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Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency

*Alvin B. Rubin**

The democratic ethos . . . , based as it is on the postulate of substantive justice in concrete cases for concrete individuals, inevitably comes into conflict with the formalism and the rule-bound, detached objectivity of bureaucratic administration.¹

During the two decades when I practiced and taught law, I thought of federal judges as magisterial if not regal. The district judge sat in black robes at a walnut bench in a paneled courtroom and presided at trials. If he—and at that time it was only “he”—did anything else, he was not judging. Circuit judges were even more august; they sat in stately triumvirates and, after listening to the oratory of argument, retired to their chambers where, in coat and vest, they studied law books and whence they issued opinions in phrases redolent of, if not equal to, those of Learned Hand and Benjamin Cardozo. This indeed was judging. All else was as incidental and unimportant as who held the judge’s robe when he donned it.

Perhaps long ago that image was an accurate one. It is now fantasy. Today’s federal judge is far busier than his predecessors, devotes a majority of his time to work in chambers and has much less time, if any at all, for reflection. The change is not due merely to an increase in the number of cases. Indeed, although total filings have increased dramatically, the number of annual filings per judgeship in district courts has not changed drastically in the last forty

* Circuit Judge, United States Court of Appeals for the Fifth Circuit. I express my appreciation to Susan Collins, A.B., University of North Carolina, M.A., University of Chicago, J.D. University of Virginia, who, beyond the call of her duties as my law clerk, has assisted me in the preparation of this paper. Bureaucratization has some pleasant aspects, too, and one is the opportunity to work with lawyers like Susan. I have also benefited from work done on these topics a year ago by Laura B. Bartell, B.A., Stanford University, J.D., Harvard Law School, who was then my law clerk.

¹ I have plucked ideas from many others and have not tried by footnotes to attribute each one. However, I do acknowledge my indebtedness to Maurice Rosenberg, Assistant Attorney General, with whom I have from time to time discussed some of the concerns expressed; James McCafferty, Chief, Statistical Analysis and Reports Division, Administrative Office of the United States Courts, both for assistance in obtaining data and for the ideas he has shared with me for many years; Richard Hoffman, Attorney Adviser in the Office for Improvements in the Administration of Justice, for the insights in his paper, “Coming Problems of Bureaucratization and Management in the Federal Courts;” Leo Levin, Director of the Federal Judicial Center; and Russell Wheeler, Assistant Director of the Federal Judicial Center, with both of whom I have had many enlightening conversations about judicial education and court management.

Thoughtful and provocative views about some of the problems of appellate courts are expressed by Dean Paul D. Carrington, Duke University School of Law, in an unpublished paper, “Legal Realism and Justice on Appeal.” A complete bibliography is on file at *The Notre Dame Lawyer* office.

years.² For the trial judge, management problems are due in great part to the mutation in the character of federal cases. Gone are most of the simple trials. Instead both civil and criminal litigation have evolved into complex proceedings, full of discovery and pretrial problems and culminating in lengthy trials.

Appellate judges are confronted not only with the same vast increase in intricacy of cases but, in addition, with a staggering increase in the volume of their work.³ The annual appeals commenced per circuit panel in 1940 were 184. By 1978 the number had jumped to 585.⁴ Our 1940 cases were largely one or two issue matters. Today appeals involve records of thousands of pages and briefs arguing dozens of issues.

In testifying before the Commission on Revision of the Federal Court Appellate System, commonly called the Hruska Commission, Judge Ben Cushing Duniway stated:

When I came on the court [in 1961], I had time to not only read all of the briefs in every case I heard myself, which I still do, and all the motion papers . . . , which I still do, but I could also go back to the record and I could take the time as I went along to pull books off the shelves and look at them. And then I had time, when I was assigned a case, to write. And occasionally I could do what I call "thinking," which was to put my feet on the desk and look at the ceiling and scratch my head and say, "How should this thing be handled?"

. . . .

Today the situation is quite different.

