as well as defendants is to provide for an administrative adjudication of Title VII disputes. This approach might be problematic for class action cases and for cases that have broad policy implications, both of which would be better resolved by an Article III tribunal. But some cases, notably discharge cases -- in which an individual woman or minority worker disputes a firing or layoff determination -- are commonly fact specific and seldom implicate broader issues of federal law.[59] In such cases, litigants might be well served if they had the option to pursue a lower cost form of adjudication. Since punitive or compensatory damages are not available in Title VII litigation and therefore victims of discharge are entitled only to backpay and possible reinstatement, the stakes in many discharge cases are sufficiently small that claimants may find it difficult to litigate in an Article III tribunal. Winning plaintiffs will be able to collect attorney's fees, but the prospect of these fees must be discounted by the probability that the litigant will not prevail. Because litigating in the district courts is so

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[58]For a discussion of how Congress settled upon the current set of Title VII procedures, see Berg, "Equal Employment Opportunity Under the Civil Rights Act of 1964," 31 Brooklyn Law Review 62 (1964).

[59]For example, a great deal of wrongful discharge litigation turns on whether a discharged worker was better or worse than another worker who was not fired.

time-consuming and expensive, attorneys may be unwilling to undertake litigation in close cases. Moreover, this problem is exacerbated by the courts' tendency to consider the amount in controversy in calculating a "reasonable" attorney's fee.

To provide this alternative to district court litigation would require strengthening the EEOC (or some other administrative authority) to enable it to adjudicate wrongful discharge cases. The adjudication of similar cases by the National Labor Relations Board with a right of appeal to the circuit courts may provide an appropriate model.

If the primary concern was economy of decisionmaking, then one might argue in favor of making the EEOC the exclusive forum to resolve such disputes. Since the Committee does not wish to undermine the strong endorsement of antidiscrimination policy that is implicit in allowing such claims to be resolved before an Article III judge, however, it recommends that the plaintiff have the option of pursuing relief before either the EEOC or the district court. Presumably, many litigants would find this remedy less costly and burdensome to pursue than district court litigation, and therefore, one might expect a sizable reduction in the roughly 4500 discharge cases currently filed in federal court. On the other hand, if the costliness of federal litigation is a major deterrent to seeking redress for perceived wrongful discharges then creating the administrative forum may increase the number of such disputes. In the latter case, the number of cases would rise, presumably enhancing the protection afforded by federal law, but without increasing the federal district court caseload.

Subcommittee on Workload

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September 11, 1989

To: Federal Courts Study Committee

From: Sara Sun Beale
Associate Reporter

Re: Federal Criminal Caseload/Scope of Federal Criminal Jurisdiction

SUMMARY

The federal criminal caseload has grown so rapidly in the 1980's that the resources of the federal courts will soon be overwhelmed. Drug cases are the principal source of this rapid expansion. If the present trend continues, the increase in the federal criminal caseload will soon require Congress to choose between substantially enlarging the federal courts or drastically reducing the scope of federal civil jurisdiction to offset the criminal caseload.

The situation is urgent. The new drug prosecutions loom like a tidal wave that will soon inundate the federal judicial system. Immediate Congressional action is needed on the following two proposals.

(1) Congress should appropriate additional resources to enable the federal courts to deal vigorously and effectively with their enlarged criminal caseload. Congress should provide both the resources requested in the Judicial Conference's March 1989 report "Impact of Drug Related Criminal Activity on the Federal Judiciary" and the additional judgeships called for in the 1984, 1986, and 1988 biennial judgeship surveys.

(2) Federal drug prosecutions should be limited to cases that cannot be effectively prosecuted by the states (because, for example, of an international or interstate element). An effective drug enforcement strategy requires a partnership between the federal government and the states, with each partner playing a distinctive role. The war against drugs must be fought not only in the federal courts, but also in the state judicial systems. Given the small size of the federal judiciary, it is essential to limit federal drug prosecutions to cases that cannot be effectively prosecuted by the states. To the extent that Congress can provide additional federal funds for the war on drugs, those funds should be used primarily to provide federal assistance for drug enforcement at the critical state and local level, not to fund more federal prosecutions.

These proposals are fully consistent with a recognition of both the importance of the drug problem and the need for the federal government to play a leading role in devising and implementing strategies to respond to it. The adoption of these two proposals is the best way for the federal and state courts to play their role in the war against drugs, and the best way to preserve the ability of the federal judicial system to play its vital and historic role of interpreting and enforcing federal law and rights as a whole.

I. CURRENT CRIMINAL CASELOAD AND TRENDS

A review of the caseload data reveals that the federal courts are at a crucial turning point. The criminal caseload has expanded rapidly in the last decade, and all available evidence points to the continuation and acceleration of that expansion. Absent an offsetting reduction in the civil caseload or a substantial increase in the size of the federal courts, the growth of the criminal caseload will soon begin to overwhelm the resources of the federal courts.

a. The Size and Makeup of the Criminal Caseload

The most significant fact that emerges from a review of the data concerning the federal courts' criminal docket is the meteoric increase in drug cases in the 1980's,[1] a trend that

[1] The data in this memorandum regarding drug prosecutions is taken from the Report of the Judicial Conference of the United States to Congress, "Impact of Drug Related Criminal Activity on the Federal Judiciary" (March 1989). This report contains a comprehensive discussion of the impact of the increase in drug prosecutions on the federal judicial system.

appears likely to accelerate as a result of the the Anti-Drug Abuse Act of 1988, P.L. 11-690, 102 Stat. 4181. Between 1980 and 1988, the number of drug cases has increased 229 percent. Cases involving marijuana are up almost 400 percent. Cases related to nonprescription drugs, such as heroin and cocaine, are up 260 percent. Drug cases have risen more dramatically than any other type of case in the federal system. Between 1980 and 1988 drug cases increased from 11 to 24 percent of all federal criminal cases.

Even these figures considerably understate the importance of drug prosecutions, since they tend to consume far more resources than nondrug cases. Drug cases typically involve multiple defendants. Detention hearings and motions to suppress are more common in drug than nondrug cases. Moreover, while drug cases in 1988 accounted for only 24 percent of criminal filings, they accounted for 44 percent of the criminal trials and roughly 50 percent of the criminal appeals.

Absent some change of direction by Congress, the increase in drug prosecutions will continue and indeed accelerate because of the 1988 appropriation of funds to hire additional prosecutors and to augment the budgets of the FBI and DEA.[2] In light of these appropriations, the Judicial Conference estimates that by 1991 drug case filings will increase from 20-50% over the 1988 levels.[3]

[2] For a description of the additional resources provided, see the Judicial Conference Report supra n. 1 at 10.

[3] See Table 5 of the Judicial Conference Report supra n. 1.

The number of nondrug cases in the system has also grown in the last decade, though not as dramatically as drug cases. Between 1980 and 1988 the number of nondrug criminal cases rose 34 percent. There is reason to believe that the character of the nondrug cases is changing as well, with an increase in complex prosecutions that tend to consume more judicial resources.[4]

b. Impact of the Growth in the Criminal Caseload

Although federal civil filings still far outnumber federal criminal filings, the impact of the projected increases in criminal filings will be profound. Criminal cases are far more likely to go to trial than civil cases. In 1988, for example, there were trials in 17.9% of the criminal cases that were terminated, but only 5.5% of the civil cases that were terminated. Moreover, because of the restrictions imposed by the Speedy Trial Act,[5] criminal cases take priority over civil cases on the trial calendar. The pressure to prepare criminal cases

[4] There is presently no hard data to support the view that the nondrug cases on the federal docket are consuming more resources case for case than in the past. However, the Federal Judicial Center is currently conducting a time study in all federal districts that will provide the data necessary to make a sophisticated determination of the average time necessary to process various types of offenses. This data will be used tc update the case weighting system employed by the Administrative Office of the U.S. Courts.

[5] Under the provisions of the Speedy Trial Act, 18 U.S.C. §3161(c)(1), criminal charges must ordinarily be brought to trial within 70 days after the indictment is filed or made public, excluding certain periods specified in §3161(h). If trial is not commenced within the specified time, the Speedy Trial Act requires that the charges be dismissed. 18 U.S.C. §3162.

for trial within the speedy trial deadlines also means that pretrial proceedings in criminal cases must often take priority over civil cases.

Absent congressional action, the dramatic increase in federal criminal filings will soon begin to overwhelm the resources of the federal courts. It seems likely that the initial consequence will be a rapid erosion of the resources available for civil cases. In fact, the Federal Court Study Committee has received reports from judges and prosecutors in districts with heavy drug caseloads predicting that in the very near future those districts will be unable to try any civil cases.[6]

II. PROPOSALS

a. Additional Appropriations

Additional appropriations are needed immediately to enable the federal courts to deal vigorously and effectively with their greatly enlarged criminal caseload. The resources of the federal courts have not kept pace with the courts' expanding responsibilities. The situation is urgent. Congress should act now to provide the additional judgeships called for in the 1984, 1986,

[6] See e.g., the statement of Anton Valukas, U.S. Attorney for the N.D. Ill. at the committee's public hearings, and the letter from the Hon. Judith Keep, U.S.D.C., S.D. Cal., to the Workload Subcommittee. A similar theme was sounded by several of the respondents to the Workload Subcommittee's survey of district judges.

and 1988 biennial judgeship surveys. Action should not be deferred until the 1990 judgeship survey is completed. Further, as described in greater detail in the Judicial Conference's March 1989 report,[7] the judiciary needs at least $269 million in additional funding for 1990 just to handle its current caseload effectively, exclusive of the impact of the Anti-Drug Abuse Act of 1988. In light of the additional resources the 1988 Act appropriated for federal investigative agencies and prosecutors, the judiciary will need $37 million to $92 million more to meet the additional criminal caseload that will be generated. The war on drugs cannot be waged without cost. The huge increases in the federal criminal caseload generate costly new demands on all parts of the federal judicial system, including magistrates, judges, the marshals service, and probation officers. The federal judicial system cannot play its role in the war against drugs unless Congress provides the necessary resources.

b. Limiting the Federal Criminal Caseload

As much as possible, federal drug prosecutions should be limited to cases that require the specialized resources of the federal judicial system. No matter how rapidly the resources of the federal system are expanded, the war against drugs cannot be waged solely in the relatively small and specialized federal judicial system. An effective drug enforcement strategy requires

[7] See n.1 supra.

a partnership between the federal government and the states, with each partner playing a distinctive role.

The current federal caseload includes many drug prosecutions that could and should be brought by state prosecutors in state courts. These prosecutions do not involve any interstate or international conduct that requires the unique resources of the federal judicial system. In the Southern District of New York, for example, one day a week is called "federal day" and all persons arrested by local police on drug charges on that day are charged with federal rather than state offenses. Another district reports that virtually every criminal charge involving crack cocaine is brought in federal rather than state court. In some federal drug prosecutions the judge is the only true federal participant: a state prosecutor has been designated as a federal prosecutor for that case, and all the witnesses are state and local law enforcement officials.

The sheer number of drug prosecutions poses a threat to the federal courts' ability to perform their constitutional role. Given its small size, of the federal judicial system is not capable of expanding to accommodate an ever-increasing share of the drug prosecutions in the United States. If the federal courts are to continue to play their vital historic role of interpreting and enforcing federal law as a whole, the federal criminal caseload must be limited to cases that require the unique resources of the federal system. The federal courts are not designed for -- and they cannot effectively accommodate -- every case involving crack or all of the drug related cases in

which local police make an arrest on one day each week. Even if additional resources are provided, the sheer numbers of those cases will eventually swamp the system. We are already at the point where the sheer number of those cases is jeopardizing the ability of the federal judicial system to process civil cases.

Congress and the executive branch must share the responsibility for narrowing the criminal caseload to drug prosecutions that require the unique resources of the federal system. The Department of Justice and local United States Attorneys should immediately begin to refocus their charging policies to reduce the avalanche of drug prosecutions. But in bringing the increasing number of drug cases in the federal courts, the Department of Justice has been implementing what it perceives to be the policy established by Congress in the drug legislation of the 1980's. Congress must clarify federal policy in this area to reflect the specialized nature of the drug prosecutions that should be brought in the federal courts. Funding for future drug enforcement initiatives should also reflect the specialized nature of the federal courts. If Congress is able to provide federal funds for the war against drugs beyond those needed for the specialized caseload in the federal courts, those funds should be used primarily for drug enforcement at the critical state and local level, not for more federal prosecutions.

This revised strategy reflects the distinctive role of the state and federal governments, each of which must contribute to the war on drugs. Limiting federal prosecutions allows the

federal courts to play their distinctive role in the war against drugs without jeopardizing the federal courts' ability to perform their core function of interpreting and enforcing federal law as a whole.

Memo to: Workload Subcommittee, FCSC
From: Rick Marcus, Associate Reporter
Date: Oct. 16, 1989
Re: Guidelines for consolidation and severance procedures

Opportunities and occasions to combine separate lawsuits are likely to increase. The Committee may recommend, for example, that multidistrict transfer for trial as well as pretrial be authorized. The procedures for implementing such combination usually involve consolidation of cases and in many instances severance of issues for serial trial treatment. These procedures will become more important. The Committee should endorse increased use of consolidation and severance to expedite disposition of cases where that can be done effectively and fairly.

Unfortunately, combination is not always desirable, and there are grounds for uneasiness with routine consolidation of cases and separation of issues for trial. The Committee should therefore also endorse the development of standards or guidelines for the use of consolidation and severance.

At present the law has very few guidelines for judges to use. The ALI Complex Litigation Project has suggested some criteria that could bear on the problem, and further development of standards for making such decisions should be endorsed by the Committee. Actually devising such guidelines is a challenging task that this committee could probably not perform effectively, although it could suggest that the treatment of the subject in the Manual for Complex Litigation or the Federal Rules of Civil Procedure be expanded on the basis of study of the issues.

This memorandum first explains the reasons for concern about this area, and the factors that bear on the wisdom of consolidation and severance decisions. It then sketches the limited authority in the present rules and suggests some directions for improvement.

I. IMPORTANCE OF THE ISSUES

With the ongoing concentration of services and manufacturing in our economy the frequency of related claims will increase. In the past, there were a number of jurisdictional impediments to combination of such cases into a single lawsuit.

Much work is being done to eliminate impediments to combination of related lawsuits. One example is the ALI Complex Litigation Project. Another is the ABA Commission on Mass Torts. Jurisdictional impediments may be relaxed, and the federal courts may be granted a new species of jurisdiction to handle all suits arising out of certain events that give rise to multiple claims. Similarly, innovations to permit the combination of cases originating in a number of state and federal courts before a single state court are being considered. The net effect of all these ideas would be to enhance the ability of the judicial system to combine cases originally filed as separate actions.

The assumption underlying these reforms is that it is desirable to combine lawsuits. The ALI Preliminary Study of Complex Litigation, for example, proceeded from "the intuition that the common transaction, series of transactions, or course of conduct . . . should provide a basis for some form of consolidated or coordinated treatment of all of the resulting litigation." ALI Preliminary Study of Complex Litigation 5 (1987). In many instances this assumption is well founded, and the Committee should therefore endorse the use of consolidation and severance to effect the combination of cases into a workable

litigative unit.

Nevertheless, combining suits raises some important concerns as well, if it overrides legitimate litigant interests and causes actions to be fractured into units that abandon the traditional American trial. To illustrate with an extraordinary case, consider In re Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988), in which the district court consolidated actions for personal injuries allegedly caused by an anti-nausea drug. Over 800 cases involving 1100 plaintiffs were eventually combined, and the court then trifurcated the cases and held a jury trial limited to the issue of general causation. The judge also directed that no visibly deformed plaintiffs or plaintiffs under the age of ten could attend the trial in person; both as a result of the volume of litigants brought together by consolidation and as a result of these rules, many plaintiffs had to observe the trial by closed circuit television. After a defense verdict on the causation issue, the appellate court affirmed, noting that "the trifurcation ruling has been most troubling to us." Id. at 307. Given the demands of the litigation, the court found that the district court had acted properly and that plaintiffs had not been unfairly treated. Nevertheless, the case illustrates the impact consolidation and severance can have on litigation.

II. REASONS FOR CONCERN ABOUT CONSOLIDATION AND SEVERANCE

The point of referring to the Bendectin litigation is not to suggest that the court's solution to the challenges of that case

was inappropriate, but rather to emphasize the way in which decisions to consolidate and/or bifurcate can alter the normal handling of lawsuits. These concerns are peculiarly applicable to the question of combined trial, but also appear in connection with consolidated pretrial proceedings. It is worthwhile to note a number of such concerns.

1. Judicial burden: The assumption is that combining cases will ease judicial burdens. But the very combination may create an ungainly single litigation in place of a series of commonplace cases. Discovery may escalate as the dimensions of the litigation grow due to the combination of originally-separate cases. Often a joint trial will dispose of the action only if defendants prevail on some generally applicable ground. Otherwise, the energy savings resulting from combination may be harder to identify. But in some cases such binding determination adverse to defendant might materially facilitate the resolution of most cases. For example, recurrent litigation of certain state of the art issues in asbestosis litigation seems wasteful. The point is not that there cannot be judicial savings, but that they cannot be assumed to exist in all cases.

2. Sterile trial: The Anglo-American tradition has relied upon an in-court trial in which the litigants can participate and testify. E.g., Marcus, Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure, 50 U. Pitt. L. Rev. 725, 728-37 (1989). This usually involves consideration of all issues presented by the

case and entrusts the decision to a jury aware of all these circumstances.

When the cases are combined for trial, this tradition often cannot work because the number of parties and issues preclude disposition in a single-event trial. The solution has been severance of issues for separate trial. "There is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere . . . ." In re Beverly Hills Fire Litigation, 695 F.2d 207, 217 (6th Cir. 1982). This could work a substantial change in the nature of a trial.

This change may not be the result of consolidation, however. In some trials the court would want to sever issues for separate trial in an action by a single plaintiff. Where a scientific or technical advisory panel is appropriate, for example, it may be that the issue involved will properly be considered in isolation from others whether or not consolidation occurs. But consolidation promotes such severance, and may rob the trial of vigor it would have if the cases were handled in the traditional manner.

3. Disregard for individual circumstances: Where cases are consolidated, the natural focus of the combined proceedings is on common rather than individual issues. At trial, this focus can result in the sterile atmosphere mentioned above as only one

issue is addressed. Before trial, the focus on common issues may interfere with development of the specifics that are pertinent to individual parties, perhaps due to concentration of discovery on common issues. Indeed, the court may even be tempted to alter the substantive law to make those specifics unimportant, a process that can be found in some class action decisions. E.g., Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976) (court eliminates proof of reliance to facilitate class certification in securities fraud class action).

4. Pre-defendant shift in results: A related phenomenon has for some time been noted as a consequence of severance of liability from damages, whether in consolidated or individual cases. Almost 25 years ago, it was reported that defendants in personal injury cases won 42% of those in which severance occurred, but 79% of those in which liability was tried separately. Rosenberg, Court Congestion: Status, Causes, and Proposed Remedies, in H. Jones, The Courts, The Public, and the Law Explosion (1965) at 48. Although this variation might indicate that courts sever more often when the case for liability seems weak, "when it is seen that the split trial reduces by more than half the cases in which personal injury plaintiffs are successful, it is apparent that bifurcation makes a substantial change in the nature of jury trial." 9 C. Wright & A. Miller, Federal Practice & Procedure § 2390 at 299.

5. Loss of individual control of cases: Combination of cases almost unavoidably reduces the degree of control over the

litigation enjoyed by individual parties and lawyers. This can be a troubling development; it is hard to deny that there is "a centuries old tradition of individual claim autonomy in tort litigation involving substantial personal injuries." Transgrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. Ill. L. Rev. ___.

This autonomy cannot easily survive if the case is transferred across the country, there to be batched together with many others and handled together under the auspices of lead counsel designated by the court. Moreover, while courts say that in consolidated cases the parties retain the right to act independently, the dynamics of consolidation erode this independence: "[T]here can be but one master of a litigation on the side of the plaintiffs. It is also plain that it would be as easy to drive a span of horses pulling in diverging direction, as to conduct a litigation by separate, independent action of various plaintiffs, acting without concert, and with possible discord." Manning v. Mercantile Trust Co., 57 N.Y.S. 467, 468 (1899); see also Cellini, An Overview of Antitrust Class Actions, 49 Antitrust L.J. 1501, 1505 (1980) (in multi-defendant antitrust cases everything is handled by committee and consensus).

Recognizing this phenomenon does not demonstrate the importance to be attached to it, however. Plaintiff lawyers may rely on an overblown portrait of the level of autonomy and control clients exercise in ordinary litigation. See Williams, Mass Tort Class Actions: Going, Going, Gone? 98 F.R.D. 323,

329-30 (1983) (criticizing opposition by plaintiff lawyers to class certification). More generally, the fact that respect for such autonomy is traditional may not mean that it should persist: "A plaintiff is entitled to due process, but has no right to sole possession of center stage; we need to tell the prima donna of the legal world that she must work with some co-stars." Freer, Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigation Unit, 50 U. Pitt. L. Rev. 809, 813 (1989).

At the same time, when consolidation tends to isolate plaintiffs more from the resolution of their cases, that is a cost that should be weighed. Recent empirical research, for example, has shown that tort plaintiffs prefer trial and arbitration to court-administered settlement conferences because it allows them to participate and tell their stories. E. Lind, R. MacCoun, P. Ebener, W. Felstiner, D. Hensler, J. Resnik & T. Tyler, The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (Rand 1989). Indeed, it may be that in an age when judges and lawyers seem to shy away from trials, litigants are the only participants who still like them. See Hensler, Resolving Mass Toxic Torts: Myths and Realities, 1989 U. Ill. L. Rev. ___.

III. PAUCITY OF CURRENT GUIDELINES

Despite the importance and difficulty of the issues involved, there are currently only very general directions on when and whether to combine and reformulate cases. The

multidistrict litigation statute, 28 U.S.C. § 1407, only directs that cases be transferred if coordinated or consolidated pretrial will serve "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." Though the Judicial Panel on Multidistrict Litigation may have developed rules of thumb on such problems, they are not generally accessible and the basic decisions about these matters need to be made by district judges to whom cases have been transferred.

District judges get little guidance from Rule 42, which says that consolidation should be done to avoid unnecessary costs or delay and that in directing separate trial of certain issues the court should preserve the right to jury trial. Beyond this, the general attitude is that the district court is accorded wide discretion, though it is reported that judges rarely consolidate unless the common issue is a central one. See 9 C. Wright & A. Miller, Federal Practice & Procedure § 2383 at 260-61. The Manual of Complex Litigation (Second) mentions consolidation and severance at several points, but provides little guidance about when and how to employ the devices.

This paucity of guidance may be contrasted with the provisions of Rule 23(b)(3), dealing with common question class actions. Before certifying such an action, the judge is to determine whether the common issue predominates. In addition, the judge to ask whether a class action would be superior to other methods of adjudication, including consideration of "the interest of members of the class in individually controlling the

prosecution or defense of separate actions" and "the difficulties likely to be encountered in the management of a class action."

IV. POSSIBLE DIRECTIONS

The treatment in Rule 23(b)(3) may point in a desirable direction, but more work will need to be done in formulating guidelines. They should focus on the factors that need to be considered, including consideration of the grounds for uneasiness about routine consolidation mentioned in section II above. It may be that a categorical approach looking to the type of case would work well. Thus, consolidation for trial might seem routinely appropriate in securities fraud and antitrust actions, more problematical in environmental actions, and still more troubling in personal injury actions. In addition, different kinds of issues might be more susceptible to separate trial. For example, the question of tolling the statute of limitations might be more suitable than the question of impact in an antitrust case. With regard to pretrial consolidation, attention might focus on the types of situations in which simultaneous coordinated discovery can accomplish the purposes of consolidation without some of the burdens.

This sort of detail seems better suited to treatment in the Manual for Complex Litigation than the Federal Rules. Already some guidance is provided by the ALI Complex Litigation Project. See ALI Complex Litigation Project, Tentative Draft No. 1, § 3.01, which directs that cases be transferred and consolidated if they involve common questions and transfer will promote the just

and efficient conduct of the actions. It continues:

> (b) Factors to be considered in deciding whether the standard set forth in subdivision (a) is met include
>
> > (1) the extent to which transfer and consolidation will reduce duplicative litigation, the relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary, and
> >
> > (2) whether transfer and consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to the parties and witnesses.
>
> In considering those factors the court may take account of matters such as
>
> > a. The number of parties and actions involved;
> >
> > b. The geographic dispersion of the actions;
> >
> > c. The existence, extent and significance of local concerns;
> >
> > d. The subject matter of the dispute;
> >
> > e. The amount in controversy;
> >
> > f. The significance and number of common issues that are involved;
> >
> > g. The likelihood of additional related actions being commenced in the future; and
> >
> > h. The stages to which the actions already commenced have progressed.

In addition, section 3.06 of the ALI proposal directs that the transferee judge have full power after a transfer to manage and organize the actions. In particular, he is to prepare a plan for disposition of the litigation indicating whether the entire action or only specified issues should be determined in the transferee forum or handled separately. In connection with that, the court shall have "broad discretion" to order the separated

issues to be retransferred for consolidated treatment in another district, or returned to the districts of origin. This approach, the commentary suggests, preserves the ability of individual parties to control the litigation of issues unique to them. The commentary also points up the need for the judge to be "extremely attentive" to the possible effects that bifurcation can have on the particular type of litigation involved.

This description of the ALI proposals is not meant to suggest that the Committee adopt them or any other particular formulation. Instead, there are legitimate concerns about whether the fracturing of lawsuits into issues to be transferred to different places should happen in any but the most extraordinary cases. The weighing of pertinent factors in devising guidelines could not appropriately be handled by this group, since the task requires substantial study and seems better suited for the drafters of the Manual or the Federal Rules of Civil Procedure.

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May 31, 1989

To: Workload Subcommittee, Advisers, and Staff

From: Sara Beale, Associate Reporter

Re: Supervised Release and Parole Hearings

ISSUES

1. Whether FCSC should recommend that Congress establish an administrative forum for initial parole hearings and revocation hearings involving federal inmates whose crimes were committed before the effective date of the Sentencing Reform Act of 1984.

2. Whether FCSC should recommend that Congress establish an administrative forum for revocation hearings involving federal inmates who are alleged to have violated the conditions of their supervised release.

SUMMARY

Issue 1 should not generate much debate. It seems clear that when it abolished the Parole Commission (effective in 1992) Congress failed to make adequate provision for persons sentenced under the law in effect before the adoption of the Sentencing Reform Act. To comply with the ex post facto clause, Congress must establish an agency to hold parole hearings for such "old law" prisoners. Once Congress recognizes the need to create such an agency, it should be relatively easy to lodge the responsibility for parole revocation hearings in that agency, rather than having it devolve on the federal courts as will happen if no action is taken before the abolition of the Commission.

Issue 2, however, regarding the revocation hearings in supervised release cases, is much more difficult. On the one hand, once the transition period is completed, absent action by Congress revocation hearings will impose a substantial continuing burden on the federal courts. On the other hand, a releasee has more at stake in a revocation hearing than a parolee, and it is more difficult to argue that administrative proceedings like those currently conducted by the Parole Commission are adequate. The best solution may be a compromise shifting jurisdiction to an agency with greater procedural safeguards than those afforded by the Parole Commission, but it is unclear whether such a compromise would be politically viable.

DISCUSSION

Both of the problems discussed in this memorandum grew out of the transition from an indeterminate sentencing system, employing parole, to a determinate sentencing system eliminating parole but introducing the concept of supervised release. A parole system requires an administrative agency to make the determination when an individual should be placed on parole. The Parole Commission performed this function in the federal system, and also performed the related function of holding revocation hearings to determine whether individuals on parole should be reimprisoned for parole violations. In the Sentencing Reform Act of 1984 Congress abolished the Parole Commission, shifted to a determinate sentencing system, and eliminated parole prospectively, although it made provision for short periods of supervised release following terms of imprisonment for some offenders. Under the terms of the 1984 Act, supervised release (unlike parole) could not be revoked, and thus the individual could not be reimprisoned for violating of the terms of his release. Later legislation, however, both extended the authorized terms of supervised release and authorized revocation and reimprisonment when the conditions of release have been violated. Since the Parole Commission had been abolished, the federal courts were authorized to conduct these supervised release hearings.

The changes in the federal system were made prospectively only. Thus in addition to persons who have been sentenced to supervised release under the new regime, there are still many inmates in the federal system who are subject to the parole regime.

1. Parole hearings and parole revocation hearings

When it abolished the Parole Commission in the Sentencing Reform Act, Congress failed to make adequate provision for the many inmates still serving sentences for crimes committed before the effective date of the Act. Inmates sentenced under the old law were entitled to periodic hearings on their eligibility for parole. The ex post facto clause of the Constitution precludes the application of any penal provisions that would make an inmate's punishment more onerous than it would have been at the time of the offense.[1] Accordingly, the clause requires the government to continue to provide an inmate with such hearings as long as he is serving an old law sentence. The Parole Commission will continue to hold these hearings until it is abolished in 1992. Congress has not yet provided for any other agency to assume the responsibility of holding parole hearings for prisoners sentenced under the old law.

Although the number of old law prisoners will decrease over the years as individuals complete their old law sentences, in the near term there are fairly large numbers involved. The Parole Commission estimates that in 1992 there will be approximately 8,000 old law prisoners in the federal system. Unless some agency is authorized to conduct hearings on their eligibility for parole, prisoners serving old law sentences can be expected, at the time they are entitled to a parole hearing, to bring an action in federal court under 28 U.S.C. § 2255 challenging the

[1] See Weaver v. Graham, 450 U.S. 24 (1981).

legality of their continued incarceration. It appears that these claims would be meritorious, and that such prisoners would be entitled to relief. Thus, unless Congress acts in a timely fashion, there will be a large number of avoidable § 2255 actions in the federal district courts resulting in the release of serious offenders who have not yet competed their "old law" sentences.

A related issue concerns the appropriate entity to conduct revocation hearings involving old law inmates after the abolition of the Parole Commission in 1992. Unless Congress takes further action, the Sentencing Reform Act will transfer the responsibility for these revocation hearings to the federal courts in 1992. Again, in the near term substantial numbers of cases are involved. The Parole Commission estimates that in 1992 there will be approximately sixteen to twenty thousand federal prisoners on parole. The Commission further estimates that in the first year it will be necessary for the federal courts to hold approximately 1,300 revocation hearings for parolees. The number of parole revocation cases will decline each year thereafter as old law prisoners complete their sentences.

In enacting the Sentencing Reform Act, Congress gave relatively little thought to the continuing problem that would be posed by old law prisoners. After the abolition of the Parole Commission as part of the shift to a determinate sentencing system, Congress seems to have shifted the burden of parole revocation hearings to the federal courts for lack of any other obvious alternative. Once Congress recognizes the necessity of having some tribunal other than the Article III courts to hold parole

hearings, it should also recognize the desirability of authorizing such an agency to hold the parole revocation hearings as long as there are still old law prisoners in the system.

An agency like the Parole Commission can conduct revocation proceedings more efficiently than the federal courts. The Parole Commission currently holds the vast majority of the revocation proceedings on site in the federal prisons. In contrast, if the revocation proceedings are held in federal court, there will be inevitable delays due to the press of other matters before the courts, and it will be necessary for the U.S. Marshals Service to provide housing and security for the inmates near each federal courthouse. Shifting revocation hearings to the federal courts will thus impose a substantial burden on the district courts, delay the revocation hearings, and create practical problems for the Marshals Service. In addition, the Parole Commission argues that a specialized successor agency is needed to take an active role in the management of persons subject to parole release and to provide more guidance to local probation officers.

If a new agency is created to handle this responsibility, it could be placed in either the executive or the judicial branch. Parole has traditionally been treated as an executive function, and the proposals currently under study in Congress and the executive branch follow that precedent. No reasons have been advanced for shifting this function to an agency within the judicial branch, especially in light of the heavy demands already being placed on the courts.

The establishment of an executive agency to undertake the responsibilities of the Parole Commission with regard to old law cases does not appear to be controversial. The members of the defense bar to whom I have spoken generally felt that this would be appropriate, and the relevant officials in the Department of Justice have made a tentative decision to support the creation of such an agency.

RECOMMENDATION

FCSC should urge Congress to act promptly 1) to establish an appropriate agency to hold the parole hearings that are required by the ex post facto clause, and 2) to authorize this agency, rather than the federal courts, to hold parole revocation hearings.

2. Revocation hearings in supervised release cases

Unless Congress takes corrective action, the Sentencing Reform Act of 1984 and related legislation will also require the federal district courts to hold several thousand revocation hearings per year involving federal inmates on supervised release. Because the legislative changes in question affected only sentences imposed after November 1, 1987, the full effects of this legislation are only beginning to be felt. To date, relatively few federal inmates who were sentenced under the Act have completed their terms of imprisonment and begun terms of supervised release, and there have been only a handful of supervised release revocation hearings in the federal district courts. However, once the transition is complete, the burden on the federal courts will be substantial. The Parole Commission estimates that once

the phase-in period is complete it will be necessary for the federal courts to conduct 2,500 revocation hearings per year in supervised release cases. The impact will be especially severe in larger urban areas.

