

BUREAUCRATIC JUSTICE: AN EARLY WARNING *

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I.

To accommodate the staggering increase in federal litigation that has occurred in recent years, the federal judicial process has been gradually, but significantly, transformed. The number of federal judges has dramatically increased at both the trial and appellate levels.¹ The number of law clerks and "staff attorneys" employed in the courts of appeals also has grown dramatically.² Moreover, an increasing number of cases that are deemed lacking in merit for one reason or another are now decided without oral argument,³ formal opinion, or even a terse statement of reasons.⁴ These

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¹ The Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, increasing the number of authorized appellate judgeships from 97 to 132, was the most recent step in this direction. The number of district court judgeships increased from 399 in 1978 to 516 in 1979. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR Table 3, at 3 [hereinafter cited as REPORT OF THE DIRECTOR]. See notes 25, 27 & 30 *infra* & accompanying text.

² See text accompanying notes 48-65 *infra*. The Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act of 1970, Pub. L. No. 91-153, 83 Stat. 403, 418-20, provided two law clerks for each appellate judge. The Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act of 1980, Pub. L. No. 96-68, 93 Stat. 416, 428, provided for a third clerk.

For a history of the use of central staff attorneys, see D. MEADOR, APPELLATE COURTS, STAFF AND PROCESS IN THE CRISIS OF VOLUME 12-18 (1974). See also text accompanying notes 61-65 *infra*.

³ See notes 72 & 73 *infra* & accompanying text.

⁴ See text accompanying notes 72-74 *infra*.

changes, which have been made in the hope of increasing judicial productivity,⁵ have not been made without significant costs to the quality of justice.⁶ My concern is that these costs have been too high. In the language of the economists, the time has come to carefully assess whether the marginal cost of generating one more decision in a given period of time does not exceed the value of that decision, both to society and to the parties immediately involved in a dispute that requires reasoned resolution.

Much has been written about the elusive subjects of judging⁷ and judicial administration.⁸ A substantial part of the entire production is aptly summarized in two observations. The first comes not from a lawyer, law professor or judge, but from H. L. Mencken, a man not known for deference to received wisdom in the legal profession or elsewhere. Mencken, it is said, once sent a letter of congratulations to a friend who had recently become a judge. Lest his friend be misled by his new-found stature in the world of lawyers, Mencken tempered his congratulations with the warning that his friend should remember that a judge is nothing but a law student who grades his own papers. My second observation comes from a more orthodox source—Justice Brandeis—who observed that judges are respected “because we do our own work.”⁹

These two observations sum up what I take to be the traditional understanding of the judicial office: an office whose duties are defined in terms of the actions, judgment and explanations not of a committee, but of an individual. That the Founders of our Republic recognized this fact is evidenced by their efforts to guarantee

⁵ A substantial volume of literature has developed dealing with problems of judicial efficiency and productivity. *E.g.*, R. GILLESPIE, *JUDICIAL PRODUCTIVITY AND COURT DELAY: AN EXPLORATORY ANALYSIS OF THE FEDERAL DISTRICT COURTS* (1977); D. MEADOR, *supra* note 2; Bell, *Toward a More Efficient Federal Appeals System*, 54 *JUDICATURE* 237 (1971); Flango & Blair, *Creating an Intermediate Appellate Court: Does It Reduce the Caseload of a State's Highest Court?*, 64 *JUDICATURE* 74 (1980); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals—The Price of Reforming*, — *U. CHI. L. Rev.* — (forthcoming).

⁶ See all of part III *infra*. See also Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 *A.B.A.J.* 860 (1980); Reynolds & Richman, *supra* note 5.

⁷ Among the classic works are B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); J. FRANK, *LAW AND THE MODERN MIND* (1949); O. HOLMES, *THE COMMON LAW* (1881); K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

⁸ See authorities cited in note 5 *supra*.

⁹ C. WYZANSKI, *WHEREAS: A JUDGE'S PREMISES* 61 (1965).

"judicial independence."¹⁰ Life tenure¹¹ and fixed salaries¹² are only two of the mechanisms¹³ designed to ensure that judicial decisions reflect the reasoned judgment of the persons we choose as judges, rather than the temporary ascendancy of various political or social forces.¹⁴ Similarly, the system ensures that the judge shall be accountable. The judge must personally conduct the proceedings in his court.¹⁵ He is generally expected to prepare an individually signed, publicly available opinion explaining the reasons for his decision,¹⁶ and the customary use of dissenting and concurring opinions further focuses attention upon the actions of individual judges.¹⁷

¹⁰ See THE FEDERALIST Nos. 78 & 79 (A. Hamilton) (Bourne ed. 1921); DECLARATION OF INDEPENDENCE ("He has made Judges dependent on His Will alone, for the tenure of their offices, and the amount and payment of their salaries."). See generally H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 12-16 (1953); Ervin, *Separation of Powers: Judicial Independence*, 35 L. & CONTEMP. PROB. 103 (1970). Cf. ABA CODE OF JUDICIAL CONDUCT Canon 1 ("A Judge should uphold the integrity and independence of the judiciary.").

¹¹ U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

¹² *Id.* ("The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). See generally *United States v. Will*, 100 S. Ct. 1010 (1980).

¹³ For example, judicial officers are afforded almost complete immunity from liability for their official acts. See *Stump v. Sparkman*, 435 U.S. 349 (1978).

¹⁴ See H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958); Fiss, *The Supreme Court, 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6-17 (1979); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

¹⁵ See *Herron v. Southern Pac. Co.*, 283 U.S. 91, 95 (1931) ("In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct . . ."); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1041-45 (1975); Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978).

¹⁶ K. LLEWELLYN, *supra* note 7, at 35 ("those strange and beautiful institutions, the signed opinion and the recorded vote, allow particular study of the judges one by one . . .") (footnote omitted); Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 387-88 (1978); Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810 (1961); Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966).

Constitutional provisions in a number of states require that the highest court or all courts render written opinions stating the grounds for their decisions. *E.g.*, ARIZ. CONST. art. VI, § 2, cl. 2; CAL. CONST. art. VI, § 14, cl. 2; MICH. CONST. art. 6, § 6; MO. CONST. art. V, § 12; N.D. CONST. art. IV, § 89; ORE. CONST. art. VII, § 4; UTAH CONST. art. 8, § 25; VA. CONST. art. 6, § 6; W. VA. CONST. art. VIII, § 5.

¹⁷ Fuld, *supra* note 16; Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361, 363 (1973); Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952).

