The Future of the Federal Judiciary

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The main problem with Federal law is that there is too much of it. Exacerbating the problems is the fact that all too often federal laws are vague, ambiguous, in contradiction to other laws, or, *mirabile dictu*, contradictory within themselves.

Some of the consequences of the quantitative growth and qualitative deterioration in the Federal law are painfully evident. Judge Richard A. Posner, in his 1985 book, *The Federal Courts: Crisis and Reform*, analyzed the caseload statistics for the period from 1960 to 1983, and the facts are dramatic: annual case filings in the Federal district courts increased from about 80,000 in 1960 to nearly 280,000 in 1983; over the same period, annual filings in the courts of appeals increased from roughly 3,800 to more than 29,500; and applications for review in the Supreme Court rose from about 1,900 to more than 4,200. In this 23-year interval, the number of completed Federal trials increased by 110 percent and the number of signed Federal appellate opinions grew by 183 percent. This period also saw the rise of the unsigned, unpublished, uncitable appellate opinion, so the actual increase in the number of appellate dispositions was even greater.

During the same timespan the number of Federal judges also increased significantly. In 1960 there were 237 district judges and 66 circuit judges; in 1983 those numbers had grown to 484 and 127. That growth was extraordinary, far outstripping the contemporaneous increase in population. The judicial census is even greater—indeed, substantially greater—today.

But the numbers sitting on the bench do not begin to tell the story of what Judge Posner called a rising judicial “bureaucracy”: by 1983, the Federal judicial system had 18,255 employees and an annual budget of about one billion dollars. These statistics refer only to direct employment and expenditure by the Judicial Branch of the Federal Government. They do not begin to account for the resources that are poured into litigation through the employment of lawyers, the engagement of witnesses, the conduct of pre-trial discovery, or the generation of paper. And, of course, none of these surveys even begins to compute the opportunity costs.

This stunning growth in Federal litigation is out of all proportion to, say, the increase in gross national product during the same decades. An explanation for it will not be found in the criminal caseload, apart from habeas corpus proceedings; criminal prosecutions have maintained a fairly constant level since 1960. (More recent develop-

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ments in Federal drug law enforcement may change this). Yet, aside from criminal cases and cases in a few other minor categories, numbers of filings have increased across the board in all categories of Federal litigation. Some growth has been breathtaking: private civil rights cases increased at the rate of 6,256 percent between 1960 and 1983. Other trends seem, at first glance at least, to be idiosyncratic: cases brought under the Federal Employers' Liability Act have increased during the time when employment in the covered industries has steadily declined.

The stunning growth in Federal litigation is out of all proportion.

Virtually all of this sea change in the shape of Federal litigation can be attributed to the growth of the number of cases that raise "Federal questions"; that is, cases implicating a provision of the Constitution or a Federal statute or regulation. To be sure, there has also been growth in the number of "diversity" cases brought. But there has not been an appreciable expansion of the kinds of claims or legal theories upon which "diversity" suits rest. Rather, the increase in the "diversity" docket seems reasonably attributable to the steady erosion, resulting from monetary inflation, in the real value of the \textit{ad damnum} threshold—long fixed by Congress at $10,000 until its recent increase to $50,000—thus bringing more, not different, "diversity" cases within the Federal judicial purview.

The dramatic growth of litigation in the area of Federal questions has a significance that transcends the merely quantitative. This growth is explained only marginally by an increase in litigation in categories of cases that were familiar or routine prior to 1960. A significant amount of this new law business concerns subjects that, before the last generation, were either deemed utterly outside the scope of governmental processes and intervention, or were considered amenable to disposition through private, civil, and usually State-level proceedings.

Wholly new claims and wholly new remedies have appeared on the American scene in the last few decades. The courts have been called upon to address an ever-widening array of economic and social questions. New bodies of Federal case law have grown up around the environment, terms of employment, labor relations, consumer protection, securities trading, commodities allocations, race relations, government subsidies, health care provision, religious accommodation, and family relationships, to name but a few. One of the fastest growing sectors of the laws governs the increasingly "generous", steadily expanding, and consistently complex domain of entitlements to attorneys' fees against both private and governmental parties.

Surely these changes have profound implications for the stability of the law, the allegiance of the citizenry to our system of justice, and the costs of that system for those who invoke it, those whom it lashes, and those who are taxed to support it. In the long run, these changes must unquestionably affect the balance of political power between the Federal Government and the States, the courts and the political branches, various groups of private interests and their competitors, and individuals and governments in general.

