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This article was originally delivered as The Morrison Lecture *at the annual meeting of the California State Bar Association in October 1981. The author draws upon his more than eighteen years experience as a judge "on a busy court of appeals" to comment on the problems facing today's federal judiciary.*

The title of this article is not intended to disparage the court on which I sit. It derives rather from the statement in article III of the Constitution that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[1]

I could, of course, perhaps have wished that the Framers, in accomplishing their great purposes in Philadelphia, had used some word other than "inferior." When a layman asks somebody what I do, and is told that "He's an inferior court judge," there is a certain lurking ambiguity as to which noun the adjective may be taken to modify. But the terminology of "superior" and "inferior" courts was widely employed in the American colonies, familiar as they were with the judicial hierarchies of the mother country; and it was only natural that the word "inferior" should crop up in the Constitution.

There was, thus, no problem in the Constitutional Convention about the language appropriate for identifying the repositories of the national judicial power. There was some difference of view as to whether they should extend beyond the "one supreme Court" created by article III, a respectable number of the delegates being of the opinion that the courts of the new states would be fully ad-

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1. U.S. CONST. art. III, § 1.

equate and competent to ascertain and apply federal law, subject to the supervision of that "one supreme Court."[2] The conflict was resolved by the genius for constructive compromise which characterized the deliberations of that assembly. In this instance, the compromise left to the Congress of the United States the decision of what should be done about creating lower federal courts.

The first session of the new Congress acted promptly to answer that question in the affirmative. Federal district courts were created to function at the trial level, and also three hybrid circuit courts with both trial and appellate jurisdiction, the latter being manned originally by a district judge and two Supreme Court Justices. This latter institution proved to be quite unsatisfactory,[3] and I will not pursue its tortured subsequent history.

The advent of the federal circuit courts of appeals as we know them today came in 1890.[4] One of the highlights of the debate in Congress was an impassioned speech supporting the new departure by a Representative from Texas, in which he referred to the "kingly power" of district judges.[5] I have always suspected that, then and since, many of the district judges must have regarded the congressional action as simply creating a new tyranny of its own, even as we on the courts of appeals, seeing our handiwork demolished by an occasional thunderbolt from above, are tempted sadly to reflect upon man's inhumanity to man. In any event, the basic structure of the inferior federal courts was finally determined at that time, and it has remained essentially unaltered down to the present moment.

We are less than ten years away from the one hundredth anniversary of the ultimate shaping of the structure of the federal judicial system. And within this speedily foreshortening decade of the 1980's we will, in only six more years, be celebrating the bicentennial of the Constitution so miraculously wrought in the Philadelphia of 1787. Surely we of the law in all of its manifestations owe it both to our profession and to our posterity to anticipate the searching reexamination which those significant milestones will inevitably stimulate.

The Chief Justice of the United States—a close and thoughtful observer of the functioning of the federal judicial system both

2. *See* 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 104-05, 124-25 (rev. ed. 1937).

3. *See generally* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM 11-14 (1927).

4. *See* 28 U.S.C. § 43 (1976) (originally enacted as Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826); *see also* 28 U.S.C. § 1291 (1976) (based on Act of March 3, 1911, ch. 231, § 128, 36 Stat. 1133).

5. 21 CONG. REC. 3404 (1890) (remarks of Rep. Culberson).

from its pinnacle and from fourteen years of service on a court of appeals—more than a year ago invited a prominent member of the California Bar Association and federal circuit judge, The Honorable J. Clifford Wallace, to focus his attention on the problems of the system as they bid fair to take shape over the next ten to twenty years. A first fruit of Judge Wallace's intense and scholarly labors has been the introduction in the Senate this past summer of a bill creating a Federal Courts Study Commission and a Federal Courts Advisory Council on the Future of the Judiciary.[6] The former is a legislative commission to study all aspects of the functioning of the federal courts and to recommend desirable changes, including revision, if necessary, of the relevant provisions of the Constitution and the federal statutes. The Commission's life would be of limited duration, but the Council, representing all three branches of the national government, would be an ongoing body to protect and advance the effective operation of the federal judiciary at all its levels.

