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THE SUPREME COURT AND THE FEDERAL JUDICIAL SYSTEM

*Kenneth W. Starr**

January 1992 brought to a close the five-year celebration of the Bicentennial of the Constitution, a period of national reflection and commemoration that culminated in December 1991 with the celebration of the ratification of the Bill of Rights. Just last evening, on PBS, a series of Fred Friendly seminars on the Bill of Rights was launched as an appropriate closing salute to a period of celebration that Chief Justice Berger has aptly called, "a national history lesson."¹

Midway in the celebrations which began in 1987, we paused to note the passage of the Judiciary Act of 1789.² That seminal statute established the federal district courts and determined the appellate jurisdiction of the Supreme Court. This enduring Act fleshed out the structure of the federal judiciary, as contemplated by the uncomplicated terms of Article III of the Constitution itself.

From that humble beginning, with no courts of appeals, with only 13 United States District Courts, each with but a single judge, and only six members of a decidedly underworked United States Supreme Court (except for circuit-riding responsibilities), the federal judiciary remained small and highly collegial for the next 150 years.³

* Mr. Starr, former Solicitor General of the United States, delivered these remarks at Case Western Reserve Law School on February 5, 1992.

1. THAT DELICATE BALANCE II: OUR BILL OF RIGHTS (PBS television broadcast, Feb. 4, 1992).

2. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. The modern statute organizing the courts is codified at 28 U.S.C. §§ 1-482 (1988).

3. When Congress revised Title 28 of the United States Code, entitled "Judicial Code and Judiciary" in 1948, it provided for 59 circuit judges and 187 district judges. Act of June 25, 1948, ch. 646, §§ 44, 133, 62 Stat. 869, 871, 895-96. Currently, federal law authorizes 179 circuit judgeships and 632 district judgeships. 28 U.S.C.A. §§ 44, 133

To be sure, great issues of considerable consequence were resolved along the way, especially relating to the powers of the federal government, including the judiciary, *vis-a-vis* the States. This has been, of course, a source of dynamic friction throughout our history, and remains so to this day with debate still unfolding over the law of habeas corpus, federal preemption of state law, and the immunity of States from suits under the Eleventh Amendment. But these great issues, and great cases, were hammered out by a small and cohesive judiciary that tended to focus first on principles: what is the nature of this vast commercial republic; what is the appropriate relationship between federal and state courts, federal and state law; and the powers of Congress *vis-a-vis* the States.

This focus on structural questions is all the more evident when we recall that the Bill of Rights itself was viewed, even after ratification of the post-Civil War Amendments, as not being applicable to the States. *Barron v. Baltimore*⁴ established that critical point in 1833. And Congress was relatively inactive, especially in matters touching on individual liberties, so that the Bill of Rights was rarely invoked to seek to invalidate congressional action. Indeed, the first decision of the Supreme Court striking down a congressional enactment was in 1965 with Justice Douglas' opinion for the court in *Lamont v. Postmaster General*.⁵

It has thus been only in this Century and indeed in the later half of the Century that the federal judiciary has been transformed from a small, cohesive group of courts (completed structurally with enactment of the Evarts Act in 1891⁶ establishing the various courts of appeals) into a large group of judges, now approaching 1000 active judges, and with district courts with as many as 28 active district judges and courts of appeals with as many as 28 active circuit judges.⁷

The nature of the work has changed as well. Compare, for example, Volume 142 of US Reports, covering the October 1891 Term, with the present Term (100 years later). Examine the issues

(West Supp. 1992).

4. 32 U.S. 243 (7 Pet. 1833).

5. 381 U.S. 301 (1965).

6. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (codified as amended at 28 U.S.C. §§ 43, 44, 604, 711, 713, 961, 2101, 2106, 2107 (1988)).