The judge is also unique among public officials because he has no authority to set his own agenda. A judge must hear whatever case is brought before him.¹⁸ We expect the judge, regardless of how inconsequential a case might seem to be, to bring all his intellectual power and judgment to bear on the issues before him, with the expectation that he will reach the correct result for the right reasons.¹⁹ The judge's profession is one, as Judge Friendly has aptly remarked, whose "favorite word is 'why.'" ²⁰ The "bottom line" is not unimportant, but it is not in itself the measure of judicial performance. When we read a judicial opinion, we may be swayed in some small measure by whether the writer shares our views or prejudices and concludes with the words "AFFIRMED" as we ourselves would.²¹ But it is what comes before—how the issues are stated and how they are resolved—that leads us to conclude whether this is a judge we are glad to have. Thus, we expect the judge, like no other public official, to justify his decisions with reason. Several commentators recently have described this aspect of the judicial process as a "dialogue."²² This characterization well captures the personal tone of the business of judging. The notion of dialogue—attentive listening, comprehension, and reasoned response—embodies the standard we have set for judges.

It is because the quality of the judicial process necessarily depends upon these qualities of the individual that we require federal judges to be men and women in whom the appointing authority reposes "special trust and confidence," as the Federal Commission recites, because of their "wisdom, uprightness and learning."²³

¹⁸ J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 114-15 (2d ed. 1921), quoted in Fuller, *supra* note 16, at 385; Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978); Fiss, *supra* note 14, at 13; Fuller, *supra* note 16, at 385-87.

¹⁹ FISS, *supra* note 14, at 13-14; K. LLEWELLYN, *supra* note 7, at 387-88.

²⁰ H. FRIENDLY, *BENCHMARKS* 26 (1967).

²¹ Some might question whether reasoned analysis is as important for the litigants as it is for the victor, but try explaining to a client why the court ruled against him when the only judgment you have says nothing more than "affirmed." K. LLEWELLYN, *supra* note 7, at 26 ("[The] opinion is addressed also to the losing party and counsel in an effort to make them feel at least that they have had a fair break. . .").

²² R. BURT, *TAKING CARE OF STRANGERS* (1979); B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); FISS, *supra* note 14, at 13-17; Remarks by Bernard G. Segal, Annual Spring Meeting of the American College of Trial Lawyers (Mar. 19, 1974) [hereinafter cited as Segal Remarks] ("It is important to remember that while the law exists mostly on paper, it succeeds mostly in dialogue.").

²³ The Federal Commission is the certificate each federal judge receives at the time of his or her installation in office.

Provisions in a number of state constitutions reflect a similar attitude, requiring, for example, that judges be "learned" or wise. *E.g.*, ALA. CONST. art. VI,

We should not, therefore, lightly disregard trends tending to "depersonalize" the judicial function. Against this background, I would like to examine briefly the changes that have recently been made in the judicial process to accommodate the increase in the federal caseload.

II.

Few would dispute that the caseload in the federal courts has reached crisis proportions.²⁴ A few statistics make the point clearly. During the fiscal year ending June 30, 1940, there were fifty-seven circuit judges and 3,446 appeals were filed.²⁵ During the fiscal year ending June 30, 1980, 4,225 appeals were filed in the Fifth Circuit alone.²⁶ The number of judges in the Fifth Circuit is somewhat less than half the total number of circuit judges in 1940.²⁷ The Sixth Circuit, the court on which I sat, provides even more startling evidence: forty-one percent of all the appeals that the Sixth Circuit has heard since 1891 have been filed within the past decade.²⁸ More generally, during the fiscal year ending June 30, 1980, 23,200 appeals were filed in the federal courts,²⁹ more than six times the number filed in 1940. Each of the fifty-seven circuit court judges of 1940 would have been personally responsible for about sixty cases, if they were divided evenly. In 1980, each of the 132 judges that we now have³⁰ would have been personally responsible for about 175 cases. Those numbers understate the burden on individual judges because they do not account for the important fact that the courts of appeals sit in three-judge panels, requiring each of the judges to prepare to consider each of the cases heard by the panel, regardless of the ultimate writing assignment.³¹ When one con-

§ 154 ("learned in the law"); ARK. CONST. art. VII, §§ 6, 16 (same); DEL. CONST. art. IV, § 2 (same); MD. CONST. art. IV, § 2 ("integrity, wisdom and sound legal knowledge"); MINN. CONST. art. VI, § 5.

²⁴ See, e.g., NLRB v. Clothing Workers Local 990, 430 F.2d 966 (5th Cir. 1970); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L.Q. 257.

²⁵ REPORT OF THE DIRECTOR, *supra* note 1, Table 1, at 1.

²⁶ *Id.* Table 2, at 44.

²⁷ There are 25 judges in the Fifth Circuit. 631 F.2d XIII-XIV (1981) (Table of Judges).

²⁸ Oral communication from John Hehman, Clerk of the United States Court of Appeals for the Sixth Circuit.

²⁹ REPORT OF THE DIRECTOR, *supra* note 1, Table 1, at 1.

³⁰ *Id.*

³¹ The situation in the district courts is comparable. In fiscal year 1940, 34,734 cases were filed. In 1980, the total was 168,789, approximately 4.9 times the 1940

siders not only the increased volume of litigation, but also the increased complexity of individual cases,³² there can be no doubt that the federal judicial system has been pushed almost to the point of collapse.³³

III.

Attempts to deal with the vastly increased volume of litigation have focused on treating symptoms rather than causes. Efforts have centered upon speeding up the judicial process, so the increased caseload can be processed more quickly. Thus, a number of recent developments in judicial administration have muted the traditionally personal character of the judicial process.

These developments have occurred in a number of related areas: the number of judges has been increased, policies concerning the publication and content of judicial opinions have been altered, significant parts of the process of judicial decisionmaking have been delegated to staff attorneys and law clerks, and oral arguments have been reduced in number, length and importance. All of these changes may have significant effects upon the traditional structure of the judicial office. Consequently, they merit a closer examination, with particular attention to their impact upon the judicial process as it has evolved.

A common response to the litigation explosion has been to increase the number of active judges.³⁴ We cannot continue forever to simply add more judges, however, if we intend to maintain a system of adjudication in which judicial decisions are made by the individuals who have been chosen to judge. About fifty years ago, Judge Cuthbert W. Pound of the New York Court of Appeals said, "[T]he judge should no doubt . . . be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning, but

total. There were 190 district court judges in 1940. There are now 516. Again, if it is assumed that the cases were evenly distributed, each of the district judges in 1940 would have been responsible for about 183 cases, while today each of the 516 judges would be expected to dispose of about 327 cases a year. REPORT OF THE DIRECTOR, *supra* note 1, Table 3, at 3.

³² *E.g.*, *In re United States Fin. Sec. Litigation*, 75 F.R.D. 702, 712-13 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 101-03 (W.D. Wash. 1976).