In seeking a subject worthy of the long and honorable tradition of *The Morrison Lecture*, it seemed to me that perhaps the most useful thing I could do would be, from the vantage point of more than eighteen years on a busy court of appeals, to formulate my own impressions of how the system is working and what perhaps could be done to meet its most urgent needs, now and in the foreseeable future.

Overshadowing all else is, of course, the central and overriding phenomenon of growth in the sheer volume of cases crowding in upon the federal system at each of its three tiers. The Administrative Office of the United States Courts has recently made projections of future growth to the year 2000, based both on the years from 1900 to 1980, and the more immediate period from 1975 to 1980 when the growth curve sharply rose.[7] Each produces results that are virtually stupendous in terms of, first, the number of filings that may be expected, and second, the number of new judgeships that will be required.

But everything in this country seems to be getting bigger, and all of our social and governmental institutions have had constantly to devise new methods of coping. Growth alone, therefore,

6. S. 1530, 97th Cong., 1st Sess. (1981).

7. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR 216 [hereinafter cited as ANNUAL REPORT].

does not necessarily dictate what those methods should be. The courts have not been behindhand in focusing upon the intrinsic importance of various classes of cases, and developing more summary means of dealing with those cases, for example, where only the parties, and not the world at large, need to be told why the court reached the result it did. Thus, my court, like the Ninth Circuit and others, has resorted increasingly to brief and unpublished memoranda attached to the judgments which are not to be cited except for invocation of the doctrines of res judicata and collateral estoppel.

One thing that growth has made imperative, however, is very high quality indeed in the making of judicial appointments. There was a time, and not so long ago, when a court could carry on its back a weak appointee, but those days are gone. The judges must today have confidence in the abilities of each other, in order that the useful principle of the division of labor eliminating undue duplication of effort may be employed. The appointment of a judge who cannot gain that confidence is disastrous for the effective functioning of the entire court.

My own observation is that the appointing authority has become increasingly responsive to that fact, particularly when great reliance is placed upon the Attorney General who is, after all, the single biggest litigant in the federal courts and for whom, in common with all other litigants, the competence of the judges is of critical importance. At the same time, many more Senators than formerly have gotten the true religion on this score and their recommendations, thanks in large part to the influence of the organized bar, have become more responsible.

We are presently in the first year of a new appointing authority, and as always, the first appointments are the center of great public attention. My judicial years have embraced more than one of these transitions. My experience has uniformly and happily been that, if the new judge is a good lawyer and intellectually honest, the matter of pre-judicial preferences and ideologies tends to take care of itself in the shift of attention from abstract principles to the records of individual cases.

This is surely one of the factors that have contributed to the surprisingly large degree of cohesiveness that characterizes the functioning of the federal courts of appeals, as indicated by the statistics showing relatively infrequent dissents and few occasions necessitating reexamination by the entire court sitting *en banc* of the result reached by a three-judge panel.[8] There are

8. *See* J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 189-221 (1981).

other influences of an informal nature that also work to this end. Any serious prospect for a court of appeals appointment is, almost by definition, serious in his or her own attitude towards the law as a profession; and the judges as a group tend to share similar backgrounds of legal experience and common values in terms of their personal perceptions of the role a judge should play. Further, unlike the district judge who knows both the loneliness and the independence of the single decision-maker, the appellate judges participate in a collective process which exerts its own constraints through traditions of personal civility and reasoning together in conference discussions.

The view from a court of appeals extends in one direction towards the district court whose work it reviews, and, of course, to the administrative agencies whose product in the main comes to it directly. In the other direction, that view is fixedly upon the Supreme Court. The trial courts and agencies perform functions quite different from those of an appellate court, and thus they do not present the comparative interest that one appellate court quite naturally has in another, especially when the latter possesses the ultimate power of decision.

In looking at the Supreme Court, a federal intermediate appellate judge is likely to note carefully some significant differences. First and foremost is the extent to which the Supreme Court controls its own docket. Since Chief Justice Taft was successful in pushing through Congress the certiorari legislation in 1925,[9] the Court has seen even further reductions in the appeals coming to it as of right, and further steps in this direction are not only desirable but likely. For the courts of appeals, however, there is no discretion to deny review in respect of any of the appeals that are flooding it.