By comparison, the Parole Commission conducted 195 parole revocation hearings for old law prisoners from the Southern and Eastern Districts of New York, 233 for the District of Columbia, and 250 for the Central District of California (that is roughly 16, 18, and 20 revocations each month for each of these areas). Once the new supervised release system is fully phased in, the Parole Commission estimates that the courts in these districts would have to hold roughly the same number of revocation hearings in supervised release cases. Unlike the short-term problems discussed in point 1, the burden of supervised release cases is a long-term problem that will grow in proportion with the increase of the federal prison population. Indeed, the new sentencing guidelines mandate that most felony sentences include a term of supervised release.

The history of the Sentencing Reform Act and later related legislation regarding supervised release suggests that Congress made a series of legislative changes without recognizing their cumulative effect on the federal courts. The 1984 Act abolished the parole system and vested the federal courts with the exclusive responsibility to determine (with the assistance of the sentencing guidelines) how long a federal inmate should be incarcerated. In place of the discretionary system of parole, which divided responsibility between the sentencing court and the Parole

Commission and introduced uncertainty regarding how long any inmate would actually be incarcerated, Congress provided for determinate judicial sentences of imprisonment and supervised release. The 1984 Act deemphasized the importance of post-release supervision by setting short authorized terms for supervised release and not authorizing revocation and reimprisonment. The abolition of the Parole Commission flowed naturally from the change to a system of determinate sentences and short supervised release without the potential for reimprisonment. The courts were necessarily involved with supervised release, which was ordered as part of the sentence. At this point, however, the courts' involvement with supervised release did not impose any significant burden, because the authorized periods of supervised release were short and revocation and reimprisonment were not authorized. The only remedies explicitly provided for an individual's violation of the terms of the court order authorizing his release were amendment of the order and contempt.

Later legislation radically changed the nature of supervised release. The Anti-Drug Abuse Act of 1986 amended the provisions dealing with supervised release by authorizing revocation and reimprisonment upon proof of a violation of the terms of an individual's supervised release. Legislation in 1986 and 1987 also extended the authorized periods of supervised release. Finally, the Anti-Drug Abuse Act of 1988 completed the transformation by eliminating contempt as a sanction for violating the terms of supervised release.

The cumulative effect of these changes will be a substantial new burden on the federal courts. This appears to have occurred without any Congressional determination that the courts would be superior to an administrative tribunal for this purpose. When revocation and reimprisonment of persons on supervised release were authorized in 1986, it appears that Congress allocated the revocation hearing function to the federal courts because the abolition of the Parole Commission left no obvious administrative alternative. Nothing indicates that Congress concluded that it would be preferable to have revocation determined in federal district court rather than in an agency proceeding. Nor was there any consideration of the burden that would be imposed on the courts or the greater efficiency and practicality of administrative proceedings. These considerations all support the creation of an administrative agency to conduct revocation proceedings in supervised release cases. This might but need not be the same agency discussed in point 1.

There are, however, counterbalancing considerations. The defense bar will almost certainly oppose shifting the revocation hearings in supervised release cases from the courts to an administrative agency. Virtually all of the members of the defense bar to whom I spoke expressed a strong preference for retaining the federal courts' jurisdiction over revocation hearings in supervised release cases. Generally, experience with Parole Commission hearings makes the defense bar oppose granting the Commission (or a similar successor agency) jurisdiction to revoke supervised release.

The opponents of authorizing an agency to revoke supervised release make a number of important points that the Subcommittee should consider. First, revocation of supervised release -- like revocation of probation -- should be a judicial function. The judge who imposed the conditions of release is in the best position to interpret them and to decide whether a breach of those conditions is sufficiently serious to warrant revocation of release and imprisonment. Also, it is more effective and meaningful to bring the defendant back to face the judge who sentenced him. Supervised release is thus quite different from parole, for which the Parole Commission sets the conditions of release, interprets the conditions it set, determines whether a breach has occurred, and if so, decides whether it justifies revocation. Finally, a hearing before the Parole Commission (or a successor agency like it) is not an adequate substitute for a hearing in federal district court. The federal defenders to whom I spoke expressed concern that decisions regarding revocation should not be made by relatively anonymous bureaucrats, who often are not law-trained and thus may not be sufficiently observant of procedural rights. The defenders also noted that an inmate is in a much more favorable position in federal district court if an error is made at the revocation hearing, since review would be available as of right to the Court of Appeals. In contrast, if the decision is made by an administrative agency like the Parole Commission, the only way to get limited judicial review is by a petition under 28 U.S.C. § 2241 or 2255.

The concerns voiced by the defense bar must be assessed in light of the nature of supervised release. Parole has traditionally been regarded as a matter of grace, because the inmate is being released before he serves the full term of his sentence of imprisonment. If parole is revoked, the inmate merely serves the remainder of his original prison term. In the case of supervised release, by contrast, the inmate completes his full sentence of imprisonment before he is released, and there is no discretion or grace being exercised in his favor. If supervised release is revoked, the consequence is not to require the inmate to serve the remainder of his original prison term (which has already been completed). Instead, he may be returned to prison for all or part of the term of his supervised release (without credit for time served on post-release supervision). Since supervised release may be ordered for a period up to five years for some offenses, the consequences from the defendant's point of view are indeed serious. One federal public defender likened revocation of supervised release to a new sentence of imprisonment.

RECOMMENDATION

This is a much more difficult problem than the issues discussed in point 1. On the one hand, jurisdiction over revocation hearings involving supervised release will impose a substantial continuing burden on the federal courts. For this reason, despite almost certain opposition from the defense bar, it seems likely that Congress would be receptive to the suggestion that it should extend the jurisdiction of the agency discussed in point 1 to include revocation hearings in supervised release cases. On

the other hand, one of the traditional roles played by the federal courts is the protection of individual rights. The defense bar rightly raises concerns that the liberty rights of persons on supervised release will not be adequately protected if jurisdiction over revocation is shifted to the Parole Commission or a similar successor agency.

One of the federal public defenders I spoke to suggested an attractive middle ground that would provide greater protection for the rights of persons on supervised release without imposing a new burden on the federal courts. Individual rights can be adequately protected in administrative proceedings, he argued, if the decisionmaker is a lawyer and if appropriate procedural rules are established and followed. In his view current Parole Commission procedures as administered in practice do not meet the standards necessary for the revocation of supervised release, but there is no reason why Congress could not create a successor agency with better procedures and personnel. There is some question whether such a compromise position would be politically viable, and how much might in the end be gained by creating a new agency. The idea is likely to be opposed by the Parole Commission, perhaps by the Administration as a whole, and possibly by the defense bar as well. A beefed-up agency would obviously be more costly than the Parole Commission or a similar successor agency.

One possible way to ensure the quality of adjudication without necessitating the creation of an entirely new agency would be to make federal magistrates members of the administrative panels.

Magistrates are law-trained, would presumably not deal exclusively with release matters, and could preside over the review panels and make any necessary legal rulings.

THE ROLE OF ADR IN THE FEDERAL COURTS:

Preliminary Analysis and Recommendations[1]

[A]n optimal dispute resolution system is one that produces just results at the end of just procedures. It is, in addition, accessible, fair, expeditious, concerned, and protective of the dignity and privacy of the parties. All in all, such a system is likely to inspire confidence in the integrity, impartiality and commitment to justice of those who staff it. That is an immense challenge, one that no single method of dispute resolution could possibly surmount in all types of cases. Common sense suggests that meeting the standards of the ideal system will require deploying a whole battery of dispute-resolving mechanisms, variously directed, variously driven and variously employed.[2]

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[1] This preliminary paper was prepared by James F. Henry, President of the CPR Legal Program and Elizabeth Plapinger, a Vice President in Research and Publications, for the June 4-5, 1989 meeting of the Federal Courts Study Subcommittee on Workload.

[2] Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?* 21, Creighton L. Rev. 801 (1988).

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I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

What follows is a preliminary discussion of selected issues concerning the development and use of alternative dispute resolution (ADR) and related case management efforts within the federal court system. This discussion is intended to assist the Federal Courts Study Subcommittee on Workload to begin to formulate recommendations about *whether* and *how* to integrate alternative forms of dispute resolution in the federal civil justice system.[3]

The groundwork for the Subcommittee's work has been laid by a decade of remarkable procedural experimentation in the federal and state courts, aimed variously at relieving court congestion, reducing public and private costs of disputing, and achieving better results for certain categories of disputes or litigants. Interest in promoting earlier settlements and streamlining litigation has resulted in scores of court-related ADR programs and initiatives in the federal courts.[4] In some jurisdictions, ADR usage is authorized by local rule, statute, or standing order; in others, it proceeds on an ad hoc basis shaped by individual judges and litigants. Some ADR programs deal with particular classes of cases; others are designed to provide case management or settlement assistance on a case-by-case basis. Many efforts rely on local practitioners to provide neutral assistance; in others, judges and magistrates directly supervise settlement. Some districts offer a single ADR option such as court-annexed arbitration, while others present litigants with a range of collaborative, adjudicatory or investigative alternatives.

In short, ADR in the federal courts is characterized by flexibility, creativity and diversity. Procedures

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[3] This paper focuses on the use of ADR in the trial courts. For an analysis of appellate ADR programs, *see* Steelman & Goldman, *The Settlement Conference: Experimenting with Appellate Justice*, National Center for State Courts (1986).

[4] For a 1985 survey of major ADR programs in the federal courts, *see infra*, Annex A (Alternatives, *Special Issue on Judicial ADR* (1985). (not included)

vary from courtroom to courtroom, and from jurisdiction to jurisdiction, reflecting differences in program goals, targeted disputes, and judicial resources. A common thread linking this diverse activity, however, is the continuing and increasing pressure on the federal judiciary to make settlement and case management a part of their work.

What is less clear from this decade of experimentation, however, are the best strategies for performing these tasks, and for assuring the integrity, impartiality, and commitment to justice of these efforts. The burgeoning literature in the area reveals many more questions than answers, and the lack of empirical studies has frustrated ADR proponents and critics alike.

This paucity of information constrains judicial and legislative policy makers charged with developing a national response to these diverse developments. It also hampers the individual judge who "must select the occasions, the methods, and the timing of [settlement] intervention in the face of considerable uncertainty about the impact of these choices."[5] Additionally, the diversity and individualization that characterize ADR are sources of potential concern in a unified federal justice system, where differences in dispute resolution handling from one court to another seem to be increasing.

RECOMMENDATION: The Establishment of a Federal Courts Project for ADR Study, Oversight, Education, Reporting and Policy Making.

What we do have, however, is enough information to advocate the commitment of federal resources to insure that ADR development in the federal courts is undertaken wisely, well, and consistently with important civil justice and societal values. To that end, we recommend the establishment of a federal

[5] M. Provine, *Settlement Strategies for Federal District Judges* 24 (Federal Judicial Center).

ADR study project to assess current ADR practices in the federal courts, and to chart future ADR directions in a comprehensive and cohesive manner. The project would have four major focusses: (1) to increase understanding of current federal court ADR programs and options; (2) to build standardized reporting and evaluation structures into court ADR use, (3) to remedy the severe underattention to judicial education and training in this area, and (4) to establish a national advisory group to recommend federal court ADR policy, provide ongoing oversight, and promulgate advisory guidelines for judges, court administrators and lawyers in this area.[6]

More specifically, the development of a cohesive federal court ADR policy would entail:

- **INFORMATION AND ANALYSIS:** To analyze current ADR programs and initiatives on a broad spectrum of issues, among them: the quality and speed of results; program impact on the quality and perception of justice, and on litigant and court costs; the suitability of various ADR methods to particular kinds of disputes; methods for preserving fairness and judicial accountability in the settlement process; and the efficiency and equity of ADR mechanisms for aggregating or multiparty civil suits for purposes of litigation or settlement.

- **REPORTING:** To create standard reporting mechanisms for ADR use to be built into the monthly, semi-annual and annual statistics of the Administrative Office, and to establish a panel of academic advisors to assist judges and administrators to develop

[6] It should be noted that a handful of federal courts, including the Second Circuit, and several states have recently undertaken or completed comprehensive studies of the ADR programs, initiatives and options in their jurisdictions. *See, e.g.*, Report by the Standing Committee on the Improvement of Civil Litigation, *Settlement Practices in the Second Circuit*; Governor's Alternative Dispute Resolution Working Group, *Final Report: Dispute Resolution in Massachusetts* (Nov. 1986); CDR Task Force on Court-Annexed Dispute Resolution, *Report to the Supreme Court of Kentucky*; and *see* the forthcoming report of the New Jersey Supreme Court Committee on Complementary Dispute Resolution on that state's extensive ADR program.

appropriate reporting and evaluation strategies for ongoing and new ADR projects;

• **JUDICIAL EDUCATION:** To assess the most appropriate and effective methods for training judges in settlement and case management, to identify the resources needed to put in place the appropriate training vehicles, and to undertake or fund the development of needed training vehicles.

• **OVERSIGHT AND GUIDELINES:** To establish a blue-ribbon ADR policy and oversight body composed of leading judges, practitioners, legal scholars and dispute resolution experts, in conjunction with the Federal Judicial Center or the Judicial Conference, whose duties would include (i) reviewing, commenting on and possibly approving future district-wide ADR initiatives; (ii) developing a comprehensive manual on the use of alternative dispute resolution in the federal courts for judges and lawyers, in the nature of the *Manual for Complex Litigation, Second*; (iii) making recommendations on the advisability and validity of local rules regarding ADR practices,[7] and reviewing and commenting on proposed legislation relating to ADR, as well as proposed changes to the Federal Rules;[8] and (iv) establishing advisory or mandatory guidelines on across-the-board ADR issues, such as: judicial referral to extrajudicial ADR programs, the selection and allocation of settlement resources,[9] the use of special masters for settlement and case management, methods for preserving fairness and judicial accountability in the settlement process, public access to ADR

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[7] *See infra* at 14-15 for discussion of this subject.

[8] *See infra* at 15-18 for discussion of this subject.

[9] *See infra* at 6-10 for discussion of this subject.

processes, and the appropriateness of mandatory ADR programs.[10]

What follows thus, is a working outline of selected ADR issues which we believe warrant consideration by the Federal Courts Study Subcommittee on Workload, and merit further and ongoing study and action in the ways suggested above. The topics addressed below are: the selection and allocation of settlement resources; ADR's impact on the adversary system (concerns of privatization and second class justice); proposed rule changes for expedited trial, abbreviated discovery and increased ADR confidentiality protection; mandatory ADR referrals; ADR sanctions and trial disincentives; the relationship between the courts, private neutrals and private sector alternatives; and the role of ADR in mass settlement mechanisms.

II. OUTLINE OF ISSUES

1. The Selection and Allocation of Settlement Resources: Matching Dispute Resolution Process and Dispute

A concept fundamental to ADR is that particular kinds of disputes and dispute resolution processes can be matched to produce more satisfying, less costly and quicker results. Selection criteria can be parsed in a number of ways, making the creation of a single selection matrix elusive. Nonetheless, a body of learning is developing and can be tapped to give judges, administrators, lawyers and legislators general guidelines for selecting a particular dispute resolution process for a particular case, for categories of substantive disputes or litigants, or for particular points in the life of litigation.

The question of what dispute resolution process best serves what kind of case and parties arises in two

[10] *See infra* at 18-21 for discussion of this subject.

main contexts. Categories of cases can be diverted automatically to particular ADR processes, such as court-annexed arbitration, or referral can result from an individualized, case-by-case analysis. Federal court-annexed arbitration programs, for example, reflect an assumption that abbreviated, adjudicatory hearings before non-Article III judges, and resulting in speedy, unpublished decisions, are appropriate process for routine diversity tort and contract cases, involving $50,000 to $150,000. The forthcoming study of federal court-annexed arbitration programs by the Federal Judicial Center should provide some information on the appropriateness of this match.

For most judges and litigants, however, the task of selecting the occasions, methods and timing for settlement intervention is a case-by-case endeavor, heavily involving the discretion of the assigned judge. It usually involves attention to four broad concerns: the nature of the case, the relationship of the parties, the character of the dispute resolution process, and the resources of the court. Within each of these categories are a plethora of additional issues. A judge evaluating a particular case for possible settlement intervention, for instance, might consider factors such as: the complexity and number of issues, the number of parties, the amount at issue, the public impact of the case, the appropriateness of privacy, whether or not it is a test case, whether the primary issues in dispute are legal or factual, the stage which the case has reached (pre- vs. post-liability, adequate discovery concluded), extent of time pressure for resolution, and the kind of relief sought.[11]

Looking to the relationship between the parties, significant factors here may include: whether the parties have a continuing business or other relationship; the nature of the balance of power among the parties; personality and emotional concerns; the willingness of all significant parties to participate; whether the parties and their lawyers have difficulty initiating negotiations or negotiating, whether

[11] This listing is taken in part from a model bench memo developed by a panel of New Jersey judges, public officials, court administrators, and law professors. *See Model Bench Manual for the Appointment of a Special Master to Conduct Mediation*, Symposium: Critical Issues in Alternative Dispute Resolution, 12 Seton Hall Leg. J. 101 (1988).

privacy is desired, and whether some parties stand to gain by a strategy of delay![12]

The nature of the available dispute resolution processes is a third key consideration: are the procedures adjudicatory, investigative or collaborative, adversary or nonadversary; does a particular ADR process produce an outcome which predicts likely court resolutions or does it explore and seek to resolve underlying problems; does the process result in a mutually acceptable agreement, a principled decision, or a report; is it formal or informal; does it involve the assistance of a third-party neutral, and if so, what is the nature of the selection process and selection criteria; is the process public or private; what is the speed and cost of resolution; and is the resolution produced binding or nonbinding?[13]

Finally, the selection and allocation of limited settlement resources reflects the personal and institutional capabilities of the court, e.g.: the pressures of the docket; the settlement capabilities of the judge or available magistrates; whether the settlement mechanism requires the direct or indirect intervention of the judge; the availability of able nonjudicial neutrals; the presence of quality court-related or private ADR programs; the availability of funds to finance ad hoc or court-wide ADR efforts, and the response of the local legal community.

Despite the number of variables, there seems to be a developing and common-sense consensus about what dispute resolution procedures are useful when. The summary jury trial (SJT), for instance, is an adversarial ADR process which promotes settlement by exposing lawyers and their clients to a real jury in a very abbreviated mock trial. The SJT requires a fairly great expenditure of judicial resources

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[12] For an extremely helpful discussion of indicators favoring and disfavoring the use of mediation, *see* Rogers and Salem, *A Student's Guide to Mediation and The Law* 41 (Matthew Bender, 1987).

[13] *See* S. Goldberg, E. Green, and F. Sander, ***Dispute Resolution*** 7 (Little, Brown and Company, 1985); M. Provine, *supra* note 4, at 95-96 (Federal Judicial Center 1986); Rosenberg, *supra* note 2.

(assuming a judge or magistrate presides), imposes a significant burden of preparation on the parties and clients who are usually required to attend, and is generally used late in the pretrial process after a significant amount of discovery. Accordingly, some rules of thumb have developed about the appropriateness of using this kind of resource-intensive ADR process: e.g., it is useful for fairly large cases promising lengthy jury trials.[14]

Experience in both private and judicial forms of ADR suggests additional common-sensical guidelines. For example: when changed behavior or renegotiation of a contract is sought, diversion to a negotiation-based collaborative process which can produce such results should be considered. Conversely, where the client seeks to establish legal precedent or a judgment with preclusive effect, or where significant issues of public or constitutional law are involved, formal adjudication with its procedural and evidentiary safeguards, accountability and openness is clearly called for.[15] In litigation

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[14] *See also*, Plapinger, *The Mini-Trial in the District of Massachusetts*, ADR in the Courts 100-101 (CPR ed., 1987) (U.S. District Judge Robert Keeton of Massachusetts suggests the court-sponsored minitrial to parties only in cases with estimated trial times of more than fifty hours); and Aspen, *Intensive Ad Hoc Mediation*, ADR in the Courts (CPR ed., 1987) (U.S. District Judge Marvin Aspen of Illinois identifies cases for mediation by a special master as those that are complicated, likely to require a lengthy trial, and susceptible to settlement, but in which settlement efforts would require more judicial time than available or would involve the court more deeply in the substance of the case than appropriate).

[15] For a contrary position, see Final Report of the Governor's Alternative Dispute Resolution Working Group, *Dispute Resolution in Massachusetts* 35 (1986). This blue-ribbon commission charged with assessing the role of ADR in the Massachusetts court system rejected the absolute proposition that "ADR programs and in-court settlement procedures [are] inappropriate for public disputes, particularly those involving claims of individual rights violations against the government." Instead, the group suggested that the "issue ought not be so much the nature of dispute, but the impropriety of coercing settlement," explaining:

> Even in major public disputes involving fundamental individual rights, parties can find major common ground, educate and persuade one another, and fashion effective remedies for past wrongs without requiring that the grievance be given the special public visibility and historic status that comes with adjudication, particularly in broad class actions. Devices that promote honest, consensual resolution should be encouraged.... Thus, even in public cases we could approve the voluntary use of conciliators, special settlement masters, arbitration, and similar devices whose primary function is to help both sides begin to address the underlying problems that gave rise to litigation." *Id.*

involving fast-paced industries, such as high technology, it may be the speed of resolution or the privacy of the forum which interests litigants in ADR. So too the existence of a valuable business relationship between a manufacturer and its suppliers may lead those adversaries to consider the minitrial, an ADR process which casts business managers as the main negotiators. Or where complex trade-offs are required among diverse parties, the appropriate settlement vehicle may be the appointment of a special settlement master skilled in keeping open lines of communication among the parties and developing possible solutions.

B. ADR'S IMPACT ON THE ADVERSARY SYSTEM: Concerns and Cautions

The pace, extent, and ad hoc nature of contemporary experimentation with civil process have caused judges, law scholars, and practitioners to express a host of concerns, centering on ADR's impact on the adversary and public justice systems. They include apprehension: that court-related ADR forums will provide -- or be perceived as providing -- a lesser quality of justice; conversely, that the development of private forums for dispute resolution will endanger public support for the courts, leading to the creation of a private justice system for the wealthy and a lesser public system for all others; that powerful and wealthy litigants will leave the public justice system for private forums where they can conduct their litigation outside the public eye, thereby permitting potentially undesirable behavior to continue; that the development of the common law will suffer, and the important norm-setting role of the public justice system in a heterogeneous society will be eroded.[16]

Other concerns focus on the propriety of direct judicial intervention in settlement, raising worries or

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[16] *See, e.g.*, Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982); Resnik, *Due Process: A Public Dimension*, The Institute for Civil Justice (1988); Nader, *Disputing Without the Force of Law*, 88 Yale L.J. 998 (April 1979); Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 Harv. L. Rev. 668 (1986); Sarokin, *Justice Rushed is Justice Ruined*, 38 Rutgers L. Rev. 431 (1986).

coerced settlements and abuses of judicial discretion;[17] a loss of judicial impartiality and integrity caused by close involvement in the fray of settlement discussions; and an undervaluation of the importance of adjudicated resolutions.

As an initial matter, it is important to recognize that these concerns raise critical issues for ADR advocates and critics alike. As Professor Rosenberg has written, "the adversary process performs important functions in the dispute resolution field. It would be a serious loss if that process were destroyed or substantially weakened."[18] Furthermore, ADR in both its private and court-sponsored forms operates in the shadow of federal rule litigation and the adversary system. The health and integrity of the public justice system, and its ability to produce just results at the end of just, accessible and expeditious procedures are critical to the realization of a multifaceted dispute processing system.[19]

In this regard, however, there are some encouraging signs. For instance, the fear that court-related ADR forums will provide, or be perceived as providing, a lesser quality of justice appears not to have been substantiated by experience to date. Indeed, the few available studies of litigant satisfaction in court-annexed arbitration programs and early settlement programs suggest quite the opposite. A remarkably high degree of litigant satisfaction with these alternative processes has been the rule.[20]

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[17] As Professor Nancy Rogers has written, "when does healthy pressure to consider settlement become an unsurmountable burden on doing anything else?" Rogers, *Dispute Resolution Overview*, unpublished paper prepared for the Torts and Insurance Practice Session, ABA Meeting (August 10, 1988).

[18] Rosenberg, *supra* note 2.

[19] Indeed, a central focus of the Judicial Project of the CPR Legal Program is how to increase public and private support for the judicial system. We believe that the greatest danger to the quality of justice comes not from ADR, but from a societal unwillingness to commit sufficient resources to the judiciary. To assure quality adversary process and complementary dispute resolution programs, we need an attentive and able judiciary, adequately salaried, staffed and housed.

[20] *See, e.g.*, Levine, *Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 Judicature 235 (Dec.-Jan. 1988-89); *Hawaii Court-Annexed Arbitration Evaluation is First to Show Cost Reduction to Litigants*, 3 BNA's Alternative Dispute Resolution Report 140 (April 13, 1989); Hensler, *What We Know and Don't About Court-Administered Arbitration*, 69 Judicature 270

One explanation for the high levels of litigant satisfaction that seem to accompany private and judicial ADR process may be the ability of case-sensitive procedures to "keep the human touch."[21] Further, drawing from ADR experience in the private sector, many litigants seem to find justice well served when their matter is attended to promptly, fairly, and cost-effectively. Full Federal Rules litigation before an Article III judge is not necessarily synonymous with the rendering of – or the perception of – first-class justice. As the Massachusetts ADR Taskforce opined in its recent report, "the goal of any effort to improve civil justice lies not only in containing cost and overcoming delay, but in promoting a better understanding among litigants of what litigation *can* and *cannot* accomplish" (emphasis added).

The *privatization* concern does indeed raise troubling issues and suggests the need for vigilance to a weakened public justice system, whether caused by the creation of parallel private courts or crippling criminal trial loads. However, evidence suggests that the important place of the public justice system in the American consciousness is not easily dislodged. For example, it appears that the appeal of the state rent-a-judge programs is directly correlated to the health of the local court docket. Where court process is accessible and timely, resort to private litigation is clearly less compelling than in jurisdictions like California where civil dockets have severe backlogs.[22]

(Feb.-Mar. 1986). Litigant satisfaction in a closely-monitored pilot program, one might argue, is an uncertain predictor of future litigant response when the programs lose the luster of newness and become a routine part of the court process. This point, however, may simply reinforce the need for oversight, commitment to quality, and systematic monitoring.

[21] Professor Rosenberg suggests that successful process should convince "[b]oth the users and the public ... that the process has been created with genuine concern for their dignity and well-being." ADR processes seem to be fairly successful on this score. Rosenberg, *supra* note 2.

[22] *See, e.g.*, conferees remarks at the National Conference on Dispute Resolution (Nov. 16-18, 1988), co-sponsored by the National Institute for Dispute Resolution, the State Justice Institute, and the National Center for State Courts, as reported in *Is ADR A Gimmick Or a Challenge? Conferees From State Courts Ask?* 3 BNA's ADR Report 5, 6 (Jan. 5, 1989)

The concern that common law will suffer because of the advent of court-related ADR seems more speculative. After all, as familiar statistics remind us, the vast majority of cases are resolved without trial, through settlement, voluntary dismissal, default or dispositive pretrial rulings. The goal of ADR in the courts, moreover, is simply to move up the time of settlement in those cases that are going to settle, and to allow others to proceed to timely and well-planned trial. This means developing ways to identify those cases which will likely settle and then directing the expensive process of "litigotiation"[23] towards that eventual settlement, rather than toward an unlikely trial. It does not -- or should not -- mean forcing into settlement those litigants that desire formal adjudication. Thus, presumably, ADR should have less impact on case law development than some have suggested.

C. Integrating ADR Into Court Procedure and Rules

The question whether experience with ADR suggests possible improvements in the procedures of the courts raises two distinct subjects. First, a number of districts have promulgated local ADR rules regarding the use of certain ADR procedures or programs in their courts.[24] This proliferation of local

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[23] This term coined by Professor Galanter describes the usual strategy and course of civil litigation:

> "On the contemporary American legal scene, the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it is litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic pursuit of a settlement through mobilizing the court process. Full-blown adjudication of the dispute -- running the whole course [to trial] -- might be thought of as an infrequently pursued alternative to the ordinary course of litigotiation." Galanter, *Worlds of Deals: Using Negotiation to Teach About the Legal Process*, 34 J. Leg. Ed. 268, (1984).

[24] *See* ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (CPR ed., 1987), for a sampling of various ADR court rules, such as: W.D. Mich. Local Rule 42 (proscribing the procedural groundrules for the district's nonbinding case evaluation program, known as "Michigan mediation); W.D. Wash Local Rule 39.1 (procedural rules regarding the use of mediation, special masters and voluntary arbitration); D.Kan. Local Rule 45 (procedural rule authorizing the use of volunteer lawyers to act as settlement masters in civil cases); N.D. Calif. General Order No. 26 (procedural order authorizing the Early Neutral Evaluation Program).

rules suggests the need for comprehensive study to (1) gauge the extent of the local activity, (2) identify promising and less promising approaches currently in use, (3) consider the wisdom or validity of such local variations, and (4) assess the desirability of proposing national rules in this area and/or promulgating advisory guidelines for districts providing for ADR by local rule.

Second, ADR practice and concepts have spawned a number of proposals for altering federal civil practice to provide options for speedy case preparation, alternative discovery practices, and increased confidentiality protection of settlement efforts. These and other proposals call for consideration of their likely effect on the civil justice system, e.g., will the proposed changes foster more streamlined litigation process, or do they simply add an expensive, additional layer to pretrial practice. Below is a brief description of several such proposals.

1. **Altering Civil Practice to Allow for Expedited Trial or Settlement.** One lesson of ADR is that civil litigation can usually be readied for trial or serious settlement discussions much more quickly than is currently the practice.[25] Indeed, as several commentators have noted, "fast-track" case preparation is the norm in takeover litigation and preliminary injunction practice, where complex cases are routinely adjudicated in days and weeks, rather than years.[26] A second ADR lesson is that many private parties are increasingly interested in playing greater roles in controlling the costs and timing of pretrial preparation, settlement and trial. One proposed rule change reflects both these ideas and would amend the federal rules to allow litigants to select a voluntary, expedited trial preparation track

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[25] A CPR committee of leading antitrust practitioners has suggested that most antitrust cases can be prepared for settlement within 6 months of filing. CPR Antitrust Committee, *Pretrial Management and Judicial Settlement Procedures* (1987).

[26] *See, e.g.*, Second Circuit Committee on the Pretrial Phrase of Civil Litigation, *Final Report* (June 1986); Morrison, *Drastic Changes Needed to Curb Excess in Federal Discovery*, 2 Inside Litigation (Dec. 1987).

involving abbreviated discovery, in return for a guaranteed early trial date.[27]

Other case expediting proposals are aimed at containing duplicative or overdiscovery by limiting the quantity of discovery routinely available to litigants.[28] A study by the Federal Judicial Center of local rules which limit the number of interrogatories, for example, reveals widespread approval among practitioners for this discovery containment technique.[29] The validity of these local limitations on discovery and the advisability of a national rule in this area are ready for review. More drastic

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[27] McMillan and Siegal, *Suggestions for a Fast-Track Option Under the Federal Rules of Civil Procedure*, 3 ALTERNATIVES 7 (April 1985). The authors propose the following federal rule amendments:

> We propose to institutionalize the fast-track option through four specific amendments to the Federal Rules of Civil Procedure.... Three new subsection to Rule 16 are proposed, under which accelerated procedures can be elected by stipulation of the parties, with trial guaranteed within 12 months. The Rule 16 amendments also provide mechanisms to ensure that accelerated processing does not interfere with effective management of the balance of the district court docket. The Rule 16 amendments also provide mechanisms to ensure that accelerated processing does not interfere with effective management of the balance of the district court's docket. The Rule 16 amendments permit appropriate judicial control over exercise of the fast-track option and create strong incentives for a reduced motions practice to prevent unnecessary delay in the system or increased burden on the judiciary. A fourth amendment, to Rule 37, is designed to reduce discovery disputes by imposing mandatory sanctions on the losing party in any such dispute. *Id.*, at 9.

[28] *See generally, CPR Practice Guide on Alternative Discovery Practices* (1988).

[29] Shapard & Seron, *Attorneys' Views of Local Rules Limiting Interrogatories* (Federal Judicial Center 1986).

Another discovery management strategy which has also been well-received is *two-stage discovery*, a technique in which discovery is directed first toward settlement -- the most likely outcome -- and only secondarily toward trial. The division of discovery into two stages allows counsel to generate during the first streamlined stage, the key information needed to value the case for settlement. Only if settlement efforts then fail, do the parties move forward and incur the expense of full trial-oriented discovery. Whether the use of this technique should be encouraged by local or federal rule changes may warrant consideration. *See, e.g.*, Peckham, *A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery, Planning, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 267-77 (Winter 1985); Brazil, *Setting Up the Case for Settlement Negotiations*, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES (1988); Sobel, *Abbreviating Complex Civil Cases*, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (CPR ed., 1987); Second Circuit Committee on the Pretrial Phase of Civil Litigation, *Final Report* (June 1986); CPR Antitrust Committee, *Pretrial Management and Judicial Settlement Strategies in Antitrust Litigation* (1987).

limitations on discovery rights have also been proposed.[30] Discovery cost containment practices from private and court-related ADR processes may also suggest further changes in court procedure, such as the increased reliance on voluntary exchanges of information and the use of informal methods for resolving discovery disputes.[31]

2. **Confidentiality.** The extent of confidentiality in private and court-related ADR proceedings is not well settled. The newness of ADR and the resulting relative dearth of cases on point leave many confidentiality issues untested, despite the fact that a solid public policy base supports ADR confidentiality. Among the areas of uncertainty are: what is the extent of confidentiality protection afforded by Federal Rule of Evidence 408, which renders settlement talks inadmissible? Are ADR participants protected by confidentiality in subsequent litigation between themselves? Are ADR processes protected against requests for discovery by unrelated litigants and should they be? Can the neutral in an ADR proceeding be compelled to testify, or have his or her notes discovered? Can the confidentiality promised by private ADR be maintained when ADR is used inside the courthouse?