I have a strong feeling and I know many of my brothers and sisters on the

² [1979] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR, Tables 4 & 7, at 4, 7:

District Court Filings		
	<i>Total Civil & Criminal</i>	<i>Per Judgeship</i>
1940	68,135	359
1950	92,382	429
1960	89,112	364
1970	127,280	318
1978	174,753	438

³ [1979] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR, Table 1:

Circuit Court Appeals Commenced		
	<i>Total</i>	<i>Per 3-Judge Panel</i>
1940	3,446	184
1950	2,830	131
1960	3,899	172
1970	11,662	361
1978	18,918	585

⁴ The alert reader may note that this is based on the number of appellate judgeships in 1978. That number has been increased. However, the number of district judgeships has also been increased. Filings in district courts are not a measure of appeals. A filing does not result per se in an appeal. Appeals arise from final judgments and a few types of interlocutory orders by judges. Our experience in the Fifth Circuit is that the number of appeals per district judgeship, year in and year out, is forty. Therefore, we expect no decrease in the appeals per panel in the Fifth Circuit despite the addition of eleven new judgeships.

Court have the same feeling—that we are no longer able to give to the cases that ought to have careful attention the time and attention that they deserve.⁵

As a result of changes both in the character and quantity of cases, much of the judge's work in 1980, a highly important part, will not be done on the bench. The average trial judge completed forty-seven trials last year, with an average duration of three days each. This means he spent about 141 days on the bench in open court. The rest of his time was not spent fishing; he considered motions, conducted pretrial conferences, assisted in the negotiated disposition of cases, prepared jury charges, wrote findings of fact and frequently ate lunch at his desk.

No appellate court works harder than the Fifth Circuit. Our judges handle about 25% of the total of all the federal appellate cases submitted for decision. Yet each of us spends only forty to sixty days a year on the bench. The rest of our work is in chambers—studying briefs, writing opinions and doing myriad other judicial tasks.

Our courts continue to work furiously, but they are unable to cope with the torrent of cases without resorting to measures adopted primarily as time-savers. District courts delegate more and more of their work to magistrates, who handled 292,179 matters in 1978-1979 alone. Appellate courts reduce time for oral argument. My own court, the Fifth Circuit, is compelled to decide 50% of its cases without any oral argument.

These changes have a hidden adverse impact. As more judges are appointed and as judges become busier, they have less time to communicate with each other. Their ability to harmonize opinions and reach collegial decisions diminishes. More conflicting opinions are rendered and the law becomes less predictable and less effective as a guide to behavior.

This is not the preamble, however, to a suggestion for more judgeships or more staff. Inundated by our case load, we of the judiciary have sought, and Congress has provided, palliatives: more judges, more magistrates and larger staffs.⁶ Magistrates and staff cost less per capita than judgeships. Accordingly,

⁵ Quoted in Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579, 583 n.14.

⁶ Most of the data is from [1979] ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIRECTOR, Tables 20, 21 & 22 at 19-23:

	Total
Circuit Court Authorized Judgeships (increased by 35 in 1978)	132
District Court Authorized Judgeships (increased by 117 in 1978)	516
Special Court Judges	20
Territorial Court Judges	3
Retired Judges	181
Resigned Judges	6
U.S. Magistrates	444
Bankruptcy Judges	236
Total Judges and Magistrates	1,538

Law clerks (including those expected to be employed as a result of 1978 legislation; calculated on the basis of 3 per circuit judge, 2 per

while the number of judgeships has grown, the size of supporting staffs has waxed even more. For example, our judges are now assisted by 1612 law clerks and 136 staff attorneys, a body the size of an army regiment. Let us take a look at the total size of our judicial branch: The 648 authorized federal judgeships are supplemented by 181 retired judges, 444 U.S. magistrates, 236 bankruptcy judges, and a total complement of 11,857 other persons. The ratio of staff to federal judges (including retired judges) is seventeen to one. (In 1954 it was eleven to one, so in twenty-five years the ratio itself has increased over 50%.)

