

# The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations

JUDITH RESNIK\*

## TABLE OF CONTENTS

I. JUDICIAL REVISION OF ARTICLE III: ADAPTATION WITHOUT ASPIRATIONS. . . . .	2589
II. THE INTERPRETATIVE TERRAIN. . . . .	2597
A. ADDITIONAL CONTEXTS . . . . .	2597
1. Civil Case Processing . . . . .	2597
2. The Staffing of the Federal Courts: Judgeships, Budgets, and Non-Article III Actors . . . . .	2601
3. Invention Without Protection . . . . .	2610
B. ADDITIONAL SOURCES IN FAMILIAR ARENAS: JURISDICTIONAL GRANTS AND RESTRICTIONS. . . . .	2613
1. Striking Jurisdiction-Confering Statutes: <i>Plaut</i> and <i>Lopez</i> . . . . .	2613
2. Lobbying Against Federal Question Jurisdiction . . . . .	2616
III. POTENTIAL INTERPRETATIONS AND THE MEANING OF THE DOCTRINE. . . . .	2627
IV. THE VULNERABILITY OF THE LIFE-TENURED JUDICIARY . . . . .	2631
A. UNHAPPY INTERACTIONS. . . . .	2631
B. ANXIOUS JURISTS . . . . .	2635

### I. JUDICIAL REVISION OF ARTICLE III: ADAPTATION WITHOUT ASPIRATIONS

This symposium examines the authority of Congress to shape the jurisdictional boundaries and remedial powers of the federal courts and the ability of those courts, in turn, to resist or reject the lines drawn by Congress. The Constitution creates a federal government of three branches, explained as

---

\* Arthur Liman Professor of Law, Yale Law School. All rights reserved. My thanks to Bruce Ackerman, Dennis Curtis, Charles Geyh, Vicki Jackson, John Kane, and William Young for comments and suggestions and to Eric Biber, Kim Demarchi, Megan Johnson, Eric Shumsky, and Tara Veazey for unusually thoughtful and generative research assistance.

purposefully erecting a system of checks and balances, dependent on separation of powers among the branches of the federal government and on their capacity for, and obligation to, function independently. Yet language within Article III can be read to license Congress to control the jurisdiction of the federal courts in such a broad fashion as to deprive those courts of much of their work or to situate that work in institutions populated by judges who lack Article III attributes of life tenure and salary protection.

The text of Article III both describes a set of specially situated judges and imbues them with authority for federal adjudication. Article III empowers federal judges specifically by protecting their salaries and their tenure in office.<sup>1</sup> Article III also enumerates a series of categories of cases, "in Law and Equity," that Article III courts may (or shall) hear.<sup>2</sup>

The practice under Article III has prompted two kinds of questions, one about the possibility of federal adjudication by non-Article III judges and the other about the ability of Congress to expand or contract the jurisdictional and remedial powers of Article III judges. Can there be federal judges who neither "hold their Offices during good Behavior" nor have salaries that cannot be "diminished during their Continuance in Office"?<sup>3</sup> What do the words—"with such Exceptions, and under such Regulations as the Congress shall make"<sup>4</sup>—authorize Congress to do to the appellate jurisdiction of the United States Supreme Court? And what is the reach of congressional powers over the lower courts, given that Article III describes those courts' very existence as dependent on Congress?<sup>5</sup>

These questions do not admit to easy answers but have, instead, spawned a distinguished literature addressed to various facets of the text of the Constitution,<sup>6</sup> its historical underpinnings, and the evolution of the federal jurisprudential system over the last century.<sup>7</sup> When faced with either kind of question,

---

1. U.S. CONST. art. III, § 1.

2. U.S. CONST. art. III, § 2. *See* discussion *infra* text accompanying notes 125-213.

3. U.S. CONST. art. III, § 1.

4. U.S. CONST. art. III, § 2.

5. U.S. CONST. art. III, § 1 ("and in such inferior Courts as the Congress may from time to time ordain and establish").

6. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997) [hereinafter Harrison, *Power of Congress*]; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) [hereinafter Meltzer, *History and Structure*]; Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994); Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847.

7. *See, e.g.*, Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) [hereinafter Sager, *Constitutional Limitations*].

judicial opinions have moved between text and structure, taking the words of Article III to prompt a discussion of Article III “values,” said to encompass an independent judiciary free to make legal rulings unconcerned about vindictive responses from either the populace or elected officials.<sup>8</sup> These opinions reiterate a commitment, founded in United States constitutionalism, to a judiciary assured of protection in its exercise of adjudicatory authority.

On the first issue (who may be federal judges?), Article III judges have read Article III to make room for a host of non-Article III federal judges who have populated territorial courts, administrative adjudication, and (more recently) Article III courts themselves.<sup>9</sup> These non-Article III judges handle a workload—including bankruptcy, social security, and other federal statutory claims—far greater than that of the life-tenured judiciary and are thus critical actors in the contemporary administrative state. Absent a manifold increase in the numbers of life-tenured judges, the application of federal law would be unmanageable without the untenured.

It might be possible, thus, to celebrate the interaction of Congress and the life-tenured judiciary as a creative adaptation of constitutional structures to meet changing needs. But the existence of a segment of the federal judiciary unprotected by salary and tenure guarantees is also a source of concern in light of a constitutional structure dedicated to some arena of judicial independence. Anxiety is increased by Article III judges’ doctrinal interpretations vesting Congress with particularly broad powers to control the decisionmakers in cases in which either the United States is a party or a statutory scheme creates the underlying cause of action—a category loosely termed “public rights.”<sup>10</sup>

Turning to the second issue (congressional control over jurisdiction and remedies), the doctrine is both sporadic and arguably contradictory. At times, the Supreme Court appears to have embraced an expansive view of congressional powers,<sup>11</sup> yet in other instances, the Court has suggested limits stemming from a commitment to judicial independence and to the structural premises of the Constitution.<sup>12</sup>

---

8. See, e.g., *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211, 218-19 (1995) (discussing the concept “deeply rooted in our law”—that the federal judiciary has the power to decide cases subject only to review by hierarchically superior Article III courts and reviewing the history of incursions on judicial decisionmaking prompting the creation of an independent judicial branch); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 150-57 (1986) (explaining that any delegation of Article III authority to non-Article III judges must be analyzed in light of the purposes of Article III so as to ensure independent adjudication and prevent self-aggrandizement by Congress); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-64 (1982) (discussing the structural import of Article III adjudication).

9. See discussion *infra* notes 64-66, 86-116 and accompanying text.

10. See *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932); *Northern Pipeline*, 458 U.S. at 66-72; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 66-72 (1989) (discussed *infra* note 91 and accompanying text).

11. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

12. See, for example, *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, reread in light of *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). See generally Gordon G. Young, *Congressional Regulation of Federal Courts’ Jurisdiction and Process: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189; Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress’s Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995).

Although specific questions about the outer limits of congressional authority over federal court jurisdiction have been posed continuously since at least the 1950s by academics concerned with the federal courts,<sup>13</sup> until recently, these questions were rarely raised in the context of actual statutes and decisions. The cluster of Supreme Court decisions were relatively few in number, many advanced in age,<sup>14</sup> and sporadic in issuance. We (who thought about this topic) did so from the safe space of the "hypothetical," albeit sometimes drawn from proposed but not enacted legislation.<sup>15</sup>

But inquiry about the constitutional boundaries has moved from hypothetical to fact, due to the enactment in the 1990s of several pieces of legislation, some expanding<sup>16</sup> and some restricting<sup>17</sup> federal court jurisdiction. Hence, the question of Article III judges' understanding of judicial jurisdictional independence is now much in view.<sup>18</sup> At what point (if at all) will the life-tenured judiciary rebuff congressional line-drawing?

The issue has historically been posed as if Congress was a *predator*, taking

13. See, e.g., RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 4 (4th ed. 1996) [hereinafter 1996 HART & WECHSLER] (chapter entitled "Congressional Control of the Distribution of Judicial Power Among Federal and State Courts"); PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 4 (3d ed. 1988); PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO, & HERBERT WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 4 (2d ed. 1973); HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 4 (1953).

14. The list typically includes the Supreme Court decisions of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868); and *Yakus v. United States*, 321 U.S. 414 (1944). Some of these precedents are also often read through the lens of being "war" cases—the Civil War and World War II—and hence of having been reached under a stress that might render them distinguishable in less demanding times. See discussion *infra* text accompanying note 277.

15. See, e.g., 1996 HART & WECHSLER, *supra* note 13, at 350-51 (describing proposed legislation and noting that "[a]t least since the 1930s, no jurisdiction-stripping bill has become law.").

16. See, e.g., Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1563 (1993) (amending 18 U.S.C. § 922 and held unconstitutional in *Printz v. United States*, 117 S. Ct. 2365 (1997)); Violence Against Women Act, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994) (codified in scattered sections of 8, 18 and 42 U.S.C. and upheld in *Brzonkala v. Virginia Polytechnic Institute & State Univ.*, 132 F.3d 949 (4th Cir. 1997), *reh'g granted* (argued before the Fourth Circuit *en banc* on March 3, 1998).

17. See, e.g., the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 to 1321-77 (codified in scattered sections of 18, 28, and 42 U.S.C. (1998)). The constitutionality of 18 U.S.C. § 3626(b) is considered in several decisions, including *Taylor v. United States*, No. 97-16069, 97-16071, 1998 WL 214578 (9th Cir. 1998); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997), *reh'g granted* (argued before the Second Circuit *en banc* Feb. 25, 1998); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, 1998 WL 19308, (U.S. June 26, 1998) (No. 97-7420); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998), *cert. denied*, 1998 WL 185147 (U.S. June 26, 1998) (No. 97-1278); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 1998 WL 83598 (U.S. June 26 1998) (No. 97-1278), discussed *infra* notes 228-49 and accompanying text.

18. See, e.g., *Hohn v. United States*, 118 S. Ct. 1969 (1998); *Stewart v. Martinez-Villareal*, 118 S. Ct. 1618 (1998); *Calderon v. Thompson*, 118 S. Ct. 1489 (1998); *Felker v. Turpin*, 518 U.S. 651, 660-62 (1996); *Plaut*, 514 U.S. at 214-15 & 230-33; *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 436 (1992); all discussed *infra* notes 196-223 and accompanying text.

jurisdiction and remedial power away from the Article III judiciary. Yet recent doctrinal answers from the Supreme Court have rejected statutes in which Congress has been a *conveyer*, giving authority to the federal courts. Within the last few years, the Supreme Court has struck a statute authorizing federal courts to hear federal statutory claims the Court had previously held to be time-barred,<sup>19</sup> denied a congressional effort to confer criminal jurisdiction over gun-related crimes close to schools,<sup>20</sup> and twice refused congressional efforts to confer standing, once on citizens<sup>21</sup> and once on members of Congress.<sup>22</sup> In other words, the recent case law suggests that Article III judges have asserted the structural authority of Article III *against* congressional decisions authorizing decisionmaking by life-tenured judges. Such an understanding stems from reading not only the relatively few Supreme Court decisions specifically addressed to jurisdictional and remedial limitations but also looking to decisions about other aspects of Article III (standing and non-Article III judges), as well as to cases not often characterized as “about” Article III but denominated as “about” congressional commerce clause powers.

Those decisions, in turn, need to be augmented by reviewing court-Congress exchanges that occur outside of statutes and case law. The branches of the federal government communicate in important ways not only through statutes and decisions but also through official reports, congressional hearings, lobbying, and informal exchanges.<sup>23</sup> Congress gives signals by considering, as well as by enacting, legislation and by holding hearings; members of Congress speak, both on and off the floor, to judges. Further, life-tenured judges have outlets in addition to decisions. Over this century, they have gained a corporate voice by forming an administrative structure (called the Judicial Conference of the United States) that takes positions on legislation and that approves reports.<sup>24</sup> The Chief Justice has also developed a practice of delivering an annual “state of the judiciary address.” The Administrative Office of the United States Courts has begun to issue “judicial impact statements,” predicting the number of cases that a piece of legislation might produce. By drafting reports, submitting legislative testimony, and issuing statements, life-tenured judges express views on the boundaries of Article III and the meaning of judicial

---

19. *Plaut*, 514 U.S. 211.

20. *United States v. Lopez*, 514 U.S. 549 (1995).

21. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

22. *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

23. A summary of some of the contemporary methods and an analysis of the degree to which they can and do produce inter-branch cooperation can be found in ROBERT A. KATZMANN, *COURTS AND CONGRESS* (Brookings, Governance Institute, 1997). See also PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* (1973). For examination of one aspect of the relationship—the creation of new judgeships—see John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996).

24. See 28 U.S.C. § 331 (1998).

independence. From this court-Congress interaction, both statutes and case law emerge.

A few recent examples help to make this point. In the late 1980s, Congress considered legislation—called the Civil Justice Reform Act—that would have restricted and structured judicial authority over civil case processing.<sup>25</sup> Article III judges responded with intensive efforts to lobby for protection of their discretionary authority over civil case processing. The life-tenured judiciary mobilized and succeeded in most part in warding off the perceived congressional intrusion. The Article III judiciary has also discussed its concern that congressional budgetary decisions are undermining the independence of the judiciary. Life-tenured judges have pressed hard for salary and cost-of-living adjustments, as well as objected when faced with members of Congress scrutinizing their habits of work and use of courtrooms.

This judiciary has also sought to preserve itself as a small cadre of life-tenured judges, to be distinguished from an expanding federal non life-tenured judiciary. Articulated in support of the position of a small life-tenured judiciary is an insistent argument about the need for an independent judiciary, coupled with a claim that the life-tenured judiciary does its work best when small in numbers and dealing with a set of cases distinct from those assigned to the state courts.<sup>26</sup>

While it may be novel for interpreters of Article III to read these extra-judicial, extra-statutory sources, it is not novel for life-tenured judges to use means other than opinions to comment on their own jurisdictional authority. Individual members of the life-tenured judiciary have written about the issue for more than a century.<sup>27</sup> Moreover, for many years the judiciary—increasingly organized—has levied complaints against specific forms of jurisdiction (such as diversity) and particular kinds of litigants (such as prisoners).<sup>28</sup>

A more recent innovation, however, is the life-tenured judiciary's pronouncement of a collective opinion against the expansion of federal question jurisdiction in general. The administrative organization of the federal judiciary during this century enables the judiciary to speak—and to make recommendations to Congress—as a whole. Expressive of that ability was the issuance, in 1995, of a "first comprehensive" *Long Range Plan for the Federal Courts*<sup>29</sup> drafted by a

---

25. The Civil Justice Reform Act of 1990, Pub. L. No. 101-650, *codified as* 28 U.S.C. §§ 471-82 (1997), discussed *infra* notes 47-60 and accompanying text.

26. See discussion *infra* notes 77-116 and accompanying text.

27. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985) (reissued and revised as THE FEDERAL COURTS: CHALLENGE AND REFORM (1996)) [hereinafter POSNER, CRISIS AND REFORM].

28. See *infra* notes 159-61 and accompanying text.

29. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (as approved by the Judicial Conference, Dec. 1995), *reprinted in* 166 F.R.D. 49 (1995) [hereinafter LONG RANGE PLAN].

committee of the Judicial Conference of the United States. The *Plan* urged Congress not to use its authority to create new federal statutory rights accompanied by federal jurisdictional grants except in limited circumstances.<sup>30</sup>

A series of themes emerge from weaving together the broader set of judicial rulings with these other documents from the judiciary. Through opinions and commentary, Article III judges have supported an expansion of the non life-tenured judiciary and a contraction of the jurisdiction of the life-tenured judiciary. More than that: they have campaigned for additional non life-tenured judges and for less jurisdiction for life-tenured judges. What they have yet to articulate, however, is an understanding of which Article III “values” are transmittable to the many federal judges who do not have Article III attributes. No doctrinal elaboration of Article III gives forms of protection to non-tenured federal judges that a constitutional structure aspiring to an independent judicial body might (in my view, should) be read to require. Although proposing and sanctioning delegation of their fact-finding authority to non life-tenured judges, life-tenured judges have not transferred with that jurisdiction any version of Article III accoutrements of independence. Instead, whatever structural protections exist come from the role of Article III judges in appellate review, from due process premises of impartial and fair decisionmaking,<sup>31</sup> or from common law interpretations of judicial immunity.<sup>32</sup>

Life-tenured judges also have not deployed structural Article III theories on behalf of vulnerable litigants, opposing government; such litigants have not been accorded access to invulnerable judges cloaked with the full complement of equity powers. The collective life-tenured judiciary did not mount an aggressive effort (parallel to that made in response to restrictions proposed on their civil case processing discretion) when legislation limiting access in immigration and prisoner litigation was pending. Rather, through doctrinal interpretations of the powers of federal equity law, the Supreme Court has been in some instances ahead of congressional efforts to limit federal court remedial powers.<sup>33</sup> And thus far, the doctrinal responses to the recent legislation have rarely struck the legislation or used it as a springboard to signal concerns about such restrictive efforts.<sup>34</sup>

Constitutional scholars need to acknowledge that, whatever Article III attributes have provided for judges, eagerness (in this era at least) to delineate

---

30. LONG RANGE PLAN, 166 F.R.D. at 83 (Recommendation 1), discussed *infra* notes 178, 187 and accompanying text.

31. See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) [hereinafter *Constitutional Fact Review*] and discussion *infra* notes 124-29 and accompanying text.

32. See *Stump v. Sparkman*, 435 U.S. 349, 349-50 & 360-69 (1978).

33. See generally Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (discussing the restrictions from case law of remedial authority in prison and school cases, and the interactions between those doctrinal retrenchments and the PLRA, and a parallel pattern between case law restrictions on habeas corpus and subsequent statutory restrictions).

34. See discussion *infra* Part III.

constitutional barricades from congressional restrictions is not among them. In their exchanges with Congress on salaries, judicial vacancies, and courtroom usage, Article III judges seem anxious about how Congress might exercise its budgetary powers. They are engaged in a series of apparent efforts to placate, to avoid the ire that might be unleashed. Either Article III protections are insufficient to the task and the judiciary (at least in its collective voice) is wisely avoiding constitutional strife (that it might well lose), or this judiciary (again as an official entity) agrees with the views of Congress and hence has no need to persuade Congress to behave differently.