Congress Is the Problem

The Federal courts have come to exercise what William Grayson warned against in his address to the Virginia Convention, assembled to consider ratification of the proposed Constitution of the United States: jurisdiction of "stupendous magnitude", a power so vast that it would be utterly "impossible for human nature to trace its extent." The reason for this is not entirely, or even chiefly, judicial arrogance or arrogance. It is, rather, because the political branches—and most especially Congress—want it that way.

Major changes have occurred in America's legal system in the last few decades. The trajectory of those changes appears to have been only partly altered during the Presidency of Ronald Reagan. There has been a steady flow of power from the States and from the people—that is, from individual Americans and from what George Bush calls "a thousand points of light", meaning private, voluntary groupings, including businesses, unions, schools, churches, philanthropies, and families—to the Federal Government. The body actively effecting these changes has been, to be sure, the United States Congress. But what is not well understood by many observers is that the powers thus surrendered to Congress have not been safely and accountably stored there. They have been given away.

Authority to make more and more decisions has been delegated by Con-
but then delegated from Congress to other Federal branches for disposition, is far beyond easy counting. Must Americans install air bags in their cars? How many television stations and newspapers may the same person own? Under what conditions are new licenses to be issued for the construction of nuclear power plants? Must private companies doing business with

the Government assemble their work forces in accordance with certain quotas for racial, ethnic, and sexual groups? What levels of market-share arithmetic make corporate mergers suspect as anticompetitive? Is "insider trading" a crime? What is "insider trading"? The Federal Government may answer all of these questions, but not one of them will be answered by Congress.

Question after question that is considered important by Americans has been federalized by Congress and then dispatched for actual decision to an entity, administrative or judicial, that is far removed from democratic responsibility. Sometimes this is accomplished with a direct and overt delegation of power, usually to an Executive or regulatory agency. At other times this is achieved through subterfuge, such as through the enactment of statutes whose meanings are intentionally opaque, so as to force competing constituencies to shift their field of combat from "Gucci Gulch" to the courthouse. At bottom, it is not so much that courts and bureaucracies have seized power as that Congress has shoved it upon them.

If it is the exception that proves the rule, then the exception here is the recent decision of Congress—firm and unequivocal—to deny itself, and all other Federal officials and judges, a substantial pay raise. It is not that Congress did not try. A commission of wise men was established to take the heat for the pay raise. Congress carefully provided that the Commission's plan would go into effect automatically, without any votes being required, unless extraordinary exertions were deliberately undertaken to halt it. Phenomenal public outrage ultimately demanded those extraordinary exertions, of course, and so Congress in the end voted to abandon the increased pay plan. It is probable, by the way, that the public was angered more by the attempt at subterfuge than by the merits of a pay increase. Whether the lesson drawn by Congress results in greater future straightforwardness, or better future camouflage, remains to be seen.

Transference of problem-solving responsibility from State and private hands to the Federal Government has yielded an explosion in Federal public law. This, in turn, has resulted in a growing caseload before administrative and judicial tribunals, thereby necessitating an increasing allocation of personnel and financial resources to dispose of them. If decision-making is not to be left in nonfederal hands, and if Federal policies are not to be made clearly, unambiguously, at the outset by the people's elected representatives, then a large administrative and judicial bureaucracy will be needed to make law incrementally. If, in turn, the people are not to feel that their lives are governed by a straitening, repressive, administrative state, then the safety valve of judicial review will be indispensable. All of this, of course, will lead to a process of law-making and legal interpretation that is time-consuming, expensive, and often probably unjust. What can be done about it?

The fundamental answer is for Congress to exercise more visibly, more directly, and more accountable the powers that the Federal Government already holds and to arrogate to the Federal Government fewer new powers.

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Modest Proposals

First, judges would render a vital service to the community if they ceased seeking to turn every case, especially at the intermediate appellate level, into what the estimable Robert Bork termed, in another context, "an intellectual feast". Most cases do not, and should not, present interesting, novel questions. They offer old, decided questions. Judges should take pride in recognizing round pegs that fit in round holes. Settled law should remain settled, the more summarily the better. Federal judges should restrain themselves from making new common law in "diversity" cases. If the common law needs adjustment, that should be the business primarily of State legislatures and State judiciaries. Similarly, if judges can discern the plain meanings of constitutional and statutory texts they should apply them, and if supplicants do not like the consequences, they should be shown the path to Capitol Hill.

