

THINKING ABOUT JUDGESHIPS

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INTRODUCTION

The term "administrative office" hardly evokes images of an exciting, important place and the title of "Director of the Administrative Office of the United States Courts" might seem to describe a rather prosaic position. The fact is, however, that under Ralph Mecham the A.O., as the Administrative Office is referred to colloquially, has continued its development into an indispensable instrument of government, one involved in the important, sensitive business of

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the relationship among all three branches of our federal government, no aspect of which is more difficult or more significant than the interface between the Legislative and the Judicial branch.¹ Accordingly, its Director is deeply involved in matters of policy affecting the very quality of justice in this country.

Ralph Mecham has been remarkably successful in that enterprise and it is an honor to be allowed to do him honor on the occasion of his completing a decade of service in this demanding and challenging position.²

I. LONG RANGE PLANNING FOR THE FEDERAL JUDICIAL SYSTEM

Under Ralph Mecham, the Administrative Office has created a division devoted to long range planning. With important support from that division and from the Federal Judicial Center,³ the Committee on Long Range Planning of the Judicial Conference of the United States, chaired by Senior Judge Otto Skopil,⁴ has been thinking about the future of the federal courts—what role they should play, with what business they should be charged, what resources they

1. The importance of the legislative-judicial relationship has been emphasized by Judge Frank M. Coffin, formerly chair of the Committee on the Judicial Branch of the Judicial Conference of the United States. Working with Professor Robert A. Katzmann, Judge Coffin has undertaken a number of initiatives to improve that relationship, which he described as reflecting "an estrangement between the two branches" whose "speedy amelioration is in the best interests of this Republic." See Frank M. Coffin, *The Federalist Number 86: On Relations Between the Judiciary and Congress*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 25, 25 (Robert A. Katzmann ed., 1988) [hereinafter JUDGES AND LEGISLATORS]; see also Robert A. Katzmann, *Summary of Proceedings in JUDGES AND LEGISLATORS*, *supra*, at 179.

2. On the occasion of a previous tribute to Ralph Mecham (1991 Federal Courts Clerks Conference), Mr. Kunz delivered a fuller appreciation of his contribution to the federal judicial system, the text of which is on file with the authors.

3. To help inform the planning process in the federal judiciary, the Federal Judicial Center is preparing a series of papers on topics critical to long range planning. See, e.g., WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CTR., ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (1994); GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993); DONNA STIENSTRA & THOMAS E. WILLGING, ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS (1995); RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE (1994); see also *infra* note 9.

4. In addition to Chairman Skopil, who is a Senior Judge on the Ninth Circuit, the Committee on Long Range Planning of the Judicial Conference of the United States included the following judges at the time of the submission of the first plan to the Judicial Conference: Sarah Evans Barker, Chief Judge of the Southern District of Indiana; Edward R. Becker, U.S. Court of Appeals, Third Circuit; Wilfred Feinberg, Senior Judge, U.S. Court of Appeals, Second Circuit; Elmo B. Hunter, Senior Judge, U.S. Court of Appeals, Western District of Missouri; James Lawrence King, Senior Judge, Southern District of Florida; Virginia M. Morgan, Magistrate Judge, Eastern District of Michigan; A. Thomas Small, Bankruptcy Judge, Eastern District of North Carolina; and Harlington Wood, Jr., Senior Judge, U.S. Court of Appeals, Seventh Circuit.

should command. An important tentative report was released in late 1994;⁵ hearings have been held,⁶ the raw materials needed for hard decisionmaking have been assembled,⁷ and in March 1995, the Judicial Conference received the committee's proposed plan with a view to further action in due course.⁸

Concern with the future of the federal judicial system has not been confined to those who call themselves "futurists." A lively debate has already appeared in the literature about the desirability of capping the number of Article III judges, limiting the growth of the Third Branch and, as a corollary, cutting the cloth of federal jurisdiction to fit the size of the institution that will result.⁹

5. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1994) (Draft for Public Comment) [hereinafter 1994 PROPOSED LONG RANGE PLAN]. Unless otherwise specified, citations to the Report are to this edition.

In March 1995, there appeared what was described, on the outside front cover, as a "Second Printing" of the Report. As the Secretary of the Judicial Conference of the United States reports in the letter introducing the Report, however, "this version contains changes made by the Committee to reflect the numerous, thought-provoking comments received in writing and at public hearings from judges, practicing attorneys, and other interested persons and organizations who had reviewed the earlier draft." COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (2d prtg. 1995) [hereinafter 1995 PROPOSED LONG RANGE PLAN].

6. Hearings on the Proposed Long Range Plan were held on December 7, 1994 in Phoenix, Arizona, on December 9, 1994 in Washington D.C., and on December 16, 1994 in Chicago, Illinois. *Id.*

7. The materials referred to include data, analyses, and opinion surveys. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, "Historical and Projected Caseloads and Judgeships, 1940-2020," tpls. 3-6; authorities cited *supra* note 3; FEDERAL JUDICIAL CTR., PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES (1994) (surveying opinions on long range planning).

8. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, Letter from L. Ralph Mecham, Director of the Administrative Office, serving as Secretary of the Judicial Conference of the U.S., to all interested parties.

Specifically, members of the Judicial Conference were authorized to request that any recommendation be referred to the appropriate Judicial Conference Committee for further study. Any recommendation not so identified within the specified period, was declared adopted as of April 12, 1995.

While a substantial number of the recommendations have been adopted, about 35 have been referred to committee for further study. These include recommendations in the following categories: "federalism and jurisdiction; court structure and process; governance and administration; utilization of resources; and access to federal court proceedings." *Judicial Conference Acts on Long Range Plan Recommendations*, 27 THE THIRD BRANCH (A.O. of the U.S. Courts, Washington, D.C.), June 1995, at 6.

9. See 1994 PROPOSED LONG RANGE PLAN, *supra* note 5, at 19-32. For a comprehensive presentation of arguments for and against the federalization of civil claims and criminal prosecutions that could be maintained in state courts, see SCHWARZER & WHEELER, *supra* note 3, at 9-38; William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1658-59 (1992) (asserting continued necessity for state-federal judicial reform and that informal arrangements are not enough); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 69-71 (discussing issues relating to growth of federal judiciary and concluding that there is no proof that growing numbers translate into less prestige or efficacy of position).

There are other proposals, also far-reaching in impact, and also quite controversial. Prominent among them are increasing the role of administrative agencies, broadening their jurisdiction and providing such agencies with additional administrative judges.¹⁰

II. LIMITING FEDERAL JURISDICTION

A preliminary question must engage us. If coping with the explosive growth of judicial business has already adversely impacted the quality of adjudication,¹¹ and in addition threatens the very nature of the institution,¹² is not the obvious next step for the courts to limit the intake? To undertake only that which, realistically, is attainable? A family that refused to reduce expenditures despite inadequate income would face financial disaster. Do federal courts consider themselves immune from the laws of logic?

The short answer is that it is Congress, and not the courts, that determines both the volume of judicial business (jurisdiction), and the available resources (judgeships and budget). Bringing the two into balance is a seemingly impossible task. It is not that limiting federal jurisdiction is not a sensible option or that Congress is unaware of existing problems. The problem is that this course is politically unpalatable.

The judges urge Congress to consider the "federal courts as a distinctive judicial forum of limited jurisdiction," specifying particular provisions that should be enacted or amended.¹³ There is, however, no constituency for more effective judicial administration, and limiting the business of federal courts is politically difficult to achieve. On the contrary, the tendency is to federalize more and more crimes, which, combined with opposition to curtailing diversity jurisdiction, points toward increased filings for the national court system.

The business of litigants does not wait for long-range political solutions. Litigants file their cases and the courts are obligated to adjudicate. Accordingly, courts have turned to more feasible means

10. See 1994 PROPOSED LONG RANGE PLAN, *supra* note 5, at 27-30, 107-08, 110 (discussing broadening role of administrative agencies).

11. See *infra* notes 24-27 and accompanying text (discussing impact of growth on judicial system).

12. See *infra* note 16 (discussing dangers of increasing size of federal judiciary, such as escalating costs); Randall Samborn, *Judges Foresee Federal Courts Caseload Crush*, NAT'L L.J., Jan. 9, 1995, at A1 (1995).

13. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 23. The first 12 recommendations of the Long Range Planning Committee come under the heading of "Defining and Maintaining A Limited Federal Jurisdiction." *Id.* See generally THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990) [hereinafter FEDERAL COURTS STUDY].

of dealing with the pressure of caseloads, some capable of implementation without congressional approval and others that, although requiring congressional sanction, budgetary or otherwise, do not ignite the same intensity of political passion. Accordingly, we turn to an analysis of how courts are trying to cope.