Why Article III might no longer be (if it ever was) sufficient protection for judges is itself an interesting question. One possibility is that the very doctrinal interpretations of Article III that have authorized the work of non-Article III judges have also disabled the life-tenured constitutional judiciary by making them dependent on sets of non-tenured, statutory judges vulnerable to Congress. In a world in which bankruptcy, magistrate, and administrative law judges play such important roles, life-tenured judges have an incentive to work smoothly with Congress to ensure the continuing support of such judges—rendering both sets of judges increasingly congressionally dependent. Further, as the federal courts have organized themselves and grown in staff and satellite institutions, they too have taken on the character of a bureaucracy with many budgetary needs. Protection of the salaries of life-tenured judges (holding questions such as cost-of-living adjustments aside) does not begin to meet the demands for staff, space, and equipment now common within the “federal courts system.”<sup>35</sup> Life-tenured judges are now dependent on Congress not only for their jurisdiction but also for their ways and means of working.

However one explains the positions taken by the judiciary, constitutionalists aspiring to the development of an Article III practice and theory that enables a robust, jurisdiction- and remedy-possessing, independent judicial workforce, holding power to hear citizens’ claims against the state while insulated from that state, will have to look beyond the doctrine and exchanges produced by the life-tenured judges of this era. Understandings of the United States Constitution that articulate limits on Congress’s reach over the federal courts or that imbue non-constitutional federal judges with forms of independence to capture the hopes of Article III are unlikely to come from the life-tenured judiciary but will have to be made—if at all—by reading outside those judges’ precedents. In search of structures of autonomy and respect for all of the judges who form the federal judicial workforce, constitutionalists will have to elaborate them for, rather than find them written by, the life-tenured judiciary.

Below, in commenting on the essays written for this symposium, I review some of the doctrine, proposed and enacted legislation, and court-Congress interactions to specify the bases for this assessment.

---

35. Hart & Wechsler’s phrase in the 1953 edition, *supra* note 13.



## II. THE INTERPRETATIVE TERRAIN

In her introduction to this symposium,<sup>36</sup> Vicki Jackson began our exploration by offering us alternative narrative plots to describe the interactions between the federal judiciary and Congress—ranging from a narrative of conflict over jurisdictional boundaries (Congress versus the federal courts) to one of agreement (Congress joined by the federal courts in a shared reshaping of jurisdiction rules). Further, Professor Jackson focused on varying protagonists, at one point conceptualizing the federal courts as a whole in relationship to Congress and at other points perceiving a division between the Supreme Court and the lower federal courts.<sup>37</sup>

By reading the essays by David Cole,<sup>38</sup> John Harrison,<sup>39</sup> and Larry Sager<sup>40</sup> and the critical commentary by Daniel Meltzer,<sup>41</sup> the variegated history of statutes and Supreme Court holdings has been shaped in support of differing interpretations of the authority of Congress over federal courts' jurisdiction and remedial powers. Their discussion addresses the constitutional boundaries of congressional legislation on access to federal courts for prisoners and immigrants,<sup>42</sup> on causes of action and remedies under the Fourteenth Amendment,<sup>43</sup> and on congressional powers to revise court rulings.<sup>44</sup> The sources for their commentary are statutes, constitutional text and structure, and case law.

This essay offers a somewhat different approach. To understand which of Professor Jackson's plot lines is most plausible or to grasp what forms of constraint on congressional authority may exist and what institutions are likely to articulate them, I suggest review of case law and statutes broader than the examples frequently cited and review of communications between the federal courts and Congress that are not only statutory or doctrinal.

### A. ADDITIONAL CONTEXTS

#### 1. Civil Case Processing

Federal courts' jurisprudence does not usually turn to questions of civil case processing because those issues are conceived to be questions falling within the

---

36. Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998).

37. *Id.* at 2452-55.

38. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998) [hereinafter Cole, *Jurisdiction and Liberty*].

39. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513 (1998) [hereinafter Harrison, *Jurisdiction*].

40. Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998) [hereinafter Sager, *Klein's First Principle*].

41. Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537 (1998) [hereinafter Meltzer, *Constitutional Remedies*].

42. Cole, *Jurisdiction and Liberty*, *supra* note 38.

43. Harrison, *Jurisdiction*, *supra* note 39.

44. Sager, *Klein's First Principle*, *supra* note 40.

category "procedure." Yet a recent debate about congressional power over federal judges arose around case processing in the late 1980s, when then-chair of the Judiciary Committee, Democratic Senator Joseph Biden of Delaware, convened a group to consider the problems of cost and delay in the civil docket. After a series of meetings at the Brookings Institution, the Biden working group produced a report, *Justice for All*,<sup>45</sup> that called for change. The group advocated legislative revisions to alter the ways in which federal judges presided over the pretrial phase of lawsuits.<sup>46</sup> What was popularly known as the "Biden" Bill, and what is officially termed the "Civil Justice Reform Act of 1990" (CJRA),<sup>47</sup> was passed in 1990. Its express goals were to reduce cost and delay in civil litigation; its means included the creation of ninety-four "advisory groups" to review each federal district court's docket and propose local solutions.<sup>48</sup>

Some tell the story of the enactment of the CJRA as a key example of conflict between the federal courts and the Congress.<sup>49</sup> No federal judge then sitting was asked to be a member of the Biden working group that drafted the legislation in 1988-89.<sup>50</sup> While the bill was pending, the federal judiciary organized against it.<sup>51</sup> Federal judges lobbied personally and testified formally against the bill.<sup>52</sup> They objected vehemently to early drafts of the legislation that would

45. BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (Brookings Institution 1989) [hereinafter *JUSTICE FOR ALL*]. How much of a change the proposals actually entailed is discussed in Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 152-202 (1997) [hereinafter Resnik, *Changing Practices, Changing Rules*].

46. *JUSTICE FOR ALL*, *supra* note 45, at 12-29.

47. 28 U.S.C. §§ 471-482 (1992). Section 105 provided for a sunset provision, which was extended; the CJRA expired on December 1, 1997.

48. 28 U.S.C. § 478.

49. See, e.g., Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 407-23 (1992) [hereinafter Mullenix, *Counter-Reformation*]. See also Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 961-62 (1996).

50. Charles Renfrew was a member of the Biden group but had resigned from the bench and was then in private practice. *JUSTICE FOR ALL*, *supra* note 45, at 48.

51. The Chief Justice appointed a special task force to "work specifically" on the legislation; the Honorable Robert Peckham of the Northern District of California chaired the committee. See S. REP. NO. 101-416, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6807 (The Judicial Improvements Act of 1990). The Judicial Conference issued a statement opposing sections of the bill because they intruded into areas "properly the province of the judiciary." *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Judiciary Comm.*, 101st Cong. 319, 349 (1990) (statement of Hon. Robert F. Peckham on behalf of the Judicial Conference) [hereinafter *Senate CJRA Hearings*].

52. *Senate CJRA Hearings*, *supra* note 51, at 208-09 & 218-22 (testimony and statement of the Hon. Aubrey E. Robinson, Jr., Chief Judge of the U.S. District Court for the District of Columbia, representing the Judicial Conference); *id.* at 360-77 (testimony of the Hon. Diana E. Murphy, as then President of the Federal Judges Association); see also *Federal Courts Study Comm. Implementation Act and Civil Justice Reform Act: Hearings on H.R. 3898 and H.R. 5381 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Judiciary Comm.*, 101st Cong. 109-82 (1990) [hereinafter *House CJRA Hearings*] (statement and testimony of Hon. Robert F. Peckham, U.S. District Ct. N.D. Calif. chair of Task Force; the Hon. Deanell R. Tacha (also representing the Judicial Conference); and Hon. Diana E. Murphy, representing the Federal Judges Association). One federal

have required federal judges to use different procedures for certain kinds of cases and to set deadlines for discovery and for trials.<sup>53</sup> During the hearings on this proposal, some of the witnesses raised the issue of whether the proposed legislation represented a violation of separation of powers; the judiciary carefully avoided an explicit challenge but argued instead that, as a matter of policy, the bill represented an inappropriate intrusion on the judicial domain.<sup>54</sup> Since its enactment, Professor Linda Mullenix has squarely (and solely) raised this constitutional objection.<sup>55</sup>

Yet federal judicial input, through public hearings and through hours of private lobbying, succeeded in altering the proposed bill.<sup>56</sup> Almost all of the mandates on process became hortatory, discretionary expectations.<sup>57</sup> The CJRA,

---

district judge, Richard A. Enslen, of the Western District of Michigan, testified in favor of the legislation. *See Senate CJRA Hearings*, *supra* note 51, at 232-77.

Members of Congress, in turn, recorded their distress that the judicial committee delegated to negotiate with Congress did not bind the judiciary and that, after negotiations, objections continued from the Judicial Conference. *See S. REP. NO. 101-416*, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6807.

53. *See, e.g.*, S. 2027, 101st Cong. § 471(b) (1990) ("each civil justice expense and delay plan shall include . . . [a] system of differentiated case management" and other mandates).

54. *See, e.g.*, *Senate CJRA Hearings*, *supra* note 51, at 221 (testimony of the Hon. Aubrey E. Robinson, Jr., Chief Judge of the U.S. District Court for the District of Columbia, representing the Judicial Conference of the U.S.) ("Many thoughtful Federal judges are very, very uneasy about the signals this bill sends of legislative incursion—albeit well-meaning—in the judicial arena and what it portends for the future"); *see also House CJRA Hearings*, *supra* note 52, at 126 (statement of Hon. Robert F. Peckham) ("Some thoughtful judges also have suggested that when Congress considers enactment of legislation that covers the kinds of procedural matters that are at the core of the judicial function, it ventures into areas of constitutional sensitivity. Rather than explore the constitutional arguments that are raised by this suggestion, we wish to emphasize our view that simply as a matter of wisdom of policy it would not be sensible to pass legislation that could deprive judges of the discretion they need to determine in individual cases how best to use procedural tools to reduce delay and litigant expense"); *id.* at 183 (testimony of Stuart Gerson, Ass't Atty. Gen., Civil Div., U.S. Dep't of Justice) (opposing "on separation of powers grounds the mandation of certain management controls upon the Federal district and courts of appeals, though we think they are a pretty good idea").

55. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1285-86; 1289-1322 (1993) (arguing that the CJRA gave "unprecedented authority" to Congress "over the internal affairs of the judiciary"). *See also* Mullenix, *Counter-Reformation*, *supra* note 49, at 407-23. *Cf.* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1472-82 (1994) (detailing her disagreements with that constitutional thesis). *See also* the *Senate Report on the CJRA*, obviously self-interested, which asserted that "as a matter of constitutional law and as a matter of policy" the separation of powers argument "is without merit." S. REP. NO. 101-416, at 9, *reprinted in* 1990 U.S.C.A.A.N. 6802, 6806.

56. As the legislative history of the enacted bill explained, the "Judicial Conference of the United States . . . was involved extensively with the committee as it considered the . . . legislation" and was given "both formally and informally" many opportunities to express views. "Negotiations between the [Judiciary] committee and the Peckham task force proceeded for several months, often on a daily basis." S. REP. NO. 101-416, at 4, *reprinted in* 1990 U.S.C.C.A.N. 6802, 6806. Further, while the district judges of New Jersey had "strongly and publicly opposed the original legislation—now, to a person, [they] support the revised legislation with enthusiasm and vigor." *Id.* at 5.

57. A notable exception was the requirement for public reporting of delays in rulings on motions and bench trials and of cases pending in excess of three years. *See* 28 U.S.C. § 476 (1993), discussed in Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay*:

as enacted, vested the district courts with substantial discretion over the processes for trying to speed litigation and to cut its costs.<sup>58</sup> Moreover, the legislation tracked much of what the federal judiciary was already doing:<sup>59</sup> increasing judicial control through managerial efforts over the pretrial phase, promoting alternative dispute resolution and settlement efforts, and attempting to curtail discovery.<sup>60</sup>

Hence, Professor Jackson's narrative of agreement,<sup>61</sup> rather than of conflict, is one I share as an interpretive guide to understanding the relationship between not only the Supreme Court and Congress but also between the lower courts and Congress on the issue of judicial power to process cases. Moments of conflict have erupted in this context, not so much in case law or statutes but as legislation was proposed and discussed. By reading both the legislation and its hearings and by reviewing the interpersonal lobbying efforts, one learns either that Congress trusted federal judges to use discretionary authority over civil case processing or that the personal efforts of federal judges, "working the Hill," succeeded in engendering sufficient confidence or in raising sufficient concerns about congressional encroachment on judicial prerogatives to result in a final product that has prompted no litigation about its constitutionality.<sup>62</sup> Either the conflict was superficial (reflecting a substrata of agreement binding judges and members of Congress about the appropriate degree of discretion that should reside both in the judiciary as a whole and in individual judges when managing their civil dockets) or judicial input during the drafting stage sufficed to convince Congress to alter its path.<sup>63</sup> The result—the formal text of the CJRA statute—begets no case law that has to face hard constitutional questions about the boundaries of congressional power over the Third Branch.

---

Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act, 41 CLEV. ST. L. REV. 511 (1993) [hereinafter Geyh, *Adverse Publicity*].

58. See 28 U.S.C. § 473 (listing a series of "principles and guidelines" for district courts in consultation with advisory groups, to consider when formulating their plans).

59. This understanding of the CJRA makes it an example of what Mark Tushnet and Larry Yackle have termed "symbolic" legislation. Tushnet & Yackle, *supra* note 33.

60. That the CJRA did not, in fact, require much alteration of judicial case processing is reflected in the results of the empirical study of the CJRA, which found that relatively little change had occurred—at least in the short term—after the Act's passage. See JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFERY, MARIAN OSHIRO, NICHOLAS M. PACE, MARY E. VAIANA, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (RAND, 1996). See generally Symposium, *Evaluation of the Civil Justice Reform Act*, 49 ALA. L. REV. 1 *et seq.* (1997).

61. Jackson, *supra* note 36.

62. No reported cases to date challenge the constitutionality of the CJRA; a few cases raise questions about districts' implementation and rulemaking. See, e.g., *Ashland Chemical, Inc. v. Barco, Inc.* 123 F.3d 261 (5th Cir. 1997) (striking a local fee-shifting rule held not to be authorized by the CJRA); *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997) (discussing judicial settlement efforts under the CJRA).

63. *The Senate Judiciary's Report*, S. REP. NO. 101-416, at 9-11, reprinted in 1990 U.S.C.C.A.N. 6802, 6811-13 argued that no separation of powers questions existed and that Congress had control over such procedural issues; yet the statute as enacted softened its mandates and hence made any constitutional challenge unlikely.

## 2. The Staffing of the Federal Courts: Judgeships, Budgets, and Non-Article III Actors

My next example comes from an arena that, unlike civil justice reform, is readily perceived as within the scholarly terrain of federal courts' jurisprudence. The topic includes both the selection and nomination of life-tenured judges as well as the creation of other kinds of federal judges (bankruptcy, magistrate, territorial, and administrative judges) who lack constitutional protections. The issues are sometimes denominated as about "Article I/Article III courts," sometimes described as about "legislative courts, administrative agencies, and Article III courts,"<sup>64</sup> and, as John Harrison reminds us, could be understood to include "Article IV courts."<sup>65</sup> I prefer to talk about the issues under the rubric of the "non-Article III" judiciary because contemporary examples include not only Article I and Article IV courts but also magistrate and bankruptcy judges who sit within Article III but are not cloaked with Article III attributes of life tenure and salary protections.

One set of constitutional issues relates to the power of the Senate over the confirmation process and the impeachment process. What does "advice and consent" mean? How active (or recalcitrant) should the Senate be when considering particular judges? A second set of constitutional issues turns on the meaning of Article III's description that "[t]he judicial Power of the United States" vests in courts whose judges hold their "Offices during good Behavior" and whose salaries are not subjected to diminution.<sup>66</sup> Given this text, what posture should Congress take when it sets the budget of the life-tenured judiciary? A distinct question is whether Congress may create—pursuant to a variety of constitutional provisions—non-Article III judges and what those judges may be empowered to decide?<sup>67</sup>

During 1997 and 1998, the rhetoric about Congress-court relations has been one of conflict, with attention drawn to ostensible "battles" about the selection of individuals to fill Article III judgeships and the salaries paid to such judges. Prominent nominees have been subjected to delayed hearings<sup>68</sup> and to debates about the need to fill a given judgeship at all.<sup>69</sup> In January of 1998, *The New*

---

64. See, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291 (1990) [hereinafter Meltzer, *Legislative Courts*]. Note that administrative law judges are either Article I or, under some readings of the administrative state, belong to a space not yet captured in any clause of the Constitution.

65. John Harrison, Comments at the Federal Courts Section of the American Association of Law Schools (Jan. 1998) (on file with author) (that territorial courts should be termed Article IV courts).

66. U.S. CONST. art. III, § 1.

67. See generally Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1981) [hereinafter Resnik, *Mythic Meaning*].

68. See, e.g., Neil A. Lewis, *Attack on Clinton Nominee May Backfire on the G.O.P.*, N.Y. TIMES, Feb. 10, 1998, at A1 (describing the attacks on and delay in considering Margaret M. Morrow, discussing her widespread support, and how senatorial opposition was shifting its focus to another nominee, described as a "much more juicy target").