A CPR committee of law scholars and practitioners has proposed amending Federal Rule of Civil Procedure 26 and Federal Rule of Evidence 408 to remove current disincentives to ADR use by clarifying the principles of its confidentiality.[32] They propose the addition of a new subsection to Rule 26 which would render undiscoverable "conduct occurring or statements made in compromise negotiations or extrajudicial settlement procedures ..., including those of the parties thereto and those

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[30] *See, e.g.*, Morrison, *Drastic Change Needed to Curb Excess In Federal Discovery*, 2 Inside Litigation (December 1987).

[31] *See, e.g.*, Second Circuit Committee on the Pretrial Phase of Litigation, *supra note*; W. Schwarzer & L. Pasahow, *Civil Discovery: A Guide to Efficient Practice* (1988); CPR Antitrust Committee, *supra* note 29.

[32] CPR Committee on Confidentiality in Alternative Dispute Resolution, *Proposed Amendments to Federal Rules of Civil Procedure, Rule 26(b) and Federal Rules of Evidence, Rule 408* (1985).

of the any other person who may have participated in the procedure as an arbitrator, mediator, neutral advisor, expert or otherwise." Rule 408 would be amended to apply the rule of inadmissibility to future litigation, as well as litigation concerning the dispute in question, and to clarify that the statements and conduct of all the participants, including neutral persons are intended to be inadmissible.

These proposals were submitted to the Committee on Rules of Practice and Procedure of the Judicial Conference of the Judicial Conference in 1985. CPR was advised that the Committee declined to act on the proposed amendments on the ground that they called for the creation of an federal evidentiary privilege, which is impermissible under Federal Rule of Evidence 501 without congressional authorization.

D. FORMULATING AN ADR POLICY FOR THE FEDERAL COURTS: Other Key Issues

Other ADR issues ready for careful study include the role of *mandatory referrals* in court-sponsored ADR; the use of *monetary disincentives* to discourage ADR litigants from returning to the trial court; the appropriate relationship between judges, and *private sector alternatives and neutrals;* and the role of ADR in multiparty litigation and mass settlement mechanisms. Below is a brief discussion of each of these topics.

1. **Mandatory ADR Referral:** At issue here is whether nonconsenting litigants can be required by a court to participate in a *nonbinding* settlement program. The question arises in two main contexts -- where a class of cases is automatically diverted to an ADR program, as in the case of court-annexed arbitration;[33] and where an individual judge seeks to compel parties before him or her to participate

[33] There is congressional authority for the mandatory arbitration experiments now underway in the federal courts (add cite).

in an ADR process. In each instance, parties so diverted retain the right to return to the trial system, although they may be subject to a monetary disincentive.[34]

To many the concept of mandatory-nonbiding ADR seems contradictory and conflicts with a strong societal commitment to unobstructed access to the courts.[35] Compulsory participation in ADR also raises the possibility that parties uninterested in settlement or desirous of an Article III forum, must wade through an additional layer of litigation, with added delay, expense, and burden to jury trial rights. This may be particularly troubling especially where mandatory referral is combined with a monetary disincentive for a trial de novo.

The use of mandatory referral in court ADR programs is supported by several rationales. Automatic mandatory diversion of certain categories of cases to ADR programs rests largely on administrative grounds: mandatory referral assures a sufficient caseload to justify pilot programs and to evaluate their results; mandatory reference permits similar classes of cases to be dealt with uniformly; and perceived burdens by a few litigants are justified by the ultimate savings that these programs promise for all litigants and the court.

When compulsory participation is ordered on a case-by case basis, its use is often justified on behavioral grounds. A key barrier to earlier civil settlement is thought to be a reluctance among lawyers and parties to *initiate* settlement discussions for fear that their interest will suggest a weak case. Compulsory participation is seen as a way to get the parties to the table without any adverse

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[34] The wisdom, validity and current legal status of such disincentives is discussed *infra* at 22-23.

[35] *See, e.g.*, Jaffe, *Dispute Resolution: A Complementary Approach to Justice -- Issues for the Future*, Working Paper 198'-7: Disputes Processing Research Program (U.Wisc.-Madison L.S. 1984); Rosenberg, *supra* note 2.

strategic consequences to either side.[36] There is also some feeling that an order to participate in one settlement conference is not sufficiently burdensome to raise troubling questions. On the other hand, compulsory reference to ADR processes like the summary jury trial, where preparation can be lengthy and expensive, may present significant concerns.[37]

Experience with private mediation may shed some light on individualized mandatory reference in the court context. Not infrequently, one party is interested in pursuing private nonbinding mediation, while its adversary is not. To help get an adversary to talk settlement, some parties offer to pay the full costs of the mediation for some initial period. Once there, experience has shown, a skillful mediator and the benefits of the process are often enough to transform a reluctant party into a full participant in the settlement process.

Beyond the policy question whether courts *ought* to refer cases to ADR without party consent, is the legal question whether they have the authority to do so. The question has been the subject of recent case law. In *Strandell v. Jackson*, 838 F.2d 884 (7th Cir.1988), the Seventh Circuit vacated a criminal contempt order levied on a lawyer for refusing to participate in a court-ordered summary jury trial. Searching the Federal Rules of Civil Procedure, particularly Rule 16, the court found no authority for district court judges to order unwilling parties to take part in nonbinding SJTs. Other courts, however, have rejected the reasoning of Strandell. *See, e.g., Williams v. Hall, 84-149* (E.D. Ky. 1988)(the judge distinguished his case from *Strandell* by citing his local court rule specifically authorizing mandatory SJTs); *Arabian American Oil Co. v. Scarfone*, 84-1536-CIV-T-17 (M.D. Fla. 1988)(found authority to order SJTs in the FRCP and in a court's inherent power to manage its

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[36] Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* (ABA 1985).

[37] *See infra*, discussion of *Strandell v. Jackson*, 838 F.2d 884 (7th Cir. 1988)(vacating a criminal contempt order levied on parties who refused to participate in a summary jury trial) and related cases.

docket).

The potential onerousness of mandatory reference can be reduced in several ways, however. For example, the successful early case evaluation program in the Northern District of California uses a rule of "presumptive" mandatory referral: i.e., "the judge to whom the case is assigned originally [has] ... the power to remove the case from [the program] on his or own initiative (such as at the initial status conference) or upon a showing of good cause by counsel."[38] Some court-annexed arbitration programs also provide for motions to remove the matter back to the trial court.

In the case of individualized mandatory reference, a panel of New Jersey judges and lawyers has recommended that judges first seek the consent of the parties in referring a case to a court-related ADR program; and "[i]f any party refuses consent, the judge can issue an order for the nonconsenting party to show cause why a mediator should not be appointed and an appropriate hearing can be scheduled."[39]

2. ADR Sanctions and Trial Disincentives. Just as mandatory participation in nonbinding ADR programs is a familiar feature of many courts' ADR programs, so too are monetary disincentives aimed at discouraging ADR participants from exercising their right to return to the trial court. The details of this technique -- which is sometimes called a "trial disincentive" or an "appeal disincentive"-- vary from court to court. For instance, in some programs the trial invoker must do no worse at trial than in ADR in order to avoid paying costs. In other programs he or she must do at least ten percent better at trial than in ADR. Sometimes, if the program has three mediators or arbitrators at each

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[38] Levine, *Northern District of California Adopts Early Neutral Evaluation To Expedite Dispute Resolution*, 72 JUDICATURE 235, 238 (Dec.-Jan. 1989).

[39] Tractenberg, *Court-Appointed Mediators or Special Masters: A Commentary*, Symposium: Critical Issues in Alternative Dispute Resolution, 12 SETON HALL LEG.J. 81, 85 (1988); *see also, Model Bench Manual for the Appointment of a Special Master to Conduct Mediation, supra* note 11, at 103.

hearing, their evaluations must be unanimous for any costs to be shifted. The costs that are shifted vary from program to program too. They may include only the neutrals' fees and costs plus the other side's attorney fees, and other combinations of these and other expenses.

The validity of such disincentives is also being challenged on legal and policy grounds. In *Tiedel v. Northwestern Michigan College*, 87-2159 (6th Cir. Dec. 29, 1988), for instance, a unanimous appeals panel banned the shifting of attorney fees by trial courts trying to impel parties to seriously consider settlement recommendations made in ADR proceedings, holding that the shift of lawyer costs is an "extraordinary remedy" normally allowed "only where Congress has expressly created an exception to the American rule" that each side pays its own attorneys.

3. Structuring the Relationship Between the Courts, Private Neutrals, and Private Sector Alternatives. Numerous questions remain unanswered, and largely unexamined, about the proper relationship between the courts and private ADR programs or neutrals. Among the issues calling for attention are whether judges should refer cases to private settlement agencies; and if referrals are made, is oversight over costs, personnel and procedures required?[40] Additional questions are raised regarding the increasing use of nonjudges to act as mediators, special masters and in other neutral roles, such as how to assure quality, to contain costs, to structure the selection process, to avoid conflicts of interest, to circumscribe ex parte communications between neutrals and the court, and to avoid abrogations of judicial responsibilities.[41]

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[40] Provine, *supra* note 5, at 30.

[41] Recommendations on the use of private neutrals by federal agencies issued by the Administrative Conference of the United States may be helpful in setting policy in this area for the federal courts. *See Administrative Conference Recommendation 86-8: Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution* (Adopted Dec. 5, 1986).

4. The Role of ADR in Mass Settlement. Increasingly, the civil justice system is being asked to resolve disputes between large number of plaintiffs and defendants. Various private and court-related mechanisms are being devised to handle these large cases, some of which involve ADR. Growing reliance by federal judges on such mechanisms -- in the form of claims facilities, claims resolution procedures, settlement trusts, or other innovative settlement vehicles -- indicates the need for greater understanding of these efforts, and of their role within the federal justice system,[42] as well as consideration of the need for legislative or policy action.

D. CONCLUSION

The CPR Legal Program is gratified by the increasing interest of legislative and judicial policy makers in judicial and private forms of alternative dispute resolution. We hope this paper contributes to informed discussion on this important topic, and we look forward to the development of a cohesive and comprehensive ADR policy for the federal courts.

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[42] *See* Peterson and Selvin, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures*, RAND NOTE (1988)(describes a current Rand research project to develop empirical information about the consequences of adopting aggregative mass procedures in mass tort litigation); *see also*, the forthcoming issue of *Law and Contemporary Problems* devoted to the settlement of mass torts.

Memo to: Workload Subcommittee

From: Rick Marcus, Associate Reporter

Date: Sept. 1, 1989

Re: Providing federal limitations periods for all federal claims

This memorandum proposes that the Federal Courts Study Committee recommend that Congress (1) establish limitations periods for Congressionally-created federal claims that presently lack such periods, and (2) adopt fallback limitations periods for those federal claims, such as claims implied by courts, that Congress did not explicitly create. In addition, it would be helpful if a compilation were prepared of the limitations periods of those federal claims that have them.

At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking federal limitations periods. There are a number of reasons why this imposes an undesirable burden on the federal courts. The borrowing process can be extremely difficult for judges because it is often unclear which state law claim is most "analogous"; the absence of clear answers to borrowing questions imposes uncertainty on litigants; and reliance on state law makes the limitations period for federal claims vary from place to place as well as disrupting development of federal doctrine on issues of tolling of limitations periods.

Under these circumstances, there is little to be said in favor of the current situation and there seems to be no identifiable support for continuing this situation. This memorandum attempts in its final section to suggest possible arguments for perpetuating the situation, but finds these wanting. At the same time, it is important to note that there is support for taking action to provide federal limitations periods. For example, the New York State Bar Association has recently endorsed adoption of federal limitations periods.

Congress has occasionally adopted cures to such problems in connection with individual statutes, most notably the Clayton Antitrust Act, to which it added a limitations provision in 1955. On at least one occasion it considered adopting a fall-back one-year limitation period, but this effort was apparently abandoned on the ground that the period was too short. Although some difficulty might be encountered in fashioning a fair set of limitations periods, it appears that the Committee should recommend that the effort be made.

I. THE PROBLEM AND THE CURRENT SOLUTION

A. Claims Affected: With regard to many (perhaps most) federal claims, Congress has provided some limitations period. Unfortunately, there seems to be no compilation of such claims, and the Committee would wisely recommend preparation of one. A number of very significant claims created by Congress lack limitations periods. The list includes claims under most of the Reconstruction era civil rights acts, civil RICO, and important labor claims under the Labor Management Relations Act and the Labor Management Reporting and Disclosure Act. In raw numbers, the most significant of these claims created by Congress is the civil rights statute, 42 U.S.C. § 1983.

In addition, the federal courts have implied private causes of action under some statutory schemes. As to these, there is normally no limitations period in the statute. In this area, the most significant claims are those for securities fraud under section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b).

B. Judicial Response: There are several possible judicial responses to this problem:

1. No limitations period: The courts could have concluded that there is no limitations period when none is specified. Cf. dissent of Scalia, J., in Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 164 (1987): "[T]he most natural intention to impute to a Congress that enacted no limitations period would be that it wished none." The Supreme Court never

took that position, but rather assumed that there must be some limitations period.

2. Judicially set limitations period: The courts could have set a limitations period themselves, but they have not done so. For example, in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), the Court was asked to establish a limitations period for suits under collective bargaining agreements in order that there be national uniformity. Characterizing this argument as seeking a "drastic sort of judicial legislation," the Court refused to indulge in "so bald a form of judicial innovation." Id. at 701; 703.

3. Borrowing limitations periods: What remained was borrowing limitations periods from some other statutory framework, a solution the Supreme Court first adopted in 1830. See McCluny v. Silliman, 28 U.S. 270, 276-77 (1830). Usually this borrowing has been from state law, and the lower courts have been directed to borrow from the "most analogous" state law claim. In certain circumstances, the Court has borrowed from federal law. See Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143 (1987) (civil RICO); DelCostello v. Teamsters, 462 U.S. 151 (1983) (action by labor union member for violation of duty of fair representation). But it has recently stated that borrowing from federal law is a "closely circumscribed exception to the general rule that statutes of limitations are to be borrowed from state law." Reed v. United Transportation Union, 109 S.Ct. 621, 625 (1989).

C. Congressional Reaction:

1. Providing limitations periods for specific statutes: With regard to certain statutes, Congress has provided a limitations period to eliminate the problems created by the borrowing process. The best-known illustration is the Clayton Antitrust Act, which provided no federally-set limitations period until 1955. In that year adopted a four year limitations period. See Act of July 7, 1955, ch. 283, §§ 1 and 2, 69 Stat. 283.

In passing this act, Congress recognized the kinds of problems that plague the courts under other statutory schemes lacking limitations periods:

> "Heretofore, such actions have been controlled by State law on the subject, leading to widespread variations from jurisdiction to jurisdiction as to the time within which an injured party may institute such a suit, as well as considerable confusion in ascertaining the applicable State law." H.R. Rep. No. 422, 84th Cong., 1st Sess., 1.
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> "It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws." S. Rep. No. 619, 84th Cong., 1st Sess., 5.

Some other statutes that once lacked Congressionally-set limitations periods have acquired them. For example, although state law once had to be borrowed for claims of patent infringement, Campbell v. Haverhill, 155 U.S. 610 (1895), there

is now a federal limitations period. See 35 U.S.C. § 286 (claims limited to damages sustained during six years prior to suit).

2. General fallback statute: Rather than adding limitations periods to each statute that lacks one, Congress could simply provide an omnibus fallback limitations period. There is one for federal crimes. See 18 U.S.C. § 3282 (5 years). There is also one for civil actions for a penalty or forfeiture. See 28 U.S.C. § 2464 (5 years). Congress considered a uniform one-year catchall limitations provision in 1945, but that this proposal was dropped in the face of opposition from the Attorney General on the ground that the one year period was too short for civil rights actions, actions under the antitrust laws and actions for trademark and copyright infringement. See Developments in the Law--Statutes of Limitations, 63 Harv. L. Rev. 1177, 1268 & nn. 753; 754 (1950).

II. PROBLEMS CREATED BY CURRENT REGIME

A. Burden on Courts: The task of selecting the most analogous limitations period from state law (and perhaps looking to federal law instead for a better analogy) introduces a difficult additional decision point that has nothing to do with the merits. Although decisions have, over time, cleared up some uncertainties, others remain. Just this past Term, the Supreme Court had to decide three cases involving the handling of borrowed limitations periods. The lower courts must decide far more, shouldering a heavy and unnecessary burden. Consider the following remarks of a panel of the Ninth Circuit:

> The background of this appeal illustrates once again the burden which the failure of Congress to provide clear guidelines on the question of limitations periods for private enforcement of federal civil rights statutes places upon litigants, administrative agencies, and the courts. The delay and uncertainty engendered by the confusion arising from overlapping remedies and procedures benefits neither of the parties before us.

London v. Coopers & Lybrand, 644 F.2d 811, 813 (9th Cir. 1981).

A prime reason for this burden is the difficulty presented by selecting the analogous claim from state law. This problem proved especially acute in connection with claims under 42 U.S.C. § 1983 for violation of federal rights under color of state law. As the Supreme Court recognized in Wilson v. Garcia, 471 U.S. 261 (1985), it is "the purest coincidence" when state law provides equivalent remedies to the federal Act, since "[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." Id. at 272-73. Partially as a consequence, the Court indicated, "the [lower] courts vary widely in the methods by which they characterize a section 1983 action, and in the criteria by which they evaluate the applicability of a particular state statute of limitations to a particular claim. The actual process used to select an appropriate state statute varies from circuit to circuit and sometimes from panel to panel." Id. at 266 (quoting lower court

opinion).

The Court's solution in Wilson v. Garcia, supra, was to direct that, whatever the nature of the underlying § 1983 claim, the state limitations period for personal injuries should be employed. In this way, it was hoped that the task of selecting the right limitations period would be simplified. Already, however, the Court has had to refine the treatment because "Wilson has not completely eliminated the confusion over the appropriate limitations period for § 1983 claims" since many states have more than one limitations period for personal injury claims. Owens v. Okure, 109 S.Ct. 573, 577 (1989). Accordingly, after rather exhausting analysis of a "non-exhaustive list" of state limitations periods for personal injuries, see id. at 578-79 n.8, the Court opted for residual personal injury limitations period.

It is unlikely that the most recent spate of Supreme Court decisions has resolved all uncertain issues. The courts will have to continue grappling with these problems.

B. Uncertainty for Litigants: As then-Justice Rehnquist has remarked, "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of limitations." Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting). The burdens imposed on the courts by the borrowing regime are reflected in comparable uncertainties among lawyers and litigants. As the Supreme Court put it in describing the lot of civil rights litigants before Wilson v.

Garcia, supra, "plaintiffs and defendants often had no idea whether a federal civil rights claim was barred until a court ruled on their case." Owens v. Okure, 109 S.Ct. 573, 576 (1989); see also Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 150 (1987) (referring to "intolerable uncertainty and time-consuming litigation" resulting from the variety of approaches used by the courts to the borrowing problem).

Because one cannot confidently say that all this confusion has now been resolved, it is likely such burdens on lawyers and litigants will continue.

C. Varying Limitations Periods in Different Places: Limitations periods of different states are applied to claims under the same federal statute, sometimes even with regard to the same transaction. For example, claims for securities fraud under section 10(b) of the 1934 Securities Exchange Act have been subjected to borrowed limitations periods ranging from one year to ten years. See Ruder & Cross, Limitations on Civil Liability Under Rule 10b-5, 1972 Duke L.J. 1125, 1144. Such wide variation hardly serves the interests of legislation that presumably should apply in a relatively uniform fashion nationwide.

These variations pose obvious temptations to forum shopping; the federal courts are familiar with the migrant plaintiff seeking a favorable limitations period. Cf. Keeton v. Hustler Magazine, Inc. 455 U.S. 770 (1984) (plaintiff sues in New Hampshire, even though she apparently has no connection with the state, because her claim is time-barred in all other states).

Yet there is no rule directing that the federal court consider the underlying events in choosing the state whose limitations period should be applied; it is mechanically to refer to the limitations period of the state in which it sits, thereby benefitting the migrant plaintiff. Some drawbacks of such forum shopping can be dealt with extent by transfer to a more convenient forum under 28 U.S.C. § 1404(a), but it has been held that the plaintiff retains the favorable limitations period after transfer. H.L. Green Co. v. McMahon, 312 F.2d 650 (2d Cir. 1962), cert. denied, 372 U.S. 928 (1963); see Marcus, Conflicts Among Circuits and Transfer Within the Federal Judicial System, 93 Yale L.J. 677, 708-09 (1984) (discussing the effect of transfer on borrowed limitations periods).

Beyond fostering forum shopping, the variousness of state limitations periods can mean that different limitations periods are applied to federal claims arising from related events depending on where the suits are filed. To a certain extent, the Supreme Court seems attuned to this problem. Thus, in Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 154 (1987), it noted that "[t]he multistate nature of RICO indicates the desirability of a uniform federal statute of limitations." But since the Court continues to insist that ordinarily state limitations periods should be applied, this consideration is unlikely to solve the problem.

Not only is it unseemly that varying state limitations periods apply to federal claims of different persons arising out of the

same controversy, these differences may also impede efficient joint resolution of those claims. To take an easy example, consider a nationwide securities fraud scheme. This might be ideally suited to class action treatment, but the imposition of many different state law limitations provisions could significantly interfere with such joint disposition of the case. Because the borrowing has been extended to subsidiary issues of tolling (as discussed in the next sub-section), the complications may implicate questions such as whether concealment justifies application of the doctrine of fraudulent concealment that interfere with class action treatment. Similar difficulties might attend consolidated or other joint handling of the claims. This subcommittee plans to consider the utility of such combined resolution, and these complications are therefore particularly worthy of note.

In sum, the variousness of state limitations periods not only makes the borrowing process extremely difficult for federal judges, it also makes outcomes very different for federal claimants in different places, invites forum shopping, and poses problems for joint resolution through class actions or related measures.

D. Complications Regarding Tolling and Subsidiary Doctrines:

Finally, there exist problems in applying subsidiary doctrines dealing with tolling and accrual of claims that may be important in limitations litigation. One approach to borrowed limitations periods would be to borrow only the limitations period and apply

federal doctrine to all these subsidiary issues. To take a leading example, the long-established federal doctrine of fraudulent concealment, which provides that limitations should be tolled if defendant conceals the claim, could be applied even though the limitations period were borrowed from state law. There was some early indication that this would be done. See Holmberg v. Armbrecht, 327 U.S. 392 (1946); Moviecolor Ltd. v. Eastman Kodak Co., 288 F2d. 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961).

In Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Supreme Court directed that lower federal courts borrow state limitations law on these subsidiary issues where the limitations period was borrowed: "In virtually all statutes of limitations the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." Id. at 463-64. Just last Term, the Court reaffirmed this idea in upholding the applicability of a state rule tolling limitations during plaintiff's confinement. Hardin v. Straub, 109 S.Ct. 1998 (1989).

There are two reasons for concern about this development. First, it means that lower federal courts will have to master state law on such issues rather than relying on existing federal

law. Although federal law may be uncertain on such doctrines, there is often little reason to expect that state law will be clear. Second, this form of borrowing may undermine federal interests in ways that are not impinged by borrowing the limitations period because the federal tolling doctrine may itself protect federal rights. The fraudulent concealment doctrine, for example, may protect against subversion of federal rights by defendant's efforts at secrecy. See generally, Marcus, Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?, 71 Geo. L.J. 829, 845-55 (1983) (arguing for continued application of federal doctrine).

III. REASONS FOR CAUTION IN ADOPTING FEDERAL LIMITATIONS PERIODS

In the interest of completeness, this memorandum hypothesizes some possible arguments for continuing the current regime. It is important to note at the outset, however, that <u>there appears to be no significant support for perpetuating the current borrowing regime</u>. To the contrary, those who have taken a position have favored solving the problem with Congressionally-set limitations periods. Most recently, the New York State Bar has taken this position.

A. <u>Value of Consistency With State Law</u>: Because both federal and state law claims often arise out of the same transaction, there may be a reason for making the same limitations period apply to both types of claims to protect the legitimate expectations of the parties. If different limitations periods

applied to federal securities fraud and state common law fraud claims, for example, prospective defendants relying on the state law period might be unfairly surprised. Similarly, when an action for violation of a trademark is filed there is often a pendent claim for violation of state law trademark rights, and the expectations of the parties may be influenced by the applicable state law limitations period. In addition, having different limitations periods apply to different parts of the same case could in some instances complicate the litigation.

These concerns do not seem forceful. Defendant's expectations are hard to credit given the great uncertainty surrounding the selection of the properly analogous limitations period. Moreover, they may often be defeated if the case is filed in a federal court in another state, which will then mechanically apply the limitations period of that state without regard to where the events occurred.

B. Burden of Developing Ancillary Doctrines: In Section II, this memorandum noted that Supreme Court's recent direction that where limitation periods are borrowed the subsidiary doctrines of tolling, etc., should be borrowed from state law as well. To a certain extent, such borrowing may save the federal courts the job of developing federal doctrines. Since such ancillary doctrines are needed to handle federal claims with Congressionally-set limitations periods, however, this concern seems unimpressive.

C. Drafting Difficulties: As noted above, Congress once

explored the possibility of enacting a catch-all limitations period and chose not to do so because the one-year period proposed was viewed as too short for certain types of claims. Admittedly devising a sensible catch-all limitations statute would involve some work. There might be reason to provide quite different limitations periods for different types of claims, and these difficulties would be compounded with regard to claims implied by the courts since it would be impossible to foresee exactly what those would be. The suggested compilation of federally-set limitations periods should provide some guidance for the effort. Compared with the burdens and uncertainties imposed on litigants under the present regime of borrowing, drafting difficulties seem considerably less important.

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REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION ON THE APPLICATION OF STATUTES OF LIMITATIONS IN FEDERAL LITIGATION

I. Introduction and Overview

Congress has never enacted a general "catch-all" statute of limitations for federal civil suits, and it has long been creating causes of action without specific limitations periods. 1/ Given this void, which the Supreme Court has acknowledged to be "commonplace in federal statutory law," 2/ the federal courts have long been struggling with the essentially legislative task of determining what, if any, limitations should apply to such claims. According to virtually all authoritative sources, judicial efforts have resulted in much confusion, inconsistency and time-consuming litigation concerning limitations issues, and Congressional action is clearly required in this area. 3/

In the vast majority of cases for which Congress has not provided specific limitations, the federal courts have simply applied the state statutes of limitations governing the state claims deemed "most analogous." 4/ Under this approach, the courts must characterize federal claims for purposes of identifying appropriate state law analogues. The courts have frequently differed as to whether claims arising under a given federal statute should be characterized in the same way in all cases or differently depending upon the

varying factual circumstances, legal theories and requests for relief presented in individual cases. Such differences have resulted in inconsistent characterizations of claims arising under the same federal statutes from circuit to circuit, district to district, and in some instances, even within the same forum state. 5/

Even where the Supreme Court has resolved such differences, the state limitations periods governing analogous claims often vary from state to state, and such variations are sometimes considerable. These divergences have resulted in an anomalous lack of uniformity, with federal claimants in different states frequently being subject to shorter or longer time periods in which to assert the same federal rights. 6/ This situation encourages forum shopping. Moreover, state legislatures do not devise limitations periods with national interests in mind, 7/ and the most analogous state statute of limitations may be unduly short or otherwise unsuitable for implementation of the national policies underlying some federal causes of action. 8/

Based on such considerations, the Supreme Court has refused to apply a state limitations period in some cases and held that no limitations apply. 9/ In other cases, the Court has applied to claims arising under one federal statute the limitations period found in another federal law. In 1983, the Court employed this approach in DelCostello v. International Brotherhood of Teamsters to prescribe limita-

tions for certain federal labor claims for which it found no close analogy in state law and the suggested state analogies raised problems of "legal substance" and "practical application." 10/ In 1987, the Court again followed this approach in Agency Holding Corp. v. Malley-Duff & Associates, Inc., holding that "[t]he federal policies at stake and the practicalities of litigation" supported an application of the Clayton Antitrust Act's four-year limitations period to federal RICO claims. 11/

Such federal borrowings promote uniformity in an area of the law otherwise marred by inconsistency. However, the possibility of such borrowings to supply limitations for other federal claims is circumscribed by the relatively small number of federal statutes prescribing specific limitations periods. Most recently, moreover, the Court has emphasized that the federal borrowing approach represents a "narrow" and "closely circumscribed exception to the general rule that statutes of limitations are to be borrowed from state law." 12/

Thus, there is good reason to expect that the state limitations borrowing approach will remain the norm, breeding a continued lack of uniformity. Similarly, there is good reason to expect that issues resulting from the absence of federal statutes of limitations will continue to generate much time-consuming litigation. The prospect of such conditions clearly warrants corrective action by Congress. As Professor David D. Siegel, a leading authority on federal civil prac-

tice, has observed:

> And under the enormous caseloads that burden federal judges today should there be so frequent a need for them to spend hours in state law -- more hours than anyone suspects -- seeking out a period of limitation to attach to a federal right? Even a superficial thumbing of the Federal Supplement would excite a statistician. We hear on the one side the frequent and legitimate lament about the burgeoning federal caseloads and yet we see, on the other side, innumerable federal judicial hours spent on the pursuit of guidance in state law on an issue -- the time period in which to sue on a federal cause of action -- more appropriately governed by federal sources and suppliable there readily. A few thoughtful Acts of Congress on this subject could work wonders; they would save judicial hours probably beyond counting, and, incidentally, spare the federal bar the disappointment they often feel after a prolonged and frustrating search in state law on a matter that doesn't belong there in the first place. 13/

In sum, the best currently to be said about the law in this area has been stated previously in the reports and proposals of other members of the bar: Congress should enact comprehensive federal statutes of limitations in order to promote uniform and efficient resolution of limitations issues concerning federal claims. 14/ The need for such Congressional action is confirmed by the current state of the law in three major areas of federal litigation affected by the current lack of federal statutes of limitations -- securities regulation, civil rights actions and labor law cases. These areas are reviewed in Parts II, III and IV of

this Report. In Part V, we submit our recommendations for legislation.

II. Federal Securities Regulation

Section 10(b) of the Securities Exchange Act of 1934 15/ and Rule 10b-5 thereunder prohibit fraud in connection with the purchase and sale of securities. 16/ Although neither Section 10(b) nor Rule 10b-5 explicitly provides for a private right of action, such a right has been judicially implied. This right of action has existed for over forty years with no federal statute explicitly prescribing the limitations period applicable to it.

One consequence of Congress' continued failure to prescribe a limitations period has been conflict among the courts of appeals for the various circuits, confusion and legal gymnastics by the judiciary and litigants alike. The absence of a uniform limitations period for Section 10(b) and Rule 10b-5 actions was recently described by the Court of Appeals for the Seventh Circuit in Norris v. Wirtz, 17/ as "one tottering parapet of a ramshackle edifice. Deciding what features of state periods of limitation to adopt for which federal statutes wastes untold hours." 18/ The court in Norris lamented that "[n]ever has the process been more enervating than in securities law. There are many potentially analogous state statutes, with variations for different kinds of secu-

rities offenses and different circumstances that might toll the period of limitations." 19/

Subsequent cases serve further to confirm the conflicts among circuits described in Norris, and the need for Congressional action to bring uniformity and predictability to this field. In April, 1988, in a significant decision, In re Data Access Systems Securities Litigation, 20/ the Third Circuit announced that the statute of limitations governing Section 10(b) and Rule 10b-5 actions is to be borrowed from what the court found to be analogous sections of the Securities Exchange Act of 1934, which allow an action to be brought one year after a plaintiff discovers the violation, but in any event, not more than three years after the transaction constituting the violation.

However, the other circuits generally have declined to follow the Third Circuit's approach in Data Access, and instead have continued to borrow limitations periods from state statutes. Nor have such courts been consistent among themselves in determining what kinds of state limitations periods to borrow for Section 10(b) and Rule 10b-5 claims. Some courts, for example, continue to borrow state limitations periods applicable to common law fraud, while other courts continue to borrow limitations periods set forth in the blue-sky laws of the forum state.