7. The Ninth Circuit currently has 28 active circuit court judges. 28 U.S.C.A. § 44 (West Supp. 1992). The Southern District of New York has 28 active district court judges. 28 U.S.C.A. § 133 (West Supp. 1992).

that were before the Supreme Court of the United States in those days, presided over by Chief Justice Melville Fuller and with a young Ohioan named William Howard Taft serving as Solicitor General. Volume 142 opens with a bankruptcy case, *Sparhawk v. Yerkes*,⁸ involving the obligations of a member of the New York Stock Exchange to his creditors. Once one works through that sleeper, one stumbles onto the next case, the *New Orleans and Northeastern Railroad Company v. Jopes*,⁹ involving a railroad's liability for the action of one of its conductors who got it into his head to shoot and seriously injure one of the passengers — violence in America is nothing new — causing Justice Brewer in the opinion to resort to Blackstone's Commentaries on the law of self-defense, because the passenger was wielding a knife and comporting himself in a decidedly uncivil manner.

Now, by the way of contrast, think of the work of the Supreme Court during the present Term of Court — cases involving school desegregation, both of elementary and secondary schools and systems of higher education;¹⁰ the constitutionality of prayers at public school graduations;¹¹ whether cigarette companies are liable to the survivors of individuals who had the base judgment of killing themselves with cigarettes;¹² the constitutionality of the way in which Congress apportions the number of representatives in the House of Representatives to each State;¹³ and now the future of the law of abortion, as reflected by the Court's recent grant of certiorari in the Pennsylvania abortion case.¹⁴

Compare as well the modern work of the federal district courts and the courts of appeals. It is a truism that there has been an explosion in the caseload of both courts, and at the same time a considerable expansion of the size of the judiciary itself. The judgeship bills of 1978,¹⁵ 1984¹⁶ and 1990¹⁷ have brought the

8. 142 U.S. 1 (1891).

9. 142 U.S. 18 (1891).

10. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *United States v. Fordice*, 112 S. Ct. 2727 (1992).

11. *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

12. *Cipollone v. Liggett Group Inc.*, 112 S. Ct. 2608 (1992).

13. *Department of Commerce v. Montana*, 112 S. Ct. 1415 (1992).

14. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 931 (1992) (cert. granted), 112 S. Ct. 2791 (1992) (decided).

15. Omnibus Judgeship Act of 1978, P.L. No. 95-486, 92 Stat. 1629 (codified at 5 U.S.C. § 5108, 28 U.S.C. §§ 41, 44, 45, 46, 133, 1337, 1445 (1988)).

16. Act of July 10, 1984, P.L. No. 98-353, 97 Stat. 333 (codified at various section of

lower federal courts to a very different size than just 15 years ago. The driving reason for that expansion has been, of course, the expansion in the caseload itself; the result is that there are more judges but there are still more cases per judge in the system. And, the percentage of cases that are appealed has skyrocketed, suggesting a spirit of litigiousness as opposed to a more rational market response — especially since the reversal rate has actually declined.¹⁸

The nature of those cases has likewise changed. In his end-of-the year report, Chief Justice Rehnquist has expressed concern about the criminalization of the docket and the intrusion of federal courts into the domain traditionally occupied by state judicial systems. The Chief Justice made the point this way in speaking of one particular legislative initiative:

S. 1241, the Violent Crime Control Act, included provisions that would have provided for federal prosecution of virtually any case in which a firearm was used to commit a murder. This federalization of virtually all murders would have been inconsistent with long-accepted concepts of federalism. It would have swamped federal prosecutors, thus interfering with other federal criminal prosecutions, and would have ensured that the already overburdened federal courts could not provide a timely forum for civil cases.¹⁹

Mindful of these growing expressions of concern, let me, in these brief reflections, share a few observations that have perhaps not been visible to the eye of bench, bar or even the legal academy, about the Supreme Court and the federal judiciary

The first is that the Supreme Court is increasingly signaling its inability to maintain uniformity in the federal system. The Chief Justice alluded to his concern in his end-of-the-year report.²⁰ More concretely, each Supreme Court order list now brings with it a short opinion, and at times more than one, typically authored by

U.S.C. including 28 U.S.C. §§ 44, 133 (1988)).

17. Judicial Improvements Act of 1990, P.L. No. 101-650, 104 Stat. 5089 (codified at various section of U.S.C. including 28 U.S.C. §§ 44, 133 (West Supp. 1992)).

18. For example, criminal appeals rose three percent in 1991. CHIEF JUSTICE WILLIAM REHNQUIST; 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7.

19. *Id.* at 5.

20. *Id.* at 3.