69. The issue has been raised by Senator Grassley. See, e.g., *Conserving Judicial Resources*:

*York Times* carried a front page headline: "Senate Imperils Judicial System, Rehnquist Says."<sup>70</sup> The press described the displeasure of Chief Justice Rehnquist (himself selected by Republicans) with a largely Republican Senate membership whom he appeared to criticize for their delay in deciding on pending nominations.<sup>71</sup> Another article described a nominee to the life-tenured bench as having decided to "bag it"—to go public with his distress at senatorial practices at the expense of ever achieving confirmation.<sup>72</sup>

In addition to appointment of judges, a second issue that has dominated discussions between the judiciary and Congress over the past decade has been the budget. One question is the salaries of life-tenured judges, whose compensation cannot constitutionally be diminished. Article III judges have complained about congressional failure to increase compensation and to provide cost-of-living adjustments ("COLAs").<sup>73</sup> According to one commentator, in 1989 an

---

*Considering the Appropriate Allocation of Judgeships in the U.S. Court of Appeals for the Second and Eighth Circuits: Hearings before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 1 (Sept. 4, 1997) [hereinafter *Second and Eighth Circuit Hearings*] (commenting that after the committee's efforts, the Judicial Conference has begun to question the need for more judges); *Conserving Judicial Resources: The Caseload of the U.S. Court of Appeals for the D.C. Circuit and the Appropriate Allocation of Judgeships: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 104th Cong. 1, 4 (1995) (raising the question of whether a vacancy on the D.C. Circuit should be filled). Cf., *Second and Eighth Circuit Hearings*, *supra* (statement of Richard S. Arnold, Chief Judge, U.S. Court of Appeals for the Eight Circuit) (reporting that all judges on the court agreed that an existing appellate vacancy should be filled, that district court vacancies needed to be filled, and that a majority of the appellate judges opposed the need for a new appellate judgeship).

70. John H. Cushman, Jr., *Senate Imperils Judicial System, Rehnquist Says*, N.Y. TIMES, Jan. 1, 1998, at A6. Soon thereafter followed an editorial, *The Chief Justice and Mr. Hatch*, describing the "confrontation . . . with Senator Orrin Hatch" as "extraordinary" and praising the Chief Justice for objecting to what the paper termed "Republican obstructionism." N.Y. TIMES, Jan. 5, 1998, at A18. See also Jon O. Newman, *Misdiagnosing Courts' Problems*, N.Y. TIMES, Jan. 6, 1998, at A19 (also criticizing the Senate Judiciary Committee for attacking "activist" judges and then calling for Congress to limit federal court jurisdiction—using diversity jurisdiction as the example—and to clarify its statutes, such as detailing their effective dates).

71. Cushman, *supra* note 70, at A6 ("In an unusual rebuke . . ."). The story was based on Chief Justice Rehnquist's annual address, *The 1997 Year-End Report on the Federal Judiciary*, made public on January 1, 1998, reprinted at 30 THIRD BRANCH, at 1 (Jan. 1998) [hereinafter *Rehnquist, 1997 Year-End Report*]. The focus was on a part of the speech that addressed the problem of judicial vacancies (that "82 of the 846 Article III judicial offices in the federal Judiciary—almost one out of every ten—are vacant," that 26 of those vacancies had been open "18 months or longer" and the Ninth Circuit had "over one-third of its seats empty." *Id.* at 2). The Chief Justice urged the President to nominate judges promptly and the Senate to act "within a reasonable time to confirm or reject them." *Id.* at 3. Also noted was that some "current nominees have been waiting" a long time for senatorial approval, and that the Senate had confirmed "only 17 judges in 1996 and 36 in 1997" in contrast to a confirmation of "101 judges" in 1994. *Id.*

72. Neil A. Lewis, *Jilted Texas Judge Takes on His Foes in Partisan Congress*, N.Y. TIMES, Nov. 16, 1997, at A1. Subsequently, his home-state senators expressed their opposition to his nomination. See Ron Hutcheson, *No Blue Slips in Constitution*, LEDGER-ENQUIRER, Dec. 7, 1997, at F3 (stating that his "nomination as a federal judge is as dead as the dry fall leaves.").

73. *Breaking the Freeze on COLAs: An Interview with Judge Barefoot Sanders*, 29 THIRD BRANCH 1 (Dec. 1997) (discussing his work, as chair of a Judicial Conference Committee on the Judicial Branch in efforts to obtain such salary adjustments from Congress).

“unprecedented press conference [was held] at the Supreme Court” to publicize the salary problem, termed “the most serious threat to the future of the Judiciary and its continued operation.”<sup>74</sup> Another topic is the funding of the judiciary as an institution, with courthouse building programs, administrative offices, and personnel for both courthouses and individual judges. The last few decades have produced an expansion of staff attorneys, law clerks, and administrative support personnel. While the judiciary has long been seeking funds from the Congress, the Congress—in the personage of Senator Charles E. Grassley, current chair of the Senate Judiciary’s oversight committee—has increased scrutiny of federal judges’ use of their resources, their courthouses,<sup>75</sup> and their time.<sup>76</sup>

Given the sharp exchanges and the extensive press coverage, we may lose sight of several underlying agreements between the federal judiciary and Congress—first, about the need for more federal judicial wherewithal and, second, about the undesirability of creating more life-tenured judgeships. Identifying the degree of consensus between Congress and the life-tenured judiciary stems in part on reading case law and in part by looking at activities of federal judges as they make plain to Congress their own aspirations about judicial workload and worklife.

During this past decade, many Article III judges have actively lobbied for a very small life-tenured judiciary. They have recorded their strong preference in two major reports: a 1990 *Report of the Federal Courts Study Committee*,<sup>77</sup>

---

74. Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L.J. 163, 173 (1992). The complaint continued during the subsequent years, and when some legislation was enacted, in 1997, the Chief Justice’s first topic “Funding, Salaries, Jurisdiction, and Vacancies” began with an expression of “gratitude to Congress for its financial support of the Judiciary” and specific thanks for a COLA enactment. Rehnquist, 1997 *Year-End Report*, *supra* note 71, at 1.

75. See General Accounting Office, *Courthouse Construction: Better Courtroom Use Data Could Enhance Facility Planning and Decisionmaking* (GAO/GGD-97-39, May 1997); General Accounting Office, *Federal Courthouse Construction: More Disciplined Approach Would Reduce Costs and Provide for Better Decisionmaking* (GAO/T-GGD 96-19, Nov. 8, 1995) (both questioning the practice of assigning a courtroom to each district judge). In the spring of 1998, the Chief Justice wrote to Congress requesting \$500 million in funding for courthouse construction. See *Chief Justice Appeals to Congress for Courthouse Construction Projects*, 30 THIRD BRANCH 1 (April 1998).

76. See *Now the Judges Face the Questions*, LEGAL TIMES, Feb. 5, 1996, at 8 (describing responses by judges, the Chief Justice’s remarks that while the survey might aid Congress it might also “amount to an unwarranted and ill-considered effort to micro-manage the work of the federal judiciary,” and reproducing the questionnaire); U.S. SENATE JUDICIARY COMM. ON ADMIN. OVERSIGHT AND THE COURTS, 104TH CONG., 2D SESS., REPORT ON THE JANUARY 1996 JUDICIAL SURVEY (May 1996); *Appellate Survey Results Released*, 28 THIRD BRANCH 5 (June 1996). See also *GAO Releases Report on Noncase-Related Travel by Judges*, 30 THIRD BRANCH 6 (April 1998) (report, requested by Senate Grassley, reviewed the “non-case related trips” of 64 appellate and 254 district court judges, “encompassing 3,220” appellate workdays and 9,832 district court workdays, most of them spent on court meetings or seminars). Senator Grassley commented: “It is unacceptable for [judges] to engage in this much non case-related travel while at the same time arguing they need more judges . . . .” *Id.* The Administrative Office responded that judges, under canons of ethics, were appropriately contributing to the legal system as well as engaging in continuing education. *Id.* at 7.

77. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter FCSC REPORT].

commissioned by Congress with judicial urging,<sup>78</sup> and the 1995 *Long Range Plan for the Federal Courts*,<sup>79</sup> drafted by a committee of the Judicial Conference, which in turn approved most of the recommendations.<sup>80</sup> While a few outspoken exceptions (such as Stephen Reinhardt of the Ninth Circuit) have broken ranks and argued for a larger judiciary,<sup>81</sup> the official voices, including that of the Chief Justice<sup>82</sup> and the Judicial Conference, joined by several other judges,<sup>83</sup> have argued for a small life-tenured judiciary.<sup>84</sup> As the Chief Judge of the Fourth Circuit recently told the Congress: "Uncontrolled growth in judges and jurisdiction is the single greatest problem the federal judiciary has to confront."<sup>85</sup>

---

78. See Judicial Improvements and Access to Justice Act, Title I (Federal Courts Study Act) §§ 101-109, Pub. L. No. 100-702, 102 Stat. 4644 (1988) (codified temporarily at 28 U.S.C. § 331 "note").

79. LONG RANGE PLAN, 166 F.R.D. at 98 (1990) (Recommendation 15, "The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction."); *id.* at 78 (describing as "nightmarish" scenarios of 4,000 federal judges to "handle the federal courts' docket in 2020").

80. One note of explanation about the status of the various commentaries by members of the federal judiciary is in order. Only the LONG RANGE PLAN, 166 F.R.D. 49 (1990), has been officially "approved" by the Judicial Conference. The FCSC REPORT, *supra* note 77, became the basis for many recommendations from the Conference, some of which has been translated into legislation, and the Chief Justice's annual addresses are not the product of the Conference itself.

81. See Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A. J. 52 (1993).

82. See Rehnquist, 1997 *Year End Report*, *supra* note 71, at 3 ("a bigger federal Judiciary is not necessarily a part of a solution for every public-policy question"); William Rehnquist, 1991 *Year End Report on the Federal Judiciary*, 138 CONG. REC. S443-01 (1992) [hereinafter Rehnquist, 1991 *Year End Report*] ("a federal judiciary rising above 1,000 members will be of lesser quality and could be dominated by a bureaucracy of ancillary personnel").

83. See, e.g., Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 187-88, 194 (1993) (arguing for drawing such a line to enable high-visibility decisionmaking and a coherent body of law); Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) (suggesting that federal courts have reached the "natural limits" of their expansion); Gerold Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70 (1993).

84. The actual number of life-tenured judges could be reported in a variety of fashions, depending upon whether one counts judges who have taken on senior status, many of whom carry full or almost full dockets. As of January 1, 1998, the number of authorized life-tenured judgeships at the district court level was 642 (including 10 "temporary" judgeships); the number of senior status district judges was 337; the number of authorized judgeships at the appellate level was 179; the number of senior appellate judgeships was 91. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUSTICES AND JUDGES OF THE UNITED STATES (Jan. 1, 1998); see also L. RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES 10 (Jan. 1998) [hereinafter OPTIMAL UTILIZATION]. If both active and senior judges are counted and if all authorized judgeships are assumed to be filled, then 1249 federal life-tenured judges were working in 1997. Even if a vacancy rate left 100 judgeships to fill (as of January 1, 1998, 62 district and 23 appellate judgeships were open), more than 1100 life-tenured judges worked. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUSTICES AND JUDGES OF THE UNITED STATES (Jan. 1, 1998).

85. *Examining the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the Senate Judiciary Comm.*, 105th Cong. 15 (1997) [hereinafter *Allocation of Judgeships*]



But federal judges not only believe in a small life-tenured judiciary. They also believe that they have too much work to do and hence need additional help (as well as fewer cases, a point to which I will shortly return). On the issue of more help, Congress has responded with a three-decade expansion program that has resulted in the creation of a fourth tier within the federal judiciary, comprised of magistrate and bankruptcy judges. The workforce within the federal judiciary has in turn been augmented by the expansion of the aegis of the administrative judiciary. Together, magistrate, bankruptcy, and administrative judges shoulder a proportion of the federal docket numerically far larger than that of the life-tenured judiciary.<sup>86</sup>

One might have expected life-tenured judges to be fierce guardians of their distinctive mandates and therefore to read Article III's text<sup>87</sup> either to prohibit or to curtail congressional assignment of Article III adjudicatory activities to non-Article III actors. One might also have expected that in their communications with Congress, federal judges would raise skepticism about the wisdom—if not the constitutionality—of congressional transfers of Article III activities elsewhere. In other words, judicial persuasive efforts (observed in the context of the Civil Justice Reform Act) might similarly be likely to occur when the question of “other” judges is raised. On the whole, however, case law and other communiques from the judiciary to Congress license and promote the expansion of the non-Article III judiciary.<sup>88</sup>

An occasional decision by the United States Supreme Court does suggest a path that might have been taken—a robust conception of constitutional judges' authority that in turn narrows the role for the non-Article III judiciary. The 1932 ruling of *Crowell v. Benson* warned against efforts to “sap the judicial power as it exists under the federal Constitution, and to establish a government of a

---

(prepared statement of the Hon. J. Harvie Wilkinson, III) (arguing against filling vacancies on the circuit and also noting that his remarks “represent [his] own views” and that some of his colleagues disagree). See also J. Harvie Wilkinson III, *We Don't Need More Federal Judges*, WALL ST. J., Feb. 9, 1998, at A19. Cf. *Allocation of Judgeships*, *supra*, at 31 (prepared statement of the Hon. Sam J. Ervin, III) (requesting that the two vacancies on the circuit be filled).

86. For example, as of 1994, the more than 400 full-time and more than 80 part-time magistrates presided at 1700 trials with the consent of the parties and “disposed of over 500,000 judicial matters.” 1996 HART & WECHSLER, *supra* note 13, at 438. The bankruptcy courts' docket exceeded one million filings in 1996. See *Federal Courts' Caseload Continues Upward Spiral*, 29 THIRD BRANCH 4, 6 (Mar. 1997).

87. U.S. CONST. art. III, § 1.

88. But such communications do not advocate their full participation in the internal governance of the federal courts; magistrate and bankruptcy judges have small and circumscribed roles in the Judicial Conference. Compare COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 64 (Draft for Public Comment, Nov. 1994) [hereinafter PROPOSED LONG RANGE PLAN] (proposing “meaningful participation” of “Non-Article III judges” by specifying that the Judicial Conference and every circuit judicial council include one bankruptcy and one magistrate judge with voting rights equal in most respects to district court judges), with LONG RANGE PLAN, as finalized, 166 F.R.D. at 144-45 (Recommendation 50c, repeating the call for “meaningful participation” but only calling for inclusion of a magistrate and a bankruptcy judge on the Board of the Federal Judicial Center and urging “individual district courts [to] take appropriate steps to involve these judges in “local governance”).

bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.”<sup>89</sup> The 1982 plurality opinion by Justice Brennan in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*<sup>90</sup> rejected a congressional charter granting bankruptcy judges too broad jurisdiction and too little superintendence by the Article III judiciary.

But these two opinions, dated and transformed by other doctrinal developments, have now given way (in large measure<sup>91</sup>) to a series of cases confirming the authority of Congress to vest substantial adjudicatory activities in non-Article III federal judges. In 1985, the Court upheld congressional delegation of final decisionmaking—absent allegations of fraud—of certain disputes under the Federal Insecticide, Fungicide, and Rodenticide Act to arbitrators.<sup>92</sup> Further, to the extent that the case law had appeared to rule out congressional power to vest non-Article III federal judges with the power to decide state-based common law claims, in 1986, the Supreme Court affirmed such power as long as it was confined to cases related to a sufficiently narrow grant of subject matter jurisdiction.<sup>93</sup> In short, the administrative judiciary enjoys great freedom to make factual findings and substantial discretion to apply law in an array of statutory contexts.

Turning to the delegation within Article III courts over this past decade, the Article III judiciary has not objected to the congressional authorization of magistrate judges to preside—with parties’ consent—at trials.<sup>94</sup> Federal judges have urged Congress to eliminate the requirement that misdemeanor defendants have to consent to trial before a magistrate judge,<sup>95</sup> and to relax the consent

---

89. *Crowell v. Benson*, 285 U.S. 22, 57 (1932). The meaning of *Crowell* has been debated—then and now. At the time it was issued, *Crowell* was seen as a threat to administrative adjudication. See Resnik, *Mythic Meaning*, *supra* note 67, at 596 n.67 (describing then-contemporary articles’ dismay). In contrast, by tracing *Crowell v. Benson*’s requirement—that the Article III judiciary retains authority to redetermine jurisdictional facts—into a practice of relying on administrative records, Henry Monaghan argues that *Crowell v. Benson* resulted in licensing administrative adjudication. Monaghan, *Constitutional Fact Review*, *supra* note 31, at 246-48 (1985) (arguing that by the time of *Crowell*, “a fundamental transformation in American law had occurred. The Constitution’s ‘preference’ for adjudication of disputes by the regular courts had in large part collapsed”); *id.* at 248-58 (tracing the doctrine of “jurisdictional facts,” the authorization in 1936 of reliance on administrative records in determining them).

90. 458 U.S. 50 (1982).

91. *Granfinanciera*, 492 U.S. at 53-54, relied in part on *Northern Pipeline* and *Crowell* when concluding that a litigant disputing a charge of fraudulent transfer, designated as a “core proceeding,” nonetheless had a right to a jury trial.

92. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593-94 (1985).

93. *Schor*, 478 U.S. at 858.

94. See 28 U.S.C. § 636(c). A few dissents have been registered at the circuit level. See, e.g., *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547-55 (9th Cir. 1984) (en banc) (Schroeder, J., joined by Pregerson, J., and Canby, J., dissenting).

95. Supporting elimination of the consent requirement, the Hon. Deanell Reece Tacha, on behalf of the Judicial Conference of the U.S., stated that “[c]onfidence in the magistrate judges system as a high-quality judicial resource is now firmly established.” *Federal Courts Improvement Act of 1994: Hearing before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary to Consider H.R. 4357*, 103d Cong. 57, 69 (1994) (statement of the Hon. Tacha) [hereinafter

requirements to non-core bankruptcy jurisdiction as well.<sup>96</sup> Emblematic of the shifting and expanding role of magistrate judges, litigants who object to decisions by magistrate judges sitting as trial judges now appeal directly to the circuit courts.<sup>97</sup>

Moreover, the phenomenon of the expansion of non life-tenured federal judges is not limited to the trial level. Not only do many of the administrative agencies and Article I courts have appellate structures, but at least one federal circuit is experimenting with a "commissioner" at the appellate level (in essence, a judge to decide motions and attorneys' fees petitions).<sup>98</sup> Congress has also authorized bankruptcy judges to sit as appellate judges (Bankruptcy Appellate Panels or "BAPs") to rule, if parties consent, on decisions by other bankruptcy judges.<sup>99</sup> In 1994, Congress mandated the establishment of BAPs by each circuit, absent a circuit's decision of insufficient resources or of delays and costs imposed by BAPs.<sup>100</sup>

Moving from case law to commentary, more delegation is on the horizon. The federal judiciary proposes reallocating Article III jurisdiction to administrative courts and to state courts.<sup>101</sup> A good deal of this discussion centers around

---

*Tacha Judicial Conference Testimony of 1994*]. The recommendation was enacted at 18 U.S.C. § 3401 (1998), as amended by Act of Oct. 19, 1996 (Federal Courts Improvement Act), 28 U.S.C. § 518 (1982).