III. COPING WITH THE SHORTAGE OF JUDGE-POWER

A. *Creating New Judgeships*

To understand much of the debate over the appropriate number of federal judgeships, we must recognize that we are faced with a shortage of "judge-power"—individuals with the intelligence, energy, patience, and time available for what we may loosely describe as the task of adjudication. This is not a new problem and over the course of history there have been three basic approaches to dealing with such shortages. Most familiar is legislation to increase the number of judgeships. Thus, in the short space of twenty years, the total number of Article III judgeships has increased by two-thirds, from 497 in 1975 to 828 for the statistical year ending in 1994.¹⁴

In many ways, adding judgeships is the path of least resistance. It is familiar and it adds to the number of prestigious appointments available to the White House and to the legislators involved in the process. Each newly created position fits smoothly into an existing institution without creating the need for change in structure or jurisdiction.¹⁵ What makes this approach undesirable in the present situation, in the view of many, is the likelihood—or at least the possibility—that the increase in size will change the very nature of the institution.¹⁶

14. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1980 MANAGEMENT STATISTICS 13, 129 (1980). For the number of Art. III judgeships in January 1994, see 28 U.S.C. §§ 44(a), 133(a) (Supp. V 1993).

It is, of course, possible to organize the alternatives somewhat differently. One may think in terms of expanded capacity, reduced business, i.e., curtailed jurisdiction, and different procedures. Organized in this manner, expanded capacity would include an increase in the number of judgeships and greater resort to surrogates, such as magistrate judges, bankruptcy judges and, as the text develops, law clerks.

15. While this is certainly true with respect to the addition of one or two judgeships, continued expansion, particularly at the level of the Courts of Appeals, does raise problems of maintaining consistency and collegiality. See Collins J. Seitz, *Collegiality and the Courts of Appeals*, 75 JUDICATURE 26 (June-July 1991) (discussing importance of collegiality in judicial system).

16. See Samborn, *supra* note 12. Consider, for example, that the federal judicial system was designed to consist of courts of limited jurisdiction, presided over by a relatively small number of judges of the highest quality, who were attracted in large measure by the prestige of the office and the nature of the assignment. See SCHWARZER & WHEELER, *supra* note 3, at 24-34.

For thoughtful analysis of the arguments in favor and against a moratorium on the number of federal judges, see BERMANT ET AL., *supra* note 3; SCHWARZER & WHEELER, *supra* note 3.

B. More Effective Use of Available Resources

The second approach has been to make more effective use of the resources that are available. Courts have, for example, instituted changes in judicial process that lawyers of an earlier generation would certainly have considered radical. Thus, to cite a familiar example, an appeal in the federal system no longer includes oral argument and a written, reasoned disposition as a matter of course. On the contrary, submission without oral argument is commonplace and, in statistical year 1993, there was a signed opinion in fewer than ten percent of cases terminated by the Courts of Appeals.¹⁷

While it is clear that the changes in procedure were the product of what Professor Meador has called the "crisis of volume,"¹⁸ this should not be taken to mean that if we had more judges and fewer cases we should return to the old regime. As Judge John C. Godbold has argued, not every case requires oral argument nor should there be a full-blown opinion accompanying every disposition.¹⁹ Necessity often

Clearly, there are also rather mundane considerations that serve as deterrents to expanding the size of the federal judiciary. Cost is a factor not to be disregarded, particularly in the current climate. In addition, of course, where the Senate and the White House are controlled by different political parties, other factors enter into delaying the creation of new judgeships.

The matter of cost can be viewed from two perspectives. On the one hand, the total appropriations for the Judiciary (including that Supreme Court) runs less than two-tenths of one per cent per year (e.g., \$2.532 billion out of \$1.4 trillion in fiscal 1993). For details of the judiciary budget, see 26 THE THIRD BRANCH (A.O. of the U.S. Courts, Washington, D.C.), Mar. 1994, at 2 (presenting judiciary appropriation request for fiscal year 1995 with background information).

On the other hand, the initial cost for one circuit judge is \$905,000, with annual recurring costs of \$761,000. The costs for one district judge and staff for the first year comes to \$899,000, with recurring costs of \$737,000 per annum, and the initial cost of one bankruptcy judge and staff is \$707,000, with annual recurring costs of \$586,000. For a magistrate judge and staff the comparable figures are \$681,000 and \$559,000. These costs increase if outside space is needed. As is well known, in budgetary matters, Congress frequently focuses on the details.

17. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2 (1993) (presenting judicial workload file for U.S. Court of Appeals). Cases terminated include procedural terminations as well as terminations on the merits, but reasoned dispositions with precedential value may be appropriate in both categories.

In the Courts of Appeals, in 1993 there were 10,222 cases terminated on the merits after oral hearing, compared to 15,539 after submission on briefs. This, of course, is substantially less than half. In the Fifth Circuit, however, the comparable figures were 887 compared to 2472 on submission of the briefs. In that circuit only about one case in four was decided on the merits after oral argument. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. B-1 (1993) [hereinafter 1993 ANNUAL REPORT].

18. The phrase "crisis of volume," which has become part of the vocabulary of judicial administration, was introduced by Professor Daniel J. Meador. See DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); FEDERAL COURTS STUDY, *supra* note 13; Aldisert, *infra* note 23.

19. John C. Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863, 863 (July 1980).

has the capacity to mother inventions that are independently useful and worth preserving regardless of necessity.

At the trial court level one can also find responses to the pressure of necessity that must be counted as major improvements. The development of the Judicial Panel on Multidistrict Litigation²⁰ is a good example. It was developed in response to the docket pressure created by an avalanche of civil cases in the wake of criminal antitrust convictions in the electrical cases,²¹ but it remains in effect and has helped deal with literally tens of thousands of cases as diverse as the injuries caused by an inter-uterine device and, most recently, by asbestos.²²

These are just a few examples. We make no effort to list everything that federal judges have done in order to make more effective utilization of the available resources. Perhaps, too, more can still be done. There are, however, limits to how much can be achieved by such an approach. The situation on the appellate level was forcefully described by Judge Ruggero J. Aldisert in his 1994 address to the American Law Institute:

[N]ow in the Third Circuit each active judge is responsible for terminating 361 cases [each year]; 361 fully briefed cases on the merits. The national average: 428.

May I repeat that: The national average for terminations on the merits for each active United States Circuit judge is 428 appeals. Divide 428 by 255 working days a year and you get my message. The One-A-Day brand was a great name for vitamins, but I doubt that it's equally great in describing the caseload for U.S. Circuit judges.

No more significant re-evaluation has occurred than scrutiny of the premise that all appellate cases, regardless of differences between them, must be immutably accorded the full range of all appellate procedures. Courts have found the courage to look with questioning eyes at their policies on oral argument, the necessity for opinions, the content of opinions, and the contents of records.

Id.

20. See 28 U.S.C. § 1407 (1988) (establishing Panel authorized to transfer civil cases for consolidated pretrial proceedings).

21. For the history of the Judicial Panel on Multidistrict Litigation, see *Foreword* to MANUAL FOR COMPLEX LITIGATION (1982).

Where the government obtains a judgment of conviction in an antitrust case, for example, application of the doctrine of *res judicata*, or more precisely, issue preclusion, invites a spate of civil suits by individuals or entities who were injured, in order to collect damages. While there will be no need to relitigate the basic tortious conduct, proof of individual damages and (in appropriate cases) proof of reliance, for example, will require judicial treatment. See *id.* (discussing purpose of Judicial Panel on Multidistrict Litigation).

22. In 1993 alone, 7786 cases were transferred by order of the Judicial Panel on Multidistrict Litigation. Since 1968, the Panel has transferred a total of 51,381. 1993 ANNUAL REPORT, *supra* note 17, at 390, tbl. S-10.

You must understand that the case you file with us moves along an assembly line of one case every 4.9 hours. Think about it. That's the time allotted to your appeal. And in that time the judge must read the briefs, conference with colleagues, perhaps hear oral argument, make a decision, write an opinion or order, examine draft opinions written by other judges, at the same time study motions, petitions for rehearing, and of course travel to court, check into the hotel, answer the telephone. One fully briefed case every 4.9 hours. All of this in the highest court to which a federal litigant has a right to take an appeal.