Appellate courts are customarily thought of as having two principal functions. One is essentially supervisory in the sense that it is directed to the correction of error in the application of existing law by the district court or agency under review. The other is the "making" of law to govern situations where either there is no existing law to apply, or such law as does apply should be changed to the extent that it is within the reviewing court's power to do so.

A consequence of the Supreme Court's increasing power to control its docket is that the mere fact that a lower court decision is

9. *See* 28 U.S.C. § 1254 (1976).

wrong is not enough to assure a grant of review in competition with other cases where definitive law needs to be established. The Supreme Court's lawmaking role has, thus, caused its supervisory error-correcting role to diminish. By contrast, the courts of appeals, with no docket control power, are heavily in the business of correcting decisional errors, although inevitable gaps in Supreme Court doctrine and in the reach of statutes, as well as express statutory language in some cases, leave them with large "lawmaking" responsibilities also. Needless to say, a court of appeals with too many cases to handle experiences severe tensions in trying to meet both of these responsibilities.

Those tensions have invited resolution by increasing resort in the courts of appeals to assembly line expedients which do not satisfy the public and the practicing bar any more than they do the judges themselves. I know that my own participation in the decisional process has changed markedly since my first ten years and more on the bench. That participation is much less intellectually satisfying than formerly because there is too much paper shuffling and too little time for personal involvement in research and reflection. It is the same discomfort I used to feel as a practicing lawyer whenever I got over-extended.

The time has surely come, therefore, to give careful consideration to changes, however novel and far-reaching, that will check the proliferation of both cases and judges. The call to action in this regard was sounded by Justice Brandeis when, as long ago as the time the certiorari bill was enacted for the Supreme Court in 1925, he wrote a letter to Professor Felix Frankfurter of the Harvard Law School. The Supreme Court, said Justice Brandeis, was "venerated throughout the land" because "the official coat has been cut according to the human cloth."[10] Contrarily, lower federal courts were "all subject to criticism and or execration"[11] by reason of the fact that their work loads surpassed "their human limitations."[12]

Fifty years and more later, the cutting of that coat, in Justice Brandeis's phrase, or, as in the words of Judge Henry Friendly, "averting the flood by lessening the flow," is of the greatest urgency.[13] A well-conceived and discriminating program to that end is clearly the first order of federal judicial business today.

High on any such agenda is the elimination of diversity jurisdic-

10. Letter from Louis Brandeis to Felix Frankfurter, Feb. 6, 1925, *quoted in* J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 262 (1981).

11. *Id.*

12. *Id.*

13. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

tion. The incidence of that jurisdiction is substantial, inasmuch as diversity suits account for one-fourth of the civil dockets of the district courts and one-sixth of the civil appeals filed in the courts of appeals.[14] Chief Justice Warren in 1959 specifically requested the American Law Institute to undertake a study of the proper allocation of jurisdiction between the state and federal courts.[15] That study was carried out by the most expert assistance available. Squarely in the final target sight was the diversity jurisdiction.

The Institute, although disposed to believe that complete elimination was desirable, decided, as a matter of tactics, to restrict its proposal for the time being to prevent any citizen of a state from invoking diversity jurisdiction in that state. But even that limited proposal, to which there could seem to be no rational opposition in view of the original justification for diversity as protecting out-of-state parties against local prejudice, was opposed by the bar generally. The passage of time saw some movement towards total elimination, and the House of Representatives passed a bill to that effect in 1978, but the Senate did not take it up.[16]

Since federal jurisdiction is not a subject of much interest to the ordinary citizen, the Congressmen are in the position of knowing that voting to eliminate diversity jurisdiction will not win them any votes, but will doubtless cost them some among the lawyers who, by simply remaining silent, effectively signal their wish to retain access to the federal courts. Unless and until the organized bar is prepared to affirmatively endorse the dropping of diversity, it appears unlikely that anything will happen.

The federal courts, whose reason for being is to declare federal law and to assure its uniformity and supremacy, obviously have more pressing things to do than to try to ascertain what state law is and to apply it in private civil cases. There is also no evidence that local prejudice against non-residents is a problem of the dimensions that it was thought to be as the country moved away from the colonial era.

I respectfully suggest that it is wholly irrational for professional interest and convenience to be made a standard for the allocation

14. *See* ANNUAL REPORT, *supra* note 7, at 227.

15. *See* C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 84-85 (1969).

16. H.R. 9123, 95th Cong., 1st Sess. (1978).

of jurisdiction between state and federal courts. And most especially is this so in California which possesses one of the strongest and most distinguished state court systems in the entire nation. The Conference of State Chief Justices, although initially concerned about the added caseload, has more recently adopted a resolution certifying that the state courts are ready, willing, and able to take over the job. Only the organized bar stands in the way, and anyone genuinely concerned with federal justice can only hope that this barrier will soon begin to be breached.

If diversity jurisdiction is to continue, then it seems to me that such cases should be prime candidates for inclusion under any system in contemplation for discretionary leave to appeal in the federal courts of appeals. This concept, which obviously would be partially responsive to Justice Brandeis's concerns, is being increasingly articulated by some of our most perceptive judges. Judge Friendly some years ago proposed discretionary review of administrative agency actions which have been reviewed in the first instance by a district court.[17] Social Security claims and challenged personnel actions would be obvious candidates for such treatment, as would also the burgeoning field of Freedom of Information Act appeals. Chief Judge Lay of the Eighth Circuit recently published a thoughtful proposal that Judge Friendly's suggestion be expanded to include all civil cases that appear to be insubstantial or in which the district court opinion appears on its face to be correct as a matter of fact or law.[18] The petition for leave to review procedure which he contemplates is carefully circumscribed in such a manner as to assure that any appeal of significance will be given plenary hearing and consideration.

In the justifiable concern that has sparked the movement to give the Supreme Court virtually complete control of its docket, the comparable need of the courts of appeals for relief of a similar nature has, I suggest, been neglected. Such relief for the courts of appeals cannot be anything as extensive because, as Justice Stevens—who has served at both levels of the federal appellate system—said in an opinion earlier this year: "The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our Courts of Appeals. Today they are in truth the courts of last resort for almost all federal litigation."[19]

The fact is that, just as the guarantee in the Constitution of jury

17. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 176-77 (1973).

18. *See* Lay, *A Proposal for Discretionary Review in the Federal Courts of Appeal*, 34 Sw. L.J. 1151 (1981).

19. Watt v. Alaska, 451 U.S. 259, 275 (1981).

trial in any civil suit involving more than twenty dollars has a marked air of unreality about it these days, so must there be some erosion of the long-established assumption that every litigant is entitled to at least one plenary appeal. The Constitution does not undergird that assumption, as witness the fact that Congress was nearly a century late in providing adequate appeals in federal criminal cases. I do not suggest any retreat in that field, but there are vast differences in the nature and importance of the civil cases that are presently appealable as of right. The Republic will not founder or the liberties of the citizen be destroyed if carefully considered limitations on that right begin to make their appearance.

A matter that has rankled relations between state and federal courts for some years now is the collateral attack on final state criminal convictions provided by Congress in the federal courts.[20] A state prisoner who has unsuccessfully exhausted his avenues of state trial and appellate relief can, even many years later when retrial is not practically feasible, attack that conviction in the federal district court as violative of federal law, and procure his release if such a violation is established. Since the same claim of federal law violation can, and often is, made in the trial and appellate courts of the state, with certiorari review available in the Supreme Court, the state judges understandably have some difficulty in seeing why their work should be reexamined in the federal courts whenever a colorable claim of violation is alleged.

The one place where this cannot be done is in the District of Columbia. For many years the District of Columbia had a municipal court whose criminal jurisdiction was limited to misdemeanors. All felonies proscribed in the District of Columbia Code were tried in the United States District Court, although they consisted of the typical state crimes such as murder, rape, robbery, burglary, assault, and so on. Some twelve years ago Congress enacted a comprehensive reorganization of both the local and federal courts in the District of Columbia which, expressly analogizing the District of Columbia to a state, provided that such offenses should be tried in a greatly enlarged and strengthened state court system, which is today one of the best in the nation.[21]

20. *See* 28 U.S.C. § 2254 (1976).

21. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

A person charged with a felony under the D.C. Code is indicted by a state grand jury, tried in a new Superior Court of general civil and criminal jurisdiction, and has an appeal to the District of Columbia Court of Appeals which is now the supreme court for the residents of the District of Columbia and whose judgments are subject to review by the United States Supreme Court as in the case of any other state supreme court.