96. See *Tacha Judicial Conference Testimony of 1994*, *supra* note 95, at 88-89 (seeking an amendment to 28 U.S.C. § 157(c)(1) to permit implied consent for a bankruptcy judge to hear and make final determinations on non-core provisions). That amendment has not been enacted but judicial requests for it have been renewed. See OPTIMAL UTILIZATION, *supra* note 84, at 45-46.

97. 28 U.S.C. § 636(c)(3), as amended by Act of October 19, 1996 (Federal Courts Improvement Act), 28 U.S.C. § 518 (1982). See also Smith, *supra* note 74 (discussing the expansion of magistrate judges' powers, the work of the National Council of U.S. Magistrates, and the tensions between the life-tenured judges and magistrates over status and salaries).

98. See 9TH CIR. F.R. APP. P. C(2) ("Appellate Commissioner," described as an "officer appointed by the court to rule on or review and make recommendations on a variety of nondispositive matters, such as applications by appointed counsel for compensation under the Criminal Justice Act and certain motions specified by these rules and elsewhere, and to serve as a special master as directed by the court"); Ninth Circuit's General Orders Pertaining to the Appellate Commissioner 6.3(e) (listing non-dispositive motions over which the commissioner does not have authority, such as those that would reverse a district judge's grant of injunctive relief). See also Lauren Frank, *Ninth Circuit Appellate Commissioner Assists Judges*, 78 JUDICATURE 321 (1995).

99. See 28 U.S.C. §§ 158(b)-(c) (West 1998). Review can be had from a BAP to a circuit court. See generally Thomas E. Carlson, *The Case For Bankruptcy Appellate Panels*, 1990 B.Y.U. L. REV. 545; Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 GEO. MASON L. REV. 1 (1995).

100. See The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (codified in relevant part at 28 U.S.C. § 158(b)(1)).

101. See, e.g., FCSC REPORT, *supra* note 77, at 55 ("Some current aspects of federal court business could be handled more effectively and expeditiously through new or reorganized judicial or administrative procedures outside the third branch, subject to appropriate Article III review"); LONG RANGE PLAN, 166 F.R.D. at 94 (Recommendation 10: "Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding."). These reports also include recommendations for keeping and/or expanding certain aspects of the federal docket. For example, the FCSC REPORT, *supra* note 77, at 44, called for federal

social security litigation, with suggestions to create a new Article I court for that group of claims or to alter the review process by Article III judges.<sup>102</sup> Other proposals specify certain types of cases—such as those arising under the Federal Employer Liability Act or Jones Act—for reallocation to state courts,<sup>103</sup> while yet others urge that a wide variety of small-value federal statutory claims be moved out of the federal courts.<sup>104</sup> (Through its interpretation of congressional authority, or more precisely, the lack thereof, under the Eleventh Amendment,<sup>105</sup> the Supreme Court has prompted a stream of lower court cases arguing that some federal statutory cases filed against state defendants must be filed in state courts<sup>106</sup>—thus accomplishing a piece of the reallocation without congressional action.) And, as noted, the Article III judiciary has supported increased use of magistrate and bankruptcy judges.<sup>107</sup>

In short, while occasionally warning Congress against taking away “essential attributes of the judicial power,”<sup>108</sup> and occasionally finding that a delegation of authority has gone too far,<sup>109</sup> life-tenured federal judges have by and large sanctioned the creation and ever-expanding authority of non-Article III judges. More than that: they have been at the forefront with arguments that the federal bench should not be enlarged through the growth of the life-tenured judiciary but rather through increased reliance on delegation to inferior judicial officers.

---

court jurisdiction over certain large-scale multi-party litigation.

102. FCSC REPORT, *supra* note 77, at 55-60 (including two different proposals, one from the majority and one from the dissenters); the dissenters' position was endorsed in LONG RANGE PLAN, 166 F.R.D. at 93 (Recommendations 9a and 9b).

103. LONG RANGE PLAN, 166 F.R.D. at 95-96 (Recommendations 12, 12a and 12b); FRIENDLY, *supra* note 27, at 197-98.

104. Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976).

105. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

106. For one summary of some of these cases, see RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 69 n.6 (4th ed. Supp. 1997).

107. See LONG RANGE PLAN, 166 F.R.D. at 161 (“Recommendation 65: Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy.”); Magistrate Judges Division, Administrative Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1994); *Tacha Judicial Conference Testimony*, *supra* note 95.

108. This phrase was used in *Crowell*, 285 U.S. at 51, and is repeated in *Northern Pipeline*, 458 U.S. at 77; *Schor*, 478 U.S. at 851; *Thomas v. Arn*, 474 U.S. 140, 154 (1985); *Thomas*, 473 U.S. at 585; as well as in many opinions in the lower courts.

109. See, e.g., *In re Clay*, 35 F.3d 190 (5th Cir. 1994) (reading the bankruptcy statute to avoid a constitutional question by concluding that bankruptcy judges cannot preside at jury trials and detailing the constitutional questions raised by the inability of Article III judges to review decisionmaking by an adjunct at jury trials); *In the Matter of Hipp*, 895 F.2d 1503 (5th Cir. 1990) (finding that bankruptcy judges lack the power of criminal contempt and thereby avoiding constitutional questions of their ability to exercise that form of power); cf. *United States v. Fuentes*, 107 F.3d 1515, 1529 n.25 (11th Cir. 1997) (detailing the differing views of the practice of delegation to probation officers to determine restitution and payment schedules); *United States v. Johnson*, 48 F.3d 806 (4th Cir. 1995) (finding non-delegable to a probation officer decisions about the amount of restitution to be paid). But see *United States v. Seals*, 130 F.3d 451, 458-61 (D.C. Cir. 1997) (upholding the authority of a non-Article III judge to preside at a grand jury leading to a federal indictment).

Some of the reasons why life tenured judges welcome non life-tenured judges into the world of federal “judicial officers” comes from a close reading of court decisions. In the 1930s, the *Crowell* decision alludes to the “utility and convenience of administrative agencies;”<sup>110</sup> in the 1980s, in his dissent in *Northern Pipeline*, Justice White described the bankruptcy docket as one accurately perceived by Congress to be of little interest to the Article III judiciary.<sup>111</sup> These discussions suggest that certain aspects of federal judicial business are high-volume and repetitive, and hence a misuse of expensive life-tenured decision-makers, at least at the trial level.<sup>112</sup>

But to tell the story of the growth of the non-Article III judiciary only by reference to constitutional text, congressional statutes, and court opinions is to miss some relevant sources. The statutes that gave rise to judicial opinions were themselves produced out of a context shaped by Article III judges’ negative attitudes toward expanding their own ranks. For example, immediately following the decision in *Northern Pipeline* that found the 1984 bankruptcy amendments unconstitutional,<sup>113</sup> one solution proposed was to give life tenure to the bankruptcy judges. But Chief Justice Warren Burger, whose dissent in *Northern Pipeline* denied the need for any “radical restructuring” of the bankruptcy judgeships,<sup>114</sup> lobbied against that proposal.<sup>115</sup> The resulting 1986 bankruptcy

---

110. *Crowell*, 285 U.S. at 57.

111. His words are that:

the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that lead to the establishment of the bankruptcy courts: Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner.

*Northern Pipeline*, 458 U.S. at 116 (White, J., dissenting).

112. See, e.g., *LONG RANGE PLAN*, 166 F.R.D. at 94 (“Congress should be encouraged to empower agencies or Article I courts to adjudicate, in the first instance, those types of cases involving government benefits or regulation that routinely require substantial fact-finding and do not implicate the right to a jury trial under the Seventh Amendment”). The proposal continues that the preferred mode is to have Article III reviewers of records developed by non-Article III judges. *Id.* For the view that appellate review by Article III judges protects judicial independence, see Fallon, *supra* note 64.

113. Justice Brennan’s plurality was joined by a concurrence from Justice Rehnquist and Justice O’Connor, who concluded that the bankruptcy statute was unconstitutional because Congress had given those courts too broad jurisdiction to hear claims related to bankruptcy, including traditional state law claims. *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring).

114. *Id.* at 92 (Burger, C.J., dissenting) (suggesting that all that need be done to save the constitutionality of the statute was to provide that “ancillary common-law actions . . . be routed to the United States district court[s]”).

115. *Chief Justice Is Lobbying on Bankruptcy Proposal*, N.Y. TIMES, Dec. 12, 1982, at A46 (“Chief Justice Warren E. Burger is urging Congress to reject a Reagan Administration proposal to give bankruptcy judges lifelong jobs and higher salaries. The Chief Justice has even considered appearing on national television to lobby against the proposal.”). See generally Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 8, 44 (1985) (discussing the 1978 proposal to confer Article III status on bankruptcy courts and the opposition from the Judicial Conference, the subsequent lobbying after the *Northern Pipeline* decision, and concluding that it was “disturbing that the special interest lobbyists in this case included the Chief Justice of the United States and the Judicial Conference of the United States”).

code amendments called the bankruptcy courts “units” of federal district courts, altered the jurisdiction to some extent of bankruptcy judges, and left them as appointees of the appellate courts.<sup>116</sup>

Given that federal judges (as administrators and recipients of congressional attention) plead for assistance in their caseload without radical expansion of their ranks, it is not surprising that federal judges (as producers of doctrine) sanction the delegation of some of their work to an array of non life-tenured “judges.” The twin pressures of a growing docket and of a conception of the Article III judiciary’s distinctiveness residing in its small size have produced a series of measures incrementally altering the shape of the federal judiciary. Over the course of the century, life-tenured judges have issued a series of opinions generally upholding the authority of non-Article III judges, rather than offering a reading of “the judicial Power” to vest exclusively within their life-tenured beings.

In short, while individual life-tenured judgeships and questions of budgets may result in moments of conflict, a *consensus* exists between Congress and the federal judiciary about how to respond to the growth of federal adjudicatory work. Both institutions agree: Don’t expand the life-tenured ranks much. Rely instead on delegation and proliferation of non life-tenured federal judges, as well as devolution to the states or retrenchment on access to federal courts, to which I will turn below.

### 3. Invention Without Protection

One of my purposes has been to explain—by means of an enlarged set of sources—doctrinal developments. But I might also be heard as bemoaning a reading of Article III that permits any federal judge to exist without life tenure. Thus, another of my purposes is to clarify the kinds of objections I have. While I share with Justice White a certain affection for a “simple reading”<sup>117</sup> of Article III, I agree that, given the history, a refusal to permit a judge to wear the title “federal” unless cloaked in Article III attributes is no longer possible. The issue then becomes one of line-drawing: What may be delegated, and with what oversight, if any, by Article III judges?<sup>118</sup>

I will not here rehearse all of the particulars, save to note that one of the least attractive lines drawn sketches (but has not yet clearly detailed) a category denominated “public rights” cases. Current rules about delegation permit the thinnest protection of “Article III values” to that group, in which the government is often a litigant and in which the reasons to have an independent judiciary appear to be at their height.<sup>119</sup> On the other hand, it is not obvious that

---

116. 28 U.S.C. § 151 (1998), *as amended by* Act of July 10, 1984, Pub. L. No. 98-353, Title I, § 104(a), 98 Stat. 336.

117. *Northern Pipeline*, 458 U.S. at 93 (White, J., dissenting).

118. *See, e.g., Meltzer, Legislative Courts*, *supra* note 64, at 292-93 (concerned about an “accretion of measures” that would slowly transfer significant aspects of jurisdiction to non-Article III judges).

119. *See Resnik, Mythic Meaning*, *supra* note 67 at 598-600.

the political wherewithal would ever have been gathered to populate a life-tenured judiciary sufficient to staff the adjudicatory needs of the administrative state.

Hence, another way to read these last decades of doctrine is to celebrate the Article III judiciary's capacity for invention and adaptation.<sup>120</sup> Through a creative, if not wholly satisfactory, reading of Article III, that judiciary has left open an unspecified set of doctrinal limitations, emanating from Article III, that can serve as a basis for refusal of some forms of congressional expansion while at the same time sanctioning an array of alternative institutional adjudicatory arrangements of significant proportions.

So far so good, except that the Article III judiciary has not read any Article III "values" as moving with jurisdictional grants to non-Article III federal judges. If one can read Article III to sanction transfers of jurisdiction, why not also read Article III to insist that the judges receiving such jurisdiction have protections akin to those of Article III? If not life tenure and salary guarantees, perhaps Article III values could be expressed for non-Article III judges by a prohibition of too-ready dismissal based on rulings or by some degree of insulation from congressional revision of rulings. The case law is not only silent; it seems to be going in the other direction.<sup>121</sup> For example, in *Plaut v. Spendthrift Farm*, the majority insisted on the finality of decisions of Article III judges, as distinguished from legislation that "altered rights fixed by the final judgments of non-Article III courts."<sup>122</sup> The commentary by federal judges has done no better. The 1990 *Report of the Federal Courts Study Committee* rested a part of its argument against augmenting the ranks of the life-tenured on the grounds that the "independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected . . . and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions."<sup>123</sup>

The life-tenured judiciary thus articulates a vision for non life-tenured judges

---

120. See Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 500 (1997).

121. Compare the efforts of then Senator Howell Heflin, a proponent of a series of bills such as S. 486 (Reorganization of the Federal Administrative Judiciary Act, 104th Cong., 1st Sess. (March 6, 1995)) to reorganize the administrative judiciary both to become more efficient and more independent of federal agencies.

122. *Plaut*, 514 U.S. at 232. The reference was specifically to cases involving administrative agencies and territorial courts. It is not clear from the opinion whether non-Article III judges within the Article III judiciary—bankruptcy and magistrate judges—would be protected.

Whether such immunity, were it conferred, should be equivalent to that understood as protecting Article III judges is a question for debate. Congressional ability to remedy adjudicatory failings, as contrasted with intrusion into adjudicatory decisionmaking, might be constricted. See, e.g., *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, (9th Cir. 1998) (upholding a provision in the Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-211, 1321-219 (1996), aimed at reducing the backlog of undecided cases within an administrative judicial review process by providing that any appeals from administrative law judges that had been pending for more than one year before September of 1996 would be termed summarily affirmed by the Benefits Review Board and hence eligible for appeal to the United States federal courts).

123. FCSC REPORT, *supra* note 77, at 7.

that does nothing to prop them up, to give them stature or claims to inhabit a space shared by the life-tenured. Taking Justice Scalia's use of "high walls" as a metaphor to capture the protections of the "judicial department,"<sup>124</sup> non-Article III federal judges are on the outside. Article III (as currently read by Article III judges) provides no structural protections to non-Article III federal judges who are assigned aspects of Article III jurisdiction.

Of course, constitutional theorists have<sup>125</sup> and could search elsewhere in the Constitution for means to constrain Congress in its creation of non-Article III adjudicatory mechanisms or for ways to enhance the authority of non-Article III judges. One form of protection is the common law immunity doctrine, which federal judges have determined belongs to all judges who undertake the judicial role, even if rendering grievously wrong decisions.<sup>126</sup> Further, that protection increasingly extends to non-judges who act as judges, including those functioning to facilitate dispute resolution.<sup>127</sup> One justification for such immunity is the "importance of preserving the independent judgment of these men and women."<sup>128</sup> A second source of protection may come from the Due Process Clause. As Henry Monaghan noted more than a decade ago, Justice Brandeis' dissent in *Crowell v. Benson* offered a theory specifically animated not by Article III "values" but by due process doctrine.<sup>129</sup> But neither the common law nor due process jurisprudence speak to the constitutional structure of three branches, one of which is charged with adjudicating in a specially sheltered fashion.

Thus my complaint is not against the existence of a non-Article III federal judiciary *per se*, but against the failure of the Article III judiciary to read Article III to equip those judges with some forms of systematic insulation and to provide particularly vulnerable litigants with ready access to the most protected judges. Over this century, Article III judges have developed a sense of themselves as a collective. They have learned to seek legislation believed to advance their corporate interests, which are in turn equated with constitutional commitments to judicial independence. They have not, however, broadened their

---

124. *Plaut*, 514 U.S. at 239.

125. See, e.g., Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 37-81; Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

126. See *Stump*, 435 U.S. at 360-63.

127. See *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995); *Butz v. Economou*, 438 U.S. 478, 512-13 (1978) (concluding that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages").

128. *Economou*, 438 U.S. at 514.

129. See Monaghan, *supra* note 31, at 259 (describing Brandeis' analysis as "radically separating due process from article III" and thereby understanding that "administrative adjudication could no longer be considered irreconcilably at variance with the purposes of having article III courts."). See also Meltzer, *Legislative Courts*, *supra* note 64; Fallon, *supra* note 64, at 934-44; Cole, *Jurisdiction and Liberty*, *supra* note 38, at 2494-2507. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (requiring that administrative law adjudication include an impartial judge).



understanding of who falls within the rubric nor have they been aggressive advocates to equip the very judges upon whom they depend with some kinds of independence.

B. ADDITIONAL SOURCES IN FAMILIAR ARENAS: JURISDICTIONAL GRANTS  
AND RESTRICTIONS

Jurisdictional grants, restrictions, and decisional rules (be they cast in terms of causes of action,<sup>130</sup> removing categories of cases from Article III oversight,<sup>131</sup> limiting remedial authority,<sup>132</sup> or providing interpretive rules<sup>133</sup>) are the next template on which to examine court-Congress relations. Here, once again, one can find a good deal of shared venturing weaving the doctrine of the federal courts, the public positions taken by the federal judiciary, and recent congressional enactments.