And if you think that a case involving millions of dollars or a critical issue of personal rights is able to get adequate consideration on that assembly line, just tune me out for the next few minutes, toy with your food, count the number of lights on the chandelier, don't pay any attention to me. But maybe you ask yourselves a question: "How are these cases getting decided?"²³

Speaking to the broader impact on the process of adjudication, Judge Aldisert continued:

Today there is no quiet library time. The circuit judge is on a treadmill, and your case comes to him or her in the midst of a gallop. No time to taste the morsels you dish up for a leisurely dinner here; a fast-food menu is all that's available. And with this fast-food menu, are you receiving justice, or a kind of jurisprudential indigestion?

I use the U.S. Courts of Appeals for an example, but what is true with us is equally true in many states' intermediate courts of appeals, where in the larger states each judge is writing 200 opinions a year, for publication or otherwise.²⁴

In assessing the significance of this statement by an exceedingly able, highly regarded jurist, it would be wrong to focus on the details of the data, on the averages or the medians. On the one hand, the number of judgeships ignores the persistent, exceedingly troublesome problem of vacancies, positions authorized, but not filled.²⁵ In

23. Ruggero J. Aldisert, *Luncheon Address* (May 18, 1994) in AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 71ST ANNUAL MEETING 13, 18 (1994).

24. *Id.* at 19.

25. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 94 (describing judicial vacancy rate as "among the most serious problems facing the federal courts today.").

A recent study by the Administrative Office of the U.S. Courts found that, in 1990, 45 Active Judge Work Years were lost to judicial vacancies while the contribution of Senior Judge came to 79 Active Judge Work Years. The same study, however, also found that, in 1992, 109 years, similarly defined, were lost to judicial vacancies while the contribution of the senior judges came to 92 years. *Senior Judges Help District Courts Keep Pace*, 26 THE THIRD BRANCH (A.O. of the U.S. Courts, Washington, D.C.), May 1994, at 1, 4.

More fundamentally, one may question whether the need for new judgeships has, in practical terms, been influenced by the availability of senior judges, system-wide. To the extent this is

addition, it is true that cases vary in their demands upon the judges. The important point is that a judge, of the calibre of Judge Aldisert, is asserting, from extensive personal experience, that the capacity of the system has been strained to the point of affecting quality. He is not the first appellate judge to have said so on the record.²⁶ In the view of many appellate judges, the limits of increased productivity resulting from more "efficient" procedures were reached long ago.

We can be equally proud of increases in productivity resulting from the introduction of new techniques of case management at the trial level.²⁷ In many districts, an additional factor appears to be significant. Court-annexed programs of alternative dispute resolution, e.g., court-annexed mediation and court-annexed non-binding arbitration, induce settlements, reduce the number of trials, and free the district judge to try the cases that need a judge. There are many who note with satisfaction the exceedingly low percentage of cases in which a trial is even commenced.²⁸ As long as these settlements are

true, the contribution of the senior judges does not compensate for excessive vacancy rate.

26. See Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A. J. 52 (Jan. 1993). The author, a judge on the U.S. Court of Appeals for the Ninth Circuit, writes: "[W]e now all too often give cases second-class treatment. We merely look at the files and then issue unpublished memorandum dispositions or orders. . . . [M]any cases do not get the full attention they deserve, and the quality of our work suffers." *Id.*

Following the Aldisert address, an unofficial group of seven senior judges of the U. S. Courts of Appeals, including Judge Aldisert, began the process of determining whether they could agree on recommendations that would address the present situation in a fundamental way.

U.S. District Judge John L. Kane of the District of Colorado, writing of the effect of long-standing vacancy, described the same phenomenon at the trial level. His views are summarized succinctly by the title of the article: "Too few judges, too little justice." DENVER POST, July 26, 1987, editorial.

27. Automation has become so commonplace in our society that we may become oblivious to its contribution to effective case management. For example, a judge with four to five hundred civil cases on her docket, obliged to be concerned with all, finds the simplest computer programs indispensable. This implies additional personnel to service the computers.

The addition of needed support personnel, whether to service computers or to enhance security, is not a negative development; it certainly does not imply "bureaucratization" of the federal judiciary. Neither does the addition of personnel who will collect and analyze data relevant to the operation of the federal judicial system, or who will staff a research department in the Federal judicial Center, or who will serve as probation and pretrial services officers, imply more bureaucracy.

It is true that the total number of support personnel has increased at a rapid rate, more rapidly than that of judgeships. The Budget Division of the Administrative Office of the United States Courts reports that the number of authorized positions for "court support personnel" rose from 10,086 in 1975 to 24,120 in 1994 (on file with the authors). As previously noted, however, the raw figures should not be considered to imply any negative development in federal judicial administration.

28. See, e.g., Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 222 (Dec.-Jan. 1989) (noting that in first ten years and nine months of arbitration program "only 388 of the 17,006 cases placed in the court's arbitration program[] required a trial *de novo*.").

In statistical year 1993, the percentage of all terminated civil cases that even reached trial was 3.4%. The total number terminated was 225,637. 1993 ANNUAL REPORT, *supra* note 17, at 202 tbl. C-4. The percentage varied substantially by District and by subject matter. For example in

uncoerced and reflect litigant preference,²⁹ satisfaction with the process is justified.³⁰

There are, however, limits to how much this approach can accomplish. Presiding at trials may be one of the more visible functions of a district judge, but it is not the only function. We, as a society, expect far more of our "trial" judges. We expect substantial involvement of the judge in the civil litigative process; Congress has found that such involvement is an essential ingredient of a successful program of litigation management.³¹ We expect prompt and careful attention to dispositive motions, and in the interest of reducing the cost of litigation, we expect the judge to be involved in important discovery controversies. Indeed, the Federal Rules of Civil Procedure require that the judge enter a scheduling order in every single civil case, unless it be of a category exempted by local rule,³² and we insist that there have been prior consultation with the parties before that order be entered.³³

the Eastern District of Arkansas, the figure was 11.6%, or about 350% larger than the median. *See id.* tbl. C-4A.

In employment related civil rights cases the comparable figure was 8.6%. *See id.* tbl. C-4.

Of course, sometimes trial is preferred to settlement. For a discussion of the desirability of many settlements, see *infra* note 30.

It should be clear that not all cases that are terminated before trial have been settled. Dispositive motions play an important role. For example, in the Eastern District of Pennsylvania there were 5937 civil cases filed during calendar year 1993 and terminated as of December 31, 1994. Of these, 24.6% were terminated by the court on motion (statistics on file with authors).

29. If the parties settle because the state of the docket is such that civil cases are unlikely to be tried without a waiting period of some years, this is a form of coercion and hardly the basis for satisfaction, even though the court's "productivity," measured in terms of cases terminated, may appear to be improving.

30. While a state court judge, Justice Brennan observed that "a case settled is a case best disposed of, because then one of the parties certainly avoids the heartache of losing at the trial." PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION 87 (1956), *quoted in* A. LEO LEVIN & EDWARD A. WOOLLEY, DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA 232 (1961).

An important factor inducing settlement is the desire to minimize the cost of litigation. One of the advantages of alternative dispute resolution is the fact that, if it leads to termination without trial, it tends to do so more economically than disposition by trial.

31. Section 102 of the Civil Justice Reform Act sets forth a congressional finding that a successful program of litigation management should include "early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events." Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(5)(B), 104 Stat. 5089 (codified in sections of 28 U.S.C. § 471).

32. FED. R. CIV. P. 16(b) (outlining rules allowing judge to issue, schedule, and plan orders to parties) (codified at 28 U.S.C. App. (Supp. V 1993)). Note, too, that unless provided otherwise by local rule, the district judge may not assign this task to a magistrate judge. *Id.*

The scheduling order, as its name implies, is expected to "limit[] the time (1) to join other parties and to amend the pleadings; (2) to file motions; and (3) to complete discovery" and may include other matters relevant to scheduling. *Id.*

33. *Id.* The parties need not be ordered to a scheduling conference, but may be consulted by telephone or by mail.

How many cases should a judge be asked to supervise, let alone to try in a given year? How many criminal defendants should a judge be asked to sentence in a given year? The number of trials, the number of written opinions, and the number of post-trial motions can all be quite misleading. More effective utilization of the judicial resources we possess is a goal always to be applauded. Because so much has been accomplished, one sometimes finds the courts pointing with pride at improvement in "productivity," the increase in disposition per judge and the reduction of elapsed time to termination.³⁴ Where this is accomplished without any adverse impact on the quality of the process, we too, would applaud. It is important, however, always to be mindful of the fact that our courts are designed to administer justice, not produce widgets.