Four decades ago district judges had a bailiff but no law clerk; each circuit judge had one clerk. Judge Charles Wyzanski has told me that, when he clerked for Learned Hand in 1932, he never prepared a draft opinion; indeed, Judge Hand told him never to write anything other than personal notes to prepare for discussing the case with the judge. His primary function was, in Judge Hand's words, to serve as a wall against whom the judge bounced balls. When Judge Hand was ready to discuss a case, he would summon his clerk and talk for an hour or so with feet on desk and hands behind his head. Then, having reached his decision, he wrote the entire opinion in longhand.

We are no longer able to work in this manner. To meet his responsibilities, the federal district judge today has, in addition to a secretary and two law clerks, a docket clerk assigned by the clerk's office, a court reporter, the services of a probation staff and the assistance of a magistrate and the magistrate's staff. He hears appeals from matters handled by bankruptcy judges and reviews the work of the magistrate. In effect, he runs a small law firm.

Each circuit judge now has three law clerks, two secretaries and the ser-

district judge, 1 per territorial court judge, and 1 per retired judge).		1,612
Circuit executives (10) and their staffs (18)		28
Secretaries to judges (calculated on the basis of 2 per circuit judge in the Fifth and Ninth circuits, 1 for each other circuit judge, district judge, special court judge, and territorial court judge)		720
Secretaries to retired judges		139
Staff secretaries		126
Staff attorneys: 11 seniors, 125 others		136
Clerk's office personnel		2,717
Probation staffs		2,886
Bankruptcy staffs		1,333
Magistrates' staffs		358
Court Criers		411
Court reporters		461
Supporting personnel of special courts		223
Librarians		51
Miscellaneous personnel		
District of Columbia	10	
Messengers	5	
Nurses	3	
Interpreters	14	
Temporary Emergency		
Court of Appeals	8	40
Judicial Panel on Multidistrict litigation		10
Jury Commissioner's staff		4
Staff of Administrative Office		473
Staff of Federal Judicial Center		129
Total Staffs		11,857
Total Judges, Magistrates, and Staffs		13,395

vices of staff law clerks, the staff of the circuit clerk's office and the circuit executive. He has a small appellate enterprise.

So far as I can perceive, none of the 13,395 persons in the judicial branch is idle. I can truly say that I personally know of no one who does not work hard and for long hours. However, working hard and being efficient are not necessarily the same. Our judiciary now consists of a galaxy of judicial organizations. In work, as in judging, each is autonomous.

Fortunately, the quality of decision-making is far superior to the methods used to bring issues to decision. At best, however, our operation is unwieldy and frequently ill-managed. Law clerks and secretaries work directly under the judge's supervision. Magistrates and their staffs, staff attorneys, clerks, probation staffs and other staff positions serve the court as a whole. Together they impose requirements on the practicing bar whose efforts to some degree supplement their own. When our orders or rules impose unnecessary or unproductive work on the bar, the result is to multiply the wasted effort prodigiously and increase the expense of litigation for clients.

Nominally the chief judge of each circuit and district is responsible for such management as the courts receive. He may, as is the case in our court, serve as the executive to implement policy made by the court as a body. He may, as is the case in our circuit, be assisted by committees. However, the policies embodied in court rules are frequently adopted with more regard to other considerations than good judging or efficient management. Moreover, the chief judge cannot be a chief executive because the time he can devote to administration is limited and he may or may not have managerial skills. He certainly has little time for or experience in supervising staff workers. As a result, no one appears to be in a position adequately to monitor the work being done by our staffs.

If these staffs are really competent to assist the judge, they do not act only ministerially. They do not merely run errands or perform chores; they assume responsibility. Responsibility is delegated throughout the system but the principal delegation lies at the hub, in the judge's relationship with his law clerks.

However hard a judge tries, he cannot completely review everything that his law clerks do or learn all that they know. Inevitably they assist him not only in routine tasks but in the work of judging. They read briefs, study precedents, prepare proposed jury charges and findings, and in some instances draft opinions for the judge's review. Of necessity the judge must rely to some degree on their work.

As a result, I fear we are approaching a kind of institutional judging in our courts. If each appellate judge today is reading every record and every brief that is filed with him, studying every authority cited as precedent and writing every word of every opinion he renders, he has more staff than is necessary. However, the fact is that each appellate judge does need every bit of assistance that he has because he cannot personally do each task in the way Learned Hand did—not if, as the average national appellate judge did in 1978, he is going to participate in the disposition of 585 cases, a total of twelve per working week or two per working day.

Last year, the average workload of a Fifth Circuit appellate judge included:

Opinions and participation in opinions	381
Considered petitions for rehearing en banc	285
Handled administrative and other interim matters	193
	<hr/> 859

If we assume a forty-eight week workyear, the average judge on our court wrote or participated in eight opinions each week, over one and a half per day. If he read each brief and each record, he read one and a half records and three or more briefs every working day, in addition to doing research and writing opinions. He also read one and a half briefs every day in connection with rehearing applications, and read the briefs and decided one administrative matter every working day.

Nationally, the average judge was responsible for writing seventy-five opinions and for reading 287 records and over 600 briefs. I do not have the data for the additional work he did but I am certain that, like the judges of the Fifth Circuit, his duties that did not result in writing opinions required him to consider a vast number of other matters.

Why do we not have more great judges like the mighty jurists of yesteryear? To some degree, perhaps, we are lesser people today. But perhaps another reason is that, to produce great decisions, a judge must have time to think, ponder and write in pencil in longhand. In 1937 when Judge Hand was sixty-five years old, only a little above the average age of our present appellate judge, he wrote sixty opinions. Last year the average Fifth Circuit judge wrote forty-six opinions, participated in fifty-six per curiam opinions and read briefs in and disposed of twenty-three cases without a written opinion—a total of 125 cases, more than twice as many as Judge Hand wrote. I have little doubt that in volume almost every federal appellate judge in the nation is required to perform more work every year than Justice Cardozo did when he was on the New York Court of Appeals.

It is obvious that we did not do this alone and that our regiment of law clerks had something to do with the decisional process. Those who apply for positions as law clerks are among the brightest and ablest graduates of our law schools. They seek a federal clerkship not merely to learn about how judgment is reached and rendered but also to participate in the process.

What are they doing in the judges' chambers? Surely not merely shelving books and running citations in *Shepard's*. They are in many situations para-judges. In some instances it is to be feared that they will become invisible judges as some of our colleagues succumb to the temptation of letting clerks' drafts form a major part of their opinions. Indeed, many observers have noted that opinions appear to grow longer in direct ratio to the growth of the judge's staff.

Even those of us who write every word of our opinions must be depending on these clerks to do something important. And who would not? The work is there to be done. It looms like a glacier before us, advancing inexorably. The short-term solution is to get more staff, delegate more work, accept the inevitable. But that surely means dilution of judicial responsibility as we have come to know it. In the long run it will lead to less respect for judicial decisions.

Here, then, is one aspect of our management problem: too much work, too little time to do it, the necessity for delegation, inefficient management and, ultimately, the dilution of responsibility for decision-making. As the Department of Justice observed in its 1977 report on the needs of the federal courts, "[w]e are . . . creating a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judiciary to a bureaucracy."

There are no panaceas. If, however, we are to prevent the conversion of federal judges from individual decision-makers to spokesmen for a faceless bureaucracy, we must attack the problem on two fronts: We must manage our staffs better and we must halt the dilution of judicial responsibility. Let us first discuss the matter of management.

In 1971 Congress created the post of Circuit Executive. The services of these trained executives have proved invaluable in relieving chief judges of administrative problems and in performing management tasks. The Federal Judicial Center recently published a comprehensive study about how these executives are functioning.⁷ This study deserves careful consideration because it points out ways in which executives may be used even more efficiently. These ten executives thus far have performed a service far beyond their meager number, yet the study indicates that many are not being used to the full range of their talents. While the statute also permits them to be used for district court problems, they are too few in number and their efforts focus so much on circuit problems that they cannot perform the executive work required by the district courts on a daily basis.

There are thirty district courts that we might consider metropolitan. Each has at least six judgeships, and with magistrates, probation officers and clerk's office staffs, a total complement of at least 100 people. Indeed, in the largest court, the Southern District of New York, the total staff numbers 369. In all of these district courts the sole executive function is provided by the chief judge, who is selected by seniority and who may be assisted to some extent by committees of judges. The chief judge usually will have had long tenure on the bench, but no training as an executive and little time either to learn or to accomplish management functions. These courts need a district court executive, but great care must be taken to ensure that the executive serves a management role and does not become merely another administrative aide to the chief judge.

Both circuit and district judges should be relieved of many administrative duties and their efforts should be focused on adjudication. There is no time study for circuit judges, but the most recent district court time study, made over ten years ago, shows that district judges spend 21% of their time in purely administrative tasks. That percentage undoubtedly is higher today for both district and circuit judges. So far as is consistent with the nature of our judicial task, management and administrative duties should be performed by circuit and district court executives and by clerks of court. This will not work unless judges themselves are convinced of the desirability and indeed necessity of permitting nonjudicial personnel to exercise meaningful management control and to assume responsibility for as much court administration as is practicable. In

⁷ Federal Judicial Center, *The Impact of the Circuit Executive Act* (1979).

England and on the Continent, case processing and scheduling as well as court administration and housekeeping are the responsibility of court attaches. This has been possible only because judges have been primarily interested in judging.

Our courts also could be made more efficient if we were permitted to docket cases in accordance with judicial needs and the demonstrated imperatives of particular cases instead of being required to follow a lengthy list of congressional prescriptions that entitle a host of cases to priority on our dockets. Aside from the Speedy Trial Act, there are over sixty other categories of priority cases in federal courts.⁸ There is no ranking among the priorities; most of them conflict with all of the others. Each priority case results in postponement of another case, and in some circuits there is a real possibility that, because of the great number of priority cases, nonpriority cases may never be heard. It seems to me that, save for criminal and injunction-related cases, the matter of setting priorities in all of these cases could well be left to the courts. That does not mean every case automatically will go to the foot of a long docket. Every court has a mechanism by which a litigant who thinks his case demands an early hearing can seek one. That is the primary method on which we should rely.

Let me mention one other time-consuming task of judges that appears to me to be an obsessive preoccupation. It is our concern, particularly at the appellate level, with trying to write the kind of opinion that we think law school teachers will consider scholarly. American judicial opinions surpass in verbiage, in length and in citations those written anywhere else in the world. Every judge should be required to give his reasons for a decision, and these reasons should be sufficient not only to explain the result to the litigants but also to enable other litigants to comprehend its precedential value and the limits to its authority. It would suffice to do this if we adopted a standard style of opinion, if we did not strive to cite authority for elementary propositions and if we did not try to emulate law review articles or impress our colleagues and the bar by our scholarship. Occasionally each of us may render a decision, perhaps in a highly significant case, that demands exposition of the full palette of our talents, but I fear that much of our time and the time of our clerks is spent merely in seeking felicitous expression, adding citations and attempting to produce works of art. It would be worthwhile for judges to experiment with much simpler opinion models. We will succeed, however, only if we deinstitutionalize the demand for scholarly opinions. A good motto for us might be: Sufficient unto the case is the decision thereof.

However efficient our management system, improvement of administration alone cannot solve the problems of bureaucratization of the judiciary and institutionalization of decision-making. It will simply make the machine run more smoothly. We need to ask a question: Do we really want a hyperefficient machine to decide our litigation? To me the answer is obvious: Decisions should be made by those who are appointed by the President with the advice and consent of the Senate, not by their employees or delegates, however efficient and able.

8 List is on file at *The Notre Dame Lawyer* office.

Justice Brandeis once said of the Supreme Court, "We are respected because we do our own work." It was likely for this reason that, when the Chief Justice of the Supreme Court was first authorized to employ three law clerks, Judge Hand said of Fred Vinson, then the Chief Justice, "I see that the Chief Justice has now become Vinson, Inc." His law clerk responded, "I fear he may have become Vinson, Ltd." For, even as our assistants enable us to do more work, they narrow what we are able to do ourselves. Whatever part of our work is done by others, however urgently we need them to do it, is not our own work.

If we want judging to be done by judges and only by judges, then we need to institute other changes in addition to increased efficiency. However efficient the judicial branch may become, it cannot mass-produce justice. Wise decisions cannot be made if cases come in vast numbers on a judicial assembly line.

Within constitutional limits, Congress determines the jurisdiction of federal courts and Congress, therefore, must face a critical question: What kind of federal judiciary will best serve the needs of our nation in the next two decades?

For the past century, the evolutionary answer has been simply to broaden federal jurisdiction, and, as work-load crises developed, to create more judgeships and provide larger staffs. The result has been not only the increase in size that I have already discussed; good work has generated more demand, and Congress has seen fit to entrust federal courts with the power to decide a vast array of different kinds of cases. We might continue with this trend of trying to accommodate an ever-increasing number and variety of cases on an eclectic and pragmatic basis. If so, then it is likely that our judicial establishment will double in size in the next decade. As the Department of Justice Committee on Revision of the Federal Judicial System wrote in 1977:

Overloaded courts are not satisfactory from anyone's point of view. For litigants they mean long delays in obtaining a final decision and additional expense as court procedures become more complex in the effort to handle the rush of business. We observe the paradox of courts working furiously and litigants waiting endlessly. Meanwhile, the quality of justice must necessarily suffer. Overloaded courts, seeking to deliver justice on time insofar as they can, necessarily begin to adjust their processes, sometimes in ways that threaten the integrity of the law and of the decisional process.

. . . .

These are not technical matters of concern only to lawyers and judges. They are matters and processes that go to the heart of the rule of law. The American legal tradition has insisted upon practices such as oral argument and written opinions for very good reason. Judges, who must be independent and are properly not subject to any other discipline, are required by our tradition to confront the claims and the arguments of the litigants. They must demonstrate to the public that they are not acting out of whim, caprice, or mere personal preference. Our tradition requires that judges explain their decisions and thereby demonstrate to the public that those decisions are supported by law and reason. Continued erosion of traditional practices could cause a corresponding erosion of the integrity of the law and of the public's confidence in the law.

The desirability of being a federal judge is inversely proportionate to the number of routine cases brought to federal court. There would be many who would seek a life-time appointment if all of our time were spent in hearing Social Security appeals or personal injury cases. But I do not think that these aspirants would be lawyers, law professors and state judges of the high professional quality that the constitutional role of federal courts demands. The professional quality of those who seek a federal judgeship is inevitably affected by the prestige, the challenges and the responsibilities of being a federal judge.

Let us start to solve this problem by defining anew the most important role for the federal judiciary and then pruning jurisdiction so that it includes only the cases that should be decided by Article III judges, federal judges appointed under the Constitution to perform constitutional duties. There are many reasons why this approach is desirable. It preserves the indispensable role of the federal courts in deciding constitutional questions, civil rights questions and important questions of federal statutory construction. It assures that the judge will have time to reach a considered decision on these important issues rather than being obliged to fit them into the interstices of a host of cases that are, while equally important to the litigants, less momentous to the nation.

To accomplish this, some reduction in federal jurisdiction is necessary. One aspect of this has already been debated extensively—the complete elimination of diversity jurisdiction, or at least the elimination of diversity jurisdiction when invoked by the resident party. There are many other areas in which a trial in federal courts could be eliminated. Let me give you just a few examples.

There are only two major areas of employer liability not covered by compensation statutes. These are railway workers (1540 cases in 1979) and Jones Act seamen (4905 cases in 1979). To preserve a tort action, with all of its expenses, potential inconsistencies and possible haphazard results, appears to be anomalous. The provision of a compensation remedy for these workers, such as we have for all other industrial employees in our society, would not only be more equitable and distribute both the cost of injury and the damages for injury more justly, it would also eliminate the substantial amount of federal court time devoted to these cases. Obviously these cases are important to the litigants, but they are simple personal injury problems of a kind now handled for the vast majority of workers by compensation legislation. Other matters now submitted judicially could readily be submitted to administrative agencies. One example is the Truth-in-Lending Act which generates over 2000 federal suits annually. And we should not overlook the existence of 50 capable state court systems; these too can decide federally created rights. I will not here attempt to review one by one all of the areas of federal jurisdiction. About each Congress should ask: Given the limited capacity of the federal court system, is this a matter that should be decided by these courts?

In creating new legal rights, Congress should consider carefully the judicial impact of the statute. In 1970, and again in his 1972 Annual Report on the State of the Judiciary delivered to the American Bar Association, Chief Justice Warren Burger recommended that Congress require any proposed legislation to be accompanied by a judicial impact statement. This statement

would estimate the litigation that might be anticipated if the bill became law and the additional judicial resources that would be required to achieve the congressional objective.

This reflects a common sense approach. Before enacting a law, Congress almost invariably considers its direct cost in dollars. If a statute also has an indirect cost in terms of judicial budget and the amount of additional effort required of the judicial branch, Congress ought to be equally aware of these impacts. If the purpose of the legislation is to be accomplished by litigation, those whom Congress seeks to aid will be given an empty promise if they are forced to wait for years at the end of a long line of other suitors for a day in court. The ability of the judicial branch to respond promptly and adequately to the problem is an important part of providing any real solution. Seventy-two recently enacted laws tend to increase the amount of litigation in federal courts.⁹ One might express reservations about whether each represents a considered judgment that the matters involved can only or best be heard by Article III judges.

We should also study the role of federal magistrates. It might be possible to consider giving them exclusive original jurisdiction to hear certain cases that Congress thinks should not be handled administratively but that do not demand the attention of an Article III judge. In a manner similar to that used in some states, appeals of these cases might be to the district court, with no further right of appeal to the courts of appeal but giving these courts review powers by writs of certiorari or by certificate of probable cause from the district judge.

Assuring the protection of the poor, the minority and the infirm, vindicating existing rights by federal legislation and seeking new ways to meet new national problems is Congress's proper role. However, there are many ways to create and protect a statutory right other than by imparting its resolution to an Article III judge. The determination of jurisdiction of the courts and the kind of court system our nation requires is vested in Congress by the Constitution. Congress is particularly suited to taking a broad view of these problems and reaching a decision that is responsive to the national need.

Congress must protect and reinforce the ability of the federal courts to afford a day in court to all those who seek to assert or to protect a fundamental federal right. It is for the sake of achieving that goal that I suggest the resources of the federal judiciary, its judicial talent, its reputation for impartiality and the respect it is accorded by our citizenry not be dissipated by requiring 648 judges to spread their abilities and time too thinly.

Today Congress is beset by pressing concerns. More important than many immediate matters is the kind of courts that will interpret our Constitution and federal statutes in the years 1990 and 2000. The courts must have the capacity to do the work the Constitution assigns to them and the nation expects, and they must have the ability to do that work effectively. They must be staffed by judges who have both the judicial competence and the time to be judges, not high-level bureaucrats. If we drift with the times and respond only to needs as they arise, we will by 1990 have spawned a vast judging machine. It may run smoothly. We hope so. It may be honest and capable. We hope so. But unless some basic problems are considered and solved, our judicial branch

9 List is on file at *The Notre Dame Lawyer* office.

will become increasingly faceless and anonymous. The President will nominate, the Senate will consent but the bureaucracy will decide. If this is to be averted, now is the time to act.