1. Striking Jurisdiction-Confering Statutes: *Plaut* and *Lopez*

Consider first the issue that used to be called the “*Klein*” problem, now is sometimes referenced as a “*Plaut*” issue, and to which Professor Sager properly draws our attention.<sup>134</sup> In *United States v. Klein*,<sup>135</sup> decided in 1872, the Supreme Court rejected a congressional effort that might have been understood as directing the outcome in a particular case. (The word “might” is used here because exactly what *Klein* meant or means is unclear, as Professor Sager’s commentary explains.) *Klein* could stand for an important limit on congressional authority: that whatever Congress can do to the boundaries or authority of federal courts, Congress cannot tell federal judges how to decide particular cases.

The problem with such an assertion is that legislation often affects—if not directs—the outcome of litigation. Given judicial traditions requiring that courts apply governing law as it is at the time of decision (rather than, for example, at the time a claim arose or a case was filed), a *Klein* problem could emerge whenever legislation alters legal rules. Hence, a more difficult interpretative activity is required to sort when legislation crosses from the permissible arena of lawmaking into an impermissible infringement on Article III decisionmaking prerogatives.

In the last few years, the Supreme Court has had two occasions to explicate *Klein*. In 1990, the Ninth Circuit concluded that a federal environmental statute, designed to respond to litigation in the Northwest about the spotted owl and timber logging and specifically referencing then-pending litigation, was a clas-

---

130. Harrison, *Power of Congress*, *supra* note 6, at 207.

131. Cole, *Jurisdiction and Liberty*, *supra* note 38, at 2499.

132. Jackson, *supra* note 36, at 2445.

133. See Sager, *Klein’s First Principle* *supra* note 40, at 2526.

134. *Id.*

135. 80 U.S. (13 Wall.) 128 (1871).

sic example of a *Klein* violation—directing a decision in a case.<sup>136</sup> Unfortunately for those eager to understand more about the *Klein* parameters, the Supreme Court decision—overturning the Ninth Circuit and upholding the legislation—provided virtually no explanation of how to tell if a *Klein* problem existed. Instead Justice Thomas, for the Court, simply stated that the statute at issue set out a new standard to apply and thereby changed the law.<sup>137</sup>

The second case,<sup>138</sup> *Plaut v. Spendthrift Farm, Inc.*,<sup>139</sup> did strike congressional legislation and referred to but did not base its decision directly on *Klein*.<sup>140</sup> *Plaut* grew out of a 1991 Supreme Court decision in which the Court had concluded that certain federal securities claims must be initiated “within one year after the discovery of the facts constituting the violation and within three years after such violation.”<sup>141</sup> That rule was applied to then-pending cases.<sup>142</sup> Congress disagreed and enacted an amendment to the federal securities law, providing a longer statute of limitations and permitting refiling of any case dismissed.<sup>143</sup>

Justice Scalia, for the Court, struck the statute. Quoting *Marbury v. Madison*,<sup>144</sup> Justice Scalia described the “judicial department” as possessing the sole authority to “decide” cases and concluded Congress had breached the “expressed understanding” of the Framers when it “retroactively command[ed] the federal courts to reopen final judgments.”<sup>145</sup> The Court ruled that Article III judgments (whether based on statutes of limitations or other grounds) enjoy an “immunity from legislative abrogation.”<sup>146</sup>

My own constitutional interpretative sympathies are with the majority’s holding, if not with all of its reasoning, but *Plaut* has some poignancy. Unlike

136. *Seattle Audubon Soc’y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), *rev’d* 503 U.S. 429 (1992). The statute at issue stated that “Congress hereby determines and directs” that certain actions by the Bureau of Land Management had satisfied the “statutory requirements” that were the basis of the lawsuits (named in the legislation). Department of the Interior and Related Agencies Appropriation Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. at 747 (1989).

137. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992).

138. Another vehicle for *Klein/Plaut* discussions is the Prison Litigation Reform Act of 1996 that affects extant consent decrees and injunctions. *See supra* note 17 and *infra* notes 228-49.

139. 514 U.S. 211 (1995).

140. *See id.* at 218. The opinion might be understood as articulating yet another independent doctrinal limitation on congressional authority but such a reading turns again on how one reads *Klein*.

141. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991).

142. As the *Plaut* Court explained, that application turned on the decision in another case, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), issued the same day as *Lampf*. *See Plaut*, 514 U.S. at 214.

143. *See* 15 U.S.C. § 78aa-1, *codifying* Title IV, § 476, Federal Deposit Insurance Corp. Improvements Act of 1991, 105 Stat. 2287.

144. 5 U.S. (1 Cranch) 137 (1803).

145. *Plaut*, 514 U.S. at 218-19 (emphasis in the original). Although the majority claimed that the issues were simple and that bright lines delineated “new lawmaking” from “reopening final judgments,” the potential for blurriness and close calls is illustrated by the hypothetical—raised in the dissent, *id.* at 261-62 (Stevens, J., dissenting), and floated on the screens of the federal courts “listserv”—of whether Congress could create a new cause of action to accomplish the same result.

146. *Plaut*, 514 U.S. at 230.

the prototypical Federal Courts classroom hypothetical and the many proposed bills in the 1980s that would have "limited" or "stripped" (depending on one's point of view) federal courts of jurisdiction, the legislation struck *gave* federal courts more decisionmaking opportunities. That distinction and others prompted the dissenters (Justices Stevens and Ginsburg) to argue for its constitutionality because it posed no threat to the judiciary nor raised the specter of congressional aggrandizement,<sup>147</sup> while Justice Breyer sought to articulate a middle position.<sup>148</sup>

In addition to *Plaut*, the Court has also recently struck another jurisdiction-conferring statute, one authorizing federal prosecution of a particular crime. While typically situated as a Commerce Clause case and therefore not read in the context of limitations on jurisdiction of the federal courts, *Lopez v. United States*<sup>149</sup> should become a part of this canon. In *Lopez*, the Supreme Court limited federal jurisdiction by invalidating a congressional statute that had authorized prosecution of individuals possessing a gun within 1000 feet of a schoolyard.<sup>150</sup> The majority's discussion in *Lopez* was broad, not only arguing against federal jurisdiction for the statute at issue but also discussing the lack of federal authority over education and family life.<sup>151</sup> Add to *Lopez* the recent standing decisions of *Lujan v. Defenders of Wildlife*<sup>152</sup> and *Raines v. Byrd*,<sup>153</sup> and a pattern emerges. In those two cases,<sup>154</sup> relying on relatively thin discussions of separations of powers, the Court refused litigation that Congress had authorized.<sup>155</sup>

---

147. *Plaut*, 514 U.S. at 260 (Stevens, J., dissenting) (the statute "does not decide the merits of any issue in any litigation but merely removes an impediment to judicial decision on the merits.").

148. *Id.* at 240-41 (Breyer, J., dissenting) ("the separation of powers inherent in our Constitution means that at least *sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment") (emphasis in the original).

149. *Lopez*, 514 U.S. 549 (1995).

150. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V.), a part of the Gun-Free School Zones Act of 1990.

151. *Lopez*, 514 U.S. at 564 ("under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example"). Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented, arguing the easy relationship between education and commerce clause powers. *Id.* at 624-31. As to the accuracy of the description of what has historically fallen within the federal domain, see Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171 (1995).

152. 504 U.S. 555 (1992).

153. 117 S. Ct. 2312 (1997).

154. While *Lujan* suffered from many defects, as elaborated by Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992), *Raines v. Byrd* could be understood as a much narrower limitation on congressional authority—that Congress has no power to authorize its own members to repeat their constitutional objections to legislation, raised unsuccessfully in Congress, in lawsuits challenging that legislation.

155. Another way in which judicial authority can be confined comes under the heading of "remedies." Federal courts jurisprudence has relied on examples such as the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932), and *Lauf v. Shinner & Co.*, 303 U.S. 323 (1938), in the statutory context, and

## 2. Lobbying Against Federal Question Jurisdiction

*Lopez* itself needs to be contextualized by a reference to the “other sources” I have been recommending—federal judicial reports and commentary other than judicial opinions. Above, I mentioned the *Long Range Plan for the Federal Courts*, issued by the Judicial Conference in 1995. Here, I detail the contents of this first major collective statement by the federal judiciary about their purposes. My interest is not to make an argument that, as a matter of judicial ethics or of Article III jurisprudence, federal judges must or should always be silent about the shape of their jurisdiction or be enthusiastic about all aspects of it.<sup>156</sup> Rather, I will trace some of the history of judicial commentary on jurisdiction as it has moved from opinion writing and individual commentary to collective statements.

The federal judiciary has had a long tradition of advising Congress on a variety of topics<sup>157</sup> and specifically on what the boundaries of federal court jurisdiction should be. An important example is diversity jurisdiction, against which judges of the federal courts have campaigned for nearly a century.<sup>158</sup> A second instance, of only somewhat more recent vintage, is federal judicial

---

proposed but largely not enacted limits on constitutional remedies. See, e.g., H.R. 326, 97th Cong. (1981) (school prayer); H.R. 867, 97th Cong. (1981) (abortion). Again, the images posited were oppositional ones, in which federal judges sought to exercise remedial authority and the Congress loomed large in efforts to constrain such decisions.

In her introduction, Vicki Jackson aptly draws our attention to *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), in which the Supreme Court opened the door to dismantling consent decrees in prison cases. Jackson, *supra* note 36, at 2452-53. I suggest that rereading *Missouri v. Jenkins*, 515 U.S. 70 (1995) (round II), is similarly in order. In school desegregation cases, the Supreme Court has, as a constitutional equity court, limited the role of lower judges in a fashion parallel to that which Congress has done by statute in 1996 in the Prison Litigation Reform Act (PLRA). That legislation includes a provision that all consent decrees and injunctions either terminate or be supported by new findings of current constitutional violations. 18 U.S.C. § 3626(b) (1996). The Supreme Court's school desegregation cases offer defendants an opportunity to request termination of remedial orders under similar conditions.

156. For discussion of the ethical constraints, see KATZMANN, *supra* note 23, at 92-96; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. Rev. 1165, 1197-1203 (1996) [hereinafter Geyh, *Paradise Lost*]. I am not, however, enthusiastic about judges deciding cases raising questions about the constitutionality of particular statutes for or against which those judges have personally lobbied. Judicial awareness of such a difficulty results in the posture of not officially “lobbying” but responding to invitations by Congress to comment on proposed legislation and by couching their views carefully.

157. See Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (characterizing different forms of advice and analyzing objections made to that role). One of the examples provided is judicial efforts to end the practice of riding circuit. *Id.* at 1742-43.

158. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928). Cf. John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963).

For official judicial opposition to diversity jurisdiction, see LONG RANGE PLAN, 166 FRD at 89-90 (Recommendation 7, “Congress should be encouraged to seek reduction in the number of federal court proceedings in which jurisdiction is based on diversity of citizenship”); FCSC REPORT, *supra* note 77, at 44 (recommending that Congress limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader and suits involving aliens); *Tacha Judicial Conference Testimony of 1994*, *supra* note 95, at 192-93 (advocating the abolition of in-state plaintiff diversity jurisdiction).

distress at prisoner filings. Beginning in the 1940s, a segment of the federal judiciary has sought restrictions on prisoner litigation in federal courts.<sup>159</sup> Both of these examples have parallels in doctrinal developments that read the federal diversity statute narrowly<sup>160</sup> and that interpret both prisoners' rights and habeas legislation restrictively.<sup>161</sup>

Another example is the mandatory jurisdiction of the Supreme Court. After succeeding in ending much of that obligation in the 1920s, members of the Supreme Court returned to Congress in 1935 to testify against a proposed bill that would have provided for a direct appeal to the United States Supreme Court from any lower court order "prohibiting any Federal official or employee, or Federal agency or bureau . . . from carrying out the provisions of any . . . federal law."<sup>162</sup> More generally, the federal judiciary has evolved into a regular commentator on legislation termed "administrative" and within that bailiwick has come (as noted above) the creation of alternatives to the federal courts and hence statutes about the federal courts' own jurisdiction.<sup>163</sup>

What is different—and new—in the contemporary era is that arguments, once made by individual members of the federal judiciary, through doctrinal developments<sup>164</sup> or sporadically on particular issues, are now made on behalf of the

159. See, e.g., John W. Winkle III, *Judges Before Congress: Reform Politics & Individual Freedom*, 22 POLITY 443 (1990); John W. Winkle, III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263 (1985) (detailing the creation of a committee on habeas corpus litigation and its efforts, ending in the 1948 recodifications that created a revised process for habeas corpus proceedings). See also FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN FEDERAL COURTS (1980) (committee chaired by the Hon. Ruggero J. Aldisert, proposed processes for dealing with conditions of confinement litigation and limiting its burden on the federal judiciary); *Tacha Judicial Conference Testimony of 1994*, *supra* note 95, at 59 (in support of increasing the requirements of exhaustion of administrative remedies before the Attorney General can file an action under the Civil Rights of Institutional Persons Act, 42 U.S.C. § 1997(e)).

160. See, e.g., *Owen v. Kroger*, 437 U.S. 365, 374 (1978).

161. See *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Teague v. Lane*, 489 U.S. 288 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). See also Tushnet & Yackle, *supra* note 33, at 27-29 (detailing the Court's promulgation of Rule 9(a) of the Special Rules for Habeas Proceedings and its elaboration of exhaustion requirements); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 874-963 (1984).

162. S.2176, 74th Cong. (1935). See *Appeals from Federal Courts, Hearing before the Senate Comm. on the Judiciary*, 74th Cong., at 1-12 (Mar. 25, 1935) (statements of the Hon. Charles Evans Hughes, Chief Justice; of the Hon. Willis Van Devanter, Associate Justice; of the Hon. Louis D. Brandeis, Associate Justice). Hugo Black, then Senator, had proposed the bill and argued for the need for rapid review by citing the question of the constitutionality of the Tennessee Valley Authority. *Id.* at 14.

163. See generally Geyh, *Paradise Lost*, *supra* note 156; Smith, *supra* note 74; Harvey Rishikof & Barbara A. Perry, "Separateness But Interdependence, Autonomy but Reciprocity": A First Look at Federal Judges' Appearances Before Legislative Committees, 46 MERCER L. REV. 667 (1995).

For example, when the Clinton administration was proposing health legislation in 1994, the judiciary commented on the workload implications of a federal entitlement program. See LONG RANGE PLAN, 166 F.R.D. at 96 (Recommendation 12c, "Any new cooperative federal-state program to establish national standards for employee benefits (e.g., health care) should designate state courts as the primary forum for review of benefit denial" and should also require exhaustion of administrative benefits prior to state court filings.).

164. For example, one might read *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874), interpreting the 1867 jurisdictional grant of appellate jurisdiction over state court rulings to the Supreme Court, as

organized federal judiciary, whose collective efforts are directed against specific aspects of federal jurisdiction and against new (and unspecified) federal rights creation, accompanied by federal question jurisdiction. The current judiciary's views are shaped in part by other innovations of the second half of this century: judicial "impact statements" and an embrace of a managerial, administrative approach to courts.

Beginning in 1972, Chief Justice Warren Burger called for judicial planning with regard to "burdens of the courts," from which emerged the concept of assessing the effects of new causes of action by trying to predict the number of filings that would follow.<sup>165</sup> In 1991, the judiciary established an Office of Judicial Impact Assessment, which files impact statements.<sup>166</sup> An underlying assumption of the impact process is that increasing filings are at best a "problem" to be mediated; the impact statements are not elaborations of the benefits generated by causes of action but rather of the bureaucratic difficulties that new legislation could pose for judges.

The quality of such predictions is the subject of an extensive debate; given the many variables that affect a decision to file suit, social scientists are skeptical of the ability to determine the filing rates for new (as compared with extant) causes of action.<sup>167</sup> For example, in the early 1990s, the Violence Against Women Act (VAWA) was pending, creating federal court jurisdiction over a new cause of action for those subjected to "gender-based animus."<sup>168</sup> The judicial impact statement estimated such a civil rights provision would generate "58,800 suits, with 13,450 reaching the federal courts at a cost of \$43.6 million and 450 staff years."<sup>169</sup> That prediction assisted both the Chief Justice and the Judicial Conference who objected to the proposed cause of action.<sup>170</sup> Subsequently, the Judicial Conference decided not to take a position

---

an anti-federal jurisdiction decision. Some commentators have argued that Congress had intended a broad expansion of federal authority rejected by a five-person majority of the Court, reading the provision more narrowly. See William M. Wiecek, *Murdock v. Memphis: Section 25 of the 1789 Judiciary Act and Judicial Federalism*, in *ORIGINS OF THE FEDERAL JUDICIARY* 223-47 (Maeva Marcus ed., 1992).

165. CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS 5-6 (A. Fletcher Mangum ed., Federal Judicial Center, 1995) [hereinafter *WORKLOAD CONFERENCE*].

166. *Id.* at 6-7.

167. See William Jenkins, Jr., *Observations on Impact Models for the Federal Courts*, in *WORKLOAD CONFERENCE*, *supra* note 165, at 117; Frank Arnett & A. Fletcher Mangum, *Preliminary Findings: A Retrospective Analysis of the Effect of Legislation on the Workload of the U.S. Courts*, in *WORKLOAD CONFERENCE*, *supra* note 165, at 135.

168. Violence Against Women Act of 1991, S.15, 102d Congress (draft legislation).

169. Charles Gardner Geyh, *Overcoming the Competence/Credibility Paradox in Judicial Impact Assessment: The Need for an Independent Office of Interbranch Relations*, in *WORKLOAD CONFERENCE*, *supra* note 165, at 79, 90.