C. *Surrogates for the Article III Judge: An Introduction*

The third approach involves the search for surrogates, non-Article III persons who can share in the work that otherwise would have to be done by the district judge, and to a lesser extent by the circuit judge. It is important to recognize that this is a quest that has been going on for decades, in various forms and with various manifestations.³⁵

Some of the alternatives are familiar enough and are readily recognizable as designed to relieve Article III judges of at least some of the burdens of adjudication.³⁶ A magistrate judge who presides

34. When President Clinton took office in 1993, one of his first acts was to order a National Performance Review under the direction of Vice President Gore. The resultant report, issued on September 7, 1993 and entitled *From Red Tape to Results: Creating a Government that Works Better and Costs Less*, singled out the Judicial Branch for praise for "dramatically improved productivity." Innovative programs such as automation of documents and utilization of alternative dispute resolution were cited as contributing factors.

35. See Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 345-46 (1979) (tracing origins of present Federal Magistrate System to 1789 and noting that in Judiciary Act of that year, Congress provided that bail might be set by either state or federal judge). In 1793, however, the power was conferred on discreet persons learned in the law and later called commissioners. *Id.*

36. This approach is not limited to Article III courts. For example, the Chief Judge of the Tax Court has been authorized by Congress to press a member of the bar into service in appropriate circumstances, 26 U.S.C. § 7443A(a) (1988), and this procedure has been sustained by the U.S. Supreme Court against a constitutional challenge based on the Appointments Clause, U.S. CONST. ART. II, § 2, cl. 2; see *Freytag v. Commissioner*, 501 U.S. 868, 876-78 (1991) (holding that grant of authority by Congress to chief judge of U.S. Tax Court to appoint special trial judges is not unconstitutional). Such appointments are not considered in this brief review of surrogates to Article III judges.

There are analogues in state judicial systems: Judges Pro Tem are lawyers pressed into service to fill specific needs pursuant to constitutional or statutory provisions. For example, where the only probate judge in a county has recused herself, turning to a respected member of the bar rather than attempting to find a judge in another county who can sit by designation, has many attractions. Authority is sometimes provided by statute, sometimes by constitutional provision.

over civil trials by consent of the parties provides a familiar example.³⁷ The process of assignment makes clear that the magistrate judge is intended to substitute for the district judge, adding judicial power. The officer presiding at the trial is still a judge, with all the trappings of the office, but we have not drawn on the limited supply of district judges.

Arbitrators in a court-annexed program provide a less familiar and less obvious example of supplements to existing adjudicatory resources. Consider lawyers who sit as arbitrators in a non-binding, court-annexed program of alternative dispute resolution. At first blush, they may not be thought of as judges at all. On reflection, however, they too are to be counted among the supplements. This point was made over three decades ago in the context of describing how court-annexed arbitration operated in Philadelphia:

It is well to underscore that the central source of success is the vast supply of new manpower to adjudicate: the 2,500 quasi-judges in Philadelphia and their counterparts throughout the state. The various other benefits flow from and are corollary to this central fact. Without the new judge-power there could be no ease in calendaring to a day certain, certainly not to the fixed hour which is so often set and kept. Without the backlog of arbitrators available to serve if in fact they prove to be needed, the order to arbitrate would not serve as a catalytic agent stimulating so many immediate settlements and discontinuances. It is this cheap, almost unlimited supply of adjudicators, created without creating new judgeships, which is the main operative force and the main attraction. Quasi-judges, called by other names, have been tried in other forms in other forums; and, having the same essential ingredients to offer, these systems, too, have worked. Indeed, today increased quasi-judicial manpower is being urged for other judicial tasks such as supervision of discovery proceedings.³⁸

The same point was made, rather more succinctly, by a critic of the program who put it this way: "Essentially Pennsylvania's plan is a way to stretch the supply of judges when the legislature refuses to appropriate funds for additional judges who are sorely needed."³⁹

See generally ALEXANDER B. AIKMAN ET AL., *FRIENDS OF THE COURT: LAWYERS AS SUPPLEMENTAL JUDICIAL RESOURCES* (1987). Again, we make no effort to survey that field.

37. See 28 U.S.C. § 636 (setting forth jurisdiction and powers of U.S. magistrate judges).

38. LEVIN & WOOLLEY, *supra* note 30, at 51-52 (footnotes omitted); see also AIKMAN, *supra* note 36, ch. 11 (categorizing arbitrators in an analogous program as performing quasi-judicial role).

39. INSTITUTE OF JUDICIAL ADMIN., *COMPULSORY ARBITRATION AND COURT CONGESTION: THE PENNSYLVANIA COMPULSORY ARBITRATION STATUTE, A SUPPLEMENTARY REPORT* 1, 40 (1959) (quoting Maurice Rosenberg), *quoted in* LEVIN & WOOLLEY, *supra* note 30, at 50; see also Maurice Rosenberg & Myra Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*,

IV. EXPLORING OTHER OPTIONS

The subject of surrogates for district and circuit judges deserves further treatment, describing alternatives not yet considered and analyzing in greater depth alternatives that have been mentioned only briefly.

Identifying these alternatives and attempting to evaluate them can be useful for a number of reasons. First, and quite obviously, it is good to have at hand a list of available options, alternatives to be considered in making informed choices. In addition, the mere mention of a number of these alternatives brings to mind the successes and failures we have already experienced. At one end of the spectrum is the short-lived, ill-fated experiment with the Commerce Court.⁴⁰ At the other end, there are several candidates vying for first place in the success column. Prominent among these is mandatory court-annexed arbitration.⁴¹

74 HARV. L. REV. 448, 450-56 (1961) (offering detailed analysis of Pennsylvania's experience with compulsory arbitration of small claims).

40. With jurisdiction to review decisions of the Interstate Commerce Commission, the Commerce Court was established in 1910, Mann-Elkins Act of June 18, 1910, ch. 309, 36 Stat. 539, only to be abolished in 1913, Act of October 22, 1913, ch. 32, 38 Stat. 208, 219.

Leading to the abolition of the court was "a fear . . . that it would incline too much in favor of the railroads and against the public interest." See CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 19 (5th ed. 1994).

The Commerce Court, it should be emphasized, did not involve utilizing alternatives to Article III judges, because it was created as an Article III court and those appointed to the court did in fact enjoy tenure during good behavior and were appointed and confirmed pursuant to Article III.

It did, however, represent an effort to provide an alternative to the traditional Article III courts of the federal system and to achieve efficiency through specialization. Specialization, in one form or another, continues to be considered as a means of increasing efficiency both in Article III and non-Article III tribunals. Indeed, the Commerce Court stands out as a classic example of a failed experiment.

41. The experience with court-annexed arbitration has not been uniform. See generally BARBARA S. MEIERHOEFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (Federal Judicial Ctr. 1990). In the Eastern District of Pennsylvania, however, where the federal program followed a successful state program, attorney approval of court-annexed arbitration in general was 92.8% (i.e., strongly approve or approve) compared with 7.2% who disapproved (i.e., disapprove or strongly disapprove). *Id.* at 78.

The perception of arbitrators as surrogate judges, even in non-binding programs, is illustrated by the findings of a Rand Civil Justice Institute study of a state program in Pittsburgh:

Most [litigants] did not care whether a judge in black robes or an attorney in business attire heard their case. . . . Nor did most care whether their cases were heard in a formal courtroom, complete with bar and dais, or around a plain wood table in a small hearing room. . . . For individual litigants what was important was that they had enough time to tell their story, that the arbitrators paid equal attention to the disputants—and that they could afford the process.

D. HENSLER, *REFORMING THE CIVIL LITIGATION PROCESS: HOW COURT ARBITRATION MAY HELP* 8-9 (1984), quoted in A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 35-36 n.44 (1985).

Perhaps of greater significance, by examining the full range of past experience, we may be able to identify the ingredients of success and the indicators of failure. Is it the method of appointing individuals to the office? Might it be that traditions of quality develop, which become self-perpetuating?⁴² If so, how does one go about establishing tradition? Is it possible to decree that as of the morrow this or that non-Article III tribunal will have a tradition of excellence? Is the crucial ingredient the conditions under which these judge-substitutes work? Or perhaps it is the standards of review under which they operate.

For these questions to be useful, it is not necessary that there be answers. As every lawyer knows, to formulate the right question is often the most difficult and most significant step in the effort to gain answers.