Justice White, dissenting from denial of certiorari. Justice White does this 50-60 times each Term (or at least noting his dissent). This Term he is frequently joined by Justice Blackmun and/or Justice Thomas. When that happens, as it did recently,²¹ it demonstrates the obvious — that the Court is now not taking cases even though there are three recorded votes to grant, as embodied in a published dissenting opinion. The informal practice of not so long ago — that a fourth Justice would, as a matter of collegial courtesy, provide the fourth vote to grant certiorari if there were three votes to grant — appears to have fallen by the wayside. Perhaps my inference is unduly strong, but the inference I draw is this: six members of the Court have essentially concluded that uniformity of federal law is now an impossible goal. Since uniformity cannot be achieved, the Court, under this view, should instead concentrate its focus on other issues.

That brings me to the second, related observation. The issues likely to arrest the attention of the Court are ones that are terribly important to society, such as state abortion statutes and First Amendment issues (exemplified by the Court's decisions this Term striking down New York's Son-of-Sam statute²² and Illinois' ballot qualification law that operated to exclude the Harold Washington Party from the ballot).²³ Because those issues are so difficult — and divisive — the Court is likely not to be inclined to expand its workload and thereby deprive the Justices of valuable time needed for reflection and deliberation on questions of truly great import.

The Supreme Court, in short, will likely not serve in our third century as the unifying force to maintain the consistency and coherence of federal law. This is significant because, in no small measure, that has traditionally been the Supreme Court's function. That is exactly what the Court was doing in deciding those quaint cases of a hundred years ago. But this should come as no surprise, in light of what has happened over the last 30 years. If the litigation explosion began in the 1970s, as is generally believed to be the case by those (including me) who believe that we have witnessed an explosion, it has been occasioned in no small measure

21. *Carroll v. Consolidated Rail Corp.*, 112 S. Ct. 916 (1992) (Justices White and Thomas dissenting).

22. *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991).

23. *Norman v. Reed*, 112 S. Ct. 698 (1992).

by the proliferation of federal statutes that began in the 1960s. That is, a federal statutory response is now seen as highly appropriate by all parts of the political and ideological spectrum for all of society's problems, even if those problems were once viewed as quintessentially problems for state and local resolution. Madison's vision of the vast commercial republic — captured in the Hamiltonian vision that was called Federalist but should have been called Nationalist — has been in the ascendancy for a full generation, with its roots firmly in the soil of Franklin Roosevelt's New Deal.

That we have long since entered a new era in this respect — the era of an active, full-time energized Congress — should be evident by virtue of one fact and one example. The fact is that as judicial staffs have grown modestly, with elbow clerks, staff clerks, magistrate judges and the like, the staff of the United States Congress has virtually exploded. The 435 representatives and 100 Senators now have no fewer than 31,000 staff members, far larger than any other legislative body in the world.²⁴ And those staffs, along with the presence of interest groups, K Street lobbyists, and 50,000 lawyers in the Nation's Capitol, are involved in drafting and shaping legislation, which will eventually find its way to the federal courthouse.

The Supreme Court has thus said in effect, "we can't keep up with all the workload, given the explosion of statutes and the like. The system will simply have to tolerate greater instability and uncertainty"

What will the Supreme Court thus become? It will continue to be the arbiter of the great constitutional issues of the day, not only issues of individual liberty but structural issues of federalism and separation of powers. Included in those issues are questions concerning the appropriate role of the judiciary, as we have seen in the unfolding litigation involving the unfortunate circumstances that have befallen the country of Haiti²⁵ and the Court's significant opinion in the Boston prison case concerning the role and nature of consent decrees in public lawsuits.²⁶

This leads me to a third observation about the federal judiciary. The federal justice system, notwithstanding the growth in the num-

24. Michael Kramer, *The Political Interest; Shame on Them All*, TIME, Oct. 21, 1991, at 46.

25. Haitian Refugee Center, Inc. v. Baker, 112 S. Ct. 1245 (1992); Haitian Refugee Center, Inc. v. Baker, 112 S. Ct. 1073 (1992).

26. Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992).

ber of judges, the amount of staff support, and the caseload, remains a highly effective, professional system. It stands in many ways as a model justice system. It has an effective research component in the Federal Judicial Center, ably headed by a distinguished United States District Judge well known for his innovative ideas (Judge William Schwarzer), a very well organized and effective Administrative Office of United States Courts; it also has an enviable tradition of excellence.

When we hear about the problems of breakdowns in the system, we tend not to be hearing about the United States Courthouse. Take, for example, one related aspect of the federal justice system, the corrections system. There are severe problems of overcrowding in the federal corrections system, which now operates its 70 or so facilities across the country at 165 percent over capacity²⁷ And yet the federal prison system, albeit crowded, is not under court order. The professionalism and excellence of the Bureau of Prisons, which is extraordinarily well managed, has carried the day. In short, the federal system has been responsive, and has fully risen to the challenge.

That in no small measure explains the criminalization of the federal docket in the past decade, a trend that is destined to continue indefinitely. It might well have been that the federal courts would have continued to handle antitrust, civil rights and environmental cases (and now, alas, bankruptcy cases), along with diversity cases, while the state courts were entirely swamped with the flood of criminal cases that have so crowded our system. This Nation's decadence, reflected in the drug culture, the breakdown of basic family structure, and the phenomenon of chemical dependency and substance abuse, has spawned a culture of violence, degradation, and inhumanity. It has launched an unrelenting wave of crime that has engulfed many communities across the Nation, ruined countless lives, and taken thousands of victims by virtue of the culture of violence. If you have any doubt, buy a bag of popcorn and watch Danny Glover and Kevin Kline in *Grand Canyon*.²⁸ The unsettling point about this society is made very powerfully there on the Big Screen.

In the meantime, Congress and various Administrations, beginning in the 1970s, were determined to play a role in combatting

27. Sharon LaFraniere, *U.S. Shifts on Prison Crowding; Justice Dept. to Fight Some Population Caps*, WASH. POST, Jan. 15, 1992, at A1.

28. GRAND CANYON (Twentieth Century Fox 1991).

the growing culture of drugs and violence. The result was a remarkable political consensus, crossing partisan lines and bringing together members of Congress of highly differing views. That consensus has been unsettling to many practitioners in the system and especially to federal judges. The elements of that broad consensus include such controversial elements as: increased sanctions;²⁹ use of mandatory minimum sentences;³⁰ cabining judicial discretion through Sentencing Guidelines,³¹ and stepped up federal focus on crimes of violence and in particular those who qualify for the sobriquet "Armed Career Criminal."³²

In short, Congress has come to the settled political judgment that the federal courts must be marshalled and brought into service in fighting the pestilence of crime, and especially drug-related crime and crimes of violence, in a violence-wracked society where the victims of violence are very frequently members of minority communities. Federal courts will thus continue to be caught up in the wave of crime and the response to crime, while the Supreme

29. For example, prior to October 1987, violators of 21 U.S.C. § 841 could not receive a sentence of more than 30 years imprisonment. 21 U.S.C.A. § 841 (1984). Today, a violator could receive a sentence of life imprisonment. 21 U.S.C. § 841 (West Supp. 1992) (including 1987 penalty enhancement provisions). Fines and prison sentences were also increased in conspiracy and criminal enterprise statutes. 21 U.S.C.A. §§ 846, 848.

30. *See, e.g.*, 18 U.S.C.A. § 924(c)(1) (minimum sentence of five to twenty years for using firearms during the commission of crime of violence or drug trafficking); 18 U.S.C.A. § 929(a)(1) (minimum sentence of twenty years for buying or selling children to be used in pornography); 21 U.S.C.A. § 844(a) (minimum sentence range of fifteen days to five years for possession of a controlled substance); 21 U.S.C.A. § 848(e)(1)(A)(B) (minimum of twenty years for murder committed in the course of a criminal enterprise or in connection with certain drug offenses).