³³ The state courts are experiencing comparable congestion. See D. MEADOR, *supra* note 2, at 7-9; S. WASBY, *et al.*, VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES 1-40 (1979); SELECTED READINGS: COURT CONGESTION AND DELAY (G. Winters ed. 1971).

³⁴ See notes 1, 25, 27 & 30 *supra* & accompanying texts.

such men are rare.”³⁵ If such individuals were rare in 1929, they are no less rare today.³⁶ Yet, as the figures noted earlier make clear, the need for such people today is unprecedented, and tomorrow no doubt it will be greater still.

Appointment to the federal bench has historically been deemed an ultimate ambition by many lawyers.³⁷ There have been, however, indications in recent years that the position of a federal judge may no longer be perceived as being as attractive as it once was.³⁸ Many of the most capable lawyers, some of whom might even meet Judge Pound's description of the ideal, decline to be considered, while others serve only for a short time before returning to the bar. Surely, the causes of this phenomenon are numerous and complex. In particular, the work is hard and the pay is not high.³⁹ I would suggest, also, that the proliferation of federal judgeships has itself added to the problem by lowering the status of the position.⁴⁰

The problems inherent in unlimited judicial expansion are more serious, however, than perceptions of prestige. When we choose to solve the caseload problem by adding new judges, new

³⁵ Pound, *Defective Law—Its Cause and Remedy*, 1 BULL. N.Y. STATE B.A. 279, 285 (1929).

³⁶ Cf. 2 THE FEDERALIST No. 78, at 106 (A. Hamilton) (Bourne ed. 1921) (“there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges”).

³⁷ J. SCHMIDHAUSER, JUDGES AND JUSTICE 41-42 (1979). See generally Volcansek-Clark, *Why Lawyers Become Judges*, 62 JUDICATURE 166 (1978).

³⁸ See, e.g., N.Y. Times, Nov. 8, 1980, § 1, at 10, col. 3 (statement of Judge Irving R. Kaufman).

³⁹ J. RYAN, *et al.*, AMERICAN TRIAL JUDGES 17-116 (1980); J. SCHMIDHAUSER, *supra* note 37, at 123-26, 182-95. For a discussion of increased caseloads, see all of part II *supra*. For a discussion of the work load of Supreme Court Justices, see Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (arguing that the Court is trying to decide more cases than it is able to).

Justice Blackmun has remarked that, “I thought I had labored to the limits of my ability in private practice . . . and as a judge of the Court of Appeals. Here, however, the pressure is greater and more constant, and it relents little even during the summer months.” COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 184 (1975) [hereinafter cited as INTERNAL PROCEDURES], *quoted in* J. SCHMIDHAUSER, *supra* note 37.

The issue of judicial salaries has come to the attention of both the courts and the public. In 1976, a number of federal judges brought suit in the U.S. Court of Claims seeking an increase in judicial salaries, on the theory that the effects of inflation had “diminished” their income in violation of Article III, § 1 of the Constitution. See Hazard, *The Judges Want a Raise*, THE NATION, Mar. 20, 1976, at 323; N.Y. Times, Feb. 11, 1976, § 1, at 1, col. 1. See also *United States v. Will*, 100 S. Ct. 1010 (1980).

⁴⁰ Accord, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 22-30 (1973) (“inflation of the number of district judges . . . will result by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficiency of the federal courts.”). See also W. KITCHIN, FEDERAL DISTRICT JUDGES: AN ANALYSIS OF JUDICIAL PERCEPTIONS (1978); J. RYAN, *supra* note 39, at 121-67.

problems are created for the administration of justice, as recently occurred in the Fifth Circuit. After years of steady growth both in caseload and in the number of authorized judgeships, that court now has twenty-five active judges, fifteen of whom have been appointed since October 1977.⁴¹ The judges of the Fifth Circuit sat en banc in January 1980. After that experience, they voted unanimously to support legislation splitting the circuit.⁴² As the Fifth Circuit judges themselves recognized, the expansion of a court can create intrinsic difficulties that are among the most serious of those generated by the increased caseload that originally created the need for additional judges. There is a loss of collegiality, a greater likelihood of intra-circuit conflicts, and an almost self-defeating cumbersomeness in the en banc hearings that are intended to permit resolution of those conflicts.

The Fifth Circuit was recently split. The Ninth Circuit should probably be split as well.⁴³ But that course is not one that

⁴¹ 631 F.2d XIII-XIV (1981) (Table of Judges).

⁴² The judges unanimously joined in a petition to Congress urging that their circuit be split. See H.R. REP. NO. 1390, 96th Cong., 2d Sess. 6, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 7680, 7685.

⁴³ The splitting of both circuits was recommended in 1973 by the Commission on Revision of the Federal Court Appellate System. In its report, *The Geographic Boundaries of the Several Judicial Circuits: Alternative Proposals*, 62 F.R.D. 223 (1973), the Commission stated, "We have concluded that the creation of two new circuits is essential to afford immediate relief to the Fifth and Ninth Circuits." *Id.* 228. Compelling current support for the Commission's proposal is found in the 1980 Annual Report of the Director of the Administrative Office of the United States Courts. The statistics contained in this report reinforce the view that the Fifth and Ninth Circuits are the nation's most overworked courts. For the twelve month period ending June 30, 1980, the Fifth and Ninth Circuits led all other circuits by a wide margin in terms of the numbers of appeals commenced, cases terminated, and cases pending. The Fifth Circuit had 4,225 cases commenced, 3,810 cases terminated, and 4,273 cases pending. The Ninth Circuit had, respectively, 3,738, 3,177, and 4,618 cases in these categories. The nearest circuit to these two in numbers of appeals commenced was the Second with 2,171. In numbers of dispositions, the nearest was the Fourth, with 2,242. Finally, the closest on the basis of cases pending was the Sixth, with 2,366. REPORT OF THE DIRECTOR, *supra* note 1, Table 2, at 44.

The problem of the Fifth Circuit has recently been resolved by Congress. On October 14, 1980, the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (to be codified at 28 U.S.C. 41), was passed, dividing the Fifth Circuit into two autonomous circuits. The new Fifth Circuit contains the District of the Canal Zone, Louisiana, Mississippi, and Texas. The "Eleventh Circuit" is composed of Alabama, Florida, and Georgia.