V. A ROSTER OF ALTERNATIVES

A. *Law Clerks*

We begin consideration of alternatives to Article III judges with an analysis of the role of law clerks, and enter the world of controversy. Is it fair to consider adding law clerks as an alternative to increasing the number of judges? More fundamentally, do they not simply contribute to the efficiency with which a judge operates, rather, than substitute for the judge in performing judicial duties? Moreover, by even suggesting that law clerks may serve to reduce the need for more judgeships, do we not adopt a third-year law student's view of the role of the clerk rather than the perspective of any able judge?

We would not for a moment suggest that any judge's commission is amended *pro tanto* or *de facto* in a manner that substitutes the names of her clerks. But consider the following description of what law clerks are asked to do, written by one of the finest judges to sit on an intermediate state appellate court:

I have four law clerks. That is too many to permit proper supervision. I ask each clerk to draft at least six opinions a month. That asks more than is wise; only the ablest and most diligent clerk can

42. One study concluded that both taxpayers and their attorneys "overwhelmingly" select the Tax Court as their preferred tax forum, from which it can be inferred that the Tax Court continues to enjoy a reputation for being an outstanding specialty court. See Charles E. Boynton, IV & Jack Robison, *Choosing District Court Over Tax Court: Some Case Characteristics*, 36 TAX NOTES 807, 811 (1987).

Furthermore, the recommendation of the Federal Courts Study Committee suggested that the Tax Court be assigned the role of finally deciding all taxation litigation, subject only to Supreme Court review. See FEDERAL COURTS STUDY, *supra* note 13, at 69-72.

meet such a norm and still do good work. I rarely read the entire record of the trial testimony and documents, usually reading only those parts that seem from the briefs or my clerk's draft opinion likely to be critical. In reviewing a draft opinion, I often accept the clerk's exposition, so that my revisions are mostly stylistic. Sometimes I do not read the record at all. In deciding whether to join the opinion of another judge, I often accept the judge's statement of the record, on my clerk's assurance that the statement is accurate. In ruling on motions, I usually rely on summaries and recommendations prepared by the staff attorneys and my clerks.⁴³

Nor is this a description of what ought to be if the world were ideal. As the author goes on to say:

I assent to every criticism that may be made of this breakneck way of doing things. I am sure that I should have decided some cases differently had I proceeded in a more deliberate and thorough way. But what else can I, or any judge like me, do? The cases keep piling up. They must be decided.⁴⁴

We do not question the quality of the law clerks that are selected under the present system, nor do we have any doubt that, working in chambers under the close supervision of Article III judges, they are limited in their function to what is appropriate. It does bear mention, however, that at the present time there are a total of 2283 law clerks serving district judges and circuit judges. This does not include 349 current vacancies. Nor does it include staff attorneys, pro se clerks, or clerks serving magistrate and bankruptcy judges.⁴⁵ There is likely to be much room for significant expansion of this cadre of supporting staff.

Judge Spaeth's comments, however, suggest that the role assigned to law clerks is a function of the pressure of judicial business rather than a response to an *a priori* determination of what is proper in an ideal system. It was Justice Horace Gray who began the practice of employing a young law school graduate to aid him, paying the cost

43. Edmund B. Speath, Jr., *Achieving a Just Legal System: The Role of State Intermediate Appellate Courts*, in 462 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 55 (A. Leo Levin & Russell R. Wheeler eds., 1982).

44. *Id.* It should be noted that shortly thereafter the number of judges on the court on which Judge Spaeth sat was increased and the court was authorized to sit in panels. See 42 PA. STAT. §§ 504, 727 (1993). The basic point, concern with the limits of effective utilization of law clerks, remains.

45. Authorized positions total 1218, divided as follows: Magistrate Judge Law Clerks (434), Bankruptcy Judge Law Clerks (383), Pro Se Law Clerks (131), Staff Attorneys (270). Communication from Court Services Branches, Administrative Office of the U.S. Courts (Feb. 1995) (on file with authors). To this number must, of course, be added, the number authorized for district judges and circuit judges, bringing the total to almost 4000.

out of his own pocket.⁴⁶ Congress did not appropriate funds for this purpose until 1886.⁴⁷

Since that time the number of law clerks has grown and the concept of central staff has developed. Central staff are law clerks to the court whose role has been to increase productivity. We think of central staff as supporting the work of the courts of appeals, but at the district court level, pro se law clerks are not assigned to any individual judge but rather to the task of dealing with pro se filings. Indeed, the Long Range Planning Committee has recommended "more effective use of pro-se law clerks,"⁴⁸ recognizing that they can develop expertise in recognizing "claims that deserve further attention by the court."⁴⁹

Twenty years ago, Judge George C. Edwards, Jr., of the U.S. Court of Appeals for the Sixth Circuit, inveighed against too great reliance on central staff, or staff attorneys, as they are known in the federal system, as a means of coping with judicial workload.⁵⁰ He worried about the "trend towards staff attorney decisions, law clerk opinions, and one-judge decisions."⁵¹

The pressures, however, have been inexorable. It is quite appropriate to ask what the role of the law clerk should be, but it may also be necessary to confront the question of what the role of the law clerk will become if caseloads mount and judgeships do not keep pace.⁵²

B. Magistrate Judges and Bankruptcy Judges

Magistrate judges who try civil cases by consent of the parties are assigned the task as substitutes for judges. Such trials by consent, important as they are, constitute but a very small part of the total function of the magistrate judges. There are criminal counterparts and, more significantly, a magistrate may be assigned to preside over hearings for the purpose of making recommendations to an Article III judge.⁵³ Moreover, it is clear that whatever the terminology, the

46. See xv SUPREME COURT HISTORICAL SOC'Y Q., No. 4, at 14 (1994) (citing 8 GREAT AMERICAN LAWYERS 157 (Lewis ed., 1909)).

47. *Id.* at 16.

48. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 61 (Recommendation 35).

49. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 61 (Recommendation 35).

50. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, HEARINGS: SECOND PHASE 1974-1975, VOL. II 1975 HEARINGS 1211 (1975).

51. *Id.* at 1226.

52. The role of support staff in the legislative branch has evolved over the years, also under the pressure of mounting workload. Legislative and administrative assistants are sometimes described as assistant legislators.

53. As of January 1, 1995, there are 396 authorized full-time and 92 authorized part-time magistrate judges in the federal court system. All told, these magistrate judges terminated 7835 civil cases in 1994, a significant increase from the 4958 terminations by magistrate judges in

district judge is not obligated to rehear the testimony, even in the face of a challenge by one of the parties.⁵⁴ The magistrate may indeed be viewed as a first-line judicial officer.

A magistrate who presides over the selection of a jury in a felony prosecution is serving instead of the judge and for the unambiguous purpose of saving judicial time. Magistrate judges, of course, do more than just save time for Article III judges.⁵⁵ For example, by explicit provision, they may be assigned to serve as special masters,⁵⁶ a role explored further in the next section.⁵⁷

The function of bankruptcy judges is similarly unambiguous.⁵⁸ Whether they sit at the trial level or on appellate panels, bankruptcy judges are to decide cases exactly as would Article III judges, albeit subject to restrictions on jurisdiction and different rules concerning appellate review.

The respective selection processes applicable to magistrate judges and bankruptcy judges are rigorous and designed to assure high quality.⁵⁹ The availability of review and the level of review in each case is significant,⁶⁰ in some aspects perhaps more rigorous than that available with respect to administrative law judges. In the case of magistrate judges, depending on the specific assignments, the supervision afforded is designed to assure Article III involvement and responsibility without the need for formal appellate process.

1990. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 382, tbl. M-5 (1994).

During the same period magistrate judges conducted 4723 evidentiary hearings under 28 U.S.C. § 636(b)(1)(B) (1988).

54. See 28 U.S.C. § 636(b)(1)(B); *United States v. Raddatz*, 447 U.S. 667, 673-74 (1980) (finding “[n]othing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony”).

55. See 28 U.S.C. § 636(a)(1)-(4). Magistrate powers include all powers and duties possessed by United States Commissioners; the power to administer oaths of affirmations; the power to conduct trials under 18 U.S.C. § 3401; and the power to enter a sentence for a misdemeanor. *Id.*

56. *Id.* § 636(b)(2).

57. See *infra* Part V.C.

58. There are 326 authorized bankruptcy judgeships in the federal court system. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 12.