Thus, in its post-Data Access decision in Ebrahimi v. E.F. Hutton & Co., Inc., 21/ the Tenth Circuit reiterated

that it generally applies a state statute of limitations for common law fraud to Section 10(b) actions. Similarly, in Corwin v. Marney, 22/ the Fifth Circuit applied a two-year Texas general fraud statute to Section 10(b) and Rule 10b-5 claims. On the other hand, in yet another post-Data Access appellate decision, Durham v. Business Management Associates, 23/ the Eleventh Circuit applied an Alabama blue-sky statute of limitations governing securities sales to Section 10(b) and Rule 10b-5 claims. Within the past year, moreover, district courts in at least six other circuits also have declined to follow the Data Access approach. 24/

Of course, even if the kinds of state limitations periods to be borrowed could be agreed upon, there is a wide range of different statutory limitations periods among the various states, as well as disparities between various state statutes and the federal statutes being applied by analogy in the Third Circuit under Data Access. State common law fraud statutes provide limitations periods ranging from two to ten years, 25/ and state blue-sky limitations periods range from one to three years. 26/ Thus, a Rule 10b-5 claim which is timely in one district may not be in another, even though the claim involves the same federal rights. Also, in cases involving multiple plaintiffs or conduct which crosses state lines, the issue can arise as to which state's limitations periods should apply.

As the decisional law illustrates, inconsistencies and conflicts abound in the limitations periods which would be applied to the identical federal securities law claim in different circuits, and even in different forum states within the same circuit. There is no justification, either as a matter of public policy or of equitable principles, for the inconsistencies and conflicts. Accordingly, Congressional action is warranted in order to establish a uniform federal statute of limitations governing Section 10(b) and Rule 10b-5 actions.

II. Federal Civil Rights Actions

Federal civil rights actions differ from other federal actions in which state statutes of limitations are applied in that the application of state law in civil rights actions is expressly provided by 42 U.S.C. § 1988. 27/ This statute has long been held to mean, among other things, that the limitations periods for federal civil rights actions are derived from state law. The one exception to this rule is the one-year limitations period prescribed in 42 U.S.C. § 1986, a rarely used section which provides a cause of action for anyone who knowingly fails to prevent a violation of 42 U.S.C. § 1985.

By far the most commonly used section of the civil rights act is 42 U.S.C. § 1983. This section provides for the civil liability of any person who, under color of state

law, deprives any person "of any rights, privileges or immunities secured by the constitution and laws." This section has been used to redress a wide range of constitutional deprivations committed by state and local officials.

Until recently, the long standing practice in determining the limitations period to be applied to § 1983 actions was to take the limitations period for the action most nearly analogous to the particular action being brought. This method caused uncertainty and confusion as to the appropriate limitations periods in many cases. Often the challenged conduct would have no close state law analogue. In addition, different kinds of conduct which violated § 1983 could give rise to different limitations periods.

The Supreme Court's first attempt to eliminate this confusion came in Wilson v. Garcia. 28/ In that case, the Court expressly rejected the prior practice of determining the most nearly analogous statute of limitations on a case by case basis and ruled that henceforth all claims under 42 U.S.C. § 1983 would be governed by the personal injury statute of limitations of the state in which the action is brought.

This holding still left open the question of which period of limitations to apply in states which have different limitations periods for intentional and negligent torts. 29/ After five circuits had divided on the issue, 30/ the Supreme Court finally resolved it in Owens v. Okure, 31/ holding that each state's residual personal injury statute of limitations

would apply. In its opinion, the Supreme Court made clear that it considered the determination of the proper limitations period to be "essentially a practical inquiry." 32/ Its decision evidences a desire to eliminate further litigation and uncertainty.

With respect to the time period for limitations in § 1983 actions, the Supreme Court's holding in Owens has clarified substantially the applicable limitations periods. There still exists, however, a substantial variation from state to state as to the applicable limitations period for a § 1983 action. State statutes for personal injury actions prescribe limitations periods ranging from one to six years. 33/ Thus, a § 1983 action which is timely in one state may be barred in another.

Moreover, even after the appropriate limitations period has been determined, it is still necessary to ascertain the tolling rules that govern its application. In Board of Regents v. Tomanio, 34/ the Supreme Court held that, in adopting state statutes of limitations in § 1983 actions, a federal court must also adopt the state tolling rules which go with them. In so holding, the court applied its decision in Johnson v. Railway Express Agency, 35/ where the Court reached the same conclusion concerning actions pursuant to 42 U.S.C. § 1981. 36/ This raises the possibility of additional divergences from state to state regarding federal claims.

The precise reach of these holdings is unclear. New York has a series of rules with respect to the tolling and application of its limitations periods 37/ and there is little case law on which of these provisions will be applied in federal civil rights actions. In Walker v. Armco Steel Corp., 38/ the Supreme Court held that, in a diversity action where state substantive law governs, a state law provision that an action was commenced for limitations purposes on service of the summons takes precedence over Rule 3 of the Federal Rules of Civil Procedure, pursuant to which an action is commenced on filing. Recently, in West v. Conrail, 39/ the Court indicated in dicta that the Walker holding would not apply to federal question actions in which state statutes of limitations are applied. The Court has not ruled generally on the application of other tolling provisions, and the determination of which provisions apply is fraught with uncertainty and thus a potential ground of needless litigation.

In its attempt to provide clarity regarding the applicable limitations periods for § 1983 actions, the Supreme Court noted that it "again confront[s] the consequences of Congress' failure to provide a specific statute of limitations to govern § 1983 actions." 40/ Although the Owens decision has helped eliminate some of the uncertainty governing the appropriate limitations periods in such actions, it has not provided clarity concerning the application of

related tolling provisions. It also has done nothing to reduce the disparate treatment which may be accorded to identical federal actions merely because they are brought in different states. Appropriate Congressional action is the obvious avenue to eliminate these problems.

IV. Federal Labor Law Cases

Federal labor law actions offer another illustration of the waste of judicial resources, the doctrinal confusion and the lack of uniformity caused by borrowing statutes of limitations in the absence of express statutes of limitations established by Act of Congress. Section 301 of the Labor Management Relations Act ("LMRA") 41/ provides that suits for violations of collective bargaining agreements may be brought in the federal courts. The statute does not specify who may bring suits nor does it specify the applicable statute of limitations.

In Smith v. Evening News Assn., 42/ the Supreme Court held that an employee could bring an action under Section 301 against his employer for breach of a collective bargaining agreement. In United Auto Workers v. Hoosier Cardinal Corp. 43/ the Court held that a union could also bring an action under Section 301 to enforce the provisions of a collective bargaining agreement. The Supreme Court also held that LMRA provides employees with an action against their union for breach of the union's implied duty of fair representation. 44/

It is common today for a union to bring an arbitration proceeding under a collective bargaining agreement on behalf of an employee against his employer, and, if the arbitration is unsuccessful for the employee to bring a "hybrid" suit against the employer under Section 301 and against the union for breach of its duty of fair representation. Although these actions to enforce a union member's rights under a collective bargaining agreement are clearly related, a uniform limitations period for Section 301 actions has not been established.

The Supreme Court first addressed the appropriate limitations period for Section 301 actions in United Auto Workers v. Hoosier Cardinal Corp. 45/ The Court there ruled that analogous state statutes supply the periods of limitations for federal causes of action when federal legislation is silent. 46/ It analogized the union's action under a collective bargaining agreement to an action for a breach of contract and held that the state limitations period for unwritten contracts applied. 47/ In United Parcel Service v. Mitchell, 48/ again applying the appropriate state limitations period, the Supreme Court held that the state limitations period for vacation of an arbitration award (usually measured in days or months) governed an employee's claim against his employer. 49/

Two years after Mitchell, the Court decided DelCostello v. International Brotherhood of Teamsters, 50/ a

hybrid suit. The Court this time stated that its task was to borrow the most suitable statute or other rule of timeliness from some other source. The Court chose the six-month limitations period in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), as the analogous limitations period to apply to a hybrid action. 51/ The Court concluded:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor, law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods any time state law fails to provide a perfect analogy. . . .[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law. 52/

Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") 53/ provides a federal cause of action to any employee whose rights are infringed by violation of the Union Bill of Rights contained in Section 101 of the LMRDA 54/. This statute has no specific limitations period.

After the Supreme Court's decision in DelCostello, several Circuit Courts of Appeals held that the appropriate limitations period for an action to enforce an employee's rights under Section 101 of the LMRDA was the six-month

period of Section 10(b) of the NLRA, 29 U.S.C. §160(b). 55/ On the other hand, two Circuit Courts of Appeals held that longer state personal injury limitations periods applied to such claims. 56/

In Reed v. United Transportation Union, 57/ the Supreme Court partially resolved this conflict holding that because subdivision (2) of the Union Bill of Rights protects rights of free speech and assembly and was patterned after the First Amendment, an action under that subdivision may be analogized to a state personal injury action for the purpose of borrowing a statute of limitations. The Court's rationale for rejecting the federal limitations period under Section 10(b) of the NLRA was that the federal interests in stable collective bargaining relationships and in private dispute resolution were not squarely implicated in subdivision (2) actions. 58/ The Court, however, declined to determine whether other limitations periods might apply to actions under other subdivisions of the Union Bill of Rights. 59/

As can be seen from this discussion, federal labor law actions are currently governed by a hodgepodge of state and federal statutes of limitations with no uniform rationale for the application of one or another limitations period. This situation undermines the federal interest in uniformity and predictability and encourages needless litigation. The only solution is the Congressional enactment of uniform statutes of limitations.

V. Recommendations for Legislation

This Section recommends that Congress enact express statutes of limitations for the major federal statutory causes of action that now lack them. Such causes of action include but are not limited to those in the areas of federal securities regulation, civil rights and labor law mentioned previously in this Report. Congress should also enact a general "catch-all" statute of limitations to govern all causes of action not otherwise provided for. Finally, Congress should enact uniform tolling provisions to govern the application of all federal statutes of limitations. Under current law, the federal courts borrowing and applying state statute of limitations for federal causes of action frequently borrow the state tolling rules which extend the limitations periods under certain specified conditions. 60/ In the interest of uniformity, such matters should not be left to state law.

In enacting federal statutes of limitations, Congress should address the issue of retroactivity and should specify an effective date for the application of the enacted limitations periods. Matters such as accrual and survival of actions have generally been considered matters of federal common law. 61/ In the view of this Section, these matters may be developed appropriately through case law without statutory intervention.

The Commercial and Federal Litigation Section of the New York State Bar Association

Committee on Federal Statutes of Limitations

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FOOTNOTES

1/ E.g. Lanham Trademark Act of 1946, § 43(a), 15 U.S.C. § 1125; Securities Exchange Act of 1934, § 10(b), 15 U.S.C. §§ 78; Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-76h; Racketeer Influenced and Corrupt Organizations Act, 15 U.S.C. § 1964(c); Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b); Labor-Management Relations Act of 1947, § 301, 29 U.S.C. § 185; Labor-Management Reporting and Disclosure Act of 1959, § 102, 29 U.S.C. § 412; Vocational Rehabilitation Act, 29 U.S.C. § 791; Civil Rights Act of 1964, 42 U.S.C. §§ 1981-1988. Nor is a statute of limitations prescribed for private causes of actions against federal officials for violations of constitutional rights under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

2/ Board of Regents v. Tomanio, 446 U.S. 478, 483 (1980). See also C. Wright, Handbook of the Law of Federal Courts, 394 (4th Ed. 1983) ("Quite commonly ... federal statutes will create a right of action without stating the time within which such action must be brought.")

3/ For articles collecting and discussing the relevant authorities, see Special Project, Time Bars in Specialized Common Law: Federal Rights of Action and State Statutes of Limitations, 65 Cornell L. Rev. 1011 (1980); and Sobol, Determining Limitation Periods for Actions Arising Under Federal Statutes, 41 SW. L.J. 895 (1987), and see the bar association reports cited in note 14 infra.

4/ In M'Cluny v Silliman, 28 U.S. (3 Pet.) 270 (1830), the Supreme Court held that such borrowing of state statutes of limitations was required by the Rules of Decision Act, which provided: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law of the United States in cases where they apply." This holding was incorrect; the Rules of Decision Act does not address what statute of limitations applies to a federal claim where Congress has been silent. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 159-60 (1983). In the modern era, the federal courts have continued to borrow state statute of limitations under a different rationale. As stated by the Supreme Court in Holmberg v. Armbrecht, 327 U.S. 392 (1946), "[t]he implied absorption of State statutes of limitation within the interstices of the

federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general frame work of familiar legal principles." Id. at 395.

5/ See e.g., Siegel, Service Under Amended Rule 4, 96 F.R.D. 81, 97-100 (1982). In that discussion, Professor Siegel provides a recent example of the problem in New York which involved federal civil rights claims under 42 U.S.C. § 1983. In the same year that the Second Circuit was holding such a claim governed by a three-year period supplied by one "analogous" New York Statute, Pauk v. Board of Trustess of the City University of New York, 654 F.2d 856 (2d Cir. 1981), two other courts drew different analogies and came up with two different statutes with different periods, Staffen v. City of Rochester, 80 A.D.2d 16, 437 N.Y.S.2d 821 (4th Dep't 1981) (year and ninety days); Pitt v. City of New York, 111 Misc. 2d 569, 444 N.Y.S.2d 552 (Sup. Ct. N.Y. Co. 1981) (one year).

6/ This problem exists, among other places, in three major areas of federal litigation -- securities regulation, civil rights action and labor law cases. See Parts II, III and IV of this Report.

7/ Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 367 (1977).

8/ Id.

9/ Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) (EEOC enforcement actions under Title VII are not subject to state limitations periods; courts have discretion to deny retrospective relief if there is inordinate delay in filing an action); Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) (though Age Discrimination in Employment Act requires resort to certain state proceedings before bringing federal court action, the statute does not require the state proceeding to be commenced within the time limits specified by state law); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (borrowing of state limitations period would be inconsistent with federal policy against the application of state statutes of limitations in the context of Indian claims). But cf. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) (applying state limitations period to action seeking possession of former tribal lands). See also Agency Holding Corp.

v. Malley-Duff & Associates, Inc., 483 U.S. __, 97 L.Ed.2d 121, 134-143 (1987) (Scalia, J., dissenting).

10/ 462 U.S. 151 (1983).

11/ 483 U.S. ____, 97 L.Ed.2d 121 (1987).

12/ Reed v. United Transportation Union, 57 U.S.L.W. 4088, 4090 (January 11, 1989).

13/ Siegel, supra at note 5, at 99-100.

14/ For commentators taking this position, see Special Project, supra, at note 3, 65 Cornell L. Rev. at 1105 ("... [A]bsolute certainty and consistency are possible only if Congress enacts a uniform law of limitations."); Sobol, supra at note 3, 42 SW. L.J. at 923 (In order to eliminate the problems existing with respect to limitations for federal claims, "[t]he optimal solution requires congressional limitation periods"). For notable bar association reports recommending Congressional enactment of statutes of limitations, see Association of the Bar of the City of New York, Committee on Federal Legislation, The Need For the Enactment of Federal Statutes of Limitations to Govern Federal Rights of Action , 41 Record 823 (1986); and ABA Committee on Federal Regulation on Securities, Report of the Task Force on Statutes of Limitations for Implied Actions, 41 Bus. Lawyer 645 (1986).

15/ 15 U.S.C. § 78j(b).

16/ See e.g. Herpich v. Wallace, 420 F.2d 792 (5th Cir. 1970); SEC Securities Exchange Act Release No. 3230 (May 21, 1942), noted in Comment, Statutes of Limitations in 10b-5 Actions: A Proposal for Congressional Legislation, 24 Syracuse L. Rev. 1154, n. 4 (1973).

17/ 818 F.2d 1329 (7th Cir.), cert. denied, 98 L.Ed.2d 356, 108 S. Ct. 329, (1987).

18/ 818 F.2d at 1332. The court further noted: "Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law, for help ....[T]he courts of appeals disagree on every possible question about limitations periods in securities cases." Id.

19/ Id. (Citing L. Loss, Fundamentals of Securities Regulation 1164-75 (1983), T. Hazen, The Law of Securities Regulation § 13.8 & n.2 (1985) (collecting authority); Report of the Task Force on Statutes of

Limitations for Implied Actions, 41 Bus. Law. 645 (1986)).

20/ 843 F.2d 1537 (3rd Cir.) (en banc), cert. denied, 102 L.Ed.2d 103, 109 S. Ct. 131 (1988).

21/ 852 F.2d 516, 520 (10th Cir. 1988).

22/ 843 F.2d 194 (5th Cir. 1988).

23/ 847 F.2d 1505 (11th Cir. 1988).

24/ See Halperin v. Berlandi, Civ. No. 86-0703-Mc, 1988 U.S. Dist. Lexis 15718 (D. Mass. Nov. 30, 1988) (applying limitations period of Massachusetts Uniform Securities Act); Eickhorst v. American Completion & Development Corp. 1989 U.S. Dist. Lexis 886 (S.D.N.Y. Feb. 1, 1989) (applying limitations period for common law fraud); Nicholas v. Merrill Lynch Pierce Fenner & Smith, Inc., No. 3-86-0486, 1989 U.S. Dist. Lexis 1182 (M.D. Tenn. Jan. 18, 1989) (applying period for common law fraud); Robin v. Arthur Young & Co., No. 87 C. 6222, 1988 U.S. Dist. Lexis 14083 (N.D. Ill. Dec. 7, 1988) (applying state securities statute); In re Professional Financial Management, Ltd., Civ. No. 4-85-1600, 1989 U.S. Dist. Lexis 541 (D. Minn. Jan. 19, 1989) (applying Minnesota blue sky statute); Lubin v. Sybedon Corp., 688 F.Supp. 1425 (S.D. Cal. 1988) (applying general fraud statute).

25/ Compare Texas Civ. Prac. Rem. Code § 16.070 (2 years) with Tennessee Code Ann. § 283.110 (10 years).

26/ Compare Maryland Corps. & Assns. § 11-703(f) (1 year) with Kentucky Rev. Stat. § 292.480[3] (3 year).

27/ Pursuant to the statute, specified civil rights statutes "shall be exercised and enforced in conformance with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U.S.C. § 1988.

28/ 471 U.S. 261 (1985).

29/ New York is one such state. Compare CPLR § 214(5) with CPLR § 215(3).

30/ Compare Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), cert. denied, 476 U.S. 1174 (1986); Gates v. Sphinx, 771 F.2d 916 (5th Cir. 1985), cert. denied, 475 U.S. 1065 (1986); Jones v. Preuit and Mauldin, 763 F.2d 1250 (11th Cir. 1985), cert. denied, 474 U.S. 1105 with Okure v. Owens, 816 F.2d 45 (2d Cir. 1987) aff'd, 57 U.S.L.W. 4065 (1989); Small v. Inhabitants of City of Belfast, 796 F.2d 544 (1st Cir. 1986).

31/ 57 U.S.L.W. 4065 (January 10, 1989).

32/ Id. at 4067.

33/ Compare Louisiana Rev. Civ. Code 3492-3 (1 year) with North Dakota Century Code 28-01-16 (6 years).

34/ 446 U.S. 478 (1980).

35/ 421 U.S. 454 (1975).

36/ This position was again reaffirmed in Wilson v. Garcia, where the Court held that "the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." 471 U.S. at 269.

37/ Some of these rules are codified in CPLR §§ 201-210.

38/ 446 U.S. 740 (1980).

39/ 481 U.S. ____, 95 L.Ed.2d 32 (1987).

40/ Owens v. Okure, 57 U.S.L.W. at 4066.

41/ 29 U.S.C. § 185.

42/ 371 U.S. 195, 201 (1962).

43/ 383 U.S. 696, 699-700 (1966).

44/ Hines v. Anchor Motor Freight, 424 U.S. 554, 569, 570 (1976); Vaca v. Sipes, 386 U.S. 171, 186 (1967).

45/ 383 U.S. 696 (1966).

46/ Id. at 703-704.

47/ Id. at 707.

48/ 451 U.S. 56 (1981).

49/ Id. at 62.

50/ 462 U.S. 151 (1983).

51/ Id. at 158.

52/ Id. at 171-72.

53/ 29 U.S.C. § 412.

54/ 29 U.S.C. § 411.

55/ Local Union 1397 v. United Steel Workers of America, 748 F.2d 180 (3d Cir. 1984); Vallone v. Local Union No. 705, 755 F.2d 520 (7th Cir. 1985); Davis v. United Automobile, Aerospace and Agriculture Implement Workers of America, 765 F.2d 1510 (11th Cir. 1985); cert. denied, 475 U.S. 1057 (1986); Reed v. United Transportation Union, 828 F.2d 1066 (4th Cir. 1987).

56/ Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986); Rodonich v. House Wreckers Union Local 95, 817 F.2d 967 (2d Cir. 1987).

57/ 57 U.S.L.W. 4088, 4090 (January 11, 1989).

58/ 57 U.S.L.W. at 4092.

59/ 57 U.S.L.W. at 4092 n. 6.

60/ See e.g., Board of Regents v. Tomanio, 446 U.S. 478 (1980); Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

61/ See e.g. Cope v. Anderson, 331 U.S. 461 (1947); Rawlings v. Ray, 312 U.S. 96 (1941); Schreiber v. Sharpless, 110 U.S. 76 (1884); Special Project, supra note 3, at 1092-93.

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May 31, 1989

The Work of the Federal Courts in Resolving Science-Based Disputes: Suggested Agenda for Improvement[1]

This memorandum on improving the federal courts' use of science information in decisionmaking presents the views of a working group of the Carnegie Commission on Science, Technology, and Government. The purpose of the memorandum is to aid the Cabranes subcommittee's discussions of this subject at its meeting on June 4-5, 1989. The observations and issues set out here are drawn mainly from a preliminary statement of issues prepared under the auspices of the Carnegie Commission dated April 6, 1989; and a memorandum prepared by Professor E. Donald Elliott dated April 20, 1989. Both have been made available to the members of the Cabranes subcommittee.

The Nature and Extent of the Problem

It is widely acknowledged that the pace of scientific and technological development has increased dramatically. More and more, scientific and technological change has carried over into the courtroom where judicial decisionmakers are forced to confront issues of growing scientific complexity. Familiar examples are the epidemiological studies bearing on the effects of toxic chemicals in the air, ground and water; the noxious properties of a lengthening list of products such as Agent Orange, asbestos, DES, benedectin, urea-formaldehyde foam insulation, and the IUD. In the criminal law field, examples include the use of ballistics science, chemical tests for blood alcohol level or the presence of narcotics, and more recently, DNA footprinting. The results of social science research are increasingly placed in evidence with regard to specific disputes or with regard to broad controversies such as whether the death penalty is applied in a racially discriminatory way. Similarly, concepts of risk assessment are intruding into judicial and regulatory decisionmaking.

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[1]Submitted to the FCSC Subcommittee on Workload on behalf of the Carnegie Commission on Science, Technology, and Government.

In view of the importance of science-based decisionmaking for American society, it is imperative that the courts achieve the highest feasible level of understanding and competence in dealing with scientific issues.

The reasons for the courts' deficiencies in these matters are well recognized. Most judges and jurors have not had sufficient training or practice to deal confidently with sophisticated materials from the realm of science. They require outside help. The main instrument for helping them has been the expert witness, nearly always a person who is hired by one side of the dispute or the other. However, instead of clarifying or illuminating the scientific aspects, each partisan expert attempts to persuade the decisionmaker that its side should prevail.

The consequences of partisan experts' performances are often frustrating confusion for judges and juries and mistrust of the experts themselves. Instead of being enlightened, the decision-makers often are more baffled than they were before the experts testified.

For their part, many leading scientists refuse to go to court as "hired gun" expert witnesses. They are dissuaded by the adversarial environment and are reluctant to submit to cross-examination that challenges their competence, integrity and veracity, rather than scientific merit.

The alternatives available to the courts to avoid relying on party-hired experts have not been effective. For example, even though the rules of evidence permit the district courts to appoint neutral experts, for unclear reasons federal judges rarely make use of this power. Even less frequently do they use panels of court-appointed scientists. Whether this is because of their inability to find qualified experts, out of fear that the neutrals' testimony will be given too much weight, or for other reasons, this alternative is greatly underused.

Another neutral source of information is the scientific literature. Here the obstacles are, first, in gaining access to the relevant materials and, second, in assuring that the

materials selected are reliable. Especially in appellate courts, the judges have felt free to take "judicial notice" of scientific studies even though these have not been introduced into the record made at the trial and have not been called to the notice of the attorneys so that they can be subjected to testing by the adversary process.

The courts' deficiencies in these respects need correction or amelioration. The keys to this are to improve the flow of information, to enhance the judges' ability to deal with scientific materials, and to reform certain procedures. All these steps must be taken without compromising the positive features of the adversary process. That is one complicating aspect of the problem. Another is that there are no panaceas: different types of issues raise different types of problems and call for varying responses.

As a first step, the FCSC could consider commissioning a report on the types of scientific issues presented to the courts, their frequency, and the problems of workload they represent.

Some of the other needs and issues suggested for consideration by the FCSC are these:

Science and the Courtroom

(1) The adversary process, despite faults and excesses, advances values that are widely regarded as essential to the American systems of justice. Among these are the party's active participation in the processing of the suit and the lawyer's zealous advocacy of the client's case. Some observers believe that the extensive use of court-appointed science experts or panels and the appointment of science advisors as court attaches may tend to compromise the adversary process.[2]

Despite the potential conflict, there are grounds for believing that an FCSC-sponsored analysis could identify improved procedures for the handling of scientific evidence in the courtroom without

[2]For the views of Prof. Maurice Rosenberg, see the attached memorandum entitled, "The Adversary Process and Scientific Truth."

jeopardizing the integrity of the adversary system. In addition the FCSC could undertake an evaluation of the pros and cons of using panels of court-appointed experts ("Science Panels"), science masters, and the like, in various types of cases.

(2) Issues regarding theories, findings and methods of the social sciences are commonly presented to the courts. Usually, they are more personal to the litigants and less concerned with broad scientific principles than many of the natural science issues. At times, the decision on a social science issue leads to important changes in the law -- including constitutional law. The "doll test" research referred to in the landmark school desegregation case is a vivid though much criticized example. Essential social science materials are often neglected by the litigants, requiring the court to become aware of materials by going outside the record and taking judicial notice of the literature.

The FCSC could develop a set of procedures to enhance the fairness and accuracy of judicial notice of scientific information and materials, especially by appellate courts. A resource center might be created to advise on the methodological adequacy of relevant scientific studies.

(3) Given the strong arguments against undue reliance on party-hired experts, alternative mechanisms for the identification of court-appointed experts may be needed. Furthermore, there is need to consider modification of procedures for cross-examination of expert witnesses to encourage testimony by outstanding scientists.

The FCSC may want to arrange for preparation of a set of model procedures to govern the nomination, designation, utilization and compensation of court-appointed science experts.

(4) Perhaps the Alternative Dispute Resolution movement offers a potential for improving science-based decisionmaking. While we would not expect an "alternative" tribunal to make the ultimate decision, it might undertake and report preliminary determinations to the traditional courts.

The FCSC might want to commission the preparation of a set of procedures to govern the use of ADRs for science issues.

(5) Disputes involving sophisticated science-based issues often require special tracking and treatment. Judges might benefit from a specially prepared volume addressed to the practical aspects of pretrial management and trial of a case turning on complex scientific material.

The FCSC may wish to arrange for preparation and distribution to federal judges of a "Manual and Guidelines for Resolving Science Issues".

Judicial Education

(6) Enhancing the judges' ability to identify, understand, assess and apply science materials can be done in various ways. One method is by general orientation offerings in judicial education programs. Another is by *ad hoc* programs on the eve of trial of a case that involves science issues. A corollary need is to improve the capability of judicial clerks in the same respect as the judges. To that end, consideration should be given to setting up a pilot program for teaching science concepts, theories and methods to law graduates who are about to assume duties as judicial clerks. Training in risk assessment should also be offered.

The FCSC may wish to arrange for a systematic evaluation to determine the best methods of improving the ability of the judges (and their law clerks) to handle scientific materials in the courtroom.

The Carnegie Commission stands ready to assist the subcommittee and the FCSC in responding to the challenge of issues such as the ones identified above.

May 26, 1989

The Adversary Process and Scientific Truth[1]

In contrast to courts in France, Germany, Italy, Japan and other civil law countries, where the judges take the lead in developing the facts of the case, American courts do not have that responsibility. This has been termed (correctly, I believe) the greatest difference between the role of judges in the civil law and common law systems. In American courts it is the job of the lawyers, and also their prerogative, to develop the evidence in the case. This is a key feature of the adversary process, one highly valued on the ground that justice is promoted when each side to a legal dispute does its best to produce the strongest evidence and arguments. As we know, this idea comes under vigorous attack from many observers for going too far in encouraging partisan behavior.

Nevertheless, in dealing with scientific evidence, as with any other, the courts must be careful to stay within the bounds the adversary process prescribes. Even when scientific truth is being sought, the courts are not free to investigate the disputed facts on their own, for example, by sending to the library for relevant materials that were not offered in evidence and are therefore not in the record.

The tradition and the rules severely restrain the judges from investigating factual matters on their own. The development of evidence by the parties' efforts is looked upon as providing the best source of what the court knows. The judges and juries do the best they can with evidence presented by adversaries. They do not worry that some evidence is missing. It is thought that if the judges go outside the record, the adversary process will be undermined.

A good example of the strength of the adversary philosophy is its defeat of an idea that flourished a generation ago in an effort to soften excessive adversarialism by partisan experts.

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[1]Submitted by Maurice Rosenberg, Professor of Law, Columbia University School of Law; consultant to the Carnegie Commission on Science, Technology, and Government.

Early in the 1960's, the judiciary in several jurisdictions tried to remedy the difficulties caused by partisan experts' testimony in personal injury lawsuits by creating "impartial medical panels." In Pittsburgh and New York the courts appointed well-known doctors (from lists prepared by local medical societies) as neutral advisers to the judge and jury. The neutral was to diagnose, evaluate and explain the medical evidence whenever the parties' doctors disagreed about what the evidence proved. After a flurry of interest lasting a few years, the impartial panel idea fell into disuse. Many members of the bar were against the panel plan, apparently because they believed the judge's and the panel's influence over the disputed issues frustrated the working of the adversary process.

In more recent times, various proposals to provide appellate courts with scientific experts as staff aides have not been well received, despite the fact that "technical advisors" are firmly established and well accepted in the Court of Appeals for the Federal Circuit. The advisors in that court are trained in law and also hold advanced degrees in a scientific or technical specialty such as physics, chemistry or engineering. They assist the judges in patent cases and other lawsuits that turn on scientific proof. A major reason the technical advisor model has not been accepted for other courts is that the legal profession is generally wary of allowing in-court experts to speak inaudibly and anonymously to the judges in ways that may determine the results of sharply contested cases.

A better solution to the problems of unbridled and unhelpful partisanship may be to adapt the practice employed in voluntary arbitrations to the process of resolving science issues. The National Academy of Sciences or a similarly respected professional group might create panels of outstanding scientists who have not taken partisan positions on important scientific issues before the courts. When an issue arises in a lawsuit, the court would have authority under the rules to require the parties to agree to the appointment of one or more experts from the designated list of experts in the relevant specialty. The selection procedure would resemble the practice followed in selecting arbitrators: each side would have the right to strike names off the list until one or more names remained. In the federal courts, authority for this procedure may already exist in the rule providing for pretrial conferences.

[E.D. Elliott revision, 4-20-89]

Issues of Science and Technology Facing the Federal Courts

by E. Donald Elliott[1]

This is a revised version of the rough draft, prepared by Prof. E. Donald Elliott of the Yale Law School, of the issue paper entitled "Preliminary Analysis of Issues of Science and Technology Facing the Federal Courts" that the Carnegie Commission on Science, Technology and Government submitted to the Federal Courts Study Committee on April 6, 1989. None of the statements in this draft should be attributed to the Carnegie Commission, which has not endorsed them; the statements made here represent the views of the author and the author alone. They are submitted to the Federal Courts Study Committee for its consideration, but they should not be construed as representing the views or positions of any organization or group.

I. The Role of the Federal Courts Study Committee.

The Federal Courts Study Committee can play an important role both in facilitating better handling of issues of science and technology by the federal judiciary, and also in improving

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cooperation between the national scientific community and the judiciary more generally.

The author understands the mandate of the Federal Courts Study Committee is "to examine problems facing the Federal courts and develop a long-range plan for the future of Federal Judiciary."[2] The author believes that scientific and technical issues already constitute an important problem area facing the federal courts, and that the importance of these issues will only increase in the future as scientific and technical information grows and the law struggles to regulate increasing technical subjects.

Therefore, the author respectfully suggests that the "long-range plan for the future of the Federal Judiciary," which is to be developed by the Federal Courts Study Committee, should address the special difficulties that face "scientifically-illiterate judges" when they are called upon to adjudicate controversies that raise issues "on the frontiers of science and technology."[3]

In what follows, the author will briefly outline the importance of issues of science and technology in the federal courts, and its reasons for believing that scientific and technical controversies will become even more important in the future. Next, the paper identifies several major problem areas

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[2] Administrative Office of the U.S. Courts, "Federal Courts Study Committee Formed" (Press Release) December 22, 1988 p. 2.

[3] See Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir.) (Bazelon, J., concurring), cert. denied, 426 U.S. 941 (1976).

involving scientific and technical issues and the techniques that have been suggested in the literature, or utilized by individual judges on an experimental basis, to improve the ability of the courts to handle scientific and technical issues. In the final section, the author identifies several specific recommendations that it believes warrant further study by the Federal Courts Study Committee.

II. The Importance of Scientific and Technical Controversies.

"Scientific and technical controversies" are not confined to a discrete category of the workload of the federal courts; they arise in every area of the federal courts' business when courts are called upon to assess the significance of scientific and technical information.