In doing all this, the Congress, tracking the language of the collateral attack section of the U.S. Code, provided in the D.C. Code for collateral attack upon a D.C. criminal conviction to be made in the new and improved D.C. court system.[22] It explicitly declared, however, that no further collateral challenge could be made in the federal courts in the District of Columbia.[23] Thus it is that for some years now, although a state prisoner across the Potomac in Virginia, or one over the line in Maryland, has a second chance for collateral review of his conviction in the federal courts in those states, a state prisoner in the District of Columbia does not.

This seeming anomaly was challenged on constitutional grounds in the federal courts in the District, but the Supreme Court ultimately held that Congress could constitutionally make the choice it did, articulating that result in terms which would appear to give Congress the same latitude to end in all of the states collateral attack by state prisoners in the federal courts.[24] There have been no reports, so far as I am aware, of egregious injustices to District of Columbia prisoners because of this denial of state habeas jurisdiction in the federal courts, although it would be useful if a careful study were made of the collateral attack cases heard and disposed of by the District of Columbia courts over the last decade. If such a study were to show no horror stories of federal rights denied, as appears to me likely, then Congress might well consider the abolition of collateral attack by state prisoners in the federal courts, at least in certain kinds of cases.

The early finality of criminal convictions is generally desirable, and especially so when that can be assured without duplication of judicial effort. The resources of the federal courts at the present time are strained by their own criminal caseloads. They should not have to exercise a supervisory authority over the administration of state criminal laws unless that is plainly necessary in the interest of justice.

Certainly there appears to have been a steadily increasing sensitivity by state judges to claims of federal right—a sensitivity

22. D.C. CODE ANN. § 23-110 (1981).
23. *Id.*, § 23-110(g).
24. *See* Swain v. Pressley, 430 U.S. 372 (1977).

that can only be frustrated by needless subjection to second-guessing by federal judges. Since Congress has in effect made the District of Columbia a laboratory for testing the need for federal collateral attack by state prisoners, the Congress would do well to study carefully the actual results of that experiment. If it turns out to be positive, then the opportunity exists to eliminate simultaneously a significant number of cases from the federal courts and a condition which has always roiled the waters of federal-state relations.

Many thoughtful observers of the current operations of the federal judicial system have, over the last several years, come to believe that there is a need for increased appellate capacity at the highest level. At the last Term of the Supreme Court, 154 cases were orally argued, and 144 were disposed of by full signed opinions.[25]

It has become increasingly clear that, whether the Supreme Court annually receives 4,000 or 10,000 certiorari petitions and appeals as of right, only about 150 cases, give or take a few more or less each year, will be given plenary treatment. This seems to be the figure which the Supreme Court has, several years ago, tacitly determined as constituting its capacity for such treatment.

Although circuit judges naturally experience feelings of gratification and relief when certiorari is denied in important and difficult cases they have decided, all of us know that many of such cases warranted authoritative Supreme Court resolution in order that federal law shall be uniform and definitive throughout the nation. This is especially true in cases where there is conflict among the circuits.

Given the policy and practice of the Internal Revenue Service not to acquiesce in circuit decisions it believes to be wrong, and to await the opportunity to seek a different result in another circuit, it is literally possible for taxpayers in one circuit to pay their taxes on a different and more favorable basis than the taxpayers in another. This is wholly at variance with the concept of equality of treatment under the law, and perpetuates injustice until the Supreme Court finds it possible, if it ever does, to get around to resolving the conflict. Since tax cases tend not to involve constitutional questions but only interpretations of the frequently ar-

25. *See* 50 U.S.L.W. 3044 (Aug. 11, 1981) (statistical recap of the Court's workload during the last three terms).

cane and convoluted rhetoric of the Internal Revenue Code, there is no compelling reason why the Supreme Court's energies should be diverted from its overriding responsibility to settle the law of the Constitution.