170. See Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 13 (1996) ("state and federal judges mounted a campaign to warn that the bill would 'flood the federal courts' and deprive the states of their traditional jurisdiction."). Thereafter the Chief Justice called, in his 1991 year end report, for congressional "self-restraint in adding new causes of action," specifically noted that the proposed legislation would impose an unnecessary burden on the federal judiciary, and reported that the Judicial Conference

on the issue of VAWA's civil cause of action and recorded its support of other aspects of the legislation;<sup>171</sup> the cause of action was itself reworded in a somewhat limiting fashion, and as of this writing (four years after the Act), about a dozen reported cases address this aspect of VAWA.

The move towards increased judicial management (both of individual cases, of the docket as a whole, and of the courts as institutions) was a predicate to the development of the impact process. A range of administrative efforts, including impact assessments and futures planning and akin to the managerial efforts undertaken by trial judges to control their individual dockets,<sup>172</sup> are artifacts of the federal judiciary's posture as a bureaucratic organization, seeking both to understand its own needs and to make them known to the other institutions with which it interacts.

This self-conscious managerial stance found new expression in 1995, when the Judicial Conference of the United States approved a series of recommendations set forth as an official statement of a *Long Range Plan for the Federal Courts*, a first in federal courts' history. One reading of the *Long Range Plan* is as a *cri de coeur* against the imposition of impossible workload demands by a Congress carelessly adding rights without providing budgets and staff to match.<sup>173</sup> Unquestionably, one of the animating concerns of the *Long Range Plan* is workload burdens. But the *Long Range Plan* is not simply an objection to additional jurisdiction without accompanying resources;<sup>174</sup> it argues affirmatively against the creation of new federal rights.

A centerpiece of that *Long Range Plan* is discussion of federal court jurisdiction; its "first goal" is "limiting the federal court's jurisdiction."<sup>175</sup> The section devoted to this issue opens with the comment that "the actual scope of lower federal court jurisdiction [is left by the Framers] to Congress' discretion."<sup>176</sup> Thereafter, the *Plan* criticizes Congress for its decisions "to 'federalize' crimes previously prosecuted in the state courts and to create civil causes of action over matters previously resolved in state courts."<sup>177</sup> The first "recommendation" is

---

and the Conference of Chief Justices of the State Courts opposed the civil remedy in that statute. *Id.* at 16 (citing the 1991 Year End Report, 138 CONG. REC. S443-01 (1992) (remarks of Chief Justice William H. Rehnquist)).

171. Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, 1183 n.16 (1993).

172. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnik, *Managerial Judges*].

173. KATZMANN, *supra* note 23, at 107-08, could be read as suggesting this approach, that the issue of "federalization" be seen as an "administrative" problem, of expanding caseloads and insufficient resources.

174. See LONG RANGE PLAN, 166 F.R.D. at 74 ("Should the Congress and the nation not heed these concerns about the implications of uncontrolled growth, one of two unfortunate consequences will inevitably follow: (1) an enormous, unwieldy federal court system that has lost its special nature; or (2) a larger system incapable, because of budgetary constraints, workload and shortages of resources, of dispensing justice swiftly, inexpensively and fairly").

175. *Id.* at 82.

176. *Id.* at 81.

177. *Id.* at 82.

that Congress should confer jurisdiction on the federal courts only upon a finding of "clearly defined and justified national interests."<sup>178</sup>

The *Long Range Plan* distinguishes between civil and criminal jurisdiction. On the civil side, the *Long Range Plan* calls for congressional "restraint" in the creation of new federal civil causes of action.<sup>179</sup> Provided are specific areas of "federal interest" justifying jurisdictional grants to the federal courts. Included are cases that arise under the Constitution; cases that "deserve federal adjudication" because of unsatisfactory state responses and either a "strong need for uniformity" or "paramount federal interests;" cases that involve "foreign relations," cases in which the federal government or its officials are parties, and cases that arise from "disputes among the states" or that "affect substantial interstate or international disputes."<sup>180</sup> The commentary also posits a "high" burden for Congress to satisfy and gives "patent, trademark, and copyright laws" as examples meeting that test.<sup>181</sup>

Although the *Long Range Plan* mentions the federal courts' role in the "preservation of individual rights and liberties found in the Bill of Rights and subsequent amendments . . . [and in] protection—through the writ of habeas corpus—of persons held in violation of the Constitution or federal law,"<sup>182</sup> the discussion is unclear about what role federal courts should play in enforcing statutory civil rights, stemming either from legislation following the Civil War or more recently. While noting that "the federal courts have played a vital role in promoting civil rights and in eliminating invidious discrimination," the *Plan* also urges Congress to

recognize that all state judges take an oath to uphold the U.S. Constitution and the supremacy of federal law. Absent a showing that state courts cannot satisfactorily deal with an issue, Congress should be hesitant to enact new legislation enforceable in the federal courts, and should not do so in any event without a concomitant reduction of federal jurisdiction in other areas.<sup>183</sup>

In other words, while the *Long Range Plan* gives an unqualified endorsement of patent and copyright litigation in federal courts, it is less certain about the place that civil rights actions should hold. The *Plan* counsels against the creation of new federal civil rights and raises the possibility of retreat from some of the

---

178. *Id.* at 83 (Recommendation No. 1) See also Rehnquist, 1991 Year-End Report, *supra* note 82, at 4 ("New additions [to federal jurisdiction] should not be made unless critical to meeting important national interests which cannot otherwise be satisfactorily addressed through non-judicial forms, alternative dispute resolution, or the state courts.").

179. LONG RANGE PLAN, 166 F.R.D. at 88 (Recommendation 6: "Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests.").

180. *Id.* at 88-89 (Recommendation 6).

181. *Id.* at 88.

182. *Id.*

183. *Id.* at 88-89.



jurisdictional grants already given.<sup>184</sup>

On the criminal side, the *Long Range Plan* proposes that Congress also be reluctant to enlarge federal court jurisdiction by the creation of new federal crimes ("federalization of crime"). The *Long Range Plan* lists "five types of offenses" properly in federal courts, including (1) an "offense against the federal government" or its agents or against "interests unquestionably associated with a national government; or [an area over which] the Congress has evinced a clear preference for uniform federal control;" (2) offenses involving "substantial multistate or international aspects;" (3) offenses within a single state involving a "complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise;" (4) proscribed activities about local corruption; or (5) proscribed activities, about "highly sensitive issues" for a local community, that make the crimes "more objectively prosecuted within the federal system."<sup>185</sup>

Note the sequence of events. Beginning in the 1980s, the federal judiciary complained about "federalization of crime."<sup>186</sup> In 1994 and 1995, in drafting its blueprint for the future, the federal judiciary called for limits on federal criminal jurisdiction.<sup>187</sup> In 1995, the Supreme Court imposed such a limit in one arena as a matter of constitutional law.<sup>188</sup>

The *Long Range Plan* should be of special interest to federal courts scholars. It could be read as the grandchild of Henry Hart and Herbert Wechsler, who saw federal law was "interstitial in its nature;"<sup>189</sup> the *Plan's* preference for state court adjudication echoes that of Hart and Wechsler. The intermediate generation here might be represented by Henry Friendly and by Richard Posner, who in the 1970s and 1980s wrote books devoted to federal jurisdiction and called for different forms of jurisdictional retrenchment.<sup>190</sup> A revised version of that

---

184. The *Long Range Plan* echoes the position of the Chief Justice in his 1991 *Year End Report*, *supra* note 82, at 582 ("Modest curtailment of federal jurisdiction is important; equally important is self-restraint in adding new federal causes of action.").

185. 166 F.R.D. at 84-85 (Recommendation No. 2). See also *Dep't of Commerce, Justice, and State, the Judiciary, and Related Agencies, Appropriations for 1996 Hearings before a House Subcomm. of the Comm. on Appropriations*, 104th Cong., at 13 (Mar. 8, 1995) [hereinafter *1995 House Appropriations Hearings*] (comments of Justice Kennedy, "concerned with any increase across the board in Federal crimes, particularly for matters that have historically been left to the States"); *id.* at 17 (comments of Justice Souter, that "I think it is safe to say, not a person is going to want to become a Federal judge, if what he has to face 60 or 70 percent of his time is handling routine criminal cases that in my day as a State court judge we handled").

186. See, e.g., Hon. Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A15. See generally Symposium, *Federalization of Crime*, 46 HASTINGS L.J. 965 (1995).

187. PROPOSED LONG RANGE PLAN, *supra* note 88, at 20 (Recommendation 1, "In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate"); *id.* at 22 ("Recommendation 2, Congress should review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose."). See also COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 23, 25 (2d Printing, Mar. 1995).

188. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (Thomas, J., concurring).

189. 1996 HART & WECHSLER, *supra* note 13, at 521 (reprinting the 1953 statement).

190. FRIENDLY, *supra* note 27, at 1-14 (describing both "minimum" and "maximum" models of

vision has now moved from occasional commentary to an official statement made on behalf of the federal judiciary.

A second, and again relatively recent, source of insight into the judiciary is the annual reporting by the Chief Justice of the United States.<sup>191</sup> These now-yearly speeches provide another means of mapping judicial concerns and attitudes, albeit lacking the imprimatur of any source other than the Chief Justice himself. Here my focus is on the 1997 statement, issued on January 1, 1998. In that report, the Chief Justice spoke to the issue of federal court jurisdiction.<sup>192</sup> Complaining about the high volume of cases for the relatively few life-tenured judges, the Chief Justice praised the Congress, described as "wisely" acting "to reduce this disparity by enacting laws that in effect decrease the number of potential filings in federal court."<sup>193</sup> He specifically cited the restrictions on habeas corpus jurisdiction and on prisoners' civil rights actions, both termed "promising examples of how Congress can reduce the disparity between resources and workload in the federal Judiciary without endangering its distinctive character."<sup>194</sup> The Chief Justice's praise was followed by the complaint that such legislation was insufficiently frequent ("sporadic and inconsistent") and by his plea ("I therefore call on Congress") to do more to "reduce the jurisdiction of the federal courts."<sup>195</sup>

Upon reading *Plaut* and *Lopez* against the background of the *Long Range Plan* and the Chief Justice's annual addresses, one finds that in both case law and commentary, the federal judiciary has recently warned Congress to be wary of *giving* jurisdiction to federal judges and has said nothing to signal concern

---

federal jurisdiction, arguing for Article III specialized courts for patent and tax, and for lower courts to have jurisdiction over constitutional cases, civil rights legislation, disputes between the United States and its citizens, certain areas of criminal law and certain congressional legislation); POSNER, CRISIS AND REFORM, *supra* note 27, at 175-92 (in the 1985 edition, developing a theory of the "optimal scope of federal jurisdiction" related to a theory of federalism and centrally concerned with questions of whether certain forms of law making impose externalities; under his view, some of the current kinds of federal jurisdiction would remain, in modified form, but other areas, such as litigation stemming from rights conferred by the Fourteenth Amendment, would be reduced). In his 1996 revision of that work, Posner detailed a similar approach, in which the "allocation [of cases] would resemble, but not be identical to, the allocation we actually observe today." POSNER, *supra* note 27, at 280 (1996 ed.). Competition to avoid monopolies and concern about the imposition by insiders of the costs of externalities (based on "economic self-interest," rather than xenophobia), prompted him to suggest both narrowing and broadening of diversity jurisdiction, *id.* at 282-82, revising aspects of federal criminal jurisdiction, *id.* at 284-85, narrowing federal court access based simply on Fourteenth Amendment rights (because most of such cases are "simply unrelated to externalities or related to them only tenuously"), *id.* at 288, but permitting such access if the people asserting those rights are "politically disfavored" as contrasted to members of "politically influential groups." *Id.* at 289. See also *id.* at 292-303 (discussing "specific caseload implications").

191. The custom of providing such a "state of the judiciary" address begins with Warren Burger. See William Rehnquist, *The 1995 Year-End Report on the Federal Judiciary*, 28 THIRD BRANCH 1, 1 (1996).

192. Rehnquist, *1997 Year-End Report*, *supra* note 71. While the press response to this speech was to describe a conflict between the Chief Justice and the Republican-controlled Senate on judgeship confirmations (see *supra* notes 70-71), the story that might have run was that the Chief Justice commented on issues that might soon be before the Court.

193. *Id.* at 2.

194. *Id.*

195. *Id.*

about the prospect of *taking away* federal jurisdiction. Then turn to the recent precedent—*Felker v. Turpin*,<sup>196</sup> *Hohn v. United States*,<sup>197</sup> *Stewart v. Martinez-Villareal*,<sup>198</sup> and *Calderon v. Thompson*<sup>199</sup>—all of which address congressional limitations on jurisdiction imposed through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>200</sup> Two comments are in order. First, all of these decisions decline to find that Congress has divested the courts of jurisdiction to hear the specific claims at issue. Through a variety of readings of statutory text (some arguably creative, at least according to dissenters<sup>201</sup>), the Court concluded that judicial review was not barred by AEDPA, although it might not otherwise be available.<sup>202</sup> That a majority of the Court has not embraced AEDPA as a means of constant door-closing could well be heartening to those who fear jurisdictional restrictions.<sup>203</sup> Given these initial judicial readings of AEDPA, it is possible to see the Court as a buffer against congressional incursions.

But the other comment to be made about these cases undercuts an assumption of the Court as a vigorous protector of juridical autonomy. In none of the four major opinions does one find language warning Congress against its course of conduct constricting jurisdiction. In contrast to the broad language of the Chief Justice in *Lopez*,<sup>204</sup> opining on the limited power of Congress to *confer* jurisdiction, the recent majority decisions construing the AEDPA do not contain dicta either urging Congress to watch its step when *retracting* jurisdictional authority or, more generally, worrying about the problem of jurisdictional limitations. Moreover, in one of the decisions (*Calderon v. Thompson*), a five person

---

196. 518 U.S. 651 (1996).

197. 118 S. Ct. 1969 (1998).

198. 118 S. Ct. 1618 (1998).

199. 118 S. Ct. 1489 (1998).

200. Pub. L. No. 104-132, 110 Stat. 1217 (1996). Jurisdictional limitations in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 will be before the Court in its 1998-99 Term. See *Reno v. American-Arab Anti-Discrimination Comm.*, 118 S. Ct. 2059 (1998) (granting review on the question of whether that Act permits jurisdiction over challenges to deportation proceedings “prior to the entry of a final order of deportation”).

201. See, e.g., *Stewart v. Martinez-Villareal*, 118 S. Ct. 1618, 1622, 1623 (Scalia, J., joined by Thomas, J., dissenting) (“The Court today flouts the unmistakable language of the statute to avoid what it calls a ‘perverse’ result.”) (citation omitted); *Hohn*, 118 S. Ct. at 1979 (Scalia, J., joined by Rehnquist, C.J., O’Connor, J., and Thomas, J., dissenting) (“the Court ignores the obvious intent” of AEDPA).

202. *Hohn v. United States*, 118 S. Ct. 1969 (1998), upheld jurisdiction by relying on an interpretation of AEDPA’s appealability provisions in conjunction with Supreme Court jurisdictional authority under 28 U.S.C. § 1254. *Stewart v. Martinez-Villareal*, 118 S. Ct. 1618 (1998), found jurisdiction through an interpretation of the meaning of “second or successive” habeas applications under AEDPA. In *Calderon v. Thompson*, 118 S. Ct. 1489 (1998), the Court concluded that the Ninth Circuit’s recall of a mandate was based on a first, rather than a second or successive application, and therefore was not barred by AEDPA but that relief was barred by the Court’s own jurisprudential limitations on habeas relief. *Felker v. Turpin*, 518 U.S. 651 (1996), held that AEDPA did not repeal the Supreme Court’s authority over original habeas petitions.

203. *Calderon v. Thompson* requires a more complex assessment. See discussion *infra* notes 214-18 and accompanying text.

204. 514 U.S. at 654

majority did invoke AEDPA's "values and purposes" when relying on its own habeas jurisprudence to restrict appellate courts' authority to recall their mandates in habeas proceedings.<sup>205</sup>

An examination of this recent case law is in order. In *Felker*, the Court considered one aspect of AEDPA, relating to successive filings.<sup>206</sup> In a brief majority opinion by the Chief Justice, the Court held that, because it continued to have a basis upon which to entertain a petition for habeas corpus, the constitutional challenge based on Article III's Exception and Regulations Clause was "obviate[d]."<sup>207</sup> Given the Court's own constriction of habeas relief, the decision's other holding (that Congress's imposition of what it termed a "modified res judicata rule" was not an unconstitutional suspension of the Writ under Article I, § 9) was unsurprising.<sup>208</sup> Even if sympathetic to the construction of statutes to avoid constitutional issues, the Court's opinion gave no signal to Congress that it might be troubling—either constitutionally or prudentially—for Congress to impose significant restrictions on access to the federal courts, here in the context of the writ of habeas corpus. While the concurring justices wrote to argue for more access to the Supreme Court than that noted by the majority,<sup>209</sup> and Justice Souter adverted by way of footnote to law review articles describing theories of Article III that restrain Congress,<sup>210</sup> no member of the Court used the occasion to "beat the drums" against congressional limitations on federal court jurisdiction.

Another decision of the 1997-98 Term, *Stewart v. Martinez-Villareal*,<sup>211</sup> also involved a question related to restrictions on "second or successive habeas applications."<sup>212</sup> A seven-person majority—in a decision again by the Chief Justice—analyzed the dismissal of a petition as premature to one dismissed for unexhausted state claims. The Court concluded that a premature petition would not be barred

---

205. 118 S. Ct. at 1502.

206. At issue were amendments to 28 U.S.C. § 2244(b), which stated that grants or denials of "second or successive" habeas applications "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

207. *Felker*, 518 U.S. at 654. The Court further noted that Congress had imposed restrictions on successive petitions and "[w]hether or not we are bound by these restrictions, they certainly inform our reconsideration of original habeas petitions." *Id.* at 663.

Why habeas corpus original jurisdiction is available to the Court is itself a question, given the proposition stemming from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the Congress cannot enlarge the original jurisdiction of the Supreme Court and habeas is not listed among the categories of such jurisdiction. The conventional Federal Courts' wisdom is that because at least state prisoners' petitions are predicated upon a prior court's conviction of a petitioner, even original jurisdiction in habeas cases is a kind of appellate jurisdiction. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); 1996 HART & WESCHLER, *supra* note 13, at 1339-42. Whether such an interpretation is plausible when a petitioner is challenging administrative detentions such as in immigration proceedings is debatable—and has been on the "Federal Courts' listserv."

208. *Felker*, 518 U.S. at 664.

209. *Id.* at 665-66 (Stevens, J., joined by Justices Souter and Breyer); *id.* at 666-67 (Souter, J., joined by Justices Stevens and Breyer).

210. *Id.* at 667 n.2 (Souter, J., concurring).

211. 118 S. Ct. 1618 (1998).

212. 28 U.S.C. § 2244(b), as it was amended by AEDPA.

“under any form of *res judicata*” and, over angry dissents from Justices Scalia and Thomas, authorized a hearing on the merits of the prisoner’s claim that he was ineligible for execution because he was insane.<sup>213</sup> Once again, the general issue of congressional limitations on judicial authority was unexplored.

In *Calderon v. Thompson*,<sup>214</sup> a third decision considering the effects of AEDPA, the issue centered around the decision of the Ninth Circuit, en banc, to recall a mandate in a capital case. A five person majority, through an opinion written by Justice Kennedy and relying heavily on a dissent by Judge Kozinski of the Ninth Circuit, scolded the Ninth Circuit for recalling its mandate and concluded that such an action was an abuse of discretion.<sup>215</sup> The majority decided that, while some recalls of mandates rest on “new claims or evidence” and would thus be barred by AEDPA’s ban on “second or successive applications,” the specific recall in *Calderon v. Thompson* related to claims in the first petition and therefore did not come within AEDPA’s prohibitions. However, while AEDPA did not bar relief, the Court did. Citing the “profound societal costs that attend the exercise of habeas jurisdiction”<sup>216</sup> and AEDPA’s goals, the Court held that a mandate to reconsider the merits of a denial of habeas relief can only issue if a court “acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence.”<sup>217</sup> Reviewing the arguments by petitioner Thompson, the majority found his evidence insufficient to meet the burdens of proof imposed by the Court on habeas petitioners claiming actual innocence.<sup>218</sup>

In yet another recent decision, *Hohn v. United States*,<sup>219</sup> also interpreting AEDPA, Justice Kennedy (writing for a majority of five) found that Congress had not limited Supreme Court jurisdiction to review refusals by federal appellate courts to certify appeals of habeas proceedings.<sup>220</sup> That majority insisted, over a dissent claiming that “Congress [had], with unmistakable clarity,”

---

213. 118 S. Ct. at 1622.

214. 118 S. Ct. 1489 (1998).

215. The four dissenters, Justice Souter, writing on behalf of himself and Justices Stevens, Ginsburg, and Breyer, found the exercise of judicial discretion reasonable and rejected the majority’s reliance on AEDPA. *Id.* at 1505-09 (Souter, J., dissenting). The dissenters agreed with the majority that AEDPA did not apply but disagreed with AEDPA’s invocation on behalf of what the dissenters characterized as the “novelty” of the majority’s approach. *Id.* at 1509 (Souter, J., dissenting).

216. *Id.* at 1500 (citation omitted).

217. *Id.* at 1502.

218. *Id.* at 1504-06. Neither majority nor dissent engage with the issues raised by Judge Reinhardt’s opinion in the *en banc* proceedings, that the “extraordinary” circumstances of the case—the granting of habeas relief to a person sentenced to death, a panel’s reversal, the errors at the appellate level in the processing of requests to hold *en banc* review, the efforts to correct those errors through recall of a mandate—required judicial decisionmaking on the merits, because of “fairness, justice, and due process of law.” *Calderon v. Thompson*, 120 F.3d 1045, 1060, 1063 (9th Cir. 1997) (Reinhardt, J., concurring in the recall of the mandate).

219. 118 S. Ct. 1969 (1998).

220. The majority’s reading of the statute required it to overrule a part of a 1945 decision that held that the Court lacked “statutory certiorari jurisdiction to review refusals to issue certificates of probable case.” *Id.* at 1977.

denied Supreme Court jurisdiction,<sup>221</sup> that the Court had the power to act. Yet, by framing the issue as one of statutory construction, the majority did not explore either the role that other statutes, such as the All Writs Act,<sup>222</sup> play in providing ready access to the Court nor the constitutional limits, if any, of congressional restrictions on appellate jurisdiction. As in *Felker* and *Stewart*, the majority in *Hohn* did not use the occasion to warn, as a matter of policy or principle, against jurisdictional restrictions.<sup>223</sup>

To summarize, in the 1990s, a new paradigm governs the relationship between the federal judiciary and Congress with respect to statutory limits on federal jurisdiction. In the leading historic precedent, the post-Civil War *McCardle* case,<sup>224</sup> Congress limited federal jurisdiction and, while the judiciary acquiesced, its subsequent rulings narrowed or questioned broad congressional power.<sup>225</sup> One hundred years later, Congress was again perceived as aggressive in its efforts to "strip" federal courts of jurisdiction and members of the judiciary raised objections to such action.<sup>226</sup> In the 1990s, however, federal

---

221. *Id.* at 1979 (Scalia, J., dissenting, joined by Chief Justice Rehnquist, Justice O'Connor and Justice Thomas). The dissenters assumed access to the Supreme Court by way of the All Writs Act but that its requirements had not been met. *Id.* at 1983-84.

222. 28 U.S.C. § 1651.

223. AEDPA was also invoked, but not much discussed, in another decision of the 1997-98 Term, also refusing to entertain the merits of a prisoner's claim of illegal detention, this time based on violations of international treaties. *See Breard v. Greene*, 118 S. Ct. 1352 (1998) (concluding that an alleged violation of the Vienna Convention was barred from being considered because it had been waived and that no suit against the incarcerating state was available either to the Consul General or to Paraguay itself).

224. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

225. Katyal's characterization, *supra* note 157, at 1818, is that "Congress blinked." *See* BRUCE ACKERMAN, *WE THE PEOPLE II: TRANSFORMATIONS* 223-27 (1998). Soon thereafter, however, Congress used its authority to expand federal jurisdiction. *See* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969).

226. One illustration comes from the Senate confirmation hearings of then-Judge Anthony Kennedy, who was questioned about whether Congress could limit federal court jurisdiction over school prayer. *See Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 100th Cong. 737-78 (1987), reprinted in 15A THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1987, at 1011-12 (Roy M. Mersky & Gary R. Hartman eds., 1991) [hereinafter SUPREME COURT HEARINGS] (responding to a written question from Senator Howell Heflin, Judge Kennedy stated that "there would be grave constitutional questions concerning whether the exceptions and regulations clause gives Congress the power to divest the Supreme Court of jurisdiction to hear cases involving school prayer if the effect were to strip the Court of jurisdiction to determine rights under the First Amendment"); SUPREME COURT HEARINGS, *supra*, at 1015 (responding to a written question from Senator Paul Simon that Kennedy did not intend his oral testimony "to suggest that it is constitutional for Congress to limit jurisdiction in a class of cases based on the constitutional or federal issues presented. In fact, I suggested at one point . . . that Congress should not take that step without serious consideration of the grave constitutional questions it would present."). Then-Judge Kennedy distinguished jurisdictional limitations in diversity. *Id.* at 1012 ("I have suggested that in order to reduce the heavy caseload of the federal courts, Congress may wish to consider excluding certain classes of diversity cases, such as auto accident cases.").

judges are more often than not commanding (doctrinally) and recommending (in their commentary) that their jurisdiction over federal rights be curtailed.<sup>227</sup>

### III. POTENTIAL INTERPRETATIONS AND THE MEANING OF THE DOCTRINE

Federal courts jurisprudence is much taken with interpretation of doctrine; a few comments are thus in order on the contemporary legislation that forms the basis of the other articles in this symposium. I shall use as my example the question of the constitutionality of the Prison Litigation Reform Act (PLRA), which as noted, requires that consent decrees and injunctions terminate absent new findings of current constitutional violations.<sup>228</sup> The legal question raised is how to interpret the Supreme Court's ruling in *Plaut*, which insisted on the finality of judgments. While I appreciate the invention of Guido Calabresi (writing for a panel of the Second Circuit in *Benjamin v. Jacobson*,<sup>229</sup> which avoided the constitutional problem by interpreting the PLRA as requiring that federal courts no longer enforce consent decrees but unhappy litigants could turn to state courts for such enforcement<sup>230</sup>), I think that the constitutional issue is less easily eluded given that the statute calls for the termination of such decrees.<sup>231</sup> Further, while I understand the possible arguments based on precedent that distinguish congressional authority over prospective, as contrasted with retrospective, relief<sup>232</sup> and arguments that describe institutional litigation as generating wholly different, quasi-administrative forms of decisionmak-

227. For example, in the 1995 budget hearings, *1995 House Appropriations Hearings*, *supra* note 185, at 21, Justice Kennedy responded to a question about how to "economize" in the federal judiciary by saying that the "easiest place to achieve savings is by reducing the intake, by reducing the jurisdiction of the Federal courts."). Yet Justice Kennedy recently wrote the majority opinion refusing one such restriction and perhaps retains his wariness, expressed in the confirmation hearings, of certain forms of congressional limitations. *See Hohn*, 118 S. Ct. 1969; *supra* text accompanying notes 219-23.

228. That statute has drawn a good deal of commentary and litigation. Other examples of recent congressional efforts aimed at judicial decisionmaking include a rider to the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 335, 110 Stat. 1321 (1996), upheld in *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 557 (9th Cir. 1996), and termed by concurring judge John Noonan to be an "explicit intervention of Congress into a judicial proceeding." *Id.* at 558. See also congressional oversight of the criminal litigation arising from the bombing of a federal building in Oklahoma, in which a district judge had limited access by potential witnesses but was "overruled" by Congress. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 235, 110 Stat. 1241, 1246 (1996) (closed circuit televised court proceedings for victims of crime); Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (codified at 18 U.S.C. §§ 3481, 3510, 3593 (1997)).

229. 124 F.3d 162 (2d Cir. 1997), *reh'g granted* (argued before the Second Circuit *en banc* Feb. 25, 1998).

230. *Id.* at 166-68 (drawing a distinction between vacating decrees and termination of prospective relief, and thus construing the statute to address enforceability in federal courts rather than annulling the underlying decrees).

231. *See* 18 U.S.C. § 3626(b)(1) (1997) ("relief shall be terminable"). *See also* *Taylor v. United States*, Nos. 97-16069, 97-16071, 1998 WL 214578, at \*3 (9th Cir. May 4, 1998) (concluding that the constitutional question is unavoidable).

232. *See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), discussed in *Benjamin*, 124 F.3d at 171-72.

ing,<sup>233</sup> I am not persuaded. Given that the judicial power extends to "all cases, in Law and Equity,"<sup>234</sup> that consent decrees are under current law a final judgment,<sup>235</sup> and that separation of powers, as expressed in *Plaut* and *Klein*, requires Congress not to interfere with specific decisions of the judiciary, a strong argument can be presented that the PLRA is unconstitutional.

Article III judges should be particularly open to this view because their authority is very much at stake. If the PLRA's provisions undoing injunctions and consent decrees are upheld (as they have been in several circuit decisions<sup>236</sup>), then Article III judges only have the power to enter final judgments at law. Their equitable authority, when prospective, totters at the call of Congress.<sup>237</sup>

---

233. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (suggesting that public law litigation encompasses a new litigation model that alters the traditional private law adjudication model); but see Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (disagreeing with Chayes' claim that the forms of adjudication had changed and arguing that the participants—mental patients, children in schools and prisoners—brought the novelty). My own discussion of "managerial judges" in Resnik, *Managerial Judges*, *supra* note 172, could, on the other hand, be used as a basis for an argument that given the transformation of the trial court from an adjudicatory to a managerial/settlement process, "decisions" of courts (particularly consent decrees in which judges participate in the negotiations) can no longer be understood as "judgments" and hence that *Plaut* and *Klein* have no applicability. That argument turns not on distinctions between prospective and retrospective relief but on a view that much of what life-tenured judges order, in both law and equity, result from bargaining and bargains are not "judgments." Whether appellate courts might have either the patience or the ability to sort that which is "adjudicated" (in the formal/historical) sense and that which is negotiated is not obvious. See the difficulties encountered in *Martin v. Wilks*, 490 U.S. 755 (1989), in which the majority and dissent disagree about what the trial court actually adjudicated, as contrasted to that to which the parties agreed. See *infra* text accompanying notes 240-49 on the potential to eliminate consent decrees.

234. U.S. CONST. art. III, § 2, cl. 1.

235. In the words of the Defendants-Appellees' brief, filed for rehearing *en banc*, what were entered were "Partial Final Judgments by Consent." Brief for Defendants-Appellees at 33, *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (No. 96-7957).

236. See, e.g., *Plyler v. Moore*, 100 F.3d at 370-72 (upholding the PLRA over separation of powers objections); *Gavin*, 122 F.3d at 1087 (reversing a district court conclusion that the PLRA unconstitutionally mandated reopening final judgments and concluding that, because "Congress has the authority to control the remedial powers of the Article III courts," and because consent decrees are prospective, the PLRA is constitutional); *Inmates of Suffolk County Jail*, 129 F.3d at 655-57 (interpreting the PLRA as "mandating the termination of extant consent decrees altogether unless the district court makes the specific findings that are necessary to keep a particular decree alive" and upholding its constitutionality on the theory that consent decrees are not "final judgments" for separations of powers purposes); *Hadix*, 133 F.3d at 942-43 (reversing district court conclusions that the PLRA violated *Plaut* and *Klein* because the provisions "merely alter the prospective application of orders requiring injunctive relief" and "only prescribes the standard for authorizing a remedy in any given case").

Two circuits have found difficulties with the PLRA. A panel of the Second Circuit, as noted, has held it constitutional by interpreting it to permit enforcement of federal consent decrees in state courts, see *Benjamin v. Jacobson*, discussed *supra* note 230, but that decision has now been heard *en banc*. The Ninth Circuit recently concluded that it was unconstitutional to reopen consent decrees. See *Taylor v. United States*, Nos. 97-16069, 97-16071, 1998 U.S. App. LEXIS 8550 (9th Cir. May 4, 1998).

237. The PLRA also raises Equal Protection Clause problems, akin to those outlined by Larry Sager in his 1981 discussion of jurisdictional limitations. See Sager, *Constitutional Limitations*, *supra* note 7. See also Tribe, *supra* note 125.



Yet, given ambiguous precedents on congressional control over jurisdiction and remedies and given recent Supreme Court constriction of federal equitable powers in a series of school desegregation and prison cases,<sup>238</sup> limits on congressional power are less clear. If a litigant may return under Rule 60(b) to modify injunctions and consent decrees, what prohibits Congress from specifying the conditions for such modifications? For me, a boundary should be formed at the word "terminated," for Congress is seeking not only to change standards but to alter final, albeit future-looking, decisions. In my view, a meaningful constitutional distinction exists between statutes altering underlying standards that prompt litigants to seek relief from injunctive judgments by going to courts and statutes altering those judgments directly. A constitutional statute may change legal rights over which Congress has regulatory authority but should leave the effects of that change on a particular decree to a judge hearing the litigants' arguments about the ongoing validity of a decree. Congress should not have the capacity to make courts' past promises of enforcement (also known as "final decrees") evaporate.

Turning from the PLRA's effects on judgments to the broader issue of congressional power, the legislation prompts another question—about the relationship between injunctions and consent decrees. Given that injunctions are based on legal standards and to the extent those standards are not constitutionally prescribed, Congress could change the underlying standards and thereby provide the predicate for an court to grant a motion for modification or termination of an injunction. But consent decrees are a form of contract; parties consent (typically for reasons unspecified) to the entry of a judgment. Hence, revisions in the law have no relevance, and Congress might therefore not be able to alter consent decrees.<sup>239</sup>

The next question is whether Congress could prevent the federal courts from entering injunctions or consent decrees. Both forms of relief have long been associated with courts; the constitutionality of blanket prohibitions would return us to a discussion of the "essential attributes of the judicial power."<sup>240</sup> Consent decrees may, however, be distinguished from injunctions. Such decrees are in essence contracts negotiated by parties. Historically, such agreements gained the stature of law through the entry of those contracts as judgments of the courts; a rationale for court involvement was to use courts as a method of recording, as well as enforcing, these agreements.<sup>241</sup> Arguably, Congress could tell the fed-

---

238. See, e.g., *Lewis v. Casey*, 518 U.S. 343, (1996); *Freeman v. Pitts*, 503 U.S. 467 (1992). As Tushnet and Yackle, *supra* note 33, at 55, 71, point out, many of the PLRA rules can be found in Supreme Court doctrinal limitations.

239. But see *Inmates of Suffolk County*, 129 F.3d at 657 (interpreting the PLRA as a congressional decision to "divest district courts of the ability to construct or perpetuate prospective relief when no violation of a federal right exists").

240. *Crowell*, 285 U.S. at 51; see also discussion *supra* notes 89-119 and accompanying text.

241. See Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43. While the treatise writers describe this phenomenon, the underlying social conditions that explain its development have yet to be articulated.

eral courts to abandon this outmoded (and odd) contract-judgment so long as Congress does so for future litigation (thereby avoiding the *Klein/Plaut* problems by not changing extant decrees) and in all or enough kinds of cases (thereby responding to the Equal Protection Clause problem). However, I should note that my idea of what is constitutionally permissible is politically implausible. Given contemporary celebrations of settlement as a mode of disposition of litigation and given incentives to settle offered by consent decrees, Congress is unlikely to ban them in all kinds of cases.

Yet Congress might be able to single out certain kinds of consent decrees, for example, by prohibiting federal courts from entering decrees or judgments, supported by consent, if one of the parties is a local or state government. The argument would be that federalism norms should constrain federal courts from lending their enforcement authority to any judgment not predicated on violations of federal law.<sup>242</sup> Given that, through the PLRA, Congress has already created disincentives to settlement in prison litigation, this route might be conceived to be the next step. On the other hand, selectively disabling local and state officials from having a freedom to negotiate now enjoyed by private litigants hardly expresses federalism's respect for local decisionmaking—and thus might also be politically unlikely.