The key factor that defines a "scientific and technical controversy" is not particular types of cases, but the presence of information developed using specialized methods and techniques. People who are lack relevant background and training have difficulty evaluating the significance of such information. For example, scientific and technical issues of epidemiology and toxicology may arise in mass tort cases, where parties debate the effects of chemicals or pharmaceuticals on health; issues of geochemistry and ecology may arise under federal statutes, such as the National Environmental Policy Act; issues of brain physiology may arise in ordinary criminal cases, where defendants raise issues involving organic brain damage, or pre-menstrual stress syndrome, or voiceprint evidence; or complex issues of

organic chemistry may arise even in a simple contract case, involving the ownership of chemical formulas, or other "high tech" subject matter.

Available data shows that scientific and technical evidence is presented in a surprisingly large percentage of court cases. One study of 5,550 judges and lawyers found that 23 percent of those responding encountered scientific evidence in at least half of their criminal cases; 24 percent believed that in at least half of the cases in which it was not used it could have been; and 86 percent said that they would like to see such evidence used more frequently.[4] Other studies present a comparable picture. Over twenty years ago, Kalven and Zeisel's study of over 3,000 jury trials found that the prosecution introduced at least one expert witness in 25 percent of criminal cases.[5]

Better data is definitely needed about the frequency of use of scientific and technical evidence in the courts,[6] but the limited data available suggest that scientific and technical issues arise in a substantial fraction (i.e. an estimated 20-30%) of cases today.

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[4] Schroeder (undated), cited M. SAKS & R. VAN DUIZEND, THE USE OF SCIENTIFIC AND TECHNOLOGICAL EVIDENCE IN LITIGATION 7 (Nat. Center for State Courts, 1983).

[5] This and other studies regarding the use of scientific and technical evidence are reviewed in Vidmar, Assessing the Impact of Statistical Evidence, A Social Science Perspective in THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 279, 280-81 (S. Fienberg, ed, 1989).

[6] Vidmar, supra note 6, correctly characterizes the existing body of empirical knowledge about the use of technical evidence in the courts as "meagre."

There are strong reasons to believe that the frequency with which scientific and technical data are encountered in litigation will increase in the years ahead. Scientific and technical knowledge is increasing exponentially, and computers and computerized databases have made this data increasingly accessible. In addition, at least some observers believe that the workload of the federal courts is changing to encompass more "public law cases" involving regulation of complex systems, to which scientific and technical data is especially relevant, rather than merely transactions between private parties which can be determined based on historical facts as in the past.[7]

It cannot safely be taken for granted that the general educational system in the United States is adequate to prepare judges and lawyers, as well as lay jurors, to be sufficiently literate in science that they can evaluate the scientific and technical evidence that already constitutes a substantial percentage of what is presented in federal courts, and which is likely to increase in the future.

Scientific and technical controversies are already a striking exception to the generally positive reputation for competence enjoyed by the federal courts. Commentators who have studied the courts' performance in scientific and technical controversies are, without exception, highly critical of the "institutional competence" of courts in scientific and technical

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[7] See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

areas.[8] Stripped of euphemism, there is already a strong consensus among commentators that courts are seriously hampered in scientific and technical controversies by their inability to understand the true implications of the evidence before them.

Some of the judges with the most experience in scientific and technical controversies agree that courts are in serious trouble in these areas. For example, the trial judge in the Agent Orange litigation, Jack B. Weinstein, recently suggested that science-based compensation controversies do not belong in

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[8] THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 74 (S. Fienberg, ed, 1989)("The case studies reveal that in dealing with statistical evidence courts can face substantial problems of institutional competence."); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, BOSTON U. L. REV. (1989) (forthcoming); Abraham & Merrill, Scientific Uncertainty and the Courts, 2 ISSUES IN SCI. & TECHNOLOGY 93 (Winter 1986); Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM. L. REV. 277 (1985); Ashford, Ryan & Caldart, Law and Science Policy in Federal Regulation of Formaldehyde, 222 SCIENCE 894 (Nov. 25, 1983); Yellin, High Technology and the Courts: Nuclear Power and the Need for Institutional Reform, 94 HARV. L. REV. 489 (1981); Jasanoff & Nelkin, Science, Technology, and the Limits of Judicial Competence, 214 SCIENCE 1211 (1981); Tribe, Trial By Mathematics: Precision and Ritual in the Legal Process, 84 HARV. L. REV. 1329 (1971); Korn, Law, Fact, and Science in the Courts, 66 COLUMBIA L. REV. 1080 (1966).

the courts.[9] Other judges, however, perceive themselves as handling technical controversies well.

A possible explanation for the disparity is that judges often do not know what they do not know. By definition, scientific and technical knowledge is counter-intuitive. It is a kind of knowledge that is not apparent to the ordinary observer, but only becomes known through specialized methods and techniques. That is what distinguishes empirical science, from Francis Bacon to the present, from speculative metaphysics as practiced by the ancient Greeks.

Many judges fail to appreciate the differences between their ability as intelligent generalists to evaluate science and the other types of evidence. As a result, courts often mangle scientific and technical evidence by applying the same type of common sense and reasoning that serves them well in other areas. One concrete illustration is the Gulf South Insulation case,[10] in which the court rejected a body of scientific evidence that formaldehyde causes cancer by applying good common sense. As has

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[9] Judge Weinstein's view that science-based compensation issues are best handled by institutions other than courts is stated in Institute for Health Policy Analysis, Final Report Conference on Science in the Courtroom: The Use of Science and the Handling of Causation in Cases Involving Personal Injury From Toxic Substances and Medical Malpractice 26 (undated draft). See also Bazelon, Coping with Technology through the Legal Process, 62 CORNELL L. REV. 817 (1977).

[10] Gulf South Insulation v. CPSC, 701 F.2d 1137 (5th Cir. 1983).

been shown in a detailed criticism of the decision,[11] however, a lay persons' common sense often contradicts established scientific principles.

For example, the Gulf South Insulation court dismissed most of the scientific studies as irrelevant because they involved cancers at various locations in animals rather than nasal cancer, which the court took to be the primary concern in humans. Although this judgment about relevance is hard to resist as a matter of ordinary logic -- after all, everyday language teaches that nasal cancer is one "thing," and other cancers are "something else" -- the court's distinction is nonsense scientifically. There is a consensus among scientists that, due to biological differences between animals and humans, a carcinogen does not necessarily cause cancer at exactly the same site in humans as in animals. The Gulf South Insulation court may have blundered into a wise result, but there is no question that it seriously misapprehended the significance of the scientific evidence before it.

The verdict is essentially the same in every serious case study of judicial decisionmaking in scientific and technical controversies.[12] Although judges may perceive themselves as applying sound common sense and reasoning, they often

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[11] Ashford, Ryan & Caldart, Law and Science Policy in Federal Regulation of Formaldehyde, 222 Science 894 (Nov. 25, 1983).

[12] For examples, see the numerous studies cited, supra note 7.

misunderstand the nature and significance of the scientific and technical evidence before them. This is a serious problem today, when scientific and technical evidence is introduced in many important controversies before the courts, and if left unaddressed, the problem will almost certainly worsen in the years ahead. The stakes involved in judicial resolution of scientific and technical controversies, are enormous, both economically and socially.

III. Recommendations for Areas of Further Study.

The essential difficulty in scientific and technical controversies is that lay judges and juries lack sufficient background and training to evaluate the evidence presented to them. The measures that have been suggested for dealing with this difficulty may be thought of as arrayed along a spectrum of increasingly strong measures for up-grading the scientific and technical sophistication of decisionmakers. At the most modest end of the spectrum are proposed reforms of procedures for presenting scientific and technical evidence in court. Those who advocate such procedural reforms believe that it is possible to educate judges and juries sufficiently within the context of a single case. At an intermediate point on the spectrum are proposals for up-grading judicial sophistication in dealing with scientific and technical matters through judicial education, science advisers to the courts and "hybrid" procedures in which scientific judgments by other bodies are given prima facie weight in court. At the extreme end of the spectrum are proposals for

replacing court jurisdiction with specialized tribunals or "science courts."

A. Procedural Reforms.

1. Court Appointed Expert Witnesses.

The present system for presenting scientific and technical evidence in trial courts relies primarily on expert witnesses selected and paid for by adversary parties. Some observers believe that experts hand-picked for their partisanship may sometimes mislead untrained judges and juries. Judge Weinstein recently summed up the problem of experts-for-hire as follows:[13]

> ... an expert can be found to testify to the truth of almost any factual theory, no matter how frivolous, thus validating the case sufficiently to avoid summary judgment and forcing the matter to trial. At the trial itself, an expert's testimony can be used to obfuscate what would otherwise be a simple case. ... Juries and judges can be, and sometimes are, misled by such experts-for-hire.

Many federal judges share Judge Weinstein's concern. In a Harris survey of 200 federal judges conducted in late 1987, 45 percent said there were "a lot of problems" or "some problems" with "qualification and inappropriate use of expert witnesses" in their jurisdiction.[14]

Commentators, extending as far back as Learned Hand in

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[13] J. Weinstein, Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation, Address Before the ABA Annual Meeting, August 9, 1987 at p. 12.

[14] Louis Harris & Assoc., Judge's Opinions on Procedural Issues p. 45, Table 6.1 (Study No. 874017)(Oct.-Dec., 1987).

1901,[15] have suggested that neutral, court-appointed experts (either alone or in combination with the parties' experts) could do a better job than partisan experts alone of assuring that the judge and jury correctly perceive the distribution of scientific opinion.[16] Trial judges also agree that court-appointed experts should be used more frequently. In the 1987 Harris poll, 76 percent of federal judges said they favored the use of independent expert witnesses in cases "involving technical or scientific issues," while only 20 percent opposed them.[17]

Although federal judges overwhelmingly support court-appointed experts in theory, very few have actually utilized them in practice. An on-going and still incomplete study of court-appointed experts by the Federal Judicial Center indicates that fewer than 20% of federal judges have ever appointed an independent expert witness, and that only a dozen judges in the entire federal judiciary have done so in more than 5 cases.

The power of federal judges to appoint independent expert witnesses to testify is undisputed.[18] Discussions among judges,

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[15] Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 HARV. L. REV. 40 (1901).

[16] See, e.g. Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, BOSTON U. L. REV. (1989) (forthcoming); Langbein, The German Advantage in Civil Procedure, 52 U.CHI.L.REV. 823 (1985); Frankel, The Search for Truth, An Umpireal View, 123 U.PA. L.REV. 1031 (1975).

[17] Louis Harris & Assoc., Judge's Opinions on Procedural Issues p. 53, Table 6.8 (Study No. 874017)(Oct.-Dec., 1987).

[18] Fed. R. Evid. 706; T. Willging, Court-Appointed Experts 1 (Fed. Jud. Ctr., 1986).

lawyers and scientists at a recent conference suggest that three kinds of concerns have impeded judges from utilizing court-appointed expert witnesses as frequently in practice as they have said that they would like to use them in theory:[19]

(1) Payment problems;

(2) Selection problems; and

(3) Concern that a court-appointed expert's testimony may be too influential with the jury.

The author suggests that the Federal Courts Study Committee should investigate possible means to improve the utilization of court-appointed experts in each of these areas.

1. Advancing Payment for Court-Appointed Experts.

Under the Federal Rules of Evidence, except in criminal and condemnation cases, compensation for court-appointed experts shall be "paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs."[20] Some cases have held that this language gives judges discretion to require one party (or both) to advance fees and expenses for a court-appointed expert.[21] However, many judges are uncomfortable doing so, and concerns about how to compensate court-appointed experts, and the long delays that may

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[19] National Workshop on Improving Procedures for Scientific Evidence in Toxic Tort Cases: A Discussion Among Scientists, Judges and Lawyers, Washington, D.C., March 17-18, 1989.

[20] Fed. R. Evid. 706(b).

[21] U.S. Marshall Serv. v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984)(en banc). Contra Cagle v. Cox, 87 F.R.D. 467, 468 (E.D. Va. 1980).

occur before their fees are taxed as costs, inhibit some judges from appointing independent experts.[22]

The author recommends that the Federal Courts Study Committee consider whether mechanisms should be adopted to facilitate early payment of fees of court-appointed experts, such as through a revolving fund to advance fees. The fund could later be reimbursed from taxable costs or other fees.

2. Selection Procedures for Court-Appointed Experts.

In practice, most courts rely on the parties to identify and agree on the expert to be appointed by the court.[23] This procedure does not necessarily guarantee a well-qualified neutral expert, however, so much as an expert that both parties predict may support their position. Nonetheless, many trial judges feel compelled to rely on the parties to identify neutral experts because they do not feel that they as judges can easily identify appropriately-qualified experts in fields with which they are not familiar.[24] Moreover, judges frequently express concern that the expert that they appoint may, unbeknownst to them, have

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[22] 3 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE AT 706-11 TO -12 (1976); T. Willging, Court-Appointed Experts 14 (Fed. Jud. Ctr., 1986); National Workshop on Improving Procedures for Scientific Evidence in Toxic Tort Cases: A Discussion Among Scientists, Judges and Lawyers, Washington, D.C., March 17-18, 1989.

[23] T. Willging, Court-Appointed Experts 6-7 (Fed. Jud. Ctr., 1986).

[24] National Workshop on Improving Procedures for Scientific Evidence in Toxic Tort Cases: A Discussion Among Scientists, Judges and Lawyers, Washington, D.C., March 17-18, 1989; T. Brennan, Helping Courts With Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts (unpublished manuscript).

professional commitments and biases that may unduly influence the outcome of litigation.[25]

A number of commentators have suggested that academic and professional societies could be asked to maintain lists of well-qualified neutral experts.[26] This procedure might have the additional side-benefit of introducing a modest element of "peer review" into the testimony offered by experts. In addition, a substantial number of scientists indicate that they are willing to testify if contacted by the court, but not at the behest of private litigants.[27]

Recently, some professional societies have indicated a willingness to compile lists of well-qualified persons willing to testify if requested by the judiciary.[28] At present, however, no

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[25] Berry, Impartial Medical Testimony, 32 F.R.D. 481, 539-46 (1962).

[26] C. MCCORMICK, EVIDENCE 43-44 (E. Cleary 3rd ed. 1984) (recommending "establishing panels of impartial experts designated by groups in the appropriate fields, from which panel court-appointed experts would be selected"); Manual for Complex Litigation Second Sec. 21.51 (1985); Langbein, The German Advantage in Civil Procedure, 52 U.CHI.L.REV. 823 (1985); Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 HARV. L. REV. 40 (1901).

[27] National Workshop on Improving Procedures for Scientific Evidence in Toxic Tort Cases: A Discussion Among Scientists, Judges and Lawyers, Washington, D.C., March 17-18, 1989.

[28] National Workshop on Improving Procedures for Scientific Evidence in Toxic Tort Cases: A Discussion Among Scientists, Judges and Lawyers, Washington, D.C., March 17-18, 1989 (statement of Dr. Moyses Szklo, President, Society for Epidemiologic Research). At the same conference, Jim Wright, General Counsel of the National Academy of Sciences, offered his good offices in identifying appropriate professional groups and organizing such an effort.

mechanism exists for requesting professional societies to compile such lists and no means are available to make the information readily available to trial courts.

The author suggests that the Federal Courts Study Committee investigate possible mechanisms to make lists of respected, relatively-unbiased experts in various fields willing to serve as court-appointed witnesses available to trial judges.

3. Effect of Court-Appointed Experts on Outcomes.

Some trial judges are reluctant to appoint neutral experts because they fear that an expert testifying with the imprimatur of the court will have undue influence on the jury.[29] Some trial judges report that to ameliorate this problem, they do not disclose to the jury that an expert has been appointed by the court in an attempt to reduce the risk that the jury will perceive the court as endorsing his or her conclusions.

There is little empirical evidence to either confirm or deny the hypothesis that court-appointed experts have undue influence on juries.[30] It is methodologically difficult, moreover, to

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[29] National Workshop on Improving Procedures for Scientific Evidence in Toxic Tort Cases: A Discussion Among Scientists, Judges and Lawyers, Washington, D.C., March 17-18, 1989 (statement of Judge Thomas Penfield Jackson); Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, BOSTON U. L. REV. (1989) (forthcoming); T. Brennan, Helping Courts With Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts 15 (unpublished manuscript).

[30] Compare Levy, Impartial Medical Testimony, 34 TEMPLE L. Q. 416, 424-27 (1961)(some judges perceived impartial witnesses as overly influential with juries) with Van Dusen, A United States District Judge's Views of the Impartial Medical Expert System, 32 F.R.D. 481, 498 (1962)(study of 19 cases showing only

define an appropriate baseline for how much influence a neutral expert "should" have on a jury. The on-going study by the Federal Judicial Center of practices in the federal judiciary regarding court-appointed experts includes two questions concerning the effect of court-appointed experts' testimony. In view of the small base of experience with court-appointed experts to date, it seems unlikely that this study will definitively answer the question whether court-appointed experts have undue influence with juries. In addition, an important subject that has received no study to date is whether the practice of appointing neutral experts may induce adversaries to evaluate their positions more realistically, thereby increasing settlements.

The author recommends that the Federal Courts Study Committee study whether further research is necessary and feasible regarding the effect of testimony by court-appointed experts on jury verdicts and settlements.

2. Science Panels.

The perception that on many controversial issues scientific opinion is not uniform, and that courts should therefore refrain from appearing to endorse any of the contending views by

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modest effect of court-appointed witness, with whom jury agreed in 63% of cases). See also Imwinkelried, The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology, 28 VILL.L.REV. 554, 566 (1982-83)("[T]here is little or no objective support for the assertion [that jurors attach too much weight to scientific evidence] and ... almost all the available data points to the contrary conclusion.").

appointing a single expert witness, has led to the suggestion that instead courts should appoint panels of scientists to give the jury a more accurate picture of the range and distribution of scientific opinion.[31]

The author believes that it is essential not to confuse contemporary suggestions for science panels to aid courts in understanding complex scientific and technical issues with the suggestion, which was made and rejected in the 1970's, for "science courts."[32] In the "science court" proposal, scientifically-trained persons purported to make the final decisions on behalf of society. Numerous critiques of the "science court" idea have correctly pointed out that scientific training provides no special mandate to make political decisions about competing values that lie at the core of most public policy controversies, including those with a strong component of scientific or technical fact. Unlike the science court idea, however, the science panel leaves lay, political decisionmakers

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[31] Cf. Kaysen, An Economist as the Judge's Law Clerk in Sherman Act Cases, 12 ABA ANTITRUST RPT. 43, 46-47 (1958) ("There is also the possibility that the view of any single man [sic] may suffer from unconscious biases and prejudices and that a panel of two or three economists might do better ...."). See also Science Panel: Cause/Effect Relationships in Health Risk Cases, 22 JURIMETRICS 378 (1981).

[32] Martin, The Proposed "Science" Court, 75 MICH. L. REV. 1058 (1977).

In the view of the current author, the fundamental differences between the two approaches may not be identified with sufficient clarity in the Carnegie Commission's "Prelimnary Analysis," April 6, 1989 at p. 6.

in firm control of the final decisions, including the weighing of competing values. The role of the science panel is not to make the final decision on behalf of society, but to enhance the factual information available to enable the decisionmaker to perceive correctly what issues of values are presented to be decided.[33]

Science panels are commonly used in the administrative process,[34] where they are usually called "scientific advisory committees." Generally speaking, administrative science panels have been reasonably successful. A study by University of Connecticut Professor Peter Barth of medical advisory panels in worker's compensation claims found, for example, "a high degree of satisfaction" with such panels from all concerned in states where they are active.[35]

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[33] See Elliott, The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems, 25 HOUSTON L. REV. 781, 782-83 (July, 1988)("But the fact that experts should not dictate decisions of these issues to the rest of society does not imply, as many seem to think, that only policy or value decisions matter and that science is irrelevant or unimportant. The fact that juries are deciding fundamental issues of public morality in toxic tort cases is a compelling argument in favor of making sure that their verdicts are based on "good science," not an argument against it. Getting the science right is necessary to frame the issues of value for juries to decide, just as good science is necessary to frame the policy issues for political decisions in the regulatory process.")

[34] See, e.g. Shapiro, Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA Board of Public Inquiry, 1986 DUKE L. J. 288.

[35] P. BARTH, RESOLVING OCCUPATIONAL DISEASE CLAIMS: THE USE OF MEDICAL PANELS Executive Summary 7 (Workers Compensation Research Institute, 1985).

The American Bar Association Mass Torts Commission is currently considering a recommendation for the use of science panels in complex mass tort cases. Such panels could either be used to assist the judge in pre-trial management (including on the issue of whether expert opinions have sufficient scientific support to preclude summary judgment[36]), or the panel's conclusions could be introduced before the jury.

Some courts believe that the use of the plural term "expert witnesses" in Rule 706 already authorizes them to appoint panels of experts.[37] Several practical problems inhibit successful use of science panels, however. Science panels are relatively expensive, and they are only likely to be cost-effective if a large number of pending cases can be consolidated for resolution in a single proceeding. The Bendectin litigation, in which several large verdicts have been rendered for plaintiffs in state cases despite a verdict for the defense in the consolidated federal action,[38] illustrates the difficulty of achieving true consolidation under the current statutes. Effective use of science panels may require amending the statutes relating to

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[36] See generally Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir., 1988); In re Agent Orange Prod. Liab. Lit. (Opt Out), 611 F. Supp. 1223 (EDNY 1985), aff'd on other grounds, 818 F.2d 145 (2d Cir. 1987).

[37] Gates v. U.S. 707 F.2d 1141, 1144 (10th Cir. 1983); T. Willging, Court-Appointed Experts 6 & cases cited n.22 (Fed. Jud. Ctr., 1986).

[38] For an overview of the status of the Bendectin litigation, see 3 INSIDE LITIGATION 46-47 (Jan., 1989).

Multidistrict Litigation to permit pending state cases raising the same or similar causation issues to be consolidated in federal court in matters affecting interstate commerce. In addition, a number of procedural issues surround the use of science panels, such as whether each member of the panel would be subject to cross-examination individually, or whether the group would be permitted to present its conclusions through a single representative.

The author suggests that the Federal Courts Study Committee should examine the use of science panels, and other Alternative Dispute Resolution (ADR) techniques to promote more effective resolution of scientific and technical issues in the courts.

3. Manual for Scientific and Technical Controversies.

At present, no mechanism more systematic than publication in law reviews exists for communicating among judges the successful experience gained by their colleagues in developing improved techniques for handling scientific and technical controversies. Since not all judges confront difficult problems of scientific and technical evidence on a routine basis, it may be desirable to develop a reference source, rather than to attempt to train all judges in techniques that some of them may not have occasion to use frequently. Recommending the creation of a compendium like the Manual for Complex Litigation, or perhaps separate sections in the Manual itself, dealing with techniques for handling scientific and technical matters, should be considered by the Federal Courts Study Committee.

B. Increasing Technical Sophistication of Decisionmakers.

Reforms that go beyond increasing the effectiveness of procedures for presenting scientific and technical evidence in court generally focus or various means to increase the scientific and technical sophistication of the decisionmaker. Devices that have been suggested range from providing judges with scientific and technical advisers or aides,[39] to projects to educate judges and lawyers in rudimentary scientific principles,[40] to specialized tribunals or "science courts."[41]

Underlying all these proposals is a basic tension between issues of fact, on which the opinions of experts may deserve special weight, and judgments of value, on which they do not. One wise observer has pointed out that because scientific controversies inevitably involve combinations of technical and political issues, they are difficult to resolve within any single institutional framework; changes that increase scientific expertise often decrease political legitimacy, and vice versa.[42]

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[39] Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. PA. L. REV. 509, 546 (1974).

[40] The Institute for Health Policy Analysis, Georgetown University Medical Center, is currently developing a judicial education program that would introduce judges to basic scientific concepts and principles of epidemiology and toxicology.

[41] Martin, The Proposed "Science" Court, 75 MICH. L. REV. 1058 (1977).

[42] Boyer, Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic or Social Issues, 71 MICHIGAN L. REV. 111 (1972).

This has led some to propose increased reliance on "hybrid" procedural mechanisms in which determinations by other specialized scientific institutions are given prima facie weight in court, but the judiciary does not abdicate its authority over the ultimate resolution of the controversy to others.[43] An example of a "hybrid" institution is the Agency for Toxic Substances and Disease Registry, which was funded by Congress in 1986 to conduct health studies of communities exposed to hazardous wastes. Alternatively, some types of controversies may not belong in a judicial forum, but may be more appropriately handled through insurance, administrative bodies or other remedies.

The author proposes that the Federal Courts Study Committee should consider whether collaborative relationships between courts and other institutions, including both governmental regulatory agencies and private bodies, may be possible that would facilitate better understanding of scientific and technical controversies.

III. Developing Data and Institutional Linkages.

The relationship between science and the judiciary is still in its infancy. While some improvements are definitely possible within the lifespan of the Federal Courts Study Committee, other measures will require sustained action over the longer term. The Federal Courts Study Committee may nonetheless play a valuable

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[43] Elliott, The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems, 25 HOUSTON L. REV. 781 (July, 1988).

role by identifying needs and laying the groundwork for continuing institutional reforms in the future. Two areas are particularly salient for improving relationships between the judiciary and the national scientific community: the need to develop better information about the role of science in the courts, and the need to improve institutional linkages between science and the judiciary.

1. The Need for Better Data.

Reliable statistics concerning the use of scientific and technical information in federal courts do not currently exist. Fundamental unanswered questions include: 1) what proportion of their time do federal courts spend on cases involving complex scientific and technical issues?; 2) in what types of cases do scientific and technical issues arise?; 3) are the cases involving scientific and technical issues becoming more or less frequent in federal courts?; 4) what kinds of special problems do courts face in adjudicating such controversies?

Basic data could be collected by the Administrative Office of the U.S. Courts, or through studies conducted by the Division of Research of the Federal Judicial Center. The annual report by the Administrative Office presently contains a wealth of information regarding the business of the federal courts, but it is not useful for assessing the role of scientific and technical issues because cases are counted only by traditional legal categories (i.e. tort, contract, patent, antitrust). As the importance of scientific and technical controversies increases in

the years ahead, it will be important to gather information regarding the business of the federal courts based on additional factors, such as the types of evidence adduced, in addition to types of cases and legal theories.

2. Improving Institutional Linkages.

The focus in this paper, as in most of the dialogue regarding law and science, is on improving means for scientific and technical information to be utilized in individual cases and controversies in court. As important as this subject is, it should not overshadow the need to improve relationships and linkages between science and the judiciary on an on-going, institutional basis. It is a striking fact that the judiciary is the only branch of government that does not have an institutional mechanism for obtaining scientific advice and expertise. Other lines of communication between judges and scientists are rarely utilized. The judiciary rarely, if ever, commissions the National Academy of Sciences to assist it in analyzing or planning. Scientists are rarely, if ever, invited to attend judicial conferences. Yet much of the knowledge that science is developing bears on issues that the judiciary will inevitably face in the years ahead. While improving procedures for dealing with scientific and technical controversies is important, creating the means for an on-going relationship to develop between science and the judiciary is at least as vital to the future of the federal courts.

Memo to: Workload Subcommittee, FCSC
From: Rick Marcus
Date: Oct. 16, 1989
Re: Confidentiality of discovery materials

Particularly in complex litigation, confidentiality of materials produced through discovery can assume substantial importance. First, where (as is often true) litigation makes inquiry into materials that are sensitive or confidential, the discovery process may be substantially enhanced by assuring confidentiality through the use of protective orders so that concern about extraneous matters does not impede the discovery process. Second, where the same issues are presented in a number of related cases, sharing of information among litigations may make litigation less expensive and more accurate by saving later litigants from the cost of reinventing the wheel.

Recently there has been a substantial amount of controversy surrounding the use of protective orders, particularly in product liability cases. On the one hand, some object to the use of such orders at all in such litigation, urging that the fruits of litigation be generally available to the public. At least one bill reflecting such concerns is pending before Congress. On the other hand, product liability defendants sometimes intensely oppose evidence sharing among plaintiffs, thereby seemingly increasing litigation costs and protracting litigation.

In these circumstances, this memorandum recommends that the Committee take the following positions: (1) It should endorse the use of confidentiality orders to expedite litigation. This proposal appears to allow broader use of protective orders to facilitate litigation than the bill currently before Congress. (2) It should endorse flexible modification of such orders to grant access to discovered information where relevant to other litigation unless such access is opposed by all parties to the present litigation.

I. THE PROBLEM AND ITS LITIGATION CONTEXT

It is a commonplace that broad discovery is both intrusive and burdensome, but also that discovery is important in many cases to full development of cases. It is also clear that discovery disputes are a needless drain on the time and energy of courts and litigants.

One avoidable side effect of discovery is the risk that confidential material disclosed in discovery may as a result become somehow "public." Because the ambit of discovery is broad, it may include material that has only a remote bearing on the issues involved in the case. Disclosure of such material might, however, endanger important confidentiality interests of the party producing it or cause undue embarrassment. In this connection, it is important to remember that discovery can compel disclosure by nonparties as well as parties. Despite these concerns, it is often asserted that discovered material is presumptively public.

As a general matter, Fed. R. Civ. P. 26(c) provides that such circumstances can provide good cause for imposing a protective order limiting the use of such material to litigation preparation. Indeed, confidentiality orders are often entered by consent. To minimize disputes and the drain on the time of the court and litigants, such orders are often "umbrella orders," applying to all materials designated confidential in discovery.

The entry of a confidentiality order can materially facilitate litigation. It eliminates the need for litigants to

dispute about the confidentialty of materials produced through discovery, and relieves the court of the burden of deciding those disputes. In addition, it facilitates fuller disclosure through discovery by eliminating the risk that courts may deny access to evidence possibly important to the case due to confidentiality concerns. Finaly, it reduces the temptation (particularly for nonparties) to withhold material from discovery to prevent public dissemination. Thus, the Manual for Complex Litigation concludes that protective orders "greatly expedite the flow of discovery material while affording protection against unwarranted disclosures." Manual for Complex Litigation (Second) § 21.431; see generally Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1, 15-28 (1983).

These desirable effects would be sacrificed by routine public dissemination of confidential material obtained through discovery. The Committee should therefore endorse continued use of protective orders, to expedite litigation, with regard to genuinely confidential materials. This does not mean that there need be a change in the good cause standard, but the endorsement for confidentiality should include the use of umbrella protective orders (covering all materials designated confidential in good faith).

This recommendation may run counter to H.R. 129, 101st Cong., 1st Sess., which appears to limit the use of protective orders in product liability actions in all courts, state and federal. (For the convenience of the Committee, a copy of H.R.

129 is attached to this memorandum.) In brief, this bill would require that protective orders in such cases permit disclosure of information about "design specifications, performance standards, warranties, warnings and instructions, or any other matter related to the safety of any product" to governmental regulatory agencies or attorneys representing other product liability plaintiffs.

In some ways, the difference between this recommendation and H.R. 129 may not be great because the second part of the recommendation is that courts freely grant access to such discovered materials at the request of other litigants. See section II below. Indeed, a provision for access to other litigants might be included in an order (providing that any such recipient is also bound to use the material only for purposes of preparation for litigation, and that the producing party is given notice of the delivery of the material to another person).

The difference between the proposal and H.R. 129 relates to the automatic authority for delivery to other regulatory or legislative bodies. Admittedly, the bill proposes that such disclosure occur only when the public body has procedures in place to prevent unauthorized disclosure to the public (leaving open the question what constitutes authorized disclosure). Thus, much of the thrust of the recommendation regarding continuing use of confidentiality orders would remain.

Nevertheless, this effort to use the courts to generate material for regulatory agencies and legislative bodies at all

levels of government weakens the value of a protective order in comforting concerns about disclosure that a party faced with a discovery request may feel. Given the number of local governmental bodies that might be considered to have some "regulatory, law enforcement, legislative, or adjudicative responsibility with respect to the product," and the possibility that such a body might decide to publicize the material, this provision might well undermine the value of a protective order. Much as the goal of providing such public agencies with complete information about products is a worth one, this seems another example of the use of the court system to achieve objectives not substantially related to the resolution of litigation before the courts. Accordingly, this memorandum recommends that protective orders with regard to confidential information be available in product liability suits as in other suits.

II. LITIGANT ACCESS TO CONFIDENTIAL MATERIALS

The principal litigated protective order issue recently has focused not on general public access but on access to protected materials on behalf of litigants who desire to use the material in their own cases. Perhaps the best-known example of such litigation involves suits against manufacturers of tobacco products. E.g., Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir. 1986).

This problem raises issues that are materially different from the question of general public access. To insist that litigants repeat discovery efforts already completed by others

seems wasteful on its face. Indeed, efforts to coordinate or consolidate cases during their pretrial phase are designed in large measure to avoid repetition of discovery by promoting sharing of information. Thus, a transferee judge in a multidistrict case may properly alter protective orders entered before transfer to provide sharing of information not only among plaintiffs in federal courts but also with parties to related state court litigation. In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation, 664 F.2d 114 (6th Cir. 1981); see Manual for Complex Litigation (Second) § 21.422 (suggesting that where information is available from other litigation, the parties may be required to review it and, perhaps, limited to supplemental discovery).

It is true that the prospect that future litigants may obtain information delivered through discovery could produce some of the disadvantages of the public access attitude disapproved above. But these concerns are much diluted in this context, and do not outweigh the importance to the judicial system of reducing unnecessary duplicative discovery. Rather than affording automatic access, moreover, limitations could be imposed on litigant access that would ameliorate these concerns (see Marcus, supra, 69 Cornell L. Rev. at 41-46):

(1) The court could insist on a showing that the materials could be obtained in action brought by second litigant: If for some reason the materials would not be available to this litigant through discovery in his own litigation, the policies furthered

by denying access there would be subverted by access in this litigation. This would be a rare circumstance; the main focus would be on whether the materials are relevant to the second litigant's case, which should be a liberal standard.

(2) Access should be limited where opposed by all litigants to the current action: If all parties to the current action actively oppose nonparty access, it would seem proper for the court to deny access. Although that would impose some additional costs on the second litigant, it would not seem necessary to insist that he be allowed to piggyback on the first litigant over that person's opposition. This may be particularly important if there is some confidential ADR proceeding in the first litigation that might be imperilled by such disclosure to a nonparty. In considering this limitation, it is important to recognize that usually opposition to disclosure is limited to the producing party.

(3) Access should be limited to extraordinary circumstances where a confidentiality order was an ingredient of a settlement: In some cases parties are willing to settle only if materials disclosed through discovery are kept under wraps. Unless such orders are respected, their role in facilitating settlements (whether through ADR proceedings or otherwise) would be compromised. Here again the court asked to approve the confidentiality provision of the settlement confronts a choice between the possible savings for future litigants and the interests of the current litigants in resolution of their case.

In this instance the interest in respecting the desires of the current litigants seems more pressing.

The court could, however, direct that the materials be retained by the producing party so that they could be available if essential to further litigation. As a guiding standard for justifying such access, one might look to Fed. R. Crim. P. 6(e), which allows civil litigants access to grand jury materials only upon a showing of particularized need. See generally Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). For example, in Ex Parte Uppercu, 239 U.S. 435 (1915), petitioner was able to gain access to the record of the first case even though it was sealed pursuant to a settlement by showing that the plaintiff in a second action had directly contradicted his position in the second action during sealed testimony in the earlier case. Such access could be critical in such cases, but presents a far different situation from that of a litigant whose claim is only generally related to the claim involved in the earlier case.

These three qualifications are not essential to the broader statement of principle that there should be litigant access to materials covered by a protective order. That proposition seems important for this Committee because of the need to facilitate disposition of litigation.

Memo to: Workload Subcommittee

From: Rick Marcus, Associate Reporter

Date: Oct. 16, 1989

Re: Measurement of attorneys fee awards

There is substantial concern that under the "lodestar" method of fee measurement--relying on hours of attorney time and the hourly rate appropriate for the lawyer--the job of fee measurement constitutes an undue burden on judges. In addition, the hourly compensation approach may in some cases encourage undesirable behavior by lawyers. Hence, consideration of ways of simplify and improve the fee-setting process is appropriate for this subcommittee. Because the subcommittee is also considering measures that would increase fee shifting, thereby increasing occasions for fee measurement, consideration of the method of measurement becomes more important.

Unfortunately, despite dissatisfaction with the current situation it is difficult to propose ways to simplify this process and ease the burden on the courts and litigants. The basic problem is that in many instances fee-setting is a difficult task because it depends upon an assessment of the circumstances of an individual case. Moreover, stringency in fee setting threatens to undermine Congress' purpose in providing for fee shifting (and to erode the effectiveness of fee shifting proposals the Committee might recommend). In addition, this is a sensitive area in which proposals for substantial changes are likely to generate significant controversy.

Nevertheless, an examination of the current state of the law suggests several measures that could profitably be recommended, including further study of alternatives to the lodestar.

1. It would be desirable to adopt rules or guidelines to govern a number of factors important to the lodestar determination, and the Committee could recommend adoption of such rules:

a. Rates: To limit disputes about rates and discrepancies among judges, reasonable rate schedules could be adopted regionally, nationally or otherwise;

b. Contingency enhancement: To simplify the handling of the risk of loss, a uniform enhancement factor, or a schedule of factors for different types of cases, could be adopted;

c. Taxing master: To relieve district judges of the task of setting fees (and perhaps to develop expertise for the task), large districts could designate a single Magistrate to become taxing master and pass on all fee

applications. In the alternative, this task might sometimes be assigned to special masters;

d. Adoption of fee measurement guidelines: To avoid later disputes over fees, the Committee could recommend that judges adopt reasonable guidelines regarding fee awards that would apprise counsel of the standards that would later be applied.

2. In addition, the Committee could recommend that alternatives to the lodestar be studied. The basic alternative is a percentage approach that makes the fee turn on the relief obtained. Because shifting to this approach could entail many problems, it is not recommended here. Nevertheless, given criticisms of the lodestar, further study seems warranted. This study could include consideration of a combination of percentage and hourly methods for fee setting. In addition, it could consider fixing a schedule of presumptive fees for certain types of cases.

I. THE PURPOSE BEHIND FEE SHIFTING AND THE TURBULENT CONDITION OF THE LEGAL MARKETPLACE

Before turning to judicial measurement of fee awards, it is important to say something about the purpose these awards are designed to achieve because that could significantly affect the measurement of the awards. Were fee shifting designed to enhance deterrence of violation of rights, or as punishment, the award should be measured with that objective in mind.

The prevailing view, which this memorandum will adopt, is that fee shifting is designed to promote (or deter) certain types of litigation. In part, this objective is compensatory; fee shifting vindicates national policy by encouraging victims to make the wrongdoers pay because the incentive to file such suits would otherwise be reduced by the prospect of attorney's fees that consume the recovery. In a real sense, however, the goal is often to give lawyers an incentive to take cases that they would not take absent the prospect of fee shifting.

Given that incentive orientation, one naturally turns (as Congress did in the 1976 Civil Rights Attorneys Fees Act) to a marketplace orientation, and a brief comment on the state of the market is in order. In the last 15 or 20 years, hourly billing has become a norm for lawyer billing, and it is thus not surprising that it has been installed in the lodestar as the primary measure for fee awards.

The legal marketplace is undergoing major changes, however. For a description, see Annual Judicial Conference, Second

Judicial Circuit of the United States, 125 F.R.D. 197, 210-34 (1988) (discussing effects of increasing competition in legal marketplace). Law has, in short, become much more of a business. The hourly billing method has caused problems in this environment because it permits bill padding and "stacking" (assignment of too many lawyers to a case). Reacting to such concerns, the Commission on Professionalism of the ABA recommended in 1986 that judges (not necessarily federal judges) undertake a more active role in supervising fees. See Report of ABA Commission on Professionalism, 112 F.R.D. 243, 283-84 (1986). It seems clear that the "proper" way to bill for services in this business remains uncertain, controversial and volatile.

Given this tumult in the marketplace, it is particularly difficult to fashion an appropriate method for judges to measure fees. Not only must judges strive to create a mock-up of the real market to fashion fee awards for cases that don't attract lawyers in the real market, they must deal with a moving target given the state of flux in the legal marketplace. In addition, the proper role of judges in policing fees is uncertain.

II. CURRENT LEGAL PRINCIPLES GOVERNING FEE AWARD MEASUREMENT

Congress provided little guidance on how a "reasonable fee" should be measured, but quite a body of law has developed in the courts over the last 15 years, all couched in terms of implementing the intent of Congress. Although this set of guidelines could easily be altered by Congress, it provides a starting point in determining whether change is necessary. As to

many matters, it seems that recommendations by the FCSC would not be helpful, and this memorandum accordingly does not endorse involvement in those issues.

The Supreme Court has recently stated that "we have adopted the lodestar approach as the centerpiece of attorney's fee awards." Blanchard v. Bergeron, 109 S.Ct. 939, 945 (1989). It is therefore appropriate to examine the way in which the hours times rates formula has been refined by the Court.

1. Rate: The Court has directed that a market rate approach be employed. For lawyers who charge for their time, this usually involves looking to the rate they charge their paying clients. For lawyers who have no such rate, the Court has upheld looking by analogy to lawyers with comparable academic credentials working in commercial law firms. Blum v. Stenson, 465 U.S. 886 (1984). It rejected defendant's argument that a cost-based measure should be used because the lawyers involved were employees of a nonprofit legal aid organization. Some lower courts have held that public interest firms that charge below-market rates to clients of limited means nevertheless can be awarded fees calculated at the fair market rate. E.g., Student Public Interest Research Group v. AT & & Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988).

2. Hours: Fee applicants need to submit a detailed breakdown of the time spent and the task performed by attorneys on the case. In asking to be paid, they are to use "billing judgment" to exclude from the fee request time that is excessive,

redundant or otherwise unnecessary. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

The court is to scrutinize the hours for which fees are requested with an eye to two concerns. First, it also should disallow time that was excessive or redundant. This may call for review of the time sheets.

Second, the court should refuse to compensate for time not spent on successful claims. In part, this implements the requirement that a litigant prevail to obtain a fee award. The Court explained last Term that this requirement is satisfied if plaintiff has succeeded on "any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit." Texas State Teachers Assoc. v. Garland Indep. School Dist., 109 S.Ct. 1486, 1493 (1989). Although the award should only cover time spent on successful claims in cases of partial success, it is often possible to justify compensating for most of the attorney time as contributing to the successful claims.

3. Multipliers: The traditional lodestar analysis permitted district courts to modify the lodestar using multipliers. Two grounds for modification deserve mention:

a. Quality: During the 1970's, many lower courts enhanced lodestar amounts to compensate for work of high quality. In 1984 the Supreme Court held, however, that this resulted in double counting since the lawyer's quality should determine the hourly rate. Blum v. Stenson, supra. It has been emphatic that increases for quality can be allowed only in extraordinary cases.

Pennsylvania v. Delaware Valley Citizens' Council (I), 478 U.S. 546 (1986).

b. Contingency: Lower courts often enhanced fee awards on the ground that the case was risky, requiring difficult ex post judgments on how risky the case looked before it was filed. In Pennsylvania v. Delaware Valley Citizens' Council (II), 483 U.S. 711 (1987), the Court disallowed this case-specific approach but left substantial uncertainty in the area.

The decision was 4-1-4, with Justice O'Connor providing the crucial fifth vote but concurring with the dissenters that contingency could be considered in setting fees so long as reference was made to cases of a certain class rather than the specific case before the court. She added that the fee applicant should show (1) that absent enhanced compensation for contingency there would have been difficulty obtaining representation and (2) how the relevant market compensates for the risk of loss.

4. Other matters: The Supreme Court has also dealt with a number of subsidiary issues that deserve note:

a. Proportionality: Using the lodestar can mean that the lawyer's fee outstrips the damages recovered by plaintiff because the fee depends on the number of hours expended. In City of Riverside, 477 U.S. 561 (1986), the Court was presented with a fee award of more than $245,000 in a civil rights case where the total compensatory recovery was $33,000. By a 4-1-4 vote, it affirmed, and the law on proportionality remains somewhat indistinct as a result.

The plurality emphasized that a civil rights plaintiff vindicates important interests of society by suing. The dissent renounced a strict proportionality requirement, but argued that there was no indication in the facts that plaintiff's counsel had used billing judgment, and that the standard should be whether the fee "would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys." Id. at 591. Justice Powell cast the tie-breaking vote, concluding that the district court's findings that the award was justified by collateral effects of the litigation were supported by substantial evidence, but emphasizing his view that in actions seeking money damages the court should give primary consideration to the amount of damages awarded.

(b) Effect of contingent fee contract: Last Term, the Court held that the amount provided by a contingent fee contract does not limit the award, which should be calculated in "the usual way"--using the lodestar. Blanchard v. Bergeron, 109 S.Ct. 939 (1989).

(c) Interest: The Court appears to have concluded that fee enhancement for delay in payment is permissible. See Missouri v. Jenkins, 109 S.Ct. 2463 (1989); Pennsylvania v. Delaware Valley Citizens' Council (II), 483 U.S. 711, 716 (1987). Various methods are used to provide for delay in payment.

(d) Paralegal or law clerk time: The Court held last Term that paralegal and law clerk time can be billed separately where it is billed separately by commercial law firms in the local

market.

III. OBJECTIONS TO LODESTAR

There has been widespread dissatisfaction with the lodestar. The Third Circuit, which originated it, commissioned a study of alternatives that recommended partial abandonment. See Report of Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237 (1985). It is useful to sketch the criticisms:

1. Burden: Applying the lodestar often can require more work than using a mechanical percentage-of-recovery approach in pure damages cases. The judge may have to make a factual determination about the pertinent hourly rates in the area as they apply to the lawyer seeking the fee award. More onerous is the duty of checking through the lawyer's hours in the case to exclude hours that did not contribute to the success of the case or were duplicative.

2. Uneven application:

(a) Variations among judges: Judges differed a great deal in applying the lodestar. The same lawyer might be awarded $125 per hour by one judge, but only $60 per hour by another judge in the same district.

(b) Differences among types of cases: There has been a widespread impression that awards reflected a "public interest discount" whereby lawyers in civil rights and other public interest litigation received lower hourly rates than lawyers engaged in securities or antitrust litigation.

3. Skewed incentives:

(a) Unnecessary work: A time-based system could prompt lawyers with time on their hands to load it into a fee shifting case. In class actions, the opportunity to justify fee awards by makework could generate elaborate patronage for lead counsel. See In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D.Pa. 1983) (cutting back on fee award in view of featherbedding).

(b) Deterring early settlements: Because the lawyer could only be paid for hours put into the case, there was concern that lawyers would not consider settlement until they had enough time into the case to make it worthwhile.

(c) Exacerbating attorney/client conflicts of interest: The lawyer might trade off the client's interest in relief on the merits for a higher fee by scaling down settlement requests in return for enhanced fee awards not tied to results. The lodestar permitted this strategy by emphasizing the amount of time spent by the lawyer rather than the results obtained. Some saw this as a serious problem in representative litigation. See Coffee, The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 Law & Contemp. Probs 5 (Summer 1985) (derivative suits).

IV. POSSIBLE RECOMMENDATIONS

The more basic approach to the fee setting problem would be to shift away from the hours-based system to a system that allows the lawyer a percentage of the amount obtained. For a variety of reasons described below, that approach is not recommended here, although a partial shift in this direction deserves further

study.

A. REFINING THE LODESTAR

Although the Supreme Court has prescribed some specifics for the handling of the lodestar, more could be added to respond to some of the criticisms of the lodestar. Nevertheless, particularly in view of the difficulties that seem to attend implementation of the new sentencing guidelines, it seems appropriate to make an effort to avoid elaborate standards.

1. Rate: Rate setting can be a chancy proposition that depends on the attitude of the judge involved and the evidence adduced by the parties. To cope with these problems, the Third Circuit Task Force suggested adopting a schedule of rates for attorneys. See 108 F.R.D. at 260-62. The Committee could recommend such an approach nationwide. Such a schedule could eliminate much dispute about prevailing rates and reduce concern about varying attitudes of individual judges. Probably it would be most practical to set such rates by district or other proper geographical area.

This proposal would be likely to generate controversy about the proper level of fees. Already, there has been dispute about the proposal in the Legal Fees Equity Act that fees be capped at $75 per hour; this amount seems far below that found reasonable for most lawyers in many parts of the country. The Third Circuit, for example, proposed a schedule of rates ranging from $60 per hour for newly admitted lawyers to $200 per hour for senior attorneys supervising litigation. This proposal does not

contemplate abandoning the Supreme Court's approach that ties the rates for noncommercial firms to those of comparable commercial lawyers. At the same time, it need not be true that rates must be set at a "silk stocking" rate to be reasonable. Specifics regarding rate levels and geographic scope should probably be left open by the Committee.

2. Hours compensated: The process of disallowing hours seems necessarily case-specific. Except for saving time through assigning this task to a magistrate, there appear no useful reforms to propose.

3. Multiplier: At present, there is substantial concern in the lower courts that the Supreme Court's attitude toward contingency multipliers could result in burdensome litigation under Justice O'Connor's approach (see p. 7 above). It has been suggested that proof of the level of compensation for contingency in the local legal market might require voluminous and expensive expert evidence or survey information, or both. See, e.g., McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir. 1989); Blum v. Witco Chem. Corp., 829 F.2d 367, 380-82 (3d Cir. 1987). This sort of immersion in local market details is unappetizing.

An alternative, as with a fee schedule, would be to establish a contingency multiplier schedule. One commentator suggested, for example, that a fixed multiplier of 1.33 or 1.5 might be appropriate. Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981). Obviously any such schedule would require further fact-gathering, but it would seem

preferable to a case-by-case fact-intensive examination of market practices. As with a rate schedule, it seems counterproductive for the Committee to be too specific about details.

4. Proportionality: Because the proportionality issue may seem to deserve further action, it is discussed here although no proposal is made regarding this matter.

The reason there is no recommendation is that the problem is almost intractable. By definition, many of the situations in which Congress has directed fee shifting involve small claims that often require more lawyer time than the recovery would justify. Even as to claims involving potentially substantial recoveries, such as some civil rights claims for personal injuries, complex legal issues and likely jury sympathy for certain classes of defendants combine to make actual recoveries chancier than normal personal injury litigation. Thus, it is almost a given that there will be cases in which the fee recovery properly would exceed the monetary recovery.

The problem then becomes one of determining whether a given case is one in which such an award is appropriate. The existing directions for making that decision generally ask that the judge setting the fee look to the importance of the relief obtained and keep in mind the Supreme Court's direction that the degree of success achieved is an important criterion in setting the final fee. Prescribing something more specific seems problematical at best, and the Committee could not easily recommend it.

5. Taxing master: Whatever the standards by which the fees

are to be determined, delegating the application of those standards in given cases to somebody other than an Article III judge has much to recommend it. Moreover, if schedules can remove the current diversity regarding billing rates and contingency enhancement, there would be less reason to want an Article III judge to make such touchy determinations. Accordingly, this memorandum suggests that the Committee recommend that fee setting decisions be delegated to magistrates or special masters. Such an arrangement would have some similarities to the English Taxing Master system; hence the use of that term.

There would be a number of benefits from delegation to magistrates. It would free up judge time for other matters hopefully directed to the merits of other cases. It could centralize the job of fee setting in the hands of one magistrate in larger metropolitan districts. This centralization should further improve consistency of results, and provide an opportunity for specialization by that magistrate to make the process more efficient.

One must also note possible drawbacks, however. First, the resulting specialization might magnify paperwork and attorney effort in the fee shifting process. In England, for example, the "arcane niceties" of the fee measurement process prompt solicitors to hire independent drafters to shepherd fee applications through this system, paying them as much as 7% of the amount taxed. See A. Tomkins & T. Willging, Taxation of

Attorneys' Fees: Practices in English, Alaskan, and Federal Courts 16 (FJC 1986).

In addition, the shift might be inefficient if it meant that a magistrate unfamiliar with the case had to develop a detailed grasp of it before ruling on the allowance of specific hours. A judge familiar with the case might be able to do the job faster. To the extent fee allowances are a way to influence attorney behavior by rewarding desirable litigation practices with full compensation and deterring undesirable practices by reducing compensation, assigning the task to a magistrate might curtail the judge's ability to accomplish that result. But the power to use fee awards to influence attorney behavior may unduly enhance the judge's already-substantial influence over counsel.

On balance, however, a general preference for delegation seems in order. Judges probably are not sufficiently familiar with most cases to permit them to evaluate attorney time much more rapidly than magistrates. To the extent they feel that fee awards should be altered to influence attorney behavior they could probably make that view known to the magistrate without having to do the detailed work involved in setting the precise fee. It should be possible to prevent the process from taking on an overly complex life of its own, as the English system may have done.

Many of these benefits would not be obtained, however, if magistrates' decisions were routinely appealed back to the district judge after the magistrate set the fee. One solution to

this problem would be to make the magistrate's decision final. It is doubtful that this solution would be possible under 28 U.S.C. § 636 as presently written, and it might raise constitutional problems as well. See Note, The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates, 52 U.Chi. L. Rev. 1031 (1985). Whether such a solution would be needed to make the taxing magistrate proposal work deserves attention, but does not seem to undermine the general attractiveness of this innovation.

As an alternative, courts might use special masters selected from the private bar for fee setting in individual cases. This approach could overcome the problem that results from judges' (and magistrates') unfamiliarity with current market conditions. But it could also raise difficulties to ask one lawyer to sit in judgment of the fee of another member of the bar, particularly if the lawyer making the decision might himself or herself become a fee applicant in the future.

6. Early guidelines: A role the judge can play is to adopt early and fairly specific guidelines about the standards that will be applied to fee awards. This approach was pioneered by Judge Grady in In re Continental Illinois Securities Litigation, 572 F.Supp. 931 (N.D. Ill. 1983). At the outset of the case, the judge specified a number of guidelines that he said would govern the fee award assuming plaintiff success in the case: that only one lawyer should appear for plaintiffs at hearings and depositions (to deal with "doubling up"), that the billing rates

would reflect the nature of the services performed, with senior partners getting paralegal rates if they did document review, that no fees would be allowed for general legal research since counsel were supposedly expert already, and that no fees would be paid for reviewing the work product of another plaintiff lawyer.

To the extent rate and other schedules are adopted in a more formal fashion, as recommended above, some such guidelines may not be necessary. Nevertheless, such candor and foresight early in the case should be useful, and provide guidance for a magistrate "taxing master" later on. It is accordingly recommended that the Committee endorse the more general use of such directives.

At the same time, it is important that the Committee indicate that such directives should be flexible enough to accommodate the needs of the case; the guidelines should not be a straitjacket. It may well be, for example, that where defendants use multiple counsel at hearings or depositions there is reason for plaintiffs to do so as well. In addition, it is important that the preparation of such guidelines not itself become a burdensome task.

B. STUDYING A PERCENTAGE APPROACH

The above-suggested revisions of the lodestar would not solve a number of the problems voiced by its critics, and a more basic reorientation toward awarding a percentage of the recovery as the fee might be proposed. Such an approach would deal with the risk that the lodestar prompts lawyers to delay settlement

and sacrifice the interests of their clients. It might also curb the existing incentive to load extra time into the case. By rewarding lawyers for achieving success in court, it could further the goals Congress wanted private enforcement to accomplish. Thus, the Third Circuit Task Force advocated switching to a percentage fee regime in fund-in-court (but not statutory fee shifting) cases.

Nevertheless, recommending such a shift does not presently seem warranted because it would present a number of problems:

1. Small claims: As indicated above with regard to the proportionality problem, in a significant number of situations there will not be a sufficient recovery to permit a percentage fee to work even if the percentage is 100%. For such cases, it would seem that something like the lodestar must remain. As a result, in a large number of cases there would be uncertainty about which approach (lodestar or percentage) should be used, and another decision point would be introduced into the fee setting process.

2. Valuation of nonmonetary relief: A related problem could arise in cases involving nonmonetary relief such as injunctive decrees. If a lodestar is not used in such cases, the courts may be required to make an impossible valuation determination in order to set a fee. How much is an injunction desegregating the schools in a city worth? Such problems are difficult enough in the context of the jurisdictional minimum for diversity jurisdiction; importing them into the fee setting area seems

unwise.

3. Undue emphasis on monetary relief: Moreover, to focus on monetary valuation might have the undesirable effect of promoting pursuit of monetary relief at the expense of injunctive relief. As the Supreme Court put it unanimously last Term, "[i]f a contingent fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation." Blanchard v. Bergeron, 109 S.Ct. 939, 945 (1989).

4. Attorney windfalls: At present, avoidance of windfalls for attorneys is one of the objectives of the fee measurement process. The lodestar emerged in part as a way of preventing such windfalls that could result from a percentage approach, particularly in class actions, where the combination of many claims could dramatically enhance the "value" of a lawyer's work. The prospect of lawyer compensation running to thousands of dollars per hour on a percentage approach seems contrary to Congress' directive.

5. Promoting inadequate early settlements: Lawyers operating under a percentage system can maximize their return as a function of their time into the case by settling cases early, before they have put much time into them. This, of course, is the flip side of the concern that the lodestar will deter early settlements. This incentive can prompt lawyers to recommend early settlements that will not adequately compensate the

plaintiff but will result in high hourly compensation for the lawyer.

6. Promotion of class actions: By emphasizing the size of the overall recovery, the percentage system could prompt lawyers to file more class actions in hopes of magnifying their fee awards. This seems an undesirable effect, not only as a workload matter but also because concern about client control over counsel is unusually acute in class actions.

7. Setting the percentage: Adopting a percentage approach does not determine what percentage should apply. One approach would be a schedule of percentages for certain types of cases, similar to the schedule of hourly rates suggested above, but it is unclear how this should be derived. As with the lodestar, the actual market for contingent fees may be only an imperfect guide for cases for which there currently is no market absent fee shifting.

In the alternative, the percentage could be adopted on a case-by-case approach. The Third Circuit Task Force suggested that in fund-in-court cases the court appoint a representative for the potentially benefitted persons to negotiate a percentage arrangement with the plaintiff lawyer. It is unclear whether any courts have actually done this, and there is no obvious solution to the problem of paying this negotiator.

8. Differing stakes problem: Shifting to a percentage-based approach raises risks of providing insufficient incentives to take cases when the stakes for defendants are significantly

higher than they are for plaintiffs. For example, Professors Schwab and Eisenberg recently argued that in constitutional tort litigation governmental defendants usually have more at stake and more resources to protect their interests than do plaintiffs. See Schwab & Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719, 753-54 (1988). A percentage approach could give the defendant an incentive to invest in a litigation until the plaintiff lawyer's prospective fee was exhausted.

9. Limitation to plaintiff recovery situations: Even though this memorandum has focused almost entirely on measuring the fees of a successful plaintiff, it must be kept in mind that a number of the fee shifting proposals before this Committee (and an increasing number of fee shifting situations before the federal courts today) do not fit this model. In other situations, a percentage approach seems inapplicable.

* * * * *

Despite this long list of grounds for uneasiness about percentage fees, further study seems warranted. There are probably areas in which these problems are not significant, and in those areas a percentage approach may well be desirable. Indeed, while it held that a contingency fee contract should not be a cap for recovery under the lodestar, the Supreme Court also indicated the such a contract should be "a factor" in determining whether to award the lodestar. See Blanchard v. Bergeron, 109

S.Ct. at 944. The intuitive urge to base fee awards on recovery deserves further examination.

C. BLENDING HOURLY AND PERCENTAGE MEASURES

In conjunction with studying the adoption of a percentage approach, there could also be study of the measuring fees using a combined approach. In a well-known article in 1978, Professor Clermont proposed such an approach. Clermont & Currivan, Improving on the Contingent Fee, 63, Cornell L. Rev. 529 (1978). He suggested that in situations in which fee recovery is contingent on success, the lawyer be paid on the basis of hours in the case (the lodestar) plus a contingency payment. This blend was designed to correct the tendency of the pure percentage approach to prompt the lawyer to do too little work on the case, and the tendency of the certain hourly fee to prompt the lawyer to do too much work on the case.

This proposal may offer some promise, but there are potential problems. First, since it would look to <u>both</u> hourly and percentage determinations, it could entail more work than either the hourly or the percentage methods alone. Second, it seems not to be a significant improvement on the lodestar for small claims, since the percentage bonus would not be likely in such cases to have much effect on lawyer behavior.

D. FIXED OR PRESUMPTIVE FEES

A final possibility that could be studied would be establishing a schedule of fixed or presumptive fees for certain kinds of tasks or cases. Such fixed fees have been used for

certain types of cases in the past, and they are still used for some criminal cases. Some medical services are priced in this way, and insurance schemes may try to regulate such charges (and keep them under control) through fixed schedules. See Law & Ensminger, Negotiating Physicians' Fees: Individual Patient or Society?, 61 N.Y.U. L. Rev. 1 (1986). Study of this possibility might yield a way to avoid the more difficult calculations involved in applying the lodestar.

Some cautions deserve mention, however. At present there does not seem to be a pertinent market in which such an approach obtains; setting fees in the absence of a market would probably be difficult. Unless the rate is for entire cases, moreover, it seems chancy to try to set fixed fees for given tasks. For example, taking depositions tends to be a sufficiently individualized activity so that a single fee would not be appropriate for all depositions, even in the same case.

Incentive problems could result also. If the fee were task-based, the lawyer would have an incentive to multiply tasks (as opposed to concentrating energy on the most important ones). If the fee were set case-by-case, it might promote overly early settlement by lawyers anxious to maximize the volume of cases they processes. At the same time, such a formulation might give defendants an incentive to protract cases to the point where the fee would make them uneconomical for lawyers.

Directions for Study and Action on Attorney Fee Awards and Litigation Finance Incentives--Introduction and Summary

Those who are not already quite familiar with the debates over litigation finance policy may find the area surprisingly complex, although I hasten to add that it is not impossibly so. Seemingly straightforward suggestions such as a change to the English and Continental "loser-pays" rule on attorney fees turn out to raise numerous problems of incentives, equity, consistency with substantive policies, administration, and even federalism. The goals that litigation finance rules can serve are multiple, and so are the possible mechanisms and combinations; moreover, almost certainly no single approach would be best across the spectrum of claims and litigation situations.

To begin with the range of goals--often, but not always, compatible with each other--that fee liability policies can serve, they can be designed to facilitate access to justice, or more finely to encourage meritorious and discourage unpromising litigation; they can also be used to affect the likelihood, timing, and terms of settlement. A system might award fees out of a sense that it is simply fitting for the loser to bear the winner's costs, to seek to assure full compensation to the victims of legal wrongs, to encourage the enforcement of policies deemed socially important, or to punish misconduct in primary activity or in litigation. Fee calculation policies could be designed to reduce possible conflicts of interest between attorney and client, and to minimize "second-round" litigation over the amounts to be awarded.

The choice of mechanisms is also broad, including not only the American rule against attorney fee shifting and the contrary English rule but also the increasingly common "one-way" rule normally favoring a prevailing plaintiff. Further possibilities include fee shifting against groundless claims and defenses, and offer of settlement devices affecting parties' liability for attorney fees. Nor do policies on party liability for attorney fees exhaust the options, for attorneys themselves might be liable for adversaries' fees either as a sanction or on an entrepreneurial theory; and court user fees can warrant consideration.

To pull some of the most prominent threads out of this tangle, I propose that the Subcommittee consider the following:

1) Recommending that the Committee go on record strongly <u>opposing</u> the general English loser-pays rule for most federal court litigation, with the possible exception of commercial disputes between well-financed adversaries, or unless those generally liable for fees of successful adversaries were to be the losing <u>attorneys</u> rather than their clients (a measure whose general adoption seems politically highly unlikely);

2) Recommending that to the extent recently amended Federal Rule of Civil Procedure 11 does not already accomplish this end,

plaintiffs or defendants filing or maintaining groundless claims and defenses should be held liable for their adversaries' resulting attorneys' fees, even in the absence of subjective bad faith;

3) Possible extension of present rules providing for fee awards to prevailing plaintiffs to some or all federal law claims (in federal or state court) that are not already covered by such rules;

4) Recommending that the Committee endorse further detailed study of "offer of settlement" rules broadening present Federal Rule of Civil Procedure 68 to affect liability for attorneys' fees as well as court "costs," with possible basic changes to be made only by Act of Congress and not by the normal rules process;

5) Exploring possibilities for legislation to simplify the attorney fee awarding process while retaining adequate incentive for the pursuit of claims enforcing important federal policies, and to provide incentives for desired conduct on the part of attorneys and clients; and

6) Identification of contexts in which it might be appropriate for federal courts to charge user fees, such as vexatious litigation, extensive trials between well-heeled parties, full judicial trials after alternative dispute resolution awards, payment of jury costs, and removal from state court of small federal question claims.

Attorney Fee Awards and Litigation Finance Incentives--Background Discussion

1. The English Rule. Those responding to American litigation problems often point to England's rule that the loser must pay a major portion of the winner's reasonable attorney fees. Such loser-pays fee shifting does have desirable effects--fuller compensation of prevailing parties, and deterrence of nuisance claims. The English approach, though, has negative effects as well; and it should be possible to get the benefits without at least some of the problems. In brief, the English rule works harshly in close cases, especially when a plaintiff was entirely reasonable in pursuing a claim that turned out at trial to lose. As a result, the rule may excessively discourage the pressing of plausible but not clearly winning claims, particularly when the prospective plaintiffs are "risk averse"--as is likely to be true of middle class people with something to lose but not so many assets that they can tolerably afford to lose much. Furthermore, for cases in which the parties remain in disagreement on their assessment of the likely outcome of trial, the English rule can actually make settlement less likely--other things being equal, it increases the gap between the litigants.

There are, however, some contexts in which the English rule might work tolerably well. Arizona, for example, follows it in most contract litigation, which often involves business parties suing each other with each well able to bear the costs of litigation; in such situations, general fee shifting can have the desirable effect of discouraging efforts at "hardball" tactics that

inflict unrecoverable fees on the other side. The Pacific Coast states have provided for either-way shifting as a means of overcoming possible unfair advantage when one side provides for a fee shift in its favor in a contract of adhesion. Whether some types of actions that commonly arise in federal courts would be good contexts in which to use fee shifting on these sorts of grounds is a question that could be worth further study. Another idea that has begun to surface, so far mainly in academic discussion, is that of using English loser-pays fee shifting but with attorneys liable for the fee awards, not as a sanction but on a theory of broadening the entrepreneurial role that lawyers now play in contingent fee cases. Whatever the merit of this idea, politically it is one whose time has almost certainly not come; discussion below, however, raises possible limited contexts in which it might be particularly worth considering.