Second, judges should strive to reduce the paperwork burdens of liti-

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gation. An excellent place to begin is with their own opinions, which an imaginative bar parses minutely in search of exploitable new doctrines and new tendrils of old doctrines. There is also something to be said for the revival of oral traditions in appellate judgecraft. A few immediate, oral
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affirmances, following *instanter* upon the close of oral argument, might be even more effective than the occasional imposition of sanctions in deterring frivolous suits and appeals.

Third, while judges at the appellate level should spend more time on fewer cases, husbanding their energies for the handful of vexing cases where—to the embarrassment, not the pride, of our system—clear and easy rules of decision do not appear, in the long run they are not always the best arbiters of which decisions are truly important. Appellate opinions should almost never be unpublishable and uncitable. Current practices favoring nonpublication and prohibiting citation are, in my view, a pernicious fad. They send a signal to the public that some justice is dispensed as a consciously inferior product, churned out simply to get the dockets down. At the same time they frustrate a crucial objective of our legal system: to show the steady build-up of authority, the increasing weight of doctrine that keeps questions settled and therefore inhibits their continual reemergence. If the fad’s purpose is to discourage the relitigation of old questions, it is self-defeating. And sometimes judges are just plain wrong when they think a case is unimportant or uninteresting enough to merit broader scrutiny. Time and time again genuinely attentive practitioners are stunned to find that they are learning about an important case that has worked its way up a long path of litigation and review only when it suddenly emerges into daylight with the grant of a *certiorari* petition in the Supreme Court.

Fourth, the bane of practice at the district court level is pre-trial discovery. It is in the long and numerous days in the deposition chamber; not in the short and scarce days in the courtroom that the legal system gouges the American litigant. Discovery should not be a license to harass an opponent or milk a client. Nor is its primary function the furnishing of prophylaxis against legal malpractice claims. Serious review of discovery practice is needed and prudent limitations are demanded. This is as true of document production as it is of depositions.

Fifth, we further erode confidence in the legal system and its ability to render justice when we divert scarce resources to trials within trials. I refer to the increasingly complex—and increasingly commonplace—pattern of punctuating substantive litigation with mini-trials over frivolous pleading, abuses of discovery, and the awarding of fees. We are all familiar with cases, for example, where more attorneys’ fees were expended to recover attorneys’ fees than to win the case in chief.

Sixth, recent experiments and enthusiasms in fee-shifting have themselves wrought major injustices and served to clog up the courts. There is much to commend the American Rule under which each side bears its own attorneys’ fees. There is much to commend the English Rule under which the loser, plaintiff or defendant, pays the bills on actual cost basis. But our
current legal terrain is pockmarked with hybrid hedgerows and hidden hazards that entrap the unwary, deposit windfalls on the undeserving, and consume enormous amounts of judicial time. Judges are thus engaged in what is tantamount to the administration of a cumbersome, non-market-based, price-setting bureaucracy that would have been excessive even for Soviet commissars in the days before Perestroika.

Seventh, on the criminal side of the docket, Congress would do much to relieve the Federal courts and to improve the quality of justice by eliminating the bizarre ritual of collateral attack upon State criminal judgments that goes by the name of habeas corpus. Federal constitutional claims can and should be raised in direct review of State criminal proceedings. Federal habeas corpus writs are unsatisfying and inefficient ways to achieve indirect review. Redundancy for redundancy's sake is an insult to the justice system and the American people whom it serves. Federal habeas corpus relief should be reserved for the truly rare case of State judicial, prosecutorial, or administrative misconduct or other limited, traditional predicates for such extraordinary intervention. It has become a second, virtually mandatory, route of appeal, at least in cases involving more serious crimes or more substantial penalties. That is unconscionable and insupportable.

I have not called for more judges, more prosecutors, or more pay. I do not doubt that they are needed. But Congress does not need any more advice on these points from blue-ribbon commissions. Congress needs simply to screw up its courage and take direct action. It also needs to resolve to pay for these increments by offsets in other lines of spending. There's the rub, and it is one that our spendthrift national legislature deserves to confront in solitary splendor.

I have not called for the elimination of diversity jurisdiction or for serious adjustments in jurisdictional thresholds. Common law litigation should not be excluded from Federal courts. It is the most demanding and important work that courts perform. To the contrary, more Federal question work should be allowed to be disposed of in the State courts which is the venue where most justice is done and most Americans see it.

It is, alas, all too typical of Congress to address the problems of our legal system by setting up a body to study some other branch of government. What we really need is a Federal Study Committee on the Future of the Federal Legislature. Perhaps the only place to convene that blue-ribbon panel, however, is in the voting booths.