59. U.S. magistrate judges are appointed by a majority of all judges of a district court to an eight-year term if the position is full-time or a four-year term if the position is part-time. 28 U.S.C. § 631 (1988). There are statutory requirements: the magistrate must be a member in good standing of the bar of the highest court of a State for at least five years, *id.*, and must satisfy standards promulgated by the Judicial Conference of the United States. See *id.*

U.S. bankruptcy judges are appointed by the U.S. Court of Appeals for the respective circuits. 28 U.S.C. § 152(1988). The term is fourteen years and bankruptcy judges can be removed only for incompetence, misconduct, neglect of duty, or disability by a majority of the judicial council of the circuit. *Id.*

60. Appeals from a bankruptcy court are governed by 28 U.S.C. § 158 (1988 & Supp. V 1993).

Statutory authorization for bankruptcy appellate panels makes it possible for these non-Article III judges to play a role at the appellate level,⁶¹ although it is fair to say that the impact of these panels has not been significant.⁶² One may doubt that magistrate judges will ever play much of a role at the appellate level, but in light of the function of special masters there,⁶³ that possibility cannot be ruled out entirely.

We have treated bankruptcy judges and magistrate judges in the same section. In terms of relieving district judges, they perform similar functions. In our view, it would be highly desirable for Congress to recognize this aspect of the functional similarity between the two positions. As the statutes cited above indicate, Congress has treated magistrate and district judges differently in a number of contexts.⁶⁴ If Congress were to delegate to the Judicial Conference of the United States the authority to move authorized bankruptcy judgeships and funding to U.S. magistrate judgeships, the system would become more efficient.

Specifically, when bankruptcy filings drop significantly, decreasing the need for bankruptcy judgeships, while the need for magistrate judgeships increases—a phenomenon not unknown in recent years—the Judicial Conference should have the authority to adjust the positions. This is not to suggest that all incumbents are necessarily qualified to discharge the duties of both positions, but some incumbents clearly will be. In addition, due care must be exercised not to violate tenure, or expected term of office. The need for caution in implementation, however, does not negate the advantage inherent in flexibility. Such added flexibility would be a significant improvement in terms of service to litigants.

In a chapter entitled *Confronting the Alternative Future*,⁶⁵ the Long Range Planning Committee imagines how the system might cope if, by the year 2020, there were “only” 500,000 cases a year filed in

61. See 28 U.S.C. § 158(b) (allowing circuits, at their discretion, to establish bankruptcy appellate panels).

62. In an attempt to increase the role of the bankruptcy appellate panels, the Bankruptcy Reform Act of 1994 provides that each circuit shall establish a Bankruptcy Appellate Panel unless it chooses to exempt itself because (1) adequate judicial resources were not available, or (2) such panels would result in “undue delay” or expense to the litigants. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c)(1)(A) & (B) (1994). Present indications are that this legislation will not have substantial impact. For an innovative proposal to have specialized appellate bankruptcy panels composed of Article III bankruptcy judges, see Lloyd D. George, *From Orphan to Maturity: The Development of the Bankruptcy System During L. Ralph Mecham's Tenure as Director of the Administrative Office of the United States Courts*, 44 AM. U. L. REV. 1491 (1995).

63. See *infra* notes 77-80 and accompanying text (discussing rule of special master).

64. See *supra* notes 59-62 and accompanying text.

65. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, ch. 10, at 121.

district courts and the situation were such that a breakdown of the system, as defined by a number of "statistical signposts," had begun. One suggested approach is to have "adjunct judicial officers," i.e., magistrate judges and bankruptcy judges, "conduct a wider variety of proceedings."⁶⁶

It is important to emphasize that entrusting "adjunct judicial officers" with a wider range of responsibilities is not, in the view of the Long Range Planning Committee, a step to be taken lightly. It is a remedy to be invoked only where there are "harbingers of danger" and the threat of systemic "breakdown." It is clear that in the view of the Committee, the disadvantages of such expanded use of adjuncts must be a matter of serious concern.

C. *Special Masters*

The oldest and least controversial uses of special masters involve assignments that are ministerial in character.⁶⁷ For example, special masters have been assigned accounting duties and have competently performed calculations of damages using court-approved formulae.⁶⁸ Quite obviously, such roles remain relatively noncontroversial because they do not call for the exercise of a great deal of discretion, or for development of policy. In recent years, however, special masters have been assigned a larger role, particularly in connection with judicial efforts to cope with complex litigation.⁶⁹ They may be charged with

66. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 125.

67. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 395-96 (1986) (discussing historical use of special masters and that purpose of assignment is to conserve substantial judicial resources).

68. *Id.* at 395. See, e.g., *Ex parte Peterson*, 253 U.S. 300, 306-07 (1920) (allowing court to appoint auditor without parties' consent).

69. For a comparison of contemporaneous use of special masters in cases with substantial problems of scientific evidence, see Margaret G. Farrell, Federal Judicial Ctr., *Special Masters in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* 575 (1994). Use of the special master is not without limits. The Federal Rules of Civil Procedure dictate that a special master is only appropriate "upon a showing that some exceptional condition requires it." FED. R. CIV. P. 53(b). In a precedent setting case, the Supreme Court rejected the use of a special master calling such use "little less than an abdication of the judicial function." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (construing narrowly exceptional circumstances required to enlist services of special master). The Court concluded that special masters are intended "to aid judges in the performance of special judicial duties, as they may arise in the progress of a cause." *Id.* (quoting *Ex parte Peterson*, 253 U.S. 300, 312 (1920)). For examples of situations where courts have rejected the use of special masters and clarified the boundaries of their duties, see *Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1083-88 (3d Cir. 1993) (rejecting use of special master in products liability litigation); *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-97 (3d Cir. 1987) (declaring special master referral improper when motion presents relatively simple questions of fact and law).

In the chapter on *Confronting the Alternative Future*, described in the text *supra* notes 64-65, the 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 125, also invited reexamination of FED. R. CIV. P. 53 "to evaluate how support for judges in the district court might be expanded through

supervising discovery in such cases,⁷⁰ as well as with organizing the management of complex litigation by seeking to pierce the pleadings and to determine precisely what allegations are in fact in dispute.⁷¹ Some courts have even appointed settlement masters, charged "simply" with facilitating settlements.⁷² This may involve serving as mediators, with no authority to impose any terms on any litigant, or it may consist of developing a computer program designed to provide a base for determination of damages in a gargantuan class action.⁷³

However limited the authority of the special master is in a formal sense, even an assignment limited to mediation may, realistically speaking, carry tremendous power and respected authorities, such as Magistrate Judge (formerly Professor) Wayne Brazil, have cautioned: "With broader duties, masters might contribute more, but they also may invade the proper preserve of the judiciary, change the character of adjudication, or interject themselves into sensitive aspects of the attorney-client relationship."⁷⁴

So long as our society generates mega-cases, such as class actions in which literally billions of dollars may be at stake, and cases with complex environmental issues in which as many as fifty defendants are arrayed against one or two plaintiffs, special masters would appear indispensable. It is far too late in the day to expect busy judges to cope unaided. Concern is not unfounded, however, and particular attention must be focused on the standard of review as a means of assuring that special masters will not exceed appropriate limits on their authority. Specifically, how much weight should the judge place on the special master's legal recommendations? And how closely should the presiding judge scrutinize the factual findings of the special master?

the greater use of special masters." *Id.*

70. *See, e.g.,* NLRB v. Manfort, Inc., 29 F.3d 525, 527-28 (10th Cir. 1994) (observing that special master supervised discovery, conducted evidentiary hearing and received post-hearing briefs in unfair labor practice case).

71. *See, e.g.,* United States v. A.T.&T., 461 F. Supp. 1314, 1348-49 (D.D.C. 1978) (acknowledging that in complex litigation responsibilities of special master are enormous and that even resolving disputes regarding privilege provided enough work for special masters).

72. *See, e.g.,* Haworth, Inc. v. Steelcase, Inc., 12 F.3d 1090, 1092-93 (Fed. Cir. 1993) (noting that special master conducted mini-trial to assist in settlement of patent infringement dispute); Bigelow v. Michigan Dep't of Natural Resources, 970 F.2d 154, 156-57 (6th Cir. 1992) (observing that special master was appointed to supervise pretrial matters and attempt to facilitate settlement in fishing-rights case).

73. In the Ohio asbestos litigation, Judge Thomas D. Lambros appointed two law professors as special masters to develop a case management plan for each category of asbestos case. The case management plan included the creation of a complex set of computer models to evaluate varying asbestos claims. *See* Brazil, *supra* note 67, at 398-406.

74. *See* Brazil, *supra* note 67, at 396.

There is no need for a single answer applicable across the full range of a special master's duties. If the special master is charged with making a recommendation on a point of law, as applied to particular facts, review is, by definition, *de novo*. There still will be those who are concerned lest the judge's ultimate decision will "echo the master's work," thus creating "an impression . . . that the court is not deliberating independently."⁷⁵ This, however, is not sufficient reason for dispensing with the assistance of the master where sorely needed.

With respect to procedural issues, such as the timing or even the scope of discovery, the special master's findings enjoy the presumption of correctness and are upheld unless found clearly erroneous by a reviewing court.⁷⁶

We may conclude that special masters will remain indispensable in certain types of cases, but they cannot and should not be assigned a role so broad and so pervasive that they are viewed as offering a solution of significance to overloaded Article III trial courts.

Appellate courts rely far less on special masters, but when they do, the reliance is more specialized in nature. The U.S. Supreme Court, for example, utilizes special masters in cases of original jurisdiction, i.e., where one state sues another state in the Supreme Court.⁷⁷ In such instances, of course, the action had been originally filed in the Supreme Court and the special master is not appointed to aid the Court's appellate function.

The same is not true of the U.S. Courts of Appeals. In 1974, the Second Circuit, pioneered in developing its Civil Appeals Management Plan (CAMP), bringing together the lawyers for a pre-argument conference presided over by a seasoned attorney for the express purpose either to settle the litigation or, in the alternative, to improve the quality of the appeals that were argued and reduce total elapsed

75. See Brazil, *supra* note 67, at 405.

76. See FED. R. CIV. P. 53(e)(2) ("In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."). See, e.g., *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-97 (3d Cir. 1987) (emphasizing that Special Masters should only be used in exceptional circumstances and reversing district court's referral of contempt motion because motion did not present complicated questions of fact and law); *Turner v. Orr*, 722 F.2d 661, 666-64 (11th Cir. 1984) (reversing district court by finding that Rule 53 Special Master agreed upon by parties in consent judgment could be considered equivalent to arbitrator).

77. See, e.g., *Nebraska v. Wyoming*, 113 S. Ct. 1689, 1695 (1993) (utilizing special master to resolve dispute among three states and federal government over water rights to North Platte River); *Georgia v. South Carolina*, 497 U.S. 376, 405-08 (1990) (utilizing special master to help settle boundary dispute between Georgia and South Carolina).

time in the appellate process.⁷⁸ The program met with sufficient success to warrant other circuits undertaking similar programs, the most recent of which was inaugurated in the Third Circuit in 1995.⁷⁹

In the Third Circuit, the attorney in charge of the program is known as a special master.⁸⁰ This is particularly appropriate where the volume of cases in a program is low or the flow of cases sporadic. In other situations, the attorney presiding at the conferences may be viewed as a regular member of the court's staff and considered a staff attorney.

Whatever the preferred terminology, we should not look to additional special masters on the appellate level for any significant contribution to the solution of the problems of burgeoning caseloads in a sorely pressed judicial system. This is not to denigrate the potential contribution of special masters where they have a role to play. This is particularly true in complex cases in the district court. Without the assistance of special masters, we might expect judicial disasters of the first magnitude as district judges or already burdened magistrate judges attempt to cope with a proliferation of discovery disputes in a complex multi-party case. *A fortiori*, the same is true of the attempt to establish a framework for settlement in a multi-thousand-member class action. This is a far cry, however, from attempting to utilize ad hoc appointees as substitutes for Article III judges in order to cope with ordinary litigation.⁸¹

Because judges have an interest in the effectiveness of any special masters whom they appoint, they are interested in quality. Selection does not appear to be a matter of immediate concern.⁸² Quality has to be defined in terms of the task assigned: mediation is rather different than holding hearings and resolving disputes of law.⁸³ Accordingly, great discretion must inevitably be vested in the trial judge who not only is motivated to assure success of the effort, but is

78. See JERRY GOLDMAN, AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN: AN EXPERIMENT IN JUDICIAL ADMINISTRATION 12 (1977).

79. The Third Circuit pilot program began in August 1994 and extended to all of the Circuit's "mainland" districts effective with appeals filed on January 29, 1995. See Appellate Mediation Program Expands, THIRD CIRCUIT J., Spring 1995, at 8.

80. *Id.*

81. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 17-19 (discussing Long Range Planning Committee's "Alternative Future").

82. This has not been true in every judicial system. The most obvious risk is that of appointment by cronyism. Of course, promulgation of standards, even non-binding standards, by the Judicial Conference of the United States is possible should the need develop.

83. See Levin & Golash, *supra* note 41, at 29, 40-41 (discussing non-judicial mediators at trial level).

also most familiar with the litigation, the litigants and those available for appointment.

D. *Administrative Law Judges*

There are today, in the service of the U.S. Government, many more administrative law judges (A.L.J.) than Article III judges.⁸⁴ The sheer volume of cases that they decide—approaching 700,000 a year—and the variety of matters that they handle,⁸⁵ almost inevitably invite those concerned with the caseload of the federal district courts to think of administrative decisionmaking as an alternative.

At one level, the logic of administrative tribunals as a painless substitute for the beleaguered district and circuit courts seems compelling, at least where Article III jurisprudence imposes no obstacle.⁸⁶ It would be wrong, however, to overestimate the potential gain. On closer analysis, one discovers that there are conditions that

84. In his important article, *Reflections Upon the Federal Administrative Judiciary*, 39 U.C.L.A. L. REV. 1341, 1342-43 (1992), Professor Paul R. Verkuil distinguishes carefully between administrative law judges, who are appointed under the Administrative Procedure Act (APA), and administrative judges, who are part of the "administrative judiciary," but are not appointed under the APA. *Id.* For present purposes, we include both categories of "administrative adjudicators." For convenience, we may refer to both categories together under the familiar term of administrative law judges (A.L.J.) and, unless the context indicates otherwise, it is in that sense that the term is being used in this Article.

Verkuil estimates the number of A.L.J.s, those appointed under the Administrative Procedure Act, as close to 1200, and the number of administrative judges as over 2600. This would mean a total in excess of 3500. *Id.* at 1343.

If one were to include both categories of administrative judges, the total far outnumbers Article III judges. *See id.* at 1343, 1345.

85. *See id.* at 1343 n.7, 1345-46.

86. There are constitutional limitations on delegating the power to adjudicate to non-Article III courts. It is sometimes said that there are three categories of litigation that have been traditionally exempted from the strictures of Article III. As summarized by Justice Brennan in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), those include: (1) cases arising in certain geographical areas, such as the District of Columbia and territories of the United States; (2) courts-martials; and, of greatest significance for present purposes; and (3) cases involving public, as opposed to private, rights. *Id.* at 64-66.

Justice White, speaking for the dissenters in that case, interpreted the history otherwise. *Id.* at 115-16 (White, J., dissenting) (concluding that Article III jurisprudence allows Congress to establish legislative courts to hear Article III cases where specialized knowledge is necessary to resolve issue). Justice Rehnquist, however, was not impressed. He described the dissent as having surveyed the Court's scattered precedents and found them to be little more than "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night." *Id.* at 91 (Rehnquist, J., concurring); *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 54 (2d ed. 1988).

Article III doctrine has not been known for its clarity. In recent years the Supreme Court has handed down at least two decisions that approve non-Article III adjudication in cases that do not appear to fit comfortably in any of the enumerated categories. *See* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-58 (1986) (holding that CFTC counterclaim jurisdiction does not violate Article III); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 589-90 (1985) (noting that "practical attention to substance rather than doctrinal reliance on formal categories should inform the application of Article III").

should be imposed, and that there are costs that should be calculated. When this is done and the results are taken into consideration, the net benefits may not be as great as originally contemplated. To say this much is not to urge rejection of greater reliance on administrative tribunals and Article I courts; it is to suggest that prudent planning requires examination of the details.

One thinks of adjudication in a non-Article III tribunal as a means of avoiding the need to litigate in a district court. If one provides for no review by Article III judges, that will be true. The Court of Veterans Appeals, as it functioned until very recently, offers a prime example.⁸⁷ However, litigating in a non-Article III tribunal hardly assures high quality adjudication.

Consider the experience with A.L.J.s in the Social Security Administration. At one point 29,000 appeals were filed in district court in a single year.⁸⁸ Litigants were encouraged by a high reversal rate.⁸⁹ Moreover, the agency not only attempted to establish "productivity levels" for its administrative law judges, but also to fix "allowance-rate goals," in effect setting appropriate reversal rates in advance of consideration of, and indeed independent of, any hearings on the merits.⁹⁰

Nor is this the worst example. To quote from a unanimous opinion handed down by the United States Court of Appeals for the Second Circuit earlier this year: "the district court found that the Secretary [of Health and Human Services] and Social Security Administration

87. In the case of the veterans, Congress finally intervened to create the Court of Veterans Appeals, an Article I tribunal of limited jurisdiction with the right of appeal on questions of law to the Court of Appeals for the Federal Circuit. See 38 U.S.C. §§ 7251-7297 (Supp. V 1993).