2. Fee Shifting Against Groundless Claims and Defenses. One way to try to get some of the benefits of the English rule without its possible excessive deterrence of good faith claims and defenses is to focus on the problem of baseless positions. In part, Rule 11 of the Federal Rules of Civil Procedure as amended in 1983 accomplishes this end by requiring sanctions (which may include attorney fees) when a federal court finds that a pleading, motion, or other paper was filed in violation of the Rule's standard that "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry [the filing] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of

existing law . . . ." Moreover, under existing precedent federal courts generally have authority to award attorney fees under the "bad faith" exception to the American rule that each party pays its own attorney fees, win or lose. Yet Rule 11, the bad faith exception to the American rule, and other provisions may leave significant gaps--as when it is hard to find subjective bad faith and a party stands on a position that has become untenable because of information brought out in discovery, but is not forced into filing a paper that would trigger the technical applicability of Rule 11.

The Supreme Court has responded to one aspect of this problem, in the context of existing federal fee shifting statutes, by interpreting them to modify the traditional "bad faith" requirement. In Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Court held that even though only prevailing plaintiffs are normally entitled to a fee award in federal civil rights cases, a prevailing defendant could qualify for such an award if the plaintiff's claim was frivolous, unreasonable, or groundless, or was pursued after it clearly became so in the course of litigation, even if no subjective bad faith is found. This rule combats the tactic of trying to extract a settlement because of a claim's "nuisance value" of unrecoverable costs inflicted on the other side.

To deter and compensate for nuisance claims and defenses, it is worth considering whether this Christiansburg rule should be generalized beyond the contexts in which it now applies, including its possible applicability to baseless defenses when a pre-

vailing plaintiff is not otherwise entitled to a fee shift. Eliminating the difficult requirement of a finding of subjective bad faith where it survives seems quite justified and should provide desirable incentives, making fee awards somewhat easier when a party not only lost but should have known never to raise the claim or defense or should clearly have abandoned it. Before pursuing any such recommendation, however, we should consider both the extent to which Rule 11 already covers the ground, and to what extent experience under Rule 11 gives reason for pause in attempting to use attorney fee awards as sanctions for pursuing baseless claims and defenses.

A possible complement to broadening the applicability of the Christiansburg rule is attorney liability for fees shifted under the rule. Many awards under Christiansburg have been nominal or sharply reduced because of plaintiffs' lack of means. The awards thus fail to compensate defendants for much legitimate legal expense. These decisions are understandable, given plaintiffs who could not begin to pay all of defendants' reasonable fees. Yet the gap between fees incurred, and those compensated for, partly defeats a purpose of the rule: it reintroduces the possibility of plaintiffs' bargaining for nuisance-value settlements on the basis of fees that defendants cannot expect to recover. Attorney liability in such situations could intensify conflict of interest problems and would be a politically controversial and perhaps somewhat radical step, although it has been taken recently in related and sometimes overlapping areas such as Rule 11. And if the standard is one of frivolousness or unreasonableness, admin-

istered so as not to penalize those who pursue plausible cases that lose, offending attorneys seem to deserve little sympathy. Again, experience under Rule 11 needs to be carefully considered to see whether the standards can be administered in such a way as not to chill legitimate advocacy.

3. One-Way Pro-Prevailing-Plaintiff Fee Shifting. Rather than moving toward the English rule, most recent changes in American fee shifting policy have been in the direction of "one-way" standards under which a prevailing plaintiff, but not a prevailing defendant, is normally entitled to recover reasonable fees. (The Christiansburg rule, discussed above, complements the one-way practice by sensibly making it somewhat easier than usual for prevailing defendants to recover fees, thus countering undue encouragement that one-way rules may provide for bad claims. Moreover, formal offer of settlement provisions affecting fee entitlements, discussed below, can further offset what may initially seem to be unfair plaintiffs' advantage from the basic one-way rule.) Congress has found various justifications to be persuasive for one-way fee shifting provisions, including encouraging private enforcement of federal policies in such areas as civil rights and the environment, or evening regular power disparities between sides in such cases as federal wage and hour litigation or suits against the Government under the Equal Access to Justice Act.

An additional reason that can support fee awards to prevailing plaintiffs is that of providing full compensation for legal injury, which accords with basic ideas of remedial justice but

which has been little honored in American fee award policies. To the extent that a successful plaintiff must pay counsel out of a supposedly compensatory recovery, the plaintiff receives less than full compensation--and the defendant bears less than the full costs inflicted by its wrongful conduct. This tension between the American rule of paying one's own lawyer win or lose, and the remedial principle of make-whole compensation, may make the legal system more likely to tolerate evasions in such forms as overly generous awards for pain and suffering and of punitive damages. To the extent that federal law now provides for actions in which compensatory damages may be recovered, but does not allow for the award of attorney fees to one entitled to compensation, principles of remedial justice support consideration of generalizing present rules that entitle successful claimants to attorney fees.

Awarding fees to more prevailing plaintiffs, of course, would be unlikely to reduce the federal courts' workload; by themselves, such awards should encourage the pursuit of claims in whatever courts have jurisdiction over cases in which successful claimants can recover fees, although other factors such as effects on settlement and primary conduct would contribute to the net effect on workloads. The question of broadening fee entitlements does seem to belong in this discussion, however, partly because Congress has passed a good many one-way fee award statutes and may well pass more. They are part of the landscape, and we both need to deal with them and should think about whether to make fee entitlements more uniform. Moreover, some litigation

finance measures for dealing with workload problems, such as the Christiansburg rule and offer devices [see below], depending on how they are framed might by themselves have a strong pro-defendant impact. For purposes of justice and political viability, packages of reforms may need to strive for balance and to take into account other major goals in addition to caseload volume and court efficiency.

4. Offer of Settlement Devices. Federal Rule of Civil Procedure 68 provides that if a defendant offers to have judgment entered against it, the plaintiff does not accept, and the plaintiff's judgment is not more favorable than the offer, then the plaintiff must pay the defendant's post-offer costs. The effect is to reverse the usual rule that a losing party must pay the winner's costs; the baseline for judging who "won" for purposes of entitlement to costs rises from zero to the amount of the defendant's offer. "Costs" in this country, however, are often little more than nominal, and in particular under the American rule do not usually include attorney fees. Thus the normal impact of a Rule 68 offer, and consequently the rate at which defendants have used the Rule, have not been great.

In 1983 and 1984, the federal Advisory Committee on Civil Rules proposed amendments to Rule 68. With the aim of improving both the fairness and the effectiveness of the Rule, the revisions would have 1) made the offer device available to plaintiffs as well as defendants and 2) added attorneys' fees to the costs for which a party declining an offer of settlement under the Rule could be liable. The proposals aroused a good deal of criticism

on several grounds--fear that the changes would be too severe in their effects on plaintiffs, concern that they ran counter to Congressional policy in the federal fee shifting laws, and doubt whether they fell within the rulesmakers' authority under the Rules Enabling Act, 28 U.S.C. § 2072. At least for the time being, the Advisory Committee has shelved the topic.

The problems with offer devices that drew criticism are significant, but so are the benefits that such rules might achieve. They can "smoke out" realistic settlement offers early by giving parties a positive benefit (possible fee recovery) from making such offers rather than the detriment of appearing weak in negotiations. They can give parties with strong claims or defenses, who otherwise might have to yield more in negotiations (because of the threat of unrecoverable fees) than the merits seem to warrant, an effective way of countering groundless opposition. And they hold out the possibility of something approaching full compensation without adoption of the English rule with its negative effects, because a party with a strong claim who makes a reasonable, early offer will likely get either a good settlement or a judgment including a fee award.

Yet the concerns about offer devices affecting liability for post-offer fees that aroused opposition are serious and deserve amplification. First, once the device has "smoked out" a reasonable offer, in some cases the effect after that can be to give the offeror reason to "dig in" and not be forthcoming in later negotiations, which may thus reduce the prospects for settlement. Second, offers can be a powerful weapon against the risk averse,

because they introduce the possibility of substantial loss where none existed before. An insurance company, for example, may succeed in "low-balling" a claimant with an ungenerous offer; then, even the fairly small chance that a plaintiff's verdict that comes in below the offer will be more than eaten up by the high fees of company counsel might drive underfinanced claimants to accept much less than the likely fruits of trial. Third, offers may undercut the purposes of Congressional fee award statutes by reducing the encouragement Congress meant to give plaintiffs. Because of this substantive impact--and because fee-affecting offer rules applicable to state law claims in federal court might also raise federalism problems--any fundamental revisions in Rule 68 may better come from Congress than from the usual Rules Enabling Act process.

The problems with the working of offer rules should be at least partly soluble, and the potential values of the device are great enough to warrant trying to refine and test precise framings for possible adoption. This may not be the place to mention many of the possible details, but one Rule 68 issue of current controversy deserves brief discussion. In Marek v. Chesny, 473 U.S. 1 (1985), the Supreme Court held that the reference to "costs" in Rule 68 includes attorney fees awardable under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Consequently, a federal civil rights plaintiff who declines, and then fails at trial to do better than, a defendant's Rule 68 offer loses the usual entitlement to recover post-offer fees.

Marek has been criticized for its interpretation of the Rule, and bills have been introduced in Congress to overrule the decision; but a case can be made that its policy and incentive effects are desirable. As a result of the decision, a civil rights plaintiff retains the right to recover pre-offer fees, and will not become liable for any of the defendant's fees unless the plaintiff's case is so weak as to run afoul of the Christiansburg rule--but must think seriously about the defense's offer because of the risk of not recovering plaintiff's own post-offer fees. This scheme arguably accommodates both the Congressional goal of encouraging pursuit of civil rights claims and the desirable incentive effects of Rule 68. I believe that Associate Reporter Richard Marcus may not share this sanguine view of Marek, and the two of us might provide some fireworks that will help frame the issue for the Subcommittee.

5. Approaches to Calculating Attorney Fee Awards. A significant problem with attorney fee shifting is the collateral litigation it engenders over the amounts to be awarded, although it may not be established just how large a fraction of fee award cases involve troublesome "second round" fee litigation. There seem to be two main ways of coming at this area--streamlining of procedures under existing rules for reckoning fee awards, and changing the formulas themselves to provide incentives for desired behavior. Perhaps the leading discussion of how to improve handling of fee award litigation under the prevalent rate-times-hours "lodestar" formula is the Report of the Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237 (1985). It

includes among its principal recommendations district-wide standardization of hourly rate categories and control of hours expended by discussion during litigation rather than merely after-the-fact review. Id. at 260-63. The Task Force was divided on the possibility, which might move the federal courts in the direction of the specialized English "taxing master" system, of regular reference of fee award determinations to magistrates. Id. at 273-73.

More far-reaching reform suggestions go beyond improving the administration of existing approaches to changing fee award formulas so as to provide advance incentives for desired behavior. One example is the proposal by Professor John Leubsdorf of Rutgers Law School for a fixed "contingency multiplier," the factor by which a court sometimes increases a fee award to allow for the risk of losing and collecting no fee at all. Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981). The Supreme Court seems to have been moving away from allowing much case-by-case litigation over multiplier amounts, when multipliers are allowed at all, but legislation could give needed guidance as to the level of encouragement Congress desired to provide for pursuit of claims in various categories of cases. A fixed ratio such as 1.33 or 1.5, for example, would further reduce litigation over the multiplier in individual cases and would give attorneys incentives to take cases down to a certain level of likely success.

Another measure suggested by some commentators would be to depart at least to some extent from the "lodestar" approach for

calculating fees. Although recently endorsed strongly by the Supreme Court in Pennsylvania v. Delaware Valley Citizens' Council [Delaware Valley I], 478 U.S. 546, 561-66 (1986), the lodestar method engenders a good deal of litigation over rates and what hours were reasonably spent. Among other problems, it gives attorneys an incentive to spend too many hours on a case and then in effect calls on the court to sanction the attorney for bill-padding by disallowing hours, inevitably a contentious process. In some situations, of course, the lodestar or something similar seems inevitable, as when a plaintiff seeks and obtains only injunctive relief or a defendant entitled to fee recovery prevails on the merits; no award based even in part on the amount of damages recovered is then possible.

Yet when plaintiffs in actions under fee award provisions do recover substantial damages, letting a percentage of the recovery be at least a part of the basis for the fee award can simplify fee calculations, align the interests of attorney and client, and provide some protection against the "churning" of billable hours. See, e.g., Clermont & Currivan, Improving on the Contingent Fee, 63 Cornell L. Rev. 529 (1978); American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.18, comment c (Tent. Draft No. 9, 1989). The state of disagreement among authorities on fee calculation methods is such that the best path for the Subcommittee at this point may be to recommend further study and experience, with an eye to crafting approaches suited to different circumstances--using a percentage of recovery as a ceiling on fee awards, for example, may work well in large-

stakes derivative litigation but poorly in individual civil rights cases. Associate Reporter Marcus has been working on these issues and may have further comments or develop proposals for later discussion.

A further issue in connection with the calculation of fee awards is the possibility of legislatively capping them at a certain rate. High fee awards, particularly against governments, have led to much critical reaction and to proposals for caps at such figures as $75 per hour--the presumptive rate in the Equal Access to Justice Act for many fee awards against the Federal Government. The topic is highly controversial; governments are galled at what they see as their taxpayers having to enrich high-priced lawyers. At the same time, defenders of market-rate awards see rate cap proposals as an effort to reduce the enforcement of the rights of the impoverished, by making their representation less economically competitive than it already is in comparison to regular commercial practice. Some of the problem with caps may be the effort to set them at quite low levels, compared with general market rates; limiting fee awards to something like the salary rate at which the government pays its own lawyers may be too severe, but it may also be unnecessary to assess defendants the going rates for top partners in large city private practice. If courts in fact very rarely allow exceedingly high rates, the need for caps may be less than sometimes perceived.

6. User Fees. Court user fees present difficult questions. They represent an effort to deal straightforwardly and efficiently with problems resulting from the availability of public

adjudication services at much below their cost, with the overuse and delay that often seem to follow. At the same time user fees may fail to account adequately for external benefits of fairly free access to courts (deterrence, creating precedents, preventing self-help), pose many practical problems, may discriminate against plaintiffs, and encounter some serious constitutional objections. Judge Posner in his book on the federal courts has advocated user fees to influence forum choices and reduce federal court overloads. Former Solicitor General Rex Lee, asking why court access should be favored among ways the government could spend money to help the poor, has urged user fees on a fairly general basis. Professor Albert Alschuler of Chicago suggests them only for cases in which a party rejects, and fails at trial to improve on, the result of a less formal first-stage adjudication.

In dealing with these issues it seems useful to identify the main concerns behind user fee proposals and, given their problems and the values of relatively free access to courts, to ask whether user fees or other means are the best way to serve the ends in question. The apparent goals include discouraging frivolous claims, reducing backlog problems from overuse of a service priced below cost, and perhaps raising money to help support the court system. Other measures could help achieve these aims, particularly fee shifting targeted against frivolous claims and alternative dispute resolution mechanisms to reduce backlog. Court funding requires small enough budgets compared to other public services, and could benefit little enough from user fees once

legislatures spotted the fees as another revenue source, that it might not in the end be served very well by user fees. In brief, the goals behind user fee suggestions are legitimate, but ones that often can be served by other means.

Yet even if broad user fee suggestions are rejected, some use of substantial fees could be quite warranted in specific types of cases. One use would be to punish and deter serious litigation misconduct; just because other incentives, such as attorney fee shifting, exist and deter some abuses, that does not require withholding stronger measures when the fee incentives are not strong enough. Similarly, user fees may be warranted when well-financed adversaries try big cases that take especially large amounts of court time; in connection with two-tier systems when party dissatisfied with the first-round result fails to do better after demanding trial; to pay jury costs, as is done under long-established California state practice; and to deter routine removal of small federal question cases properly filed in state courts. The Subcommittee may wish either to recommend some such particular measures or to suggest more systematic study of the potential application of user fees in various contexts.

To: The Federal Courts Study Committee*

From: Associate Reporter Sara Sun Beale

Re: Sentencing Guidelines

SUMMARY

In adopting the Sentencing Reform Act and authorizing the promulgation of the Sentencing Guidelines, Congress sought to reduce unjustified sentencing disparity while retaining sufficient latitude to adjust to special factors in individual cases. The Guidelines have produced fundamental changes in the way criminal cases are handled in the federal courts, and have significantly increased the workload of the courts.

As implemented, the Guidelines do not provide sufficient flexibility. They have unduly tied the hands of judges and prosecutors in a manner that not only causes injustices in individual cases but also threatens the federal courts' ability to process their criminal caseload without additional resources to take a far higher percentage of cases to trial. Despite the fact that 85-90% of the criminal cases in the federal system are disposed of by guilty pleas -- most of which are the results of plea negotiations -- the Guidelines do not clearly state whether the sentencing judge can give a below-Guideline sentence when he or she accepts a plea agreement. Similarly, the Guidelines make no provision for sentencing concessions when the prosecutor wishes to negotiate a guilty plea because of caseload pressures or factual or legal problems with a specific prosecution. The reduction in incentives for guilty pleas threatens the federal courts' ability to process their criminal caseload without a huge increase in resources to take a far greater number of cases to trial. At present, since no additional resources are being provided, prosecutors and defense counsel are using their charging and bargaining power outside the system in some cases to reach plea agreements and keep the system afloat. In the process, the Guidelines are being manipulated and evaded. Thus discretion is still being exercised, but in these cases it is invisible and no longer subject to judicial review.

Our recommendations are intended to enhance the federal courts' ability to process their criminal cases with available resources while still adhering to the central elements of the Sentencing Reform Act: (1) sentencing guidelines or ranges to guide the exercise and review of judicial discretion in order to avoid unwarranted sentencing disparities, (2) an explanation on the record of the reasons for a sentence and for any departure from the guidelines, and (3) appellate review of sentences by both the defendant and the government.

* This is a revised version of the memorandum originally distributed to the Federal Court Study Committee.

I. EVALUATING THE IMPACT AND PERFORMANCE OF THE GUIDELINES

A. Impact of the Guidelines on Judicial Workload

The Guidelines have accounted for a major increase in the workload of the federal judiciary. The impact has been felt in both the district courts and the courts of appeals.

1. Workload in the district courts

In order to explore the impact the Sentencing Guidelines were having in the district courts the Workload Subcommittee sent a questionnaire to all district judges. The response rate was 82%. A copy of the questionnaire with the tabulated responses is attached Appendix A.

a. Sentencing hearings

Guidelines sentencing has generally increased the time that district judges' spend in sentencing hearings. Ninety percent of the district judges who responded to our survey stated that the Guidelines have made sentencing more time-consuming, and the increase they reported is substantial.[1] Over one half of the judges stated that the time they spent on sentencing has increased at least 25% under the Guidelines, and 30% of the respondents reported that the time they spent on sentencing has increased at least 50%.[2] This information is confirmed by the first fragmentary data accumulated in the Federal Judicial Center's (FJC's) current time study. Considering only felony cases, in the FJC sample the mean sentencing time was 38% more in

[1] App. A, item 8.

[2] Ibid.

post Guidelines cases than in the pre Guidelines cases still in the system.[3]

2. Preparation of the presentence report

The Guidelines have imposed substantial additional responsibilities on the probation officers who draft the presentence reports. Rule 32 (c)(2)(B) requires the probation officer to calculate the applicable guideline in the presentence report. In order to make this calculation, the probation officer must make factual findings on a variety of issues regarding the offender's criminal history and the facts of the offense; many of these issues were not previously included in presentence reports. Moreover, the probation officer is expected to take an independent view of the facts which may differ from that of both the government and the defendant. Thus the probation officer may need to undertake his or her own inquiry into the relevant facts. The probation officer is also required to interpret the Guidelines and to decide how they apply to certain facts. This calls, in effect, for intrepretations of both fact and law.

3. Guilty pleas

The Guidelines have also had an impact on other aspects of the district courts' workload. In particular, the Guidelines have affected guilty plea cases. The responses to our district court questionnaire demonstrate several aspects of the impact of the Guidelines. First, the Guidelines tend to complicate and

[3] Letter from William Eldridge, Appendix B. It should be noted that the FJC data is too fragmentary at this point to draw many conclusions. The current FJC sample is very small, and the cases in this transition period may not be typical.

prolong the Rule 11 hearing at which a guilty plea is taken. Approximately three fourths of the district judges responding to our survey stated that the Guidelines have increased the time necessary for a Rule 11 hearing.[4] More than a quarter of the respondents stated that the time necessary had increased by 25 to 100%.[5] More importantly, a large percentage of our respondents also stated that the Guidelines had reduced the concessions that may be provided to induce a defendant to plead guilty,[6] and half of our respondents stated that the Guidelines had decreased the percentage of guilty pleas in their current criminal caseload.[7] The special problems posed by guilty plea cases will be discussed further in section I (B) below.

b. Workload in the courts of appeals

The Guidelines have also substantially increased the workload of the courts of appeals. The Guidelines have added a new issue that may be raised on appeal in cases in which the defendant has been found guilty after a trial. But even more important, under the Guidelines it is also possible to take an appeal from the sentence in the 90% of the cases which are disposed of by plea bargaining. For the year ending June 30, 1989, 32% of the appeals involved only the sentence.[8] Most or

[4] App. A, item 9 (74%).

[5] Ibid (26%).

[6] Seventy-one percent of respondents said that the Guidelines had decreased or greatly decreased the concessions that may be provided to induce a defendant to plead guilty. App. A, Item 11.

[7] App. A, item 10 (49.6%).

all of these are plea bargain cases that are in the appellate system only because of the Guidelines.[9] In an additional 51% of the cases the appeal involved both the conviction and the sentence.[10] Thus 83% of the post Guideline criminal appeals raised a sentencing issue.

B. Evaluating the Success of the Guidelines

In authorizing the promulgation of sentencing guidelines, Congress was not concerned solely with reducing disparities in sentencing persons who committed the same crime; Congress also recognized the importance of flexibility to adjust to special factors in individual cases. The legislative history states that "The purpose of sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender...."[11] The Act itself states that the guidelines shall provide "sufficient flexibility to permit individualized sentences" in appropriate cases.[12] As the Sentenc-

[8] See Appendix C, data provided by the Administrative Office of the United States Courts (AO). As of January 1, 1987 the AO began to code criminal appeals to differentiate between pre and post Guidelines cases; in post Guidelines cases "S" designates an appeal of the sentence only; "V" designates an appeal from the conviction only, and "Z" designates an appeal involving both the conviction and sentence. The AO uses the code "G" for general appeal when the proper sub designation is not known when the data is first entered. This code is to be subsequently revised to S, V, or Z. The calculations that follow are based only on the post Guidelines cases for which an S, V, or Z designation has been assigned; G cases are not included.

[9] App. C.

[10] Ibid.

[11] S. Rep. No. 225, 98th Cong., 1st Sess. 52, reprinted in 1984 U.S. CODE CONG. & ADMIN NEWS 3182, 3235.

[12] 28 U.S.C. §991(b)(1)(B).

ing Commission itself has recognized, Congress sought a balance between uniformity and proportionality, recognizing that there is some tension between these goals.[13] Judged against these goals, the current system is in need of substantial revision. The general goals of the revision should be simplification, greater flexibility, and accommodation of plea bargaining.

1. The need for simplification

More than half of the district judges in our survey concluded that the Guidelines procedures are more burdensome than necessary to achieve the goals of eliminating disparity among defendants and making sentencing more rational.[14] In light of the substantial increase in the courts' workload produced by the Guidelines, one key goal of future revisions of the sentencing system should be simplification and streamlining to reduce paperwork, red tape, and bureaucracy.

2. The need for greater sentencing flexibility

The present system has overemphasized uniformity, at the cost of unduly restricting the sentencing judges' power to recognize real differences between cases. When sentencing judges cannot take real differences between cases into account, the resulting sentences are disproportionate. More than 70% of the district judges who responded to our survey concluded that the Guidelines do not provide sufficient flexibility to allow them to give an appropriate sentence in each case.[15] Many of the judges'

[13] United States Sentencing Commission Guidelines Manual Ch. 1, pt. A §3 (Policy Statement).

[14] App. A item 13 (53%).

comments emphasized their frustration with a system that requires far more effort to produce sentences that are, in at least some instances, disproportionate. The comments identified several sources of unfairness, particularly the Guidelines' failure to take into account the personal history of the defendant and the effect of mandatory minimum sentences. In a series of policy statements (Guidelines §§ 5H1.1-5H1.6) the Sentencing Commission has indicated that youth, education, mental and emotional conditions, physical conditions (including drug and alcohol abuse), previous employment, and family and community ties are not ordinarily relevant to determining what sentence an individual should receive. The Guidelines' failure to take account of such factors regarding individual history and characteristics was deeply troubling to judges forced to hand down what they viewed as unjust sentences in individual cases. For example, one respondent noted the unfairness of requiring the sentencing judge to give a sentence within the same narrow range to two persons who had driven across the border with the same amount of cocaine. One defendant was an 18 year-old drop out and gang member; in contrast, the other was a 30 year-old father of three with a substantial work history whose business has recently gone bankrupt, leaving him without medical insurance to pay for the care required for his premature infant. The questionnaire in question noted that this was not a hypothetical; the judge who added these comments sentenced both these defendants on the same

[15] App. A, item 15 (72%).

day.

The judges' comments also revealed the concern that the Guidelines have not in fact eliminated discretion in sentencing, but instead have transferred unreviewable and in many cases invisible discretion to the federal prosecutor. Thus disparity remains despite the significant increase in the courts' workload. This latter point is discussed further in connection with plea bargaining in the section below.

3. The need to accommodate plea bargaining

Our survey and the other studies of the implementation of the Guidelines[16] reveal that the most fundamental problem lies in adapting the guidelines to plea bargaining. Both Congress[17] and the Sentencing Commission[18] recognized from the outset the

[16] The other two studies of the implementation of the Guidelines are both draft manuscripts that the authors generously agreed to share with the Federal Courts Study Committee. One, a product of the Federal Judicial Center, is Paul Hofer's "Sentencing Procedures and the Federal Guidelines" (FJC Study). It should be noted that at the time the draft FJC Study was shared with the Committee it had not yet been submitted to the processes of review, comment, editing, and possible amendment at the Federal Judicial Center. The draft FJC Study is based upon visits to six districts that have had extensive experience with Guidelines sentencing. FJC personnel interviewed judges, probation officers, prosecutors, defense attorneys, and courtroom deputies. The other study is "Guilty Pleas Under the Federal Sentencing Guidelines: A Report on the First Fifteen Months" by Sentencing Commissioner Ilene Nagel and Professor Stephen Schulhofer of the University of Chicago Law School (Nagel and Schulhofer). Nagel and Schulhofer's study is based upon visits to four districts where the authors interviewed the U.S. Attorney and some of his principal assistants, numerous trial level prosecutors, probation officers, and at least one judge. Defense counsel were interviewed in only one district.

[17] See 28 U.S.C. § 994(a)(2)(E) (directing the Sentencing Commission to issue policy statements on the use of the authority under F.R.Crim.P. 11(e)(2) to accept or reject plea bargains).

necessity of adapting the Guidelines to the plea bargaining process. Unfortunately both the structure of the Guidelines themselves and the studies of the implementation of the Guidelines reveal that the present Guidelines fail to meet this crucial need. This failure is highly significant because historically 85-90% of federal convictions have resulted from guilty pleas, most of them as a result of plea bargains.[19]

The structure of the Guidelines is inadequate because it provides no explicit incentives for plea bargaining, and it is ambiguous on a crucial point: the Guidelines do not do not clearly state whether or not the district judge has discretion to give a below-Guideline sentence when he or she accepts a plea agreement. Although some commentators have stated that the sentencing judge does have such power,[20] others vigorously dispute that such authority exists.[21] The responses to our survey and the draft field studies corroborate the uncertainty that exists on this point.

The draft field studies reveal two interrelated problems.

[18] See FJC Report.

[19] The guilty plea rate for 1986 and 1987, the two years before the implementation of the Guidelines, was 87%. See U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 440 (1987), and Administrative Office of the United States Courts, Report of the Director 120 (1987).

[20] See, e.g., Breyer, The Federal Sentencing Guidelines and the Key Compromises on Which They Rest, 17 Hofstra L. Rev. 1 (1988); Walker, Below-Guideline Plea Bargains, 2 Fed. Sent. R. 68 (1989).

[21] See e.g., Alschuler, Departures and Plea Agreements Under the Sentencing Guidelines, 117 FRD 459, 472-73 (1988); Brown, Response to Owen Walker, 2 Fed. Sent. R. 126 (1989).

First, the Guidelines do not provide for sufficient incentives to induce guilty pleas. Second, since no additional resources have been provided to take a higher percentage of cases to trial, some of the actors within the system have responded by manipulating and evading the Guidelines to induce the pleas necessary to keep the system afloat. This response within the system explains the Sentencing Commission's data showing that the guilty plea rate during the first 17 months of Guidelines sentencing was 90.2%, roughly the same as the pre-Guidelines rate.[22]

Both our survey of the district judges and the other two field studies support the conclusion that the Guidelines have greatly reduced the incentives available to induce defendants to plead guilty. Caseload pressures and compromises based upon factual or legal problems with individual cases have been two of the major factors driving plea bargaining in the past, and they continue to drive plea bargaining today. Yet the Guidelines provide no vehicle for considering either of theses factors. Since the Guidelines do not provide the tools to permit the bargaining necessary to keep the system functioning, it is not surprising that some prosecutors and defense counsel are finding ways around the Guidelines. The pressure to do so is enormous. The present allocation of resources is based upon the assumption that 85-90% of convictions will be the result of guilty pleas. Thus even a 5% drop in guilty pleas would mean a 33-50% increase in the number of trials.

[22] U.S. Sentencing Commission press release (June 27, 1989).

a. The lack of incentives for plea bargaining under the Guidelines

Although the Guidelines offer no explicit incentives for plea bargaining as such, they do contain provisions that appear to have been intended to serve this function. The principal provisions allow reductions for the defendant's "acceptance of responsibility," and for his provision of "substantial assistance" to the authorities. Unfortunately, these provisions are not sufficient, either individually or collectively, to provide the necessary incentives to keep induce the customary 85-90% guilty plea rate.

The Guidelines provide for a two-level reduction for the defendant's "acceptance of responsibility," but they explicitly state that this reduction is available without regard to whether the conviction is based upon a guilty plea.[23] The commentary further notes that while a guilty plea may be some evidence of acceptance of responsibility, "it does not, by itself, entitle a defendant to a reduced sentence under this section."[24] The Commission has not made it clear precisely how it intends the acceptance of responsibility provision to be applied, and the lower courts are giving it widely varying interpretations.[25] The credit for acceptance of responsibility is clearly not being given as an automatic reward for the entry of a plea of guilty.

[23] Guideline §3E1.1.

[24] Guidelines §3E1.1, Commentary 3.

[25] FJC Report.

In fact, an FJC computer search of acceptance of responsibility cases found that in 38% of the cases the defendant plead guilty but did not receive the reduction for acceptance of responsibility.[26]

Even assuming that the two level reduction for acceptance of responsibility is available to induce a defendant to plead guilty, it will often be insufficient. The Commission's own data showed that in the pre Guidelines period the average concession for a guilty plea was 30-40%.[27] A two level reduction (at the same point within the sentencing range) translates into only a 25% reduction.[28] Moreover, because the ranges for each level overlap substantially, a two level reduction does not guarantee a defendant any reduction in his sentence at all: the lowest sentence available on the higher range will be the same as the highest sentence available two levels down.[29] Thus unless he

[26] Ibid.

[27] U.S. Sentencing Commission, Supplementary Report on the Initial Guidelines and Policy Statements (June 1987) at 50.

[28] The maximum value of a two level reduction is approximately 35%, the difference between the top of the higher range and the bottom of the range two levels down. See footnote 29 infra.

[29] For example, for a defendant whose criminal history places him in category two the sentence at offense level 30 is 108-135 months; if the same defendant gets a two level reduction for acceptance of responsibility to offense level 28, the range is 87-108 months. Thus if the judge wished, he could give the defendant the same sentence -- 108 months -- at either level. There is, of course, another possibility: because of the range of sentences available at each level the maximum value of the two level reduction is actually greater than 25%. In the example above, the difference between the lowest sentence for level 28, 87 months, and the highest sentence for level 30, 135 months, is 48 months; thus the maximum value of the two level reduction of

knows what sentence the judge will assign, a defendant may reasonably fear that he will receive little or no actual benefit from the two level reduction.

Another feature that complicates plea bargaining is the Guidelines' partial adoption of a real offense, rather than a charge offense, system of sentences. Although the Commission itself describes the Guidelines as largely a charge offense system with a few features of a real offense system,[30] the FJC has calculated that roughly two-thirds of the current criminal caseload arises under the offenses that are subject to the real offense features of the Guidelines.[31] If the defendant and his counsel understand the Guidelines, they will realize that the focus on the real offense negates much of the potential value of plea bargaining to drop or reduce charges.[32] This in turn reduces the incentive to plead guilty.