Suggesting the legality of congressional abolition of consent decrees relates in some respects to arguments made by John Harrison, who contends that congressional power, particularly over remedies but also over lower court jurisdiction, is expansive.<sup>243</sup> I do not share all of John Harrison's views,<sup>244</sup> for I think the constitutional interpretation is more complicated than he suggests.<sup>245</sup> Yet his insistence on the public/private rights distinction<sup>246</sup> opens up at least two interpretative paths to thinking about the PLRA. One possibility is that Congress has no authority over Article III courts' functions that are akin to what the "courts of Westminster" did, a phrase from then-Justice Rehnquist's concurring opinion<sup>247</sup> in the *Northern Pipeline* litigation. If the core of federal judicial

---

242. *Pennhurst State Sch. & Hosps. v. Halderman*, 465 U.S. 89 (1984), provides a basis for this approach.

243. Harrison, *Power of Congress*, *supra* note 6.

244. In either the earlier or the essay in this symposium. See Harrison, *Jurisdiction*, *supra* note 39.

245. His impulse is to rest contemporary interpretations of separation of powers on constitutional text aimed at providing enumerated federal powers. At least two problems emerge. He does not discuss it, but I would think that he would have trouble with the very existence of non-Article III judges holding adjudicatory authority within Article III. That conclusion is, I think, made difficult by using as a source the language of Section I of Article III, describing who shall be a federal judge. Moreover, his assumption that enumerated and limited federal powers is the key concept of the constitution is undermined by the relationship of both the federal courts and the Congress toward Indian tribes, which is not premised on either constitutional or enumerated powers.

246. Harrison, *Jurisdiction*, *supra* note 39 at 2513, 2516-18.

247. *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring) (rejecting the delegation to non-Article III judges of the action at issue, seeking "damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789").

authority is that which existed in private law, then Congress might lack authority to limit consent judgments—not because of *Klein*, *Plaut*, or the Equal Protection Clause—but because this odd judicial remedy was historically available in private rights litigation.<sup>248</sup> However, an alternative view—closer to Larry Sager’s 1981 essay and other scholarly commentary—is that the federal courts are specially situated not as private law courts but as constitutional courts or public law courts. One might use that conception to argue—as David Cole does—that congressional incursions into courts’ remedial authority, particularly in cases to which the government is a party, are constitutionally suspect through interpretations of the due process clause.<sup>249</sup>

#### IV. THE VULNERABILITY OF THE LIFE-TENURED JUDICIARY

##### A. UNHAPPY INTERACTIONS

Let me summarize the narrative that emerges from reading the amalgam of sources that I recommend, which expands Professor Jackson’s emphasis on agreement. Federal judges and Congress agree that the federal judiciary should have a good deal of discretionary authority over the processing of the civil docket. They further agree that more judicial person-power is needed, but that such power should not be supplied by persons equipped with full stature as life-tenured judges. The net result is that the non life-tenured judiciary does a good deal of adjudicatory work.

But having sketched the co-venturing between the 1990s federal judiciary and the current Congress, I should not be read as describing a blissful relationship. As summarized by the American Bar Association’s Commission on Separation of Powers and Judicial Independence in its report issued in July of 1997, we are currently in a “new cycle of intense judicial scrutiny and criticism”<sup>250</sup> in which some judges are subjected to what the ABA terms “demagogic attacks.”<sup>251</sup> While the ABA’s historical review suggests other times of difficult relations between the courts and Congress, we are told that this time, not only is the conversation’s tenor shrill,<sup>252</sup> but also that there is

mounting evidence not only of a loss of confidence and respect but also a diminished understanding of the role of judges and an independent judiciary in protecting and enforcing the rights of the people.<sup>253</sup>

---

248. Resnik, *Judging Consent*, *supra* note 241, at 52-54.

249. Cole, *Jurisdiction and Liberty*, *supra* note 38, at 2494-2507.

250. AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997).

251. *Id.* at 46.

252. *See id.* at ii.

253. *Id.* at vii.

In a similar vein, the American Judicature Society has begun a project on judicial independence,<sup>254</sup> and several conferences have been held to address this issue.<sup>255</sup>

Some members of the public and some members of Congress are attacking individual judges and the judiciary as an entity in a personal and disheartening fashion. In the spring of 1997, a manuscript written by David Barton circulated in Washington; it was called *Impeachment: Restraining an Overactive Judiciary*.<sup>256</sup> After outlining a historical claim that the Framers intended that impeachment be used more than it has, Barton proposed that

[e]ven if it seems that an impeachment conviction against a certain official is unlikely, impeachment should nevertheless be pursued. Why? Because just the process of impeachment serves as a deterrent.<sup>257</sup>

His suggestions have been taken up; in the fall of 1997, a federal district judge in Pennsylvania granted a habeas corpus petition and found himself the subject of an organized campaign aimed at gathering signatures calling for his impeachment because of that ruling.<sup>258</sup> Judges—as adjudicatory authorities—are surely vulnerable, and segments of our body politic are plainly railing against certain judges and judicial power in general.<sup>259</sup>

My point, however, is that we who aspire to a judiciary bravehearted—with images of judges speaking “truth to power” that Bob Cover gave us in his essay on “folktales of jurisdiction”<sup>260</sup>—should review the last decade and consider what truths the federal judiciary presses upon Congress. When the issue is the size of the federal judiciary, its economic support through salaries, COLAs, and courthouses, its discretionary authority over case processing, or attacks on specific members of the judiciary, we find judges who argue for judicial

---

254. American Judicature Society, *Judicial Independence: An Introduction*, 80 JUDICATURE 155 (1997). The Open Society Foundation, funded by George Soros, also has a planned project in this area. (conversation of March 1998 with Charlie Geyh, Reporter to the ABA Project). See also KATZMANN, *supra* note 23, at 107-13, who writes of the “sources of the strain” in judicial-congressional relations and of methods to ameliorate the friction.

255. See also Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165 (1997).

256. DAVID BARTON, *IMPEACHMENT: RESTRAINING AN OVERACTIVE JUDICIARY* (1996).

257. *Id.* at 53. Further discussion of a programmatic effort to limit federal judges, including eliminating the ABA from the screening process and constricting jurisdiction, can be found in Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178 (1997).

258. Joseph Slobodzian, *Did this Judge Free a Killer?*, NAT’L L.J., Nov. 3, 1997, at A6 (describing a petition signed by 37,000 residents of Lancaster County, Pennsylvania).

259. Professor Cole makes an argument for what might be termed “real conflicts”—jurisdiction stripping legislation that he terms a violation of the Due Process Clause, the habeas suspension clause, if not Article III. Cole, *Jurisdiction and Liberty*, *supra* note 38, at 2494. I agree that Congress is attempting to limit federal courts’ power to adjudicate, and I believe that that effort is surely a “real conflict” when we posit the role of the judge as an adjudicator. I am not sure, however, that that conception is shared by the federal judiciary. See Resnik, *Changing Practices, Changing Rules*, *supra* note 45, at 213-19.

260. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985).

insulation based on both constitutional and prudential grounds.<sup>261</sup> Return, for example, to the context of civil justice reform, in which separation of powers arguments are thin. The federal judiciary was unabashed in its energetic opposition to congressional control; the arguments were couched in terms of poor policymaking rather than constitutional prohibitions. We see a similar "speaking up" when individual judges are singled out for criticism. When the President chastened (by noting he was considering calling for the resignation of) a district judge for a decision involving police seizure of evidence and the meaning of the Fourth Amendment, the chief judge of his circuit (joined by three former chief judges of that circuit) replied. They protested that to call for the resignation of a judge with whom one disagreed was a "grave disservice to the principle of an independent judiciary."<sup>262</sup>

But when the proposals threaten the adjudicatory powers of life-tenured judges in cases involving vulnerable segments of the population, the judicial voices are much muted. In the early 1990s, several judges testified about then-pending proposals restricting habeas corpus.<sup>263</sup> Evident divisions within the judiciary produced panels of judges offering divergent suggestions about the problem.<sup>264</sup> A few years later, the Judicial Conference expressed (by way of a

---

261. See, e.g., Rehnquist, *1997 Year-End Report*, *supra* note 71, at 2 ("The federal judiciary must shortly go back to Congress to seek the relief it needs and deserves. Only then will judges who make a lifetime commitment to public service be able to plan their financial futures based on reasonable expectations of compensation.").

262. Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 158 (1997).

263. See *Habeas Corpus Reform: Hearings on S.88, S.1757, and S.1780 Before the Comm. on the Judiciary*, 101st Cong. 118-63, 169-234, 234-92 (1989, 1990) (testimony of panel including the Hon. Donald P. Lay of the Eighth Circuit, the Hon. William J. Holloway Jr. of the Tenth Circuit, and the Hon. Stephen Reinhardt of the Ninth Circuit discussing the importance of access to federal courts and concerned about restrictions; testimony of Chief Judge Charles Clark and Judge Patrick E. Higginbotham, both of the Fifth Circuit, and Chief Judge Paul H. Rooney of the Eleventh Circuit speaking about the problems and needs for revisions, as suggested in proposals provided by a Judicial Conference Committee chaired by Justice Lewis Powell). See also *Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the Senate Comm. on the Judiciary*, 101st Cong. 311-32 (1991) (testimony of the Hon. James L. Oakes of the Second Circuit opposing limitations on the scope of habeas review); *Habeas Corpus Issues: Hearings before the Subcomm. on Civil and Const. Rights of the Senate Comm. on the Judiciary*, 102d Cong. 125-51 (1991) (testimony of the Hon. Gilbert Merritt of the Sixth Circuit (whose views were shared by several other judges) also opposing certain restrictions).

264. The Chief Justice was a proponent, in both case law and commentary, of restrictions on prisoners seeking habeas corpus relief from the federal courts. During the late 1980s, he appointed an ad hoc committee, chaired by Justice Lewis Powell, to study the role of counsel and capital habeas litigation. The Powell Committee's report recommended limits on the number and timing of habeas review. The Chief Justice sought approval for those recommendations from the Judicial Conference, which instead deferred action. Despite the Conference's decision, the Chief Justice transmitted the proposal to the Senate Judiciary Committee. Members of the Conference criticized the Chief Justice; a majority subsequently voted to support a modified set of proposals, contingent upon efforts to improve criminal defense counsel throughout the underlying criminal proceedings. See Linda Greenhouse, *Vote Is a Rebuff for the Chief Justice*, N.Y. TIMES, Mar. 15, 1990, at A16. Greenhouse commented that the open discord reflected "a deep ideological split within the Federal judiciary, with judges appointed in a more liberal era still holding leadership positions on the lower courts even as the Supreme Court itself is now dominated by conservatives." *Id.*

letter to Senator Biden) its concerns about congressional proposals on prison litigation, then called "Stop Turning Out Prisoners"<sup>265</sup> and subsequently evolving into the Prison Litigation Reform Act. The Judicial Conference's letter took "no position on the Act overall" but opposed a proposal imposing restrictions on the use of special masters<sup>266</sup> and raised concern about the alteration of any federal rule "without resort to the processes contemplated by the Rules Enabling Act."<sup>267</sup> In addition, the Conference described the bill as prompting "complex legal, procedural, and practical issues" and shared its "thoughts" about the problems raised for the administration of justice.<sup>268</sup> Anticipated new filings would require "additional court hours" to be consumed "at significant additional costs."<sup>269</sup> Also noted were federalism problems with the draft, then aimed at limiting state court as well as federal remedies. Turning to the termination provisions and reiterating its "no position" posture, the Judicial Conference stated that the Act "implicates the principle that Article III courts resolve cases and controversies by rendering dispositive judgments" and cited *Plaut*.<sup>270</sup> But no concerted, persistent effort followed from the collective federal judiciary to argue against restrictions on their juridical remedial powers.<sup>271</sup>

While some might be concerned that federal judges could not—given their role—do much more, few would suggest that they can offer no signals. Invitations by Congress to testify have come in the past. Further, neither the Chief Justice nor the Judicial Conference has been reticent in the role of "advice-giver."<sup>272</sup> The 1995 *Long Range Plan*'s discussion of the scope of federal jurisdiction could easily have included comments of concern about restrictions on federal courts' remedial authority. Recall also the lobbying about Article III status of bankruptcy judges in the wake of the *Northern Pipeline* decision.<sup>273</sup> Also reread the current Chief Justice's 1997 praise of the recent legislation embodying jurisdictional restrictions.<sup>274</sup> Judges know how to send signals in opinions and in other documents, and members of Congress know how to be responsive when they want to be.

---

265. S. 400, 104th Cong. (1995).

266. See Letter of L. Ralph Mecham, Secretary of the Judicial Conference of the United States to the Hon. Joseph R. Biden, Jr., Ranking Minority Member, Senate Comm. on the Judiciary 1 (May 25, 1995) (on file with the author).

267. *Id.* at 3.

268. *Id.* at 2.

269. *Id.*

270. *Id.* at 3.

271. Compare Justice Kennedy's comment, in *1995 House Appropriations Hearings*, *supra* note 185, at 16, that the federal judiciary does "have the role and the responsibility and the duty to comment when what the Congress proposes will effect the historic role of the Federal judiciary and the historic role of the courts."

272. Katyal, *supra* note 157.

273. See Countryman, *supra* note 115, at 44.

274. See Rehnquist, *1997 Year-End Report*, *supra* note 71.

## B. ANXIOUS JURISTS

To conclude, the discussion about the federal courts and Congress is enlightened by looking at forms of court-Congress “speech” beyond what Congress says through statutes and beyond what the courts through their opinions in cases. The relationship between the federal courts, the Executive, and the Congress is not expressed only by means of statutes and case law, but also through working interactions. While a few of those moments are highly visible—such as struggles between the Executive and Senate in confirmation hearings—a good deal of the activity is only made visible by looking at documents generated as part of testimony before Congress, by reading the colloquies on the floor of Congress,<sup>275</sup> or by reviewing the reports written either by the Judicial Conference of the United States or by others within the federal judiciary.

A focus on this array of materials offers little by way of comfort for those wanting to imagine the federal judiciary as a font of rights-guarding. At the moment, most of these judges look nervous, worried about whether Senator Grassley will send them another questionnaire and eager—at least for now—to avoid confrontations with this Congress. Despite claims by contemporary federal judges that the federal judiciary should not grow because of the danger of *becoming* a bureaucracy, the current federal judiciary *is* already a bureaucratic institution, heavily dependent on Congress for resources and plainly eager to be as responsive as possible.<sup>276</sup>

The image of an anxious judiciary is not unknown to United States history; it is typically seen at times of war or when constitutional crises loom. Decisions like *McCardle* are often explained by reference to the risks attendant to the decision, given reconstruction and the fragility of the post-civil war union. Given this history, several possible explanations for contemporary choices made by the life-tenured judiciary are available. One is that its membership believes current onslaughts on courts to be akin to war-like conditions and is wisely biding time, awaiting a shift in national representatives and a climate more understanding of the need for an expansive judiciary, active and appropriately soliticious to the rights of unpopular litigants. Another possibility is that an emphasis on the “collective” voice of the life-tenured judiciary is misplaced,

---

275. For example, in 1995, Senators Charles E. Grassley, Phil Gramm, and Orrin G. Hatch had a Colloquy on Gender Bias Studies; they argued that these studies (sponsored by some of the federal circuits and authorizing inquiry into participants’ understandings of the fairness of federal court proceedings) were destructive to judicial independence and should be stopped. The Violence Against Women Act, 42 U.S.C. §§ 13991-14001, enacted in 1994, included specific provisions supportive of these efforts. Nevertheless, several courts stopped their work for some time to avoid distressing Senators who played prominent roles in the judicial budgetary process.

276. See, e.g., OPTIMAL UTILIZATION, *supra* note 84, at 44, reporting to the Congress on the efforts undertaken by the judiciary “to provide high quality services as cost effectively as it can.” See also *Federal Judiciary Requests Smallest Budget Increase in 20 Years for FY 99*, 30 THIRD BRANCH 1 (Mar. 1998) (“For the third consecutive year the federal Judiciary has reduced its level of growth in both appropriate funds and total obligations . . .”).

because beneath the official statements lies a relatively small number of judges (such as members of the Judicial Conference) who do not necessarily reflect the views of the many judges with whom they sit.<sup>277</sup> Yet another explanation is that life-tenured judges agree with Congress about the reshaping of federal court jurisdiction, and moreover, are correct on the merits—that the doors have been opened too wide and retrenchment is to be celebrated.

Yet move from the specific issues that occupy the other essays in this symposium—access by prisoners, immigrants, and civil rights litigants—to the structural questions: the meaning of Article III and congressional power over the judicial branch. After reading this expanded set of sources, one returns to the case law and doctrine with lowered expectations. Upon looking at the contemporary papers authored by federal judges as commentators on their own authority, one learns not to anticipate doctrinal statements or even dicta from the Article III judiciary that will put many brakes on Congress. When turning to the federal judiciary as an institution, one finds an organization urging Congress to restrain itself from rights-expansion but providing little by way of self-description about why to cherish the Article III judiciary and about what role such judges should play in a constitutional democracy.

At issue for those of us who teach and write about the federal courts is what, if any, position to play. Do we elaborate arguments to tell federal judges of a protected space, free from Congress, in an effort to make it so? Do we conclude that Article III safeguards, shaped more than two centuries ago, are insufficient for the administrative state? That life tenure and salary protections do not begin to insulate the judicial institution in the late twentieth century from the powers of the legislature? Do we shift our focus from the life-tenured to other judges, to learn whether they may live up to such expectations despite their absence of the constitutional trappings of independence? Or do we become advocates on their behalf for forms of judicial independence to enable the activity of judging within a constitutional democracy to flourish?

---

277. 28 U.S.C. § 331 (1996) details that chief judges of circuits and selected district judges make up the Conference.