Going back to the report of the Freund Commission a decade ago,[26] there have been repeated proposals that there be some mechanism by which the Supreme Court could delegate the job of resolving inter-circuit conflicts, and perhaps other types of less important cases as well. A distinguished and expert legislative commission headed by Senator Hruska recommended such a step a few years back,[27] and only this summer Senator Heflin, a former Chief Justice of the Alabama Supreme Court and an effective judicial reformer in his state, introduced a bill to the same end.[28]

Such proposals have thus far gotten nowhere. But, in my judgment, this has been true because the suggestions have been unnecessarily ambitious in their preoccupation with the creation of an entirely new institution to be known as a National Court of Appeals. Movement in this direction can and should, in my view, be more tentative and experimental in character, with reliance for the time being on existing judicial resources rather than the creation of a new institution with newly appointed judges of its own. The ill-fated Commerce Court created in the second decade of this century argues strongly against summoning such an institution into being on an independent and permanent basis.[29]

No one knows, for example, the degree of use the Supreme Court would make of a case referral power. I suspect that it would approach such a power gingerly in the first instance, and that the number of referrals made by it would be few indeed until, if and when, it gains confidence in the value and efficacy of such a new and striking departure in the discharge of its decisional responsibilities. A new court staffed by newly-appointed judges might well have precious little to do, with growing doubts in the community at large about the wisdom and expense of bringing the new tribunal into being. Under such circumstances, dismantlement would be painful, and also cast a cloud over the future experimentation which surely ought to be the order of the day in grappling with the problems of skyrocketing litigation.

How much more sensible it would seem to be to create a temporary court with an experienced judge from each circuit to receive

26. *See* Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247 (1973).

27. *See* Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579, 585-98.

28. S. 1529, 97th Cong., 1st Sess. (1981).

29. *See* F. FRANKFURTER & J. LANDIS, *supra* note 3, at 153-74.

and dispose of such referrals as the Supreme Court chooses to make. This device, unlike the Commerce Court, has served the federal judiciary—and the nation—very well indeed. This was true of the Temporary Emergency Court of Appeals set up by Congress in World War II to handle disputes under price control legislation.[30] It is true of the current Temporary Emergency Court of Appeals functioning in the energy field.[31] It is true of the District Court Judicial Panel on Multidistrict Litigation,[32] which is the "traffic cop" for directing the flow of claims being asserted simultaneously in multiple district courts throughout the country, and of the Special Railroad Court under the Regional Rail Reorganization Act.[33] These tribunals all functioned as needed, and the judges assigned to them were not detached from their regular courts. No new courthouses were required, and the extra expense to the system was minimal.

Starting with a court of this character, and confining its jurisdiction in the first instance to receiving referrals from the Supreme Court of inter-circuit conflicts, is the best way to edge into this ticklish enlargement of our federal appellate capacity. It is also the one most likely to command, for its necessary legislative authorization, the support of the Supreme Court, the federal judges generally, and the legal community.

A provisional approach of this kind assures that the continuance of such a court will turn solely on the degree of its utilization and its effectiveness in performance. Its termination, if that should prove to be the popular verdict, would be uncomplicated. If it should, contrarily, come to be regarded by the Supreme Court as a helpful adjunct in its task of assuring the uniformity and supremacy of federal law, then that will be time enough to consider enlarging the referral power to include other kinds of cases, and the establishment of a new and separate judicial institution. In either event, the value of proceeding experimentally and tentatively in seeking solutions to some of our present problems will have been vindicated.

Turning to the matter of jurisdiction, it is important to recognize that there are distinctly wrong as well as right ways of altering the current allocation of judicial power between the state and

30. *See* 299 F.2d 1 (1961). The court held its final session on December 6, 1961.
31. *See* ANNUAL REPORT, *supra* note 7, at 213.
32. *See* 28 U.S.C. § 1407 (1976).
33. *See* ANNUAL REPORT, *supra* note 7, at 213.

the federal courts. Falling into the former category, in my submission, are the bills pending in the present Congress to put certain specific constitutional issues beyond the reach of the federal courts.[34] These bills are multiple in number, as well as various in their approaches. Some are addressed to both the inferior federal courts and the Supreme Court, and some only to the one or the other. It is enough for present purposes to deal only with those confined to the Supreme Court, because they pose the most serious danger to our constitutional system.