The Guidelines do contain a provision that can provide a substantial incentive for guilty pleas: they allow the sentencing judge to depart from the Guidelines if the government makes a motion stating that the defendant provided "substantial assistance in the investigation and prosecution of another person who committed an offense."[33] This provision is potentially much

the two level reduction could be said to be 36% (i.e., 48 of 135 months).

[30] Guidelines Ch. 1, pt. A, §4.

[31] FJC Report.

[32] Another problem with the real offense provisions is that they tend to be misleading, leading defendants to believe that they have gotten benefits that do not in fact exist. See FJC Study.

more valuable to a defendant than the two level reduction for acceptance of responsibility, because it allows the court to select any appropriate sentence for the defendant, subject only to the check of appellate review. Unfortunately, the effectiveness of this provision is hampered by the fact that the defendant generally cannot learn in advance what sentence the judge will actually award.[34] Defendants are reluctant to plead guilty in return for an uncertain benefit. Moreover, not all defendants are in a position to provide information regarding another person who actually committed a crime; for those who cannot provide such information, the departure for substantial assistance is unavailable.[35]

The final factor that hampers plea negotiations under the Guidelines is the existence of mandatory minimum sentence statutes. If the defendant faces a substantial mandatory minimum sentence, there may be little or nothing either the prosecutor or judge can do to induce the defendant to plea guilty.

b. Manipulation and evasion of the Guidelines

Given the shortage of resources, federal prosecutors cannot take a greatly increased percentage of cases to trial. Accordingly, they are under extreme pressure to continue to provide incentives to induce guilty pleas. Both the FJC Study and the Nagel and Schulhofer Study found that the Guidelines are being

[33] Guidelines § 5K1.1.

[34] FJC Study.

[35] This is one class of cases where the prosecutor may try to stretch -- or evade -- the Guidelines. See FJC Study.

manipulated and evaded on a widespread basis to produce the concessions necessary to induce guilty pleas and keep the system as a whole afloat. While the degree of manipulation and evasion cannot be measured precisely, both studies found that this conduct was occurring in a substantial number of cases in every district studied. Because the necessary concessions cannot be granted within the Guidelines, they are being granted in a covert fashion outside of the Guidelines where they are subject to little or no regulation or judicial review.

Many different techniques were being used to manipulate the Guidelines. Bargaining between the prosecutor and the defendant often took place before formal charges are filed, and thus before there was any judicial review available.[36] Prosecutors also deliberately framed charges to focus on behavior that occurred before the effective date of the Guidelines.[37] Finally, in some cases the prosecutor and the defense agreed that the sentence would be based upon an incomplete, distorted, or artificial version of the facts.[38] When the prosecutor and defense attempted to use the latter technique either the sentencing judge or the probation officer sometimes discovered the disparity, but frequently they did not do so and the sentence was based upon the inaccurate description of the facts.

It should be noted that many of these techniques are

[36] FJC Study.

[37] Nagel and Schulhofer Study.

[38] Nagel and Schulhofer Study; FJC Study.

inconsistent with the governing Justice Department directives. The Attorney General's instructions to all federal prosecutors expressly state that federal prosecutors should not use their charging powers to evade the Guidelines, and that departures from the Guidelines "should be openly identified rather than hidden behind the lines of an agreement."[39]

c. Transfer of discretion to the prosecutor under the Guidelines

The net effect of the Guidelines has been to increase at least some forms of prosecutorial discretion while circumscribing the court's discretion. This is most apparent in the covert bargaining that is going on outside of the Guidelines, which is subject to little or no judicial control. But it can also be seen within the structure of the incentives that are provided by the Guidelines. For example, the prosecutor has unfettered discretion to determine whether to petition the court to depart from the Guidelines because of the defendant's provision of "substantial assistance to the authorities."[40] The increase in the prosecutors' discretion and the reduction in the courts' discretion seem at odds with Congress' overall intent to reduce unwarranted sentencing disparities, since the court's discretion is exercised on the record and can be subject to appellate review, while the prosecutor's discretion is largely unseen and unreviewable.

[39] Memorandum from Attorney General Richard Thornburg to Federal Prosecutors, March 13, 1989.

[40] Guideline 5K1.1.

II. RECOMMENDATIONS[41]

A. Providing for increased flexibility and accommodating plea bargaining

One fundamental revision would remedy the problems encountered in plea bargaining and also allow the court to individualize a sentence when necessary to take account of the defendant's personal characteristics and history.

The Sentencing Reform Act should be amended to provide that the Guidelines promulgated by the Sentencing Commission are general standards regarding the appropriate sentence in the typical case, not compulsory rules. Although the Guidelines should identify the presumptive sentence, the trial court should have general authority to select a sentence outside the range prescribed by the Commission, subject to appellate review for abuse of discretion. The statute should make it clear that the exercise of this discretion may be based upon factors such as the existence of an appropriate plea bargain or the defendant's personal characteristics and history.

It is crucial to provide the flexibility necessary to induce guilty pleas in appropriate cases. If the rate of plea bargaining decreases, the judicial system will require a huge increase in resources. Since nearly 85-90% of the convictions normally result from guilty pleas, only 10-15% go to trial; even a 5% re-

[41] These recommendations are those of the author alone. These recommendations are not made in the FJC Study or the Nagel and Schulhofer Study, and should not be attributed to the authors of those draft studies.

duction in guilty pleas would mean a 33-50% increase in the number of trials. This would require large expenditures for additional judges, court personnel, prosecutors, federal defenders, jurors, etc.

On the other hand, it is also important to subject the sentencing concessions in guilty plea cases to judicial oversight under the framework of the Guidelines and the Federal Rules of Criminal Procedure. The present system forces much of this discretion outside the Guidelines, where it is invisible and unreviewable.

The best solution is amending the statute to clarify the latitude available to the sentencing court. The court should have clear statutory authority to consider a plea agreement in light of the sentence prescribed under the Guidelines, and to accept the agreement if the concessions are appropriate under the circumstances. This change would make it possible for prosecutors to follow the Attorney General's directive to reveal the proposed departure from the Guidelines openly, but still offer appropriate inducements to encourage a sufficient number of plea agreements to process the caseload with available resources. The statute should make it clear that the court has discretion to accept an appropriate plea agreement specifying a sentence under Fed. R. Crim. P. 11(e)(1)(C), as well as appropriate agreements under 11(e)(1)(A) and (B). The statute should also give the court latitude to consider other factors, particularly the defendant's personal history. Finally, as explained in greater detail below, it is desirable for the courts to have greater leeway to

deal with special problems that occasionally arise under particular Guidelines provisions. It should also be noted that whenever the actual sentence was outside the Guidelines, the sentencing court's decision would be subject to appellate review for abuse of discretion.

Adoption of this recommendation would not mean a return to the old regime of standardless and unreviewable sentencing discretion, which produced unjustified disparity. The Guidelines calculation would establish the heartland -- the sentence for the usual case --and the sentencing judge would have to state reasons in any case in which he or she deviated from that standard. Any sentence outside the Guidelines would be subject to appellate review for abuse of discretion, with the Guidelines providing the appellate court with a benchmark against which to review the sentence.

Indeed, a review of the literature reveals that some commentators take the view that the discretion we believe to be so crucial is already present in the statute and the Guidelines, though this fact has not generally been recognized by the courts and the litigants.[42] If these commentators are correct, and the amendment we propose will not alter the substance of the law, it is still needed for purposes of clarification.

[42] See e.g., Breyer, The Federal Sentencing Guidelines and the Key Compromises on Which They Rest, 17 Hofstra L. Rev. 1 (1988) (court may accept plea bargain that rests on sentence outside guidelines limits); Walker, Below-Guidelines Plea Bargains, 2 Fed. Sent. R. 68 (1989) (same); Weinstein, 52 Alb. L. Rev. 1, 10-12 (1987)(court can depart on the basis of the defendant's personal history).

If this proposal is adopted it would also give the sentencing courts desirable leeway to deal with special problems that crop up under particular Guidelines. In particular, it would provide a court with the means to deal with problems that have arisen in connection with the Guidelines authorizing a downward departure for a defendant who has provided "substantial assistance" to the authorities (Guideline §5K1.1) and the Guideline regarding "career offender[s]" (Guideline §4B1.1).

As already noted, the Guidelines authorize a departure on the basis of the defendant's provision of "substantial assistance" to the government only when the prosecutor moves for such a departure. This transfers essentially unreviewable discretion to the prosecutor and leaves open the possibility of disparity between similarly situated defendants. Indeed, at least one district court has held that the limitation to government requests only violates the due process clause. United States v. Curran, No. 88-10027 (C.D. Ill., Sept. 29, 1989). See also United States v. Roberts, Crim. No. 89-0033 (D. D.C. Nov. 16, 1989)(Guideline §5K1.1 and administrative procedure of U.S. Attorney's office denied defendant due process). But see United States v. White, 869 F.2d 822, 829 (5th Cir. 1989) (Guideline 5K1.1 does not preclude court from entertaining defendant's motion if government does not seek departure).

On the other hand, although the court should have latitide to approve a departure without government approval in an unusual case, it is not clear that it would be desirable to amend Guideline 5K1.1 to allow for motions by the defense as a matter

of course. In the ordinary case the district court will not be in a position to second guess the prosecutor on matters such as whether the defendant the defendant made a "good faith" effort to provide assistance, whether the defendant was "truthful," whether his statement was "complete," whether it was "reliable," etc. In the ordinary case, the district court would simply follow the prosecutor's recommendation that there be no departure. Given the infrequency with which courts are likely to approve departures over the government's protest, it seems undesirable to structure the Guidelines so as to encourage the defense to file a motion for departure under 5K1.1 as a matter of course. Holding a hearing and ruling on such motions would add considerably to the district court's workload with little resulting benefit to the defense.

Thus the best solution seems to be to recognize that the courts' general power to give a sentence outside the Guidelines would permit a departure based upon the defendant's provision of assistance to the government even when the government does not seek the departure under 5K1.1. This permits the court to give the proper sentence in the unusual case when there is clear evidence that substantial assistance was provided -- and thus satisfies the due process objection to the present procedure -- without encouraging such motions in every case as a matter of right.

General flexibility would also be the best remedy for the problems that arise in connection with the "career offender" (Guideline 4B1.1). This provision can produce disparate

sentences among defendants with virtually identical criminal histories.[43] One partial solution to the disparities produced by the career offender provisions is to accord the sentencing judge greater general flexibility.

B. Eliminating mandatory minimum sentences

Mandatory minimum sentences are intended to control sentencing discretion. Although they perform this function, they do so in a way that is far more rigid than the present Guidelines system, which controls discretion but also tailors sentences to the specific facts of an offense, considering, for example, whether a weapon was used, whether the defendant was the instigator and leader or a follower, the nature of the injury, if any, to the victim, etc. The Judicial Conference Committee on Criminal Law and Probation Administration has concluded that mandatory minimum sentence statutes should be repealed now that the Guideline system is in place. Mandatory minimum sentence provisions inhibit the efforts of the Sentencing Commission to fashion a comprehensive and rational sentencing system. Indeed,

[43] Categorization of a defendant as a career offender depends upon the c22lassification of his past offenses. The Guidelines draw some very fine distinctions. For example, burglary of a dwelling is included as a crime of violence, thus helping to establish that a defendant is a career offender, while burglary of other structures is not. Thus if two defendants are both convicted of bank robbery (less than $2,500) and both accept responsibility, each will be give a total offense level of 17. Assume both defendants have a criminal history category IV because each has three prior 13 month sentences and two prior 60 day sentences. Their records are identical except for the fact that A was convicted of burglary of a dwelling while B was convicted of burglary of another structure. Defendant A will be classified as a career offender, receiving a Guideline range of 210-262 months. Defendant B will not be classified as a career offender, and he will receive a Guideline range of 51-63 months.

Senator Kennedy, the co-sponsor of the Sentencing Reform Act, has recognized that mandatory minimums are inconsistent with the Guidelines system. See Mandatory Minimum Sentences in the Omnibus Drug Bill, 1 Fed. Sent. R. 350 et seq. (1989) (reprinting statements from the Congressional Record).

As noted above, mandatory minimum sentences are seriously impeding the efforts of both prosecutors and judges to handle the growing criminal caseload. When lengthy mandatory minimum sentences are applicable, it is difficult to provide any incentive that will induce a defendant to plead guilty, and this is causing increasingly serious problems in many districts. Courts with heavy criminal caseloads depend upon disposing of 85-90% of the cases without a trial. Many of the district court judges who responded to our survey added comments emphasizing the negative effects of mandatory minimum provisions.

Once the mandatory minimum sentence statutes are repealed, the Sentencing Commission should reconsider the Guidelines applicable to the relevant offenses. At present the Guidelines use the mandatory minimum as the floor for those offenses. Given the huge projected increase in the federal prison population, it is important for the Commission to reassess the appropriate Guidelines for these offenses absent the driving force of the statutory minimums.

C. Simplification of procedures in the district court

There are two amendments to Rule 35(b) that could help to simplify the proceedings in the district court. The Advisory Committee on the Federal Rules of Criminal Procedure should

propose amendments to Rule 35(b) to:

a. authorize the district court to correct an error in the sentence within 120 days on the motion of either party, and

b. authorize the district court to amend a sentence based upon newly discovered facts within 120 days on motion of either party.

Given the complexity of the Guidelines and the unfamiliarity of both the court and counsel, numerous errors occur in sentencing. Some of these errors are discovered quickly, but there is no clear procedure to remedy the error short of an appeal or habeas action.

The district court should be given explicit authority to correct sentencing errors if they are discovered promptly. It is not desirable to require the parties to take an appeal or to bring a habeas action.

Part b of this proposal is more problematic than part a, and will require careful limitation to prevent abuse. On balance, however, the committee should recommend that authority be made available to amend a sentence based upon new factual information. To guard against abuse, this authority should be limited to information that was not known to the parties at the time of sentencing. A defendant's acceptance of responsibility (see Guidelines § 3E1.1) after sentence would not qualify as a basis for a reduction under this provision. It would also be desirable for the Advisory Committee's notes to emphasize the narrow construction envisioned for this provision.

Given the need for finality, both provisions should be

limited to 120 days after sentencing.

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August 21, 1989

Professor Sara Sun Beale
Duke University School of Law
Science Drive and Towerview Road
Durham, North Carolina 27706

Dear Sara,

Enclosed is a memo prepared by John Shapard setting out a few observations about data from the time study on the burden of sentencing. As he points out, the limitations on drawing defensible inferences are very great at this point. You and your associates can recognize them as well as we. Two serious hazards attend any separation of the data from statements about its limitations: misinformed decisions may be made and the credibility of the project may be drawn into question by those who recognize the unstated limitations.

I hope these will be helpful. When we know more, we will let you know.

I hope to see you when I come to the malpractice conference.

Sincerely yours,

Bill

Federal Judicial Center
MEMORANDUM

Date: August 16, 1989

To: Interested parties

From: John Shapard

Subject: Time study data concerning affect of sentencing guidelines on case time consumption.

The district court time study currently underway includes, for all districts, a sample comprising all cases filed in a two week period following randomly selected startup dates. The first court entered the study in November, 1987; subsequent courts entered the study at a pace of approximately two per month through October, 1988, and then at a pace of four per month. All districts will have entered the study by December, 1989. All cases in the study are followed until final disposition, with judges and magistrates reporting both the time expended and the nature of the task accounting for each time entry. Ultimately, the time study will provide data on about 1500 criminal cases and 2000 criminal defendants.

Data concerning effects of sentencing guidelines

Data collected so far include some sentencing activity in 513 cases. These may be divided into three categories:

Post-guideline (Postg) includes cases reporting some time spent on guideline sentencing, but no time spent on sentencing under pre-guideline law nor on issues of constitutionality of the guidelines;

Pre-guideline (Preg) includes cases reporting some time spent on sentencing under pre-guideline law, but no time on guideline sentencing nor on constitutionality issues.

Other includes all other cases reporting time spent on sentencing (e.g., cases with time spent on the constitutional issues, and cases with time spent on both guideline and pre-guideline sentencing).

Comparison of the Preg and Postg groups is highly problematic. First, Preg cases will never comprise a representative sample. Because the guidelines became effective almost simultaneously with the start of the time study, the Preg group underrepresents criminal cases that are filed promptly after the date of the alleged offense(s). By contrast, the Postg group somewhat underrepresents criminal cases filed long after the date of the alleged offense. We do not yet have data to identify characteristics of these two classes of underrepresented cases, but the differences between the postg and preg groups clearly may distort any comparison between the groups. Second, at this early stage, the time study includes only cases that now range in age from less than one month to 21 months. Among these, the Preg cases that have reached sentencing tend to be somewhat longer-lived than do the Postg cases that have reached sentencing. This difference also confounds attempts to draw generalizable conclusions by comparison of the two groups of cases.

With these caveats in mind, the tables on the following page illustrate some observations about the groups. The first two tables suggest that cases in the Postg group consume somewhat more total time

and more time in sentencing and Rule 11 (guilty plea) hearings than do cases in the Preg group. The last two tables, however, suggest both that any such differences are due largely to a higher average number of defendants per case in the postg group and also that the standard deviations for the averages are so large that we cannot be confident that differences in observed mean values are anything other than sampling error (i.e. a consequence of the luck of the draw). Not surprisingly, the Other group tends to consume more time, both per case and per defendant, than either the Postg or Preg groups.

Data concerning the overall burden of the criminal caseload

The data collected to date afford a limited basis to draw inferences concerning whether the burden of the criminal caseload has grown more or less than is reflected in current weighted filings statistics since the 1979 time study.

We currently have A.O. data that identify the offense codes of 675 cases in the time study. If we assume that these 675 cases comprise a representative sample of current criminal case filings (the time study case sampling procedure is designed to generate such a representative sample), we can estimate the influence of the new time study data on the criminal component of the weighted filings index. The suggestion, based on judge time reported as of 8-16-89 (including time spent on cases still in progress), is that the criminal weighted filings index using case weights from the current time study would be at least 25% greater than it is when computed using the existing case weights (from the 1979 time study). It is not possible at this point to determine whether that difference is statistically significant. It is noteworthy that the difference is entirely attributable to cases of offense type 6701 (narcotics distribution), which account for 18% of the 675 identified time study cases. These cases are currently assigned a weight of 1.0 (about 4 hours average judge time per case), while the current time study suggests that their weight should be at least 2.5 (10 hours).

While the statistical reliability of these estimates is unclear, the estimates are consistent with the suggestion that the current weighted case filings index understates the burden of criminal cases, due primarily to the increased demands of drug cases.

ALL FIGURES ARE IN HOURS

All cases in time study with any time spent on sentencing:

	N	MEANS tottime	senttime	r11time
Preg	232	3.63	0.90	0.25
Postg	241	4.87	1.20	0.37
Other	40	14.40	3.25	0.6

Considering only the 301 cases for which we currently have A0 data showing that the case is a felony:

	N	MEANS tottime	senttime	r11time
Preg	129	5.70	1.3	0.4
Postg	137	7.42	1.8	0.45
Other	35	16.17	3.5	0.67

Considering same group, data on a per-defendant basis:

	Ndefs (per case)	TOTIME mean	stdev	max
Preg	173 (1.4)	4.15	8.97	76.46
Postg	229 (1.7)	4.30	7.70	63.08
Other	76 (2.2)	6.65	7.77	40.18

Same as above, but only for cases known to have been terminated:

	Ndefs (per case)	TOTIME mean	stdev	max
Preg	130 (1.3)	4.30	9.86	76.46
Postg	145 (1.1)	3.91	8.23	63.08
Other	59 (2.5)	6.80	7.88	40.18

To: Judge Jose A. Cabranes[1/]
Chairman Workload Subcommittee
Federal Court Study Committee

From: Associate Reporter Sara Sun Beale

Re: Sentencing Guidelines Proposals

You have asked me to comment on the public response to the Sentencing Guideline proposals in the Committee's Tentative Draft, and to respond to the issues raised. As of this writing, summaries are available for three of the public hearings -- San Diego, Des Moines, and Miami -- and several speakers at the Washington D.C. hearing provided written testimony on this issue. Sections I and II summarize the comments of those who supported and opposed the draft recommendations at those four hearings. Section III responds to the objections to the draft proposals that were raised in the public hearings and the written comments.

This memorandum deals only with the Committee's most important recommendation (December Draft p. 61, Wheeler draft p. 125) that Congress should amend the Sentencing Reform Act to provide that the guidelines issued pursuant to it are general standards that identify the presumptive sentence, not compulsory rules.

1/ This is an edited version of the memorandum originally distributed to the Federal Court Study Committee.

I. Statements in support of the tentative recommendations

All but four of the speakers who addressed this issue at the hearings in question favored the draft recommendations.[2/] Indeed, one speaker stated that our recommendations had been greeted with "great joy." Support was expressed for each of the critical elements of the Committee's proposal.

a. The need for revisions to give sentencing judges greater flexibility

The Committee's most important proposal urges Congress to give sentencing judges greater flexibility by amending the Sentencing Reform Act to make the Guidelines general standards that identify the presumptive sentence but do not state compulsory rules. The speakers who supported the draft recommendations agreed that the present Guidelines are causing serious problems and strongly supported the idea that more flexibility is needed. For example, the executive director of the Federal Defender Service in San Diego stated that the mandatory feature of the Guidelines is not working, and urged the Committee to "sing loud and long to Congress" that it is not working. A representative of the Federal Defender in Miami stated that the Guidelines at present are totally unworkable, describing them as "a car only mechanics can drive."

The call for change was not limited to the federal

[2/] Reporter Diana Culp did note that one speaker's comments were "ambiguous" but seemed favorable.

I have also been told by the staff that all of those who testified on this issue at the other hearing sites also favored the Committee's recommendations, but will not be able to confirm this until transcripts or summaries are available.

defenders. The president of the American Bar Association testified that the ABA Criminal Justice Standards call for a guideline system "that will provide discretion far greater than that available to federal judges under the current system." Similarly both the president of the Iowa bar and the past president of the American Board of Criminal Lawyers testified that sentencing judges should be given greater discretion. The latter speaker also noted that the discretion now being exercised by young inexperienced federal prosecutors should be transferred to federal judges.

b. Evasion of the Guidelines

The hearings also some provided support for the view that the Guidelines are being evaded: the chief of the probation office in San Diego testified that the system is "dishonest and grossly unfair," and that prosecutors and defense counsel work together to get the case to "fit the numbers they agree on."

II. Statements opposing the tentative recommendations

Four speakers opposed the Committee's central recommendation. They were the Attorney General and three past and present members of the Sentencing Commission. The major points they made were as follows.[3/]

a. Challenging the grounds for the Committee's proposals

Both Judge Wilkins, the Chairman of the Sentencing Commission, and Judge (and former Commissioner) Breyer attack the

[3/] Other aspects of their testimony suggest the desirability of clarifying and rephrasing portions of the draft report, which will be done if the Committee retains the recommendations in its final report.

Committee's draft report on the ground that it is based upon a lack of information and misunderstanding of the way the Guidelines work.

Chairman Wilkins began his written testimony with a lengthy section (pp.. 3-9) arguing that the record does not support the draft recommendations. For some points, he states (p.3), there is no support beyond the reporter's hypotheticals. Further, he concludes (pp.. 3-9) the two draft studies cited -- the Schulhofer/Nagel study and the FJC study -- do not support the Committee's tentative recommendations. He notes (p.5) that the co-author of one of the draft reports (Professor Schulhofer) has written to state that his report does not support the Committee's conclusions. As to the FJC draft report, Chairman Wilkins concludes (p. 6) it "contains serious methodological and analytical flaws, making conclusions based upon its 'findings' unsatisfactory."

Chairman Wilkins also states (p. 10) that the Committee's recommendations rest on a "factually incorrect" assertion that the rate of guilty pleas is declining. He observes (pp.. 10-11) that the Commission data, like those of the AO, show that the plea rate remains within the 85-90% range.

Both Chairman Wilkins and Judge Breyer dispute the Committee's statement that the Guidelines are hindering plea bargaining. Chairman Wilkins states (p. 11) that there is no foundation for the Committee's assertion that the Guidelines do not provide sufficient incentives to induce guilty pleas. Both testified (Wilkins p. 13, Breyer pp. 11-12) that the Guidelines

do make clear the sentencing judge's authority to accept a plea outside the Guidelines. Finally, Chairman Wilkins states (p. 12) that there is no support for the Committee's assertion that widespread evasion and manipulation of the Guidelines are occurring.

b. Fundamental incompatibility with the Sentencing Reform Act

Each of these speakers saw the draft recommendation as an attack on the Sentencing Reform Act. For example, the Attorney General testified that the draft recommendations would "return the federal courts to the pre-Guidelines sentencing system." Chairman Wilkins characterized (p.16) the recommendations as a "call to undo this far reaching criminal justice reform before it has been fairly tested." He stated (p. 16) that this would "quickly resurrect the widespread, unjustified sentence disparity and related problems that the Act sought to rectify."

Chairman Wilkins also stated (p. 16) that the draft proposal is just a revised version of an approach Congress has already rejected. Similarly, a written statement from the Judicial Conference Committee on Criminal Law and Probation Administration states (p.4) that it "does not endorse the [Federal Courts Study] Committee's recommendation" in light of the rejection of similar proposals by Congress in 1983 and 1984. Although the Judicial Conference Committee supports "increased latitude in sentencing to deal with individual differences between criminal cases," it believes this recommendation must now be addressed to the Sentencing Commission rather than Congress.

b. Action now premature

Each of the three past and present members of the Sentencing Commission argued that action now would be premature. As Commissioner MacKinnon noted (p. 1), the Supreme Court's decision upholding the validity of the Guidelines was only a year old.

III. Evaluation of the Critique of the Draft Proposals

a. Support for the Committee's recommendations

With all due respect, contrary to the statements of Judge Breyer and Chairman Wilkins, there is ample support for the Committee's draft recommendations, which are in fact based upon a clear understanding of the Guidelines methodology. First, as noted in the draft report (December draft, p. 60), the Committee surveyed every district judge and received responses from over 82% of the judges. These responses, many of which included extensive comments, were a major source for the Committee's recommendation. Apparently this point was not made sufficiently clear in the draft recommendations. For example, the "hypothetical" that Chairman Wilkins criticizes (p.3) was actually taken from the comments of one of the respondents to our survey, who was describing the problems he had encountered.[4/]

Of course the Committee had neither the time nor resources to mount its own nationwide empirical study of the operation of the Guidelines. However, the testimony at the public hearings, see part I *supra*, makes it plain that the Committee is accurately reflecting the perceptions of many if not most of the partici-

[4/] The facts, however, were altered slightly for inclusion in the Committee report.

pants in the criminal justice system.

The Committee also relied upon two draft studies that were provided to me by the authors. Both of these reports were based upon field interviews in a total of 10 judicial districts. Chairman Wilkins is thus correct that not all districts were sampled and that the sampled districts may not be representative of all districts. Chairman Wilkins also faults the methodology of the FJC study. Nonetheless, these still appear to be the best data available, and the studies agree on the two crucial points: (1) there are significant problems in adapting the Guidelines to plea bargaining, and (2) there is a substantial amount of manipulation and evasion of the Guidelines occurring.

Chairman Wilkins is quite correct in pointing out that the authors of the Schulhofer/Nagel study contend that their study does not support the Committee's conclusions. The important point, however, is the limited nature of the disagreement: Nagel and Schulhofer <u>did find</u> that manipulation and evasion is occurring, but they make the point that it was present in only a minority of the cases studied. They believe, moreover, that this may change over time,[5] and in any event, they support other remedies to address this problem. When pressed, Commissioner Nagel informed me orally that she thought manipulation or evasion was present in 10-15% of the cases they studied. This certainly

[5] Professor Schulhofer makes the point that these observations were made before the Supreme Court's decision upholding the validity of the Guidelines. Of course the observations were made in districts where the courts had not invalidated the Guidelines.

supports the Committee's statement in the December draft report (p. 62, emphasis added) that "some prosecutors (and some defense counsel), in turn, have responded by evading and manipulating the Guidelines in order to induce the pleas necessary to keep the system afloat" and that these practices "occur regularly". Nothing in the draft Committee report suggests that these practices occurred in most or all cases.

An evasion/manipulation rate of 10-15% indicates a very serious problem. The point made in the Committee's draft report is that this evasion is typically practiced to get a plea agreement and a guilty plea. If evasion and manipulation were no longer permitted, it is likely that most or all of these cases would go to trial. Since only 10-15% of all cases now go to trial, adding another 10-15% would roughly double the number of criminal trials. If, on the other hand, the evasion continues, prosecutors will continue to exercise discretion outside the system, where it is not even subject to judicial review.

The Committee draft recommendation does not depend upon the "factually incorrect" assertion attributed to it by Judge Wilkins on p. 10 of his testimony. The Committee's draft report does not state that the rate of guilty pleas is declining. To the contrary, on p. 61 of the draft report circulated in December the Committee observes that the guilty plea rate under the Guidelines has remained approximately 90%. The point is not that there are already fewer guilty pleas, but rather that there would in fact be fewer guilty pleas if the Guidelines were not being manipulated or evaded in a significant number of cases.

There is also ample support for the Committee's statement that it would be desirable to clarify the scope of the court's authority to approve below-Guidelines sentences as part of a plea agreement. It is by no means clear that the court has the authority to give a below-Guidelines sentence unless the ordinary standards for departure are met.[6/] In fact there even appears to be some disagreement between Judge Breyer and Commissioner MacKinnon on this issue. Judge Breyer states (p. 11-15) that the Guidelines plainly do permit judges to impose a below-Guidelines sentence as part of a plea bargain, and that this authority may be interpreted to allow concessions made necessary by caseload pressures. Yet Judge MacKinnon suggests (pp. 5-6) that the Guidelines do not and should not permit a below-Guidelines sentence as part of a plea bargain that is entered into because of caseload pressures. If Judge MacKinnon is correct, then the Guidelines plainly do not allow all the flexibility needed to allow the courts and prosecutors to handle the increasing caseload with the available resources. Moreover, the apparent disagreement between MacKinnon and Breyer illustrates the need

[6/] Although the Commission's policy statement in §6B1.2 provides that the court may accept a sentence agreement calling for a departure for "justifiable reasons," this policy statement does not alter the statutory requirement in 18 U.S.C. §3553(b) that a court must impose a sentence within the guideline range unless it finds the existence of aggravating or mitigating circumstances not adequately taken into consideration by the Commission. See T. Hutchinson and D. Yellin, Federal Sentencing Law andn Practice at 414 (1989); Alschuler, Departures and Plea Agreements Under the Sentencing Guidelines, 117 FRD 459, 472-73 & n.53 (1988) (noting that "[u]fortunately, several distinguished judges and scholars" have misinterpreted the Guidelines, failing to see the limits that are necessarily imposed on the sentencing judge's discretion).

for clarification.

b. Compatibility with the Sentencing Reform Act

The Committee's draft proposal would not "gut" the Sentencing Reform Act. As stated on p. 61 of the December tentative draft, each recommendation adheres "to the central principles of the Sentencing Reform Act: the establishment of sentencing guidelines or ranges to guide the exercise and review of judicial discretion in order to avoid unwarranted sentencing disparities, the requirement that the sentencing judge state the reason for the sentence and for any deviation from the applicable guidelines, and the authorization of appeals of sentences by both the defendant and the government." Since the proposals accept and incorporate each of these key elements, their adoption would not mark a return to the old days that were criticized for permitting standardless and unreviewable discretion, and the Sentencing Commission would continue to play a significant role. Of course the draft report does propose amending the Sentencing Reform Act, and to that extent is it obviously inconsistent with the Act. Congress gave this Committee the charge of recommending changes to legislation.

c. Prematurity

The past and present members of the Sentencing Commission who testified urged that it would be premature to recommend any fundamental change in the Guidelines at this point, stressing that it been little more than a year since the Supreme Court upheld the constitutionality of the Guidelines. On the other hand, the Sentencing Reform Act was adopted in 1984, and the

current Guidelines went into effect in 1987. While many courts did not follow the Guidelines until the Supreme Court's 1989 decision, many other judges have been applying the Guidelines continuously since 1987. There is in fact a substantial record against which to judge the effect of the Guidelines.

The detrimental effects of the Guidelines on the system for the administration of criminal justice and the threat to the courts' ability to process their growing criminal caseloads counsel against a wait and see attitude. Further, although the Sentencing Commission itself certainly has the authority to propose modifications of the Guidelines, the testimony of its past and present members makes it plain that they do not acknowledge the problems revealed in the Committee's report, and are not likely on their own motion to take the steps recommended in the draft report. To the contrary, the tenor of the Commissioners' testimony suggests a disturbing defensiveness.

d. Conclusion

Despite the opposition of the Department of Justice and particularly the Sentencing Commission, the Committee should retain the draft Sentencing Guidelines recommendation in its final report. There is ample support for the Committee's proposal, which has generally been favorably received. The proposal has support from many quarters: the American Bar Association, criminal practitioners, Federal Defenders, probation officials, and very large number of district and appellate judges. There is no support for the notion that the proposals reflect only the sentiment of disgruntled district judges whom

Congress sought to rein in. Moreover, it is objectionable to trivialize as self-interested or merely "anecdotal" the comments of the district judges who have the greatest practical experience with the actual operation of the Guidelines.

Subcommittee on Workload

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