31. The Sentencing Reform Act of 1984 required the United States Sentencing Commission to "prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons" UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL I (1991). The court's discretion is limited because the judge *must* select a sentence within the guideline range. *Id.*

32. For example, in 1991 Congress considered several bills with provisions aimed at Armed Career Criminals. *See, e.g.*, P.L. 102-141 (allocating funds to the Bureau of Alcohol, Tobacco & Firearms to employ a minimum of 1,127 full-time staff members solely for the Armed Career Criminal Apprehension Program); H.R. 1400, 102d Cong., 1st Sess. (1991) (the Comprehensive Violent Crime Control Act of 1991 included a provision regarding serious drug crimes by juveniles as "Armed Career Criminal Act Predicates"); S. 635, 102d Cong., 1st Sess. (1991) (the Senate counterpart of H.R. 1400); H.R. 3326, 102d Cong., 1st Sess. (1991) (the Drug Supply Reduction Act of 1991 contained provisions regarding juvenile offenses similar to those in H.R. 1400); H.R. 3371, 102d Cong., 1st Sess. (1991) (the Violent Crime Prevention Act); H.R. 3928, 102d Cong., 1st Sess. (1991) (the Armed Career Criminal Clarification Act made certain drug offenses under state law predicate offenses under the Armed Career Criminal Act).

Court remains largely aloof from this baleful development.

This political consensus shows no sign of breaking down, notwithstanding the pleas of the Chief Justice and expressions of concern by many very thoughtful judges in the system. In short, federal courts in the past decade have become — and are destined to remain — courts of criminal jurisdiction, including offenses that have traditionally been viewed as falling within the province of the States.

This means that, while the debate will go on with respect to the nature and role of federal courts, a high premium now exists on the efficient use of scarce resources. The federal judiciary, in a word, is a scarce resource, and must be viewed precisely that way. But this also means that pressures will remain intense on the judiciary to husband and manage its affairs very efficiently.

This, in no small measure, is why the federal courthouses of the future will be seen as places where disputes get resolved, not where great issues of law are examined and analyzed with the leisure and deliberativeness that great issues of law warrant. There simply is no time. Judge Milton Shadur captured the point well not long ago when he remarked: “These days, the courts are so busy that Learned Hand couldn’t be Learned Hand.”³³ As reflected by the recently enacted Biden Bill,³⁴ with its requirement of reporting to the public the state of the caseload by various district judges, the people will now be looking over the shoulders of all federal judges. Delay will not be countenanced; inefficiencies will be spotted and they will be criticized. And judges who are not keeping up will find themselves the subject not simply of adverse comment at occasional bar gatherings, but in newspaper editorials.

A case in point is that of our next Chief Judge in the United States District Court in Washington, D.C. Very recently, *The Washington Post* ran an editorial expressing concern about the caseload of that judge, who is universally admired for his intelligence and temperament.³⁵ But the docket of that particular judge is considerably behind that of his colleagues. These days that revealing information doesn’t simply find its way into dust-gathering reports to the Administrative Office of United States Courts; it is now

33. Peter H. Schuck, *Uncle Sam in the Dock; Suing Government: Citizen Remedies for Official Wrongs*, WASH. POST, June 26, 1983, (Book World) at 6.

34. Judicial Improvement Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (1990) (codified in various sections of U.S.C.).

35. *Judge Penn’s Backlog*, WASH. POST, Jan. 15, 1992, at A22.

grist for the editorial mill.

With these sorts of pressures, federal courts of our third century as a Republic will be looked upon more as places where disputes get resolved (by able and thoughtful judges), not where learned and scholarly opinions get written. Judgment orders, with brief memorandum opinions, or opinions from the bench will increasingly be the order of the day.

To be sure, when an important First Amendment issue or the like is presented, the court is much more likely than not to repair to the more traditional image of the federal courts as places of quiet deliberation, scholarship and contemplation. But this will likely be a magic moment, the pleasant exception that proves the rule, as pressures intensify to deal with 400 cases (or more) that are actively on each judge's docket and which are crying out for resolution, intensified by the hard reality of criminal cases that will tend to go to trial, with more complicated and time-consuming hearings on the appropriate sentence to be meted out to those convicted of crime.

As a result, the gulf between what the Supreme Court does, and what other federal courts do (in terms of issue-resolution), will grow. This was likely inevitable in view of the grant of plenary discretion to the Supreme Court, in controlling its certiorari docket, and with the upsurge of cases some years ago now having leveled off at more than 5000 cases per Term.³⁶ Since very few cases will be taken for resolution by the Supreme Court, increasingly the lower federal courts will enjoy both additional independence brought by the decreased prