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MORE JUDGESHIPS—BUT NOT ALL AT ONCE*

ABNER J. MIKVA**

I like to think that my time as a member of the United States House of Representatives equips me to understand the legislative perspective on issues that concern the administration of justice. In addition, I hope that the current members of both Houses of Congress will not accuse me of treason—or, what may be worse, call me a Pollyanna—when I suggest that they cede some of their power to the judicial branch. In this article, I want to add my voice to the growing chorus calling for a new method for creating federal judgeships to meet changing needs. While I do not wish to present a detailed proposal here—for that indeed would appear to trench on the power of the legislature—I do want to express my conviction that the judicial branch, through the Judicial Conference of the United States,¹ ought to have more direct control over the process by which judgeships are created. The details can be worked out with no great difficulty, especially if the task is approached in a spirit of collegiality. Legislators and judges are, after all, not competitors but colleagues in the enterprise of the federal government.

Everyone knows by now that the caseload in the federal courts is too high. For a number of reasons—including increased litigation because of recent federal legislation,² a greater public awareness of legal rights and wrongs,³ and more complex types of cases⁴—the number of new filings

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¹ See 28 U.S.C. § 331 (1976).

² See Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 5-6 (1976) [hereinafter cited as Kaufman] (legislators fail to consider impact of laws on courts); Lasker, *The Court Crunch: A View From the Bench*, 76 F.R.D. 245, 247-49 (1978) (analyzing effect of recent legislation). See also note 9 *infra*.

³ See Marcus, *Judicial Overload: The Reasons and the Remedies*, 28 BUFFALO L. REV. 111, 122-24 (1979) [hereinafter cited as Marcus] (public awareness of legal remedies coincides with growth of legal services).

⁴ See Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 108-10 (1976) (tax, patent, antitrust, and securities cases, among others, becoming too complex for trial judges). Several commentators have recommended creation of specialized courts because of the complexities involved in litigation in those areas. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 154-61 (1973) [hereinafter cited as FRIENDLY] (recommending creation of Patent Court); Kaufman, *supra* note 2, at 18 (recommending creation of Court of Tax Ap-

and the backlog of pending cases has grown at a rate that seems (fortuitously, I hope) to approach the rate of inflation of the currency.⁵ We may not be quite at the end of our rope, as Chief Judge Brown suggested for the Fifth Circuit a few years ago,⁶ but we are not exactly sitting pretty either. The substantial increase in the number of federal judgeships provided in the Omnibus Judgeship Act of 1978⁷ was, of course, very helpful.⁸ But, as I hope to show, the Omnibus Bill was a classic example of aid arriving too late—and in too great a quantity at once.

There are a number of ways to deal with the caseload problem. Some are, as far as I can tell, completely noncontroversial. No one would dispute, for example, that we all should strive for administrative efficiency by eliminating wasteful uses of the resources we have. When we attempt to rise above the level of the platitudinous, however, we encounter more complex issues.

I believe that solutions for judicial logjams can most usefully be placed into two categories. The solutions involve either an engineered decrease in the flow of business to the courts, or an increase in the resources available to meet the flow. These two measures for dealing with judicial overload can, of course, exist in conjunction. As far as the first category is concerned, I am sure that more use can be made of methods to reduce the workload of the courts by diverting some disputes into other channels.⁹ If both parties to a dispute that traditionally would involve a lawsuit can be satisfied by means of a simpler, cheaper, and faster resolution process, then we should all be grateful. Significant progress can perhaps be achieved by reducing the types of cases that may be heard in first instance federal courts¹⁰ or appealed from agency fora to

peals); Whitney, *The Case For Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973).

⁵ The number of appellate filings grew 126.4% between 1969 and 1980. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR 43, Table 1.

⁶ *Omnibus Judgeship Bill: Hearings on S.11, S.460, and Printed Amendment to S.11 Before the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. 595 (1977). See also Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 949 (1964).

⁷ Pub. L. No. 95-486, 92 Stat. 1629 (codified in scattered sections of 5, 28 U.S.C. (Supp. IV 1980)) [hereinafter cited as Omnibus Act].

⁸ Congress provided for 117 district judgeships and 35 circuit judgeships in the Omnibus Act. 28 U.S.C. §§ 44, 133 (Supp. IV 1980).

⁹ See, e.g., Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 237-38 (1976) [hereinafter cited as Bork] (suggesting increased use of administrative law judges to handle repetitious cases arising under recent legislation); note 4 *supra* (specialized courts). See generally Marcus, *supra* note 3, at 133-37; Friendly, *Averting the Flood By Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

¹⁰ A number of authorities have suggested the abolition of federal diversity jurisdiction. See, e.g., FRIENDLY, *supra* note 4, at 139-52; Burger, *The State of The Federal*

federal appellate courts.¹¹ In addition, there certainly are some cases that can be dealt with summarily without a loss of fairness to the parties: reduction in oral argument and the use of brief memorandum opinions are tools that readily come to mind.¹²

Nevertheless, I suggest that one can easily get carried away with these attempts to decrease the workload of the courts. Bear in mind that I am talking here about employing measures such as withdrawal of federal jurisdiction only in terms of the goal of increased efficiency. I am *not* discussing the other, much more significant and controversial goals of these proposals, such as an alteration in the balance of power among the three branches of the government. Viewed from the more limited perspective of judicial efficiency, suggestions for taking business away from the courts may well entail costs that far outweigh their benefits.¹³ No one would suggest that we solve the problem of high air fares by moving our cities closer together. Likewise, we should not be too eager to relieve the courts if their relief entails merely a shift of the burden to some other governmental entity or, what is worse, a net loss in the quality of justice rendered to the citizenry. The system of justice with the lowest budget would be the one that entertained no lawsuits at all, but that system ultimately would impose the greatest cost on the society as a whole.

The other type of solution, an increase in judicial resources, has the virtue of simplicity, at least when viewed in terms of the end result: if there are more judges, then presumably the work will get done faster.¹⁴ As a matter of social policy it should not be too difficult to decide whether that benefit is worth the easily calculable costs of salaries, support services, and so on. It should come as no surprise, then, that increasing the numbers of federal judges has, in Senator DeConcini's words, been the "conventional" solution to the problem.¹⁵ Not that there is no upper limit to the numbers of judges we can have while maintain-

Judiciary—1979, 65 A.B.A. J. 358, 362 (1979); Clark, *A Commentary on Congestion in the Federal Courts*, 8 ST. MARY'S L.J. 407, 408 (1976). See generally Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976).

¹¹ See generally Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Marcus, *supra* note 3, at 118.

¹² See generally Merrill, *Could Judges Deliver More Justice If They Wrote Fewer Opinions?*, 64 JUDICATURE 435 (1981). But see Bork, *supra* note 9, at 233 (intuitive wisdom of law requires written opinions). See also Benjamin & Morris, *The Appellate Settlement Conference: A Procedure Whose Time Has Come*, 62 A.B.A. J. 1433 (1976).

¹³ See generally Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974).

¹⁴ This is not to say that doubling the number of judges, for example, would cut backlogs in half. One possible effect of increasing the number of judges is that some careful judges will begin to take *more* time with their opinions.

¹⁵ DeConcini, *New Perspectives for Judicial Improvements: A Congressional View*, 24 N.Y.L.SCH. L. REV. 323, 324 (1978).

ing certain other desiderata such as collegiality and consistency of precedent.¹⁶ There do seem, however, to be reasonable solutions to the potential problems that would be experienced by courts that are *too* large. A good example is the provision in the 1978 Omnibus Act allowing courts of appeals to perform their en banc function with fewer than the total number of active sitting judges, if that number exceeds fifteen.¹⁷

Should I stop here, then, or perhaps end merely with a reiteration that we would be grateful if Congress would graciously provide us with some more federal judgeships? I am afraid not. Once we accept that an increase in the number of judgeships generally is a good thing, we must confront the problem on which I want to concentrate in this piece: how, given the desirability of the end result—more judgeships as they are needed—do we structure the means?

Not only in 1978 but in the past as well, the usual method for creating new federal judgeships has been the omnibus bill, dealing with all the perceived needs of the entire judicial system at once.¹⁸ The basic difficulty with these bills is that they have delivered what was needed too late, and, paradoxical as it may sound, they have delivered too much of it at once.

The bills have come too late because they have been so few and far between. The latest one, for example, came after eight years had elapsed.¹⁹ While it provided for a record number of new judgeships,²⁰ it responded to a need that had been growing steadily since 1970. By the time the bill was enacted, the judicial system was in a crisis and some courts were near collapse.²¹ The mere enactment of the legislation did not, of course, immediately install any new judges in the courtrooms. The new positions had to be filled by presidential nomination and senatorial confirmation.²² The process took considerably longer than it had in the past (indeed, it may be said to be still going on, because not all the vacancies have been filled), chiefly because of President Carter's decision to introduce merit selection of appellate judges by the use of nominating commissions.²³ Even as the new judges began to assume

¹⁶ See FRIENDLY, *supra* note 4, at 29-30; Marcus, *supra* note 3, at 32-33. Justice Frankfurter once wrote that "a powerful judiciary implies a relatively small number of judges." Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.J. 499, 515 (1928).

¹⁷ Omnibus Act § 6, 28 U.S.C. § 41 (Supp. IV 1980).

¹⁸ C. BAAR, JUDGESHIP CREATION IN THE FEDERAL COURTS: OPTIONS FOR REFORM 29, Table 1 (Federal Judicial Center 1981) [hereinafter cited as BAAR].

¹⁹ See *id.*

²⁰ See note 8 *supra*. The Omnibus Act increased the number of district judgeships by 30% and circuit judgeships by 36%. See BAAR, *supra* note 18, at 4.

²¹ See note 6 *supra*.

²² See H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 4 (1972) [hereinafter cited as CHASE].

²³ See generally L. BERKSON & S. CARBON, THE UNITED STATES CIRCUIT COURT JUDGE NOMINATING COMMISSION: THE MEMBERS, PROCEDURES AND CANDIDATES (1980); Berkson, *Carter's Judicial Selection: How Well Does It Work?*, 19 JUDGE'S J., Fall 1980, at 4.

their duties, it became clear that ever-increasing caseloads necessitated the creation of still more judgeships.²⁴ The omnibus bills are by their nature an attempt at catching up with a dire need. We have not caught up with the need for more judgeships yet, for it is exacerbated year by year.

When the new judgeships were created in 1978, they came too fast for all three branches of government to handle efficiently. First, it was a much more complex task to agree on an omnibus bill than to deal with needs that had arisen over a shorter period. There was much wrangling over which areas were to receive how many judgeships, and this consumed a great deal of the legislators' time. Once the bill had passed, the executive branch—particularly during the Carter presidency—had to scramble to find enough qualified candidates for the vacancies. This process placed a particularly heavy burden on the Justice Department, with its responsibilities for investigating candidates.²⁵ It seems clear that a better job could be performed if one had far fewer slots to worry about at one time. After the qualified candidates had been identified, the Senate Judiciary Committee had to deal with the nominations, as did the entire body after the Committee had carried out its task. Last but not least, the judicial branch had to face the often mundane but not inconsiderable tasks involved in dealing with large numbers of neophyte judges. The judges had to be trained²⁶ and staffs and quarters had to be found.²⁷ A tremendous strain was placed on the judicial system. While it is impossible to say with any certainty what substantive effect the advent of so many newcomers at one time will have on the development of the law, it seems obvious that the orderly progress of the law would be better served by more gradual infusions of new blood.

You would not choose a physician who refused to treat you for eight years while your malady worsened, and who then offered you a dose of medicine purportedly large enough to cure you immediately and prevent future recurrences of the disease. You would rightly fear the side effects

²⁴ See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, September 24-25, 1980, at 65-67. The Judicial Conference recommended to the 97th Congress that it create an additional 11 permanent and 3 temporary circuit judgeships, 23 permanent and 6 temporary district judgeships, and convert 1 currently temporary district judgeship to a permanent position. *Id.*

²⁵ See CHASE, *supra* note 22, at 17-18. Within the Justice Department, the Deputy Attorney General has come to be the official with primary responsibility for judicial appointments. *See id.*

²⁶ Most judges come to the bench without judicial or administrative training. *See* Clark, *The Federal Judicial Center*, 53 JUDICATURE 99, 100 (1969). Orientation programs for judges have become increasingly popular. Kaufman, *supra* note 2, at 17; *see, e.g.*, Federal Judicial Center, *Proceedings of Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89 (1976).

²⁷ *See generally* Alpert, Atkins & Ziller, *Becoming A Judge: The Transition From Advocate to Arbiter*, 62 JUDICATURE 325, 325-32 (1979); Cook, *The Socialization of New Federal Judges: Impact on District Court Business*, 1971 WASH. U. L.Q. 253 (1971).

of such treatment and would have good reason to suspect that the cure was as bad as the disease. So it is with the use of omnibus bills to treat the ailing judicial system. One is led to wonder why this unhealthy state of affairs has come about.

A discussion of why a given omnibus bill takes precisely so long to pass could by itself become quite complicated. There are a number of forces at work within the legislature when new judgeships are created, and their interplay is subtle. But for our purposes a simple answer can be given: old-fashioned politics. Federal judgeships are political plums. Congressmen desire them in their districts and, as long as senatorial courtesy prevails, senators quite naturally desire to have a say about which candidate will fill a vacancy in their states. It takes time to determine what alterations should be made in all the federal courts across the country, and the process is delayed even more by two acknowledged facts. First, Congress will not create large numbers of judgeships in a presidential election year.²⁸ Second, if a House of Congress does not have a majority of the President's party, it will be reluctant to create new judgeships at all.²⁹ So the years drag on until, finally, the body politic no longer can go without treatment. Then it gets what it needs—too late, and too much at once.

What is to be done? I believe, as does the Chief Justice,³⁰ that at least some of the power to create federal judgeships should be delegated to the judicial branch so as to ensure a more timely response to the perceived need for increases (or, for that matter, decreases) in the number of judges. It is not my purpose to present a detailed proposal for implementing such a delegation. That is for Congress to do, and it seems to me that the proper role for the judiciary in these matters is to speak with one voice through the Judicial Conference.

I should like, however, to refer readers to a study that focused my thinking on this subject. Professor Baar's study for the Federal Judicial Center, "Judgeship Creation in the Federal Courts: Options for Reform,"³¹ offers an excellent starting point for further discussion within the judicial branch and between judges and those who serve in the other two branches. In his study, Professor Baar reviews various state provi-

²⁸ See Cannon & Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1, 5 (1981) [hereinafter cited as Cannon & Cikins].

²⁹ See, e.g., *Crisis in Courts—New Moves to Speed Up Justice*, U.S. News & World Report, July 18, 1977, at 66-67 (Democrats more inclined to add judgeships since Democrat became President); *Discontent on the Bench*, 222 NATION 229 (1976) (Democrats who control Congress unwilling to give Republican President opportunity to appoint judges). See generally BAAR, *supra* note 18, at 1-2.

³⁰ Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A. J. 295, 297 (1980) [hereinafter cited as *1980 Report*]. See also Burger, *Agenda for 2000 A.D.—A Need For Systemic Anticipation*, 49 N.Y. ST. B. J. 6, 48 (1977) (noting that in Florida the governor can create new judgeships).

³¹ BAAR, *supra* note 18.

sions under which some portion of the authority for judgeship creation is delegated to the judiciary,³² and then considers how such a delegation might be structured in the federal system. He recommends allowing the Judicial Conference of the United States³³ to create a small number of judgeships annually.³⁴ Professor Baar would require that body to develop explicit and public procedures, and an appropriate timetable, for exercising this authority.³⁵ In addition, he recommends that the delegation of authority for judgeship creation should be subject to external congressional checks.³⁶

It seems to me that some combination of features such as those suggested by Professor Baar could be created to satisfy just about everyone. There are indeed many options short of a complete—and, of course, highly unlikely—turnover of legislative power to the judiciary. For example, carefully refined criteria for determining the need for additional judgeships can be worked out. Temporary judgeships can be employed to achieve flexibility and to preserve ultimate congressional control over the size of the judiciary. Other provisions can be made for congressional oversight of judicial determinations of manpower need.

Again, I do not wish to pick and choose among the many possibilities for giving the judiciary a greater role in judgeship creation. My main purpose at this point is to foster enough confidence in the idea that the thing can be done at all so that people will take the next step and begin to determine how the details should fall into place. Perhaps I can contribute something by speaking as a former congressman to my erstwhile colleagues on Capitol Hill. I understand why legislators might balk at any suggestions that they delegate some of the power they have held for so long. Indeed, one would wish to beware at the outset of the undesirable effects that could ensue if too great a delegation were to

³² *Id.* at 7-14. Nine states use statutory formulas or delegate authority to the judiciary to determine the number of judgeships. *Id.* at 8-12. Professor Baar believes that the success of these judgeship creation methods is directly linked to the conservative use of the formula or authority and the development of cooperative working relations with the state legislatures. *Id.* at 12.

³³ *Id.* at 16-19. Professor Baar does not believe that the authority for judgeship creation should be given to the Supreme Court. *Id.* at 17. He discusses the relative advantages and disadvantages of placing authority for district judgeship creation with the judicial councils of each circuit, with appellate judgeship creation authority residing in the Judicial Conference. *Id.* at 17-19.

³⁴ *Id.* at 22-33. Professor Baar examines three methods of judgeship creation that would limit the Judicial Conference's authority: (1) a formula; (2) a maximum number; and (3) the creation of temporary judgeships only. *Id.* He recommends the "maximum number" method, which would provide the Judicial Conference with a quota of judgeships to be allocated at the point and time of need. *Id.* at 30. Professor Baar suggests that the fixed maximum number would need to be responsive to any *decreases* in federal court workload. *Id.* at 30-31.

³⁵ *Id.* at 19-22.

³⁶ *Id.* at 33-39.

take place. I shudder to think, for instance, of courts intentionally building up backlogs so they can earn new judgeships in competition with other courts. Whether courts would behave in this fashion is debatable, but a congressional fear in this respect is at least understandable. I do think, though, that two possible objections can be dispelled in order to pave the way for future discussions, and I should like to close by mentioning them.

When Chief Justice Burger suggested in his State of the Judiciary message in 1980 that the judiciary might usefully be given greater authority over the creation of judgeships,³⁷ one legislator is reported to have reacted with incredulity. Senator DeConcini, then the Chairman of the Senate Subcommittee on Improvements in Judicial Machinery, said of the Chief Justice's suggestion, "Surely he doesn't really propose this in a serious vein. It would take constitutional changes and would be abrogating Congress' responsibilities."³⁸ I would comment only that in light of the many delegations of power approved by Congress over the last century, I am in turn somewhat incredulous. As Professor Baar shows,³⁹ there are numerous workable and constitutionally unobjectionable means for ensuring that Congress retains an oversight role.

The other possible objection to the delegation of judgeship creation power to the judiciary is a more practical one. Congress may be thought unwilling to renounce a power that contains an element of patronage or partisan advantage. I would respond by suggesting that this point be kept in proper perspective for, if we do so, it dwindles to insignificance. First, there are not that many judgeships to begin with, and obtaining one for one's district is not that impressive compared with, for example, an Air Force base or a hydroelectric plant. It should not be forgotten that when Congress gives the judiciary the power to say how many judgeships should be created and where, it is not handing over the political benefit involved in the power to designate *who* fills these judgeships.⁴⁰ Second, if Congress has been willing in the past to engage in a massive renunciation of partisan political advantage for the good of the country, as it did with the original Civil Service Act,⁴¹ then it should be able to swallow the sacrifice under discussion with ease. Finally, it should be readily apparent that the benefits of enabling the judiciary to respond in a more timely fashion to its changing manpower needs must

³⁷ See 1980 Report, *supra* note 30, at 297.

³⁸ Burger Proposes That a Judicial Panel, Not Congress, Create U.S. Judgeships, *New York Times*, Feb. 4, 1980, at A12, col. 3.

³⁹ BAAR, *supra* note 18, at 33-39.

⁴⁰ I address some of the qualities that ought to be considered in selecting judges in a forthcoming issue of the ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, scheduled for publication in July, 1982.

⁴¹ Civil Service Act of 1883, 22 Stat. 403, ch. 27 (codified in scattered sections of 5, 18 & 40 U.S.C. (1976)).

outweigh any costs involved. I for one am hopeful that this perception will prevail in the Congress before too long. And the spirit of inter-branch cooperation that has been manifesting itself in these Williamsburg conferences over the past few years must be regarded as a hopeful sign.⁴²

⁴² For a discussion of the Williamsburg seminars, see generally Cannon & Cikins, *supra* note 28.