Prior to the statutory change, the legal profession was quite divided in its evaluation of the Veterans' Administration. Was it an example of efficiency to be emulated or rather of a system in which errors were insulated from the possibility of corrective action? See RONALD A. CASS & COLIN S. DIVER, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 187 (1987) (writing before statutory changes were enacted). Cass & Diver describe the situation as follows:

[T]he Veterans' Administration stands as a striking example of the only federal administrative agency whose major duties are exempt from judicial review. This sweeping insulation from judicial scrutiny has earned mixed reviews from commentators. One critic, arguing that justice ought never take a back seat to administrative illegality for the sake of governmental efficiency, disparagingly referred to the Veterans' Administration as "Henry VIII in America." Another, defending the system with equal fervor, describes it as "the most competent and humane social services agency since King Solomon sat to dispense charity and justice to his adoring subjects."

Id. (citations omitted).

Experience under the statute providing for appellate review has, understandably, been hailed by those who represent veterans. See, e.g., Barton F. Stichman, *The Era of Reform Generated by the U.S. Court of Veterans Appeals*, 38 FED. BAR NEWS & J. 494 (1991) (describing decisions of U.S. Court of Veterans Appeals in its first two years).

88. Verkuil, *supra* note 84, at 1355 n.57.

89. See *infra* notes 92-93 and accompanying text (discussing reversal rates).

90. See Verkuil, *supra* note 84, at 1354-55.

(SSA) adjudicators, between June 1976 and July 1983, engaged in systematic and clandestine misapplication of disability regulations . . . causing plaintiffs' . . . applications to be denied without full review."⁹¹ Moreover, in shaping relief the court found it relevant that the violations were "covert as well as illegal."⁹²

Reversal rates have been high. By the Secretary's own count, reversal without remand was ordered in 29.4% of the cases in fiscal year 1983,⁹³ to which must be added those cases in which reversal was accompanied by remand. All of which prompted the Third Circuit to comment, in a classic example of understatement: "direct reversal of the Secretary is no longer an uncommon judicial remedy."⁹⁴

Any decision to take advantage of the additional "judge-power" that administrative adjudication can afford must be concerned with assuring quality adjudication. To emphasize this point is not to denigrate the A.L.J.s, an "impressively credentialed" lot,⁹⁵ nor would we underestimate the contributions of the Administrative Procedure Act.⁹⁶ However, the history of abuse is too fresh and the importance of the issues in the lives of ordinary people, typically the disadvantaged, too great to be satisfied with less. Indeed, as the Long Range Planning Committee has recognized, providing judicial review, without more, may not be enough.⁹⁷ At the same time, there must be concern for efficiency. As we were reminded long ago, "Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it."⁹⁸ The great challenge is to achieve quality adjudication, within a reasonable amount of time, at a manageable cost.⁹⁹

The Long Range Planning Committee has taken a two-pronged approach. It calls for Congress to assign to "administrative agencies

91. Dixon v. Shalala, No. 94-6040 1995 WL 231487, at *1-2 (2d Cir. Apr. 19, 1995).

92. *Id.* at *2.

93. See Podedworny v. Harris, 745 F.2d 210, 222 n.11 (3d Cir. 1984) (stating that 29.4% of Secretary's decisions were reversed in 1983 (citing Tustin v. Heckler, 591 F. Supp. 1049, 1059 (D.N.J. 1984), vacated in part and remanded, 749 F.2d 1055 (3d Cir. 1984))).

94. Podedworny, 745 F.2d at 222 n.11.

95. Verkuil, *supra* note 84, at 1344.

96. See Verkuil, *supra* note 84 (*passim*).

97. See *infra* text accompanying notes 99-100.

98. AMERICAN BAR ASS'N, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE (1976), reprinted in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 295, 300 (A. Leo Levin & Russell R. Wheeler eds., 1979).

99. See *supra* note 87 and accompanying text. Obviously, the availability of judicial review increases the elapsed time to disposition and, absent statutory restrictions that impose artificial limitations on legal fees, the cost to the litigants.

or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding."¹⁰⁰ In addition to providing for judicial review, however, it also calls upon "Congress and the agencies concerned . . . to broaden and strengthen the administrative hearing and review process."¹⁰¹

There is promise in this means of augmenting the federal capacity to adjudicate, without the loss of precisely those qualities that have made the federal judiciary such an important factor in assuring the quality of life in this country.¹⁰² But this approach requires the greatest care and concern for who and what will substitute for Article III judges and Article III courts.

CONCLUSION

From the point of view of strict logic, the most promising alternative is to return to fundamentals and restrict the federal judicial system to its primary functions. It is hard to fault the very first recommendation of the Long Range Planning Committee: "Congress should commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction. . . . Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests. . . ."¹⁰³ This would mean eliminating diversity jurisdiction as we know it, or at least curtailing it drastically. This approach, however, is the least palatable politically. Indeed, with the federalization of crimes becoming ever-more popular, Congress appears to be looking in the opposite direction.

Some change, however, appears inevitable. Law clerks, hidden as they are in chambers, may become junior partners in decisionmaking to a far greater extent than they are now. As docket pressures mount, who can say what course of action will appear preferable to endless delays? Will it eliminate what has long been thought to be an important ingredient of justice in this country—the right of every litigant to at least one appeal in every case? And is it important to remember that appellate review by Article III judges may be eliminat-

100. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 33.

101. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 32.

102. The emphasis in this Article has been on the quality of adjudication, i.e., the reality rather than the appearance of "second-class" justice for the "weaker vessels" of our society. This is not to suggest that appearances are unimportant; even the appearance of impropriety may subject a judicial officer to discipline. The reality, however, appears to us so much more significant than the appearance, that we are willing to allow appropriate steps concerning the latter to await the development of solutions that treat the former.

103. 1995 PROPOSED LONG RANGE PLAN, *supra* note 5, at 23.

ed *de facto* as well as *de jure*? And if appeal, as of right, is to be eliminated, will this mean a concomitant increase in the power of the trial judge?

Viewing such alternatives as realistic possibilities in the near future assumes, of course, no major changes in the substantive law, or in the procedural law designed to control access to the courts. Straight-line projections are particularly vulnerable to errors in their major premises. If fundamental change in the doctrine governing tort law, for example, should make lawsuits pointless, if universal fee shifting should make lawsuits economically hazardous, there may be a dramatic drop in the business of the federal courts.

This has happened before. A relatively recent example involves the number of class actions, in which jurisdiction was based on diversity, that were reduced dramatically in the federal courts following a redefinition of the appropriate test for jurisdictional amount.¹⁰⁴ But it would be foolhardy to plan based on assumptions of major upheaval. The federal judiciary plans on the basis of the probable.

The greatest risk is in assuming that because the federal judiciary has successfully increased productivity before, it can continue to do so in the future; because we have successfully utilized a range of surrogates for Article III judges, we can continue along that path without serious damage to the judiciary and its role as an indispensable coordinate branch of government. One must grant that what has been done successfully might, at one time, have been viewed with alarm, as most change is viewed by at least some people. One must also acknowledge that the surrogates for judicial power that the federal judiciary currently employs are indispensable to the functioning of the system and that properly controlled the advantages they offer far outweigh any risks. But there are limits. Like the drayman who, having decided that his horse was eating only because of habit, determined to wean him slowly—a little less hay each day was the regimen. His efforts seemed about to be crowned with success when the horse died. “What bad luck,” he complained, “just when I had almost made it, he goes and dies!” The federal judicial system is too precious to run such risks.

104. The Supreme Court, in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), held that in class actions in which jurisdiction is based on diversity, every member of the class must meet the jurisdictional amount requirement. *Id.* at 301. Thereafter, the number of class actions brought in federal court dropped precipitously from 3584 in 1976 to 971 in 1985. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 102, tbl. 34 (1985). A Preliminary Report on Time Study Class Action Cases (1995) by the Federal Judicial Center of the Advisory Committee on Civil Rules indicates that these figures may reflect a substantial undercount of class action activities.

There are no panaceas, but there is hope that by relatively small and careful steps, taken after adequate analysis of the obvious and the less-than obvious, we may be able to assure the continued vitality of the federal judicial system in the near future. By then, further planning, accompanied by a willingness to act, at least incrementally, may suffice to assure the continued quality of the federal courts.