First let me say that it is not only the ordinary citizen who periodically feels disappointment and frustration with particular Supreme Court rulings. That is the frequent position of an inferior court judge who sees his best effort rejected on high. But deep down we know that it is essential to constitutional government that there be one ultimate voice, and that it be not stilled on any significant question affecting the rights and liberties of any and all of our people under the protection of the Constitution. We also know that the Constitution itself provides the means by which any Supreme Court reading of that document that is unacceptable to two-thirds of each House of Congress, and to three-fourths of the state legislatures, may be nullified, that being the particular amending device by which three Supreme Court decisions in our history have been overcome.[35]

The present proposals in Congress, in contrast, contemplate that a simple majority in each House of Congress, together with approval by the President, are enough to foreclose consideration by the Supreme Court of such issues as school prayers and busing, abortion, and an all-male draft. The authority for such selective reductions in the Supreme Court's appellate jurisdiction is said to reside in Article III's grant of such jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[36]

Whether such a claim is founded upon a correct reading of those words is a tangled and complex question which, I believe it fair to say, no one can presently answer with complete assurance. Plausible arguments can be, and are, made both ways. What is certain is that Congress only once has acted, overriding a presidential veto, to compel the Supreme Court to address the ques-

34. *See, e.g.*, S. 481, 97th Cong., 1st Sess. (1981); H.R. 3225, 97th Cong., 1st Sess. (1981); H.R. 311, 97th Cong., 1st Sess. (1981).

35. The three instances are: 1) the 11th amendment overruled Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); 2) the 14th amendment overruled Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); and 3) the 16th amendment overruled Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1888).

36. U.S. CONST. art. III, § 2.

tion, and that was in the troubled Reconstruction Era immediately following the Civil War. And that case, *Ex parte McCardle*,[37] is viewed by many constitutional scholars as giving only a partial answer that is itself arguably inconclusive in respect of factual circumstances different from those that obtained in that case.

There is nothing new about the present efforts in Congress to diminish the Supreme Court by legislative incursions upon its appellate jurisdiction. Daniel Webster, successively as chairman of the House and Senate Judiciary Committees, successfully fended off such forays during the period of popular ascendancy following upon the Jackson Administration in the mid-19th century.[38] In the 1950's, hostility to the Warren Court in some quarters of the Congress mounted a major attack to this end, but the organized bar—led by the American Bar Association—rallied in time to turn back that assault in a manner reminiscent of the way that responsible lawyers of all shades of opinion formed an impregnable protective phalanx against Franklin Roosevelt's court-packing proposal at the time when his political power was at its very peak.[39]

On those occasions the lawyers did not fall back to purely defensive positions that the Congress could not constitutionally do what was proposed. Instead, they counter-attacked on grounds of wise public policy, that is to say, what is best for the country in terms of the scheme of government embodied in the Constitution. Even if the exceptions clause be taken to contain the power over the Supreme Court's appellate jurisdiction that some claim for it, there is still the question of whether the exercise of that power by Congress is in the public interest.

In pressing policy and practical objectives to the pending legislation in recent testimony before a congressional committee, Professor William Van Alstyne, of the Duke University Law School, noted the "chaos of constitutional uncertainty" that would result, and stated that "the best reason here, in Congress," (for rejecting the proposed legislation) is that Congress should "not welcome a fragmented Constitution of the United States of no national supremacy at all, but merely a ludicrous document of vagrant

37. 74 U.S. (1 Wall.) 506 (1869).

38. *See generally* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 686-728 (1922).

39. *See generally* P. JACKSON, DISSENT IN THE SUPREME COURT 189-90 (1969).

'meanings' unreviewably determined by state courts . . . ."[40]

Once again the organized bar, with the American Bar Association in the forefront, is deploying its forces in support of the Supreme Court by urging Congress not to enact the bills in question. Certainly that course would commend itself to a President of the United States who, in vetoing in 1868 the only bill of this nature that has ever been enacted, said:

> In public estimation, it [the Supreme Court] combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into or mistaken for an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences.[41]

The nation would have been better served if those words had been heeded by the Congress to which they were addressed. They merit the careful attention of the present Congress, and of all of us.

40. *Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 104 (1981) (statement of Prof. William Van Alstyne).

41. Veto of President Andrew Johnson (Mar. 23, 1868), *quoted in* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 477 (1922).