Legislation dividing the Ninth Circuit has been proposed, see, e.g., S. 2988, 93d Cong., 2d Sess., 120 CONG. REC. 2609 (1974), but it has not met with similar success. One commentator has stated that this is due in part to the opposition of the organized bar in California to any reorganization of the Ninth Circuit. See Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937, 941 n.24 (1980) (quoting *Circuit Realignment: Hearings on S. 729 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 94th Cong., 1st Sess., Part 2, at 162-68 (1975) (statement of Brent Abel)).

can be pursued for long as a general solution to the problems that face our courts. There is a limit to the number of circuits that we can have without diminishing the desirable multi-state character of the courts of appeals.⁴⁴ The character of the circuit courts would surely change if every populous or litigious state were to become a single circuit. Moreover, there is a limit to the number of circuits that can exist if the essential uniformity of federal law is to be preserved.⁴⁵ It is not unusual for years to elapse before the Supreme Court resolves conflicts among the existing eleven circuits.⁴⁶ The Court could not hope to resolve all important circuit conflicts if the number of circuits were significantly increased. Accordingly, as circuits would become more localized and parochial, they also would become more certainly courts of last resort.⁴⁷

A second response to heavier caseloads has been to provide judges with more law clerks⁴⁸ or to delegate judicial responsibility to staff attorneys.⁴⁹ Law clerks have been a part of the American judicial process for nearly a century.⁵⁰ Originally intended as cleri-

⁴⁴ Professor Wright has stated that:

It is difficult to overstate the importance of the regional character of the courts of appeals . . . [State courts] are state-oriented not nationally-oriented. This is precisely the quality which the federal courts of appeals must avoid. They must apply a national system of law in such fashion as will best serve the national interest. They are best able to do that when they are composed of judges who have practiced in different states, who have a wide variety of experience, who are free from the prejudices and provincialisms which color the thinking of lawyers in any one state.

Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 974 (1964). See also *The Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals*, 62 F.R.D. 223, 227 (1973); INTERNAL PROCEDURES, *supra* note 39, at 59-60.

⁴⁵ Speaking before the Commission on Revision of the Federal Court Appellate System, Professor Alan N. Polasky remarked that increasing the number of circuits simply enhances the possibility that you will have increased conflicts between circuits, and what I think others refer to as balkanization of national law . . . Unless there is somehow or other an opportunity to resolve these decisions . . . between the circuits, you get an increase in disharmony . . . [Y]ou must assure the people in this country that the law that is being applied, for example, in Vanderbilt, Michigan, or Philadelphia, Pennsylvania, or in New York, is the same law . . . [Y]ou have to have confidence that the people are being treated equally . . . And it seems to me that is one of the key issues for emphasizing national law.

2 *Hearings Before the Commission on Revision of the Federal Court Appellate System* (2d Phase) 787 (1975).

⁴⁶ See INTERNAL PROCEDURES, *supra* note 39, at 3, 16-19.

⁴⁷ *Id.*

⁴⁸ See note 2 *supra* & authorities cited in note 50 *infra*.

⁴⁹ See Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253 (1980).

⁵⁰ For concise histories of the use of law clerks, see Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125 (1973); Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299 (1961);

cal assistants,⁵¹ law clerks have assumed ever-increasing responsibilities.⁵² Until only recently, federal judges had only one law clerk,⁵³ and the relationship between judge and clerk was particularly close.⁵⁴ Professor Kurland described the relationship well in a tribute to Judge Frank, for whom he clerked in 1944-45:

You criticized his draft opinions and memoranda as vigorously as he had challenged yours. And each of you put the offerings of the other judges through the wringer, no matter how exalted the writer of the opinion. Thus the law clerk, barely out of law school, was encouraged by Frank to say why and where Judge Learned Hand, the dean of the federal judiciary, had erred. It was Frank who had been appointed to the court by the President with the advice and consent of the Senate and so it was he who had the last word. But short of that point egalitarianism prevailed.⁵⁵

Kurland's description of his clerkship conveys the sense of an atmosphere charged with intellectual energy. Although experiences no doubt varied from judge to judge,⁵⁶ the clerk's principal non-clerical task had become the critiquing of judicial opinions and arguments.⁵⁷ For the clerk, it was a unique educational experience.⁵⁸ For the law, it was a process in which reasons and results were thoroughly challenged. Importantly, however, the arrange-

Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179 (1973). The first official action taken towards securing clerical assistance for Supreme Court Justices was a report in 1885 by Attorney General Garland. Garland recommended that each Justice be provided with "a secretary or law clerk, to be a stenographer," who would "assist in such clerical work as might be assigned to him." 1885 ATT'Y GEN. REP. 43, *quoted in* Newland, *supra*, at 301.

⁵¹ See note 50 *supra*.

⁵² Baier, *supra* note 50, at 1128-37; Newland, *supra* note 50, at 300-05.

⁵³ Justice Harlan Stone, upon becoming Chief Justice in 1941, initiated the use of two law clerks, largely to cope with an increased Supreme Court caseload. Newland, *supra* note 50, at 303-04. See note 2 *supra*.

⁵⁴ A number of former law clerks have described their experiences in glowing terms. E.g., Brudney & Wolfson, *Mr. Justice Rutledge—Law Clerks' Reflections*, 25 IND. L.J. 455 (1950); Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661 (1957); Meador, *Justice Black and His Law Clerks*, 15 ALA. L. REV. 57 (1962); Nesson, *Mr. Justice Harlan*, 85 HARV. L. REV. 390 (1971).

⁵⁵ Kurland, *supra* note 54, at 663.

⁵⁶ Newland, *supra* note 50, at 311 ("their duties have been determined entirely by their individual justices").

⁵⁷ K. LLEWELLYN, *supra* note 7, at 322; Baier, *supra* note 50, at 296 ("a valuable sounding board"); Kurland, *supra* note 54, at 663; Newland, *supra* note 50, at 314; Meador, *supra* note 54, at 59-60.

⁵⁸ See K. LLEWELLYN, *supra* note 7, at 321-23; Baier, *supra* note 50, at 1161-63; Braden, *The Value of Law Clerks*, 24 MISS. L.J. 295, 298 (1953); Wright, *supra* note 50, at 1194-96.

ment focused on testing the judge's work, and not on substituting the clerk's efforts for it.

When I first became a judge, we were still operating with one clerk. Later, we had two. While I never served under the present system of three clerks,⁵⁹ I am not sure that I could really use three clerks and still believe that I was the one, as Professor Kurland puts it, "who had the last word." In any event, it seems to me undesirable that we move beyond three clerks. There are inherent limits to the amount and types of work that can safely be delegated to clerks.⁶⁰ Perhaps of greater importance, there are limits to the amount of time and energy that any one person can be expected to devote to the supervision of even the brightest of law clerks. It is not enough that the judge be sufficiently satisfied with the clerk's work that he is willing to sign it. The judge must make the critical decisions in the analysis and the execution of the work. Clerks are certainly helpful in relieving judges of some of the burden, but it is the judge who was appointed to weigh the issues in every case, and there are limits to the number of cases he can personally judge. Finally, the increase in the number of clerks may significantly alter the role of the clerk. Rather than critiquing and testing judicial work, clerks may come to perform this work themselves. All of these considerations raise doubts in my mind as to the wisdom of further increasing the role of law clerks in the judicial process.

A development that I regard with even greater concern, however, is the growth—I might say cancerous growth—of central staff attorneys' offices.⁶¹ As of a year ago, there were 136 persons employed as staff attorneys in the federal courts.⁶² Central staff attorneys perform a variety of functions, including several that are grounds for some concern.⁶³ They make initial recommendations

⁵⁹ See note 2 *supra*.

⁶⁰ For similar misgivings regarding over-delegation of judicial duties, see Baier, *supra* note 50, at 1163-71; Newland, *supra* note 50, at 315-16; Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REPORT, Dec. 13, 1957, at 74.

⁶¹ Arthur D. Hellman, writing on the experience of the Ninth Circuit, remarks that, "Initially the staff had only one full-time attorney, who was assisted by elbow clerks assigned . . . for periods of six to eight weeks. By 1974 there were seven attorneys on the central staff, and in 1976 the number was increased to twenty." Hellman, *supra* note 43, at 943. The increase in the use of staff attorneys—and the reasons for this increase—is also discussed in D. MEADOR, *supra* note 2, at 7-18.

⁶² REPORT OF THE DIRECTOR, *supra* note 1, Table 19, at 19. The 136 attorneys include: 11 Senior Staff Attorneys, 8 Supervisory Staff Attorneys, and 117 Staff Attorneys.

⁶³ The central staff attorneys have been given responsibility over many tasks that were originally the province of the judges assigned to the case. First, the

whether cases warrant oral argument and how they should be decided.⁶⁴ In some cases for which they deem oral argument unnecessary, they prepare draft opinions for consideration by a panel of judges.⁶⁵ These arrangements, while contributing generally to the development of a more bureaucratic judicial process,⁶⁶ are at odds in several specific respects with traditional notions of the judicial office. As pointed out earlier, we have long expected that the judge "will do his own work," and that he will be directly involved in the decisionmaking process. Similarly, we have expected that judges hear whatever claims are brought before them. The widespread use of staff attorneys creates the possibility that these expectations will not be realized.

While I have no statistics to support my conjecture, I would not be surprised if the press of business might tempt some judges to give the briefs in cases deemed unworthy of judicial attention a cursory look at best. Indeed, I have seen many *opinions* in the last few years that contain substantial internal evidence of cursory

central staff has the job of "screening" cases when they are initially filed with the appellate court. The screening staff, according to Judge Hufstedler,

acquires a case at the moment the notice of appeal is filed, shepherds it through each procedural step until the closing brief is in, prepares legal memoranda, drafts a proposed opinion or other disposition, recommends grant or denial of oral argument, and presents the complete package to the judges to be graded pass/fail.

Hufstedler, *The Appellate Process Inside Out*, 50 CAL. ST. B.J. 20, 22 (1975). See Hehman, *Judicial Administration in the United States Court of Appeals for the Sixth Circuit: Organization and Procedures to Address the Volume Crisis*, 10 U. TOLEDO L. REV. 645, 655 (1979) (similar analysis of central staff screening functions in the Sixth Circuit).

Hellman refers to a process within Hufstedler's screening phase that he terms "inventory." Hellman, *supra* note 43, at 944. This process requires the staff attorneys and law clerks to read the case's records and briefs, and to prepare "inventory cards" that contain information that assists the court in preparing its arguments calendar. *Id.* Most importantly, the attorneys will assign a given case a particular "weight," or "a numerical estimate of the relative difficulty of the case from the judges' standpoint. The weights are used to equalize the workloads assigned to the various panels sitting in any given month." *Id.*

Once a case has been placed on the court's calendar, it will be assigned to a three-judge panel. The court's staff law clerks will be responsible for preparing bench memoranda on the cases scheduled for argument, and the judge assigned to write the opinion of the court may request staff attorney assistance in the drafting of opinions in cases that the law clerks have not previously handled. *Id.* 945. A detailed description of staff attorney functions can be found in D. MEADOR, *supra* note 2, at 31-76; INTERNAL PROCEDURES, *supra* note 39, at 53-54.

⁶⁴ D. MEADOR, *supra* note 2, at 31-40 & 48-53.

⁶⁵ *Id.* 48-53.

⁶⁶ As the judicial process becomes more bureaucratic, it becomes more likely that internal political pressures and inertia will control the decisionmaking process. M. CROZIER, *THE BUREAUCRATIC PHENOMENON* 187-98 (1964); J. FREEDMAN, *CRISIS AND LEGITIMACY* (1979).

judicial examination.⁶⁷ It is not at all rare to see unpublished, per curiam opinions containing obvious logical—and even grammatical—flaws,⁶⁸ all carried beneath the names of three judges whose published opinions generally demonstrate clear thinking and precise writing. One explanation of this phenomenon is that such opinions are not authored in chambers and receive only the most fleeting consideration when they reach the judge's desk. This phenomenon gives substance to fears that the use of staff attorneys will alter our traditional expectation that judges hear whoever comes before their court.⁶⁹ More obvious, perhaps, is the stark contrast between poorly reasoned and written opinions and our fundamental expectation that judicial decisions will be accompanied by reasoned justifications.⁷⁰

Delegation of some aspects of the judge's work is essential, as is no doubt true of much of the work of many other public officials. Such delegation appears particularly desirable against the background of overloaded dockets.⁷¹ But we must not lose sight of the fundamental changes in the nature of the judicial enterprise that may accompany delegation of too many or too critical aspects of the judge's work.

On one level, excessive delegation results in a product shaped by people other than the men and women chosen because of their "wisdom, uprightness, and learning." We might well repose considerably less "trust and confidence" in a group of faceless assistants than we do in the appointed judge. On another level, excessive delegation poses a threat to the traditional institutional structure of the judicial office. We can no longer count on receiving the personal attention of a judge who is insulated by layers of staff.

⁶⁷ For a thorough empirical study examining, *inter alia*, the correlation between nonpublication and low quality of opinions, see Reynolds & Richman, *supra* note 5; Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807. See also Wold, *Going Through the Motions: The Monotony of Appellate Court Decisionmaking*, 62 JUDICATURE 58, 63 (1978) (quoting California appellate judge: "In the unpublished, there is just no room for creativeness or innovation."); Remarks of John P. Frank, Ninth Circuit Judicial Conference (July 29, 1976), cited in Reynolds & Richman, *supra* note 5.

⁶⁸ See cases noted in Reynolds & Richman, *supra* note 5. See also Wold, *supra* note 67, at 63 (quoting California appellate judge: "We've got too much to do to fool around with something like that [checking accuracy of citations and quotations] in an unpublished opinion.").

⁶⁹ For a similar argument, suggesting that the federal appellate courts may be becoming "certiorari" courts, see Reynolds & Richman, *supra* note 5.

⁷⁰ See text accompanying notes 18-22 *supra*.

⁷¹ For a favorable opinion of judicial delegation, see Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A.J. 863 (1980). Significantly, Judge Godbold will be the Chief Judge of the new Eleventh Circuit.

Elimination of time-consuming oral argument and considered opinions in cases deemed meritless is another of the palliatives increasingly used to reduce the burden of the caseload.⁷² For example, during the fiscal year ending June 30, 1980, the Fifth Circuit disposed of 1,078 cases without oral argument.⁷³ About one-third of those cases were disposed of in "opinions" that said simply: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."⁷⁴ Such summary justice may be necessary in our society today. But in my judgment it is efficiency achieved at too great a cost. My experience as a judge of the Sixth Circuit Court of Appeals leads me to believe that oral argument, although sometimes fruitless, is often useful for both the bench and bar.⁷⁵ Points not clearly made in briefs can often be forcefully made in oral argument, or at least adequately explained as a result of persistent questioning. Cases that clearly seem to be "predestined . . . to affirmance without opinion," to use Cardozo's phrase,⁷⁶ sometimes seem less predestined after oral argument. Oral argument is the most visible, and often the most effective, form of "dialogue" between judge and litigant. Curtailment of this type of exchange further alters our perception of the judicial office as a personal one.

Little need be said about the desirability of opinions. All of us have had seemingly brilliant ideas that turned out to be much less so when we attempted to put them to paper.⁷⁷ Every conscientious

⁷² See FED. R. APP. P. 34; INTERNAL PROCEDURES, *supra* note 39, at 46-49; authorities cited in *Hearings Before the Commission on the Revision of the Federal Court System* (1st Phase) 64-70 (1974) [hereinafter cited as *Revision Hearings* (1st Phase)]. The number of cases terminated without oral argument or submission on briefs increased as a percent of total terminations from 33.5% in 1979 to 36.3% in 1980. REPORT OF THE DIRECTOR, *supra* note 1, at 51.

⁷³ REPORT OF THE DIRECTOR, *supra* note 1, Table B-1, at A-3.

⁷⁴ See *id.* Table 9, at 51.

Several circuits decide substantial numbers of cases stating only "Affirmed. See Local Rule x." or using a standard recitation, tracking the language of the local rule. Reynolds & Richman, *supra* note 5.

⁷⁵ See K. LLEWELLYN, *supra* note 7, at 240 ("In any but freak situations, oral argument is a must.") (footnote omitted); authorities quoted in INTERNAL PROCEDURES, *supra* note 39, at 46-49; *Hearings Before the Commission on Revision of the Federal Court System* (2d Phase) 64 (written statement of Orison Harden), 449 (testimony of Edward Hickey) (1974-75) [hereinafter cited as *Revision Hearings* (2d Phase)]; Segal Remarks, *supra* note 22.

⁷⁶ B. CARDOZO, *supra* note 7, at 164.

⁷⁷ A number of commentators have discussed the costs and benefits of the limited publication of judicial opinions. *E.g.*, P. CARRINGTON, *et al.*, JUSTICE ON APPEAL (1976); *Revision Hearings* (2d Phase), *supra* note 75; Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIB. J. 362 (1974); Newbern & Wilson, *Rule 21: Unprecedents and the Disappearing Court*, 32 ARK. L. REV. 37 (1978); Note, *Unreported Decisions in the United States Court of Appeals*, 63 CORNELL L. REV. 128 (1977).

tious judge has struggled, and finally changed his mind, when confronted with the "opinion that won't write."⁷⁸ We can only guess at the number of decisions "affirmed without opinion" that might have been reversed had a judge attempted to write an opinion explaining the announced result. Moreover, a five- or ten-word opinion provides neither the litigants nor the rest of us with the reasoned analysis central to the judge's enterprise.⁷⁹ This development, together with the use of staff attorneys to screen cases, the reductions in oral arguments, and the increasing delegation of responsibilities to law clerks, seems to strike close to the heart of traditional notions of the judicial process. These changes subtly alter what I have termed the "personal" character of the judicial office.⁸⁰ Judges may no longer hear every case, but only the important ones. They may no longer engage in genuine dialogue with litigants nor be expected to give reasons for the decisions they announce. These changes ultimately may prove unimportant. In light of the traditional importance of the personal character of the judicial office, however, a miscalculation might prove costly. I recognize that there is room for considerable difference of opinion on this issue. My point is simply that these are costs that must be weighed against the benefits of the changes in the federal courts system.

IV.

Lest my uneasiness be thought the mere speculations of a curmudgeon, a judge turned lawyer, let me briefly describe the experience of one state appellate court, which may serve, if not to reveal the difficulties that are present in the federal courts today, at least to highlight the difficulties that await the federal court system. In a recent article, political scientist John Wold reported on his study of the California Court of Appeal.⁸¹ Professor Wold and a colleague interviewed forty-one of the fifty-six judges of the California Court of Appeal, the state's intermediate court, which sits in thirteen divisions in five districts.⁸² The court, like many others, has

⁷⁸ See Hellman, *supra* note 43, at 939. Compare K. LLEWELLYN, *supra* note 7, at 101-06; J. FRANK, *supra* note 7, at 100 ("Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.").

⁷⁹ See notes 19-21 *supra* & accompanying text.

⁸⁰ See text following note 22 *supra*.

⁸¹ Wold, *supra* note 67.

⁸² *Id.* 59-61.

experienced an explosive increase in litigation. In fiscal year 1976, 10,797 cases were filed—approximately 570 cases per panel.⁸³ The candor with which the judges discussed their work is commendable; what they had to say is frightening. For instance, one judge remarked, “We have chances for creativity a couple of times a year, maybe. But we’re too busy to think that much. We give each case full consideration, but this is essentially an assembly line.”⁸⁴

Apparently, the only way that the system works at all is through a procedure whereby incoming cases are screened by permanent central staff attorneys who weed out appeals that they consider non-meritorious.⁸⁵ The staff then prepares memorandum opinions in those cases. As Professor Wold said in his article: “The staff product does not become the decision of the court until the judges themselves adopt it. But judicial adoption, perhaps with minor modifications, is typically perfunctory, and the memoranda are eventually handed down as ‘By-the-Court’ opinions.”⁸⁶ Significantly, some judges complained that not enough cases were delegated to the staff.⁸⁷

With respect to the opinions that they wrote, the judges noted that they did not receive credit under the court’s “unofficial quota system” for writing separate concurrences or dissents, thereby creating an institutional bias in favor of unanimous decisions even in concededly difficult cases.⁸⁸ With disarming candor, one judge said, “I hate to say this, but just the workload alone may encourage one judge to agree with the others, because otherwise he or she would have to write a dissenting opinion.”⁸⁹ The judges also noted that a callousness had developed out of boredom,⁹⁰ and that “they constantly had to remind themselves that all cases deserved their close scrutiny, since appeals sometimes proved to be much more deserving of attention than they appeared at first glance.”⁹¹

⁸³ *Id.* 61.

⁸⁴ *Id.* 62.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Although only a few judges voiced this opinion, one commented that the staff “should be doing hard work.” *Id.*

⁸⁸ *Id.* 64. “Dissents were filed in an average of only 1.6 per cent of all matters disposed of by majority opinion during fiscal years 1971-1973” *Id.* n.19.

⁸⁹ *Id.* 64. The presiding judge in one division reportedly said, “My job here is to get rid of the garbage, because I can get rid of it faster than anybody else.” *Id.*

For discussion of the value of dissenting and concurring opinions, see authorities cited note 17 *supra*.

⁹⁰ Wold, *supra* note 67, at 65.

⁹¹ *Id.* Compare “As with everything in life, three-fourths of what you do is routine and pretty dull, whether you’re selling life insurance or deciding judicial

I would venture to guess that the situation that is developing in the federal courts of appeals is not different in kind from that which is portrayed in Professor Wold's study. The remedies with which we are experimenting in the federal courts have been tested in California, and they have clearly failed to solve the problem. The system of churning out staff-generated per curiam opinions in the intermediate appellate court was recently described by Chief Justice Bird of the California Supreme Court as "turning our appellate justices into administrators processing paper in a large bureaucracy, rather than judges writing opinions."⁹²

In the eyes of a number of observers, the changes in judicial administration adopted in California have altered the character of the judicial office. It is difficult, if not impossible, to square the image of "administrators processing paper in a large bureaucracy" with the traditional view of judging as a "personal" business centering on dialogue and reasoned analysis. To return to Justice Brandeis for a moment, can the judges who hand down these per curiam opinions say that they "do their own work"? And if they cannot, will they continue to command our respect?

V.

In the federal system, however, we have the basis for a solution—at least a partial solution—that is not available to the states. Quite simply, the federal courts are—and ought to be—courts of limited jurisdiction.⁹³ For the most part, the scope of that jurisdiction is determined by Congress, which need not, of course, assign all the problems of our society for solution to the federal courts.⁹⁴ Congress might take a hard look at where the bulk of the federal caseload comes from and determine where, given limitations of judicial time, the jurisdiction of the federal courts can best be cut back. The protracted and continuing debate over diversity jurisdiction, however, does not suggest that this solution will be speedily

opinions or driving a streetcar," *id.* (quoting California Court of Appeal judge) *with* "[T]he good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element The test of his success is the measure in which his craftsman's skill meets with general acceptance." Hand, Book Review, 35 HARV. L. REV. 479 (1922).

⁹² Bird, *The Hidden Judiciary*, 17 No. 1 JUDGES' J. 5-6 (1978).

⁹³ C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 7 (1976).

⁹⁴ See *id.* § 10; see also Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46-47 (1975).

or easily implemented.⁹⁵ In any event, such suggestions simply shift the burden to the state judicial systems, which if California is representative, are also staggering under the weight of their case-loads.⁹⁶

The plight of the federal courts has been repeatedly brought to the attention of the legislative branch in recent years.⁹⁷ Congress has demonstrated considerable sensitivity to the situation of the judiciary, and several reform efforts have been undertaken.⁹⁸ As I have suggested, however, many of these reforms are directed at the symptoms and not the causes of the crisis.⁹⁹ Moreover, some of these developments run directly counter to traditional notions of the judicial office.¹⁰⁰

I suggest that consideration be given to addressing the dilemma of the federal courts on a more fundamental level. Congress, in recent years, has legislated in more and more areas that once were considered the province of the states.¹⁰¹ In addition, legislation has been drafted in increasingly general terms.¹⁰² Such generality, of course, creates numerous appeals on issues of legislative intent—complex appeals in which there are no easy answers. Similarly, courts now frequently are called upon to make quasi-legislative decisions, filling in ever-increasing gaps in statutory law. These decisions, requiring consideration of a wide variety of facts and

⁹⁵ *E.g.*, *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 (1954) (Frankfurter, J., concurring) (opposing diversity jurisdiction); H. FRIENDLY, *supra* note 40, at 3-4, 139-52 (urging abolition of diversity cases except in limited circumstances); Frank, *For Maintaining Diversity Jurisdiction*, 73 *YALE L.J.* 7 (1963); Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 *A.B.A.J.* 601, 604 (1922).

⁹⁶ *See* note 33 *supra*.

⁹⁷ *E.g.*, *Revision Hearings (1st & 2d Phases)*, *supra* notes 72 & 75.

⁹⁸ *See, e.g.*, An Act to Improve Judicial Machinery, Pub. L. No. 94-381, 90 Stat. 1119 (1976) (codified in scattered sections of 28 U.S.C.); Equal Access to Justice Act, H.R. REP. No. 1418, 96th Cong., 2d Sess. (1980); Federal Courts Improvements Act of 1979, S. 677 & S. 678, 96th Cong., 1st Sess. (1979); National Court of Appeals Act, S. 2762 & S. 3423, 94th Cong., 2d Sess. (1976); Circuit Court Judgeship Bill, S. 2991, 93d Cong., 2d Sess. (1974).

⁹⁹ *See* all of part III *supra*.

¹⁰⁰ *Id.*

¹⁰¹ Judge Friendly has pointed to the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified in scattered sections of 42 U.S.C.), the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified in scattered sections of 42 U.S.C.), the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, tit. I, 84 Stat. 91 (codified in scattered sections of 33 U.S.C.), the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 (codified in scattered sections of 33, 46 U.S.C.), and the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified in scattered sections of 42, 49 U.S.C.), as examples of such "new" legislation. H. FRIENDLY, *supra* note 40, at 22-27.

¹⁰² *See* H. FRIENDLY, *BENCHMARKS* 47-48 (1967).

policy,¹⁰³ are equally difficult for courts to resolve.¹⁰⁴ Such cases, of course, take time, an undeniably scarce resource in our courts.

Congress, of course, could not legislate so as to avoid the necessity for statutory construction.¹⁰⁵ It could, however, do a better job than it does. One need only call to mind the amount of ink and the amount of judicial time that has been spent in recent years on the question whether Congress has created, *sub silentio*, a private cause of action under various federal statutes.¹⁰⁶ Congress assuredly cannot eliminate all questions that will arise under the statutes that it enacts, even with respect to remedial provisions, but fundamental questions, such as whether private parties have the right to bring suit under a statute, are certainly ones that Congress can be expected to answer.

Although legislative actions clearly contributed to the litigation explosion, the federal courts also have had a hand in the development of the crisis. The courts have not been at all reluctant to make legislative-type decisions.¹⁰⁷ Thus, Justice Powell, dissenting in *Cannon v. University of Chicago*,¹⁰⁸ linked a "flood of lower-court decisions" to an imprecise and overly lenient standard for implying a private cause of action under federal statutes.¹⁰⁹ Justice Powell

¹⁰³ Professor Davis has asserted that *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976), involved questions of science and policy "so difficult as to be in an absolute sense beyond human understanding." 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 10.3, at 316 (1979).

¹⁰⁴ The more rigorous time requirements facing a federal judge were recently discussed by Judge Friendly:

The new business of the federal courts is much more taxing than the old business was. A single school desegregation case can occupy a district judge for years. . . . Similar remarks could be made in regard to suits concerning the conditions of prisoners and mental hospitals, where federal courts have felt obliged to work out detailed codes affecting nearly every aspect of operation. . . . The handling of actions such as I have been describing is no more like that of the ordinary law suit than the operation of the Queen Elizabeth II is like paddling a canoe.

Federal Courts Improvements Act of 1979: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 171-72 (1979) (statement of Henry J. Friendly).

¹⁰⁵ Cf. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1917) (Holmes, J.).

¹⁰⁶ See cases cited in *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

¹⁰⁷ E.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976). See also cases cited in Fiss, *supra* note 14, at 12 n.28, 17 n.35 (concerning reformation of Arkansas prison system and Coney Island school).

¹⁰⁸ 441 U.S. at 730 (Powell, J., dissenting).

¹⁰⁹ *Id.* 741-42.

charged the judiciary with "assum[ing] the legislative role[s]" of creating civil remedies and defining their own jurisdiction.¹¹⁰ Although the courts frequently, and properly, make "legislative" decisions,¹¹¹ Justice Powell's criticism is persuasive. At some point, judicial "lawmaking" goes too far.¹¹² As Justice Powell reasoned in *Cannon*, "respect for our constitutional system dictates that the issue should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision."¹¹³ He concluded that the issue was not "properly to be decided by relatively uninformed federal judges who are isolated from the political process."¹¹⁴ A number of commentators have recognized, as Justice Powell did, the inherent limitations that the judiciary faces when it attempts to make this type of legislative decision.¹¹⁵ The willingness of the federal courts to assume increased "legislative" responsibilities has no doubt contributed to the current case-load crisis. Many, perhaps all, of the judiciary's activities in this area are important and probably desirable. Yet they have been accompanied by significant costs: attempts to cope with increased responsibilities have resulted in our courts becoming increasingly bureaucratic. So drastic an alteration in the judicial office as traditionally conceived ought to be undertaken only after careful con-

¹¹⁰ *Id.* 730-31.

¹¹¹ The classic view was that the judge legislates interstitially, filling in gaps left in statutory schemes. Justice Holmes wrote, "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917). See B. CARDOZO, *supra* note 7, at 68-70, 113-14 ("He legislates only between gaps."). The recent trend has been to recognize a more expansive judicial lawmaking role. *E.g.*, FISS, *supra* note 14, *passim*.

¹¹² Professor Fuller, exploring the limits of the adjudicatory process, has pointed out the difficulties that are encountered when "polycentric" problems are dealt with through the judicial process. Fuller, *supra* note 16, at 394-405. Fuller, recognizing that "[t]here are polycentric elements in almost all problems submitted to adjudication," argued that certain problems involve so many interrelated tensions that they are "beyond the proper limits of adjudication." *Id.* 395, 397. Fuller's reasoning supports Justice Powell's conclusion that the courts have involved themselves too deeply in nonadjudicative activities. *Cannon*, 441 U.S. at 730-31. See also Eisenberg, *supra* note 18, at 431-32 ("A proper appreciation of the forms and limits of adjudication turns in large part on determining the point at which . . . the process becomes unequal to the task because the nature of the problem demands more diffuse forms of responsiveness and participation than adjudication can legitimately provide.").

For a broader view of the capabilities of the judicial process, which also recognizes the limits of the adjudicatory process, see FISS, *supra* note 14.

¹¹³ *Cannon*, 441 U.S. at 731.

¹¹⁴ *Id.*

¹¹⁵ Authorities cited *supra* note 112. *But see* 2 K. DAVIS, *supra* note 103, at § 10.3, at 316 (recognizing that Fuller's theories are valid, but arguing that they are appropriate only with respect to trials).

sideration.¹¹⁶ In responding to the litigation explosion, attention should be given to the causes of the crisis. A more serious evaluation of what proposed legislation will require of the courts might well ease existing caseloads. Similarly, the judiciary itself might consider more closely what its decisions will require of future judges. Although these suggestions are quite broad, I hope that they represent a first step towards coping with the litigation explosion without fundamentally altering the judicial process. It is clear that if the federal judicial system is to work in a way that is faithful to the ends for which it exists, something must be done. Only thus can we assure that the federal courts will remain effectively available to vindicate constitutional and important federal statutory rights.

A great judge of the Second Circuit, Charles M. Hough, once wrote that "the legal mind must assign some reason in order to decide anything with spiritual quiet."¹¹⁷ It is incumbent upon all of us to do our utmost to restore the conditions necessary for our appellate courts to dispatch their constitutional obligations with "spiritual quiet," as well as with efficiency.

I am an alumnus of a state court system and of the federal courts, and because I have great respect for our judicial institutions, I hope that I have not sounded a discordant note. The Scriptures ask, "For if the trumpet give an uncertain sound, who shall prepare himself to the battle?"¹¹⁸ I trust that I have sounded an appropriate alarm and that those of us who would preserve our precious and imperilled courts as effective institutions will give heed and respond.

¹¹⁶ Cf. Eisenberg, *supra* note 18, at 430 ("adjudication has a moral force and this force is in major part a function of those elements that distinguish adjudication from all other forms of ordering. In the long run, the cost of departing from these elements may be a forfeiture of the moral force of the judicial role."); Fiss, *supra* note 14, at 16 ("[The adjudicatory] process is a limitation on [the judge's] legitimacy . . .").

¹¹⁷ *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1008 (2d Cir. 1915).

¹¹⁸ 1 *Corinthians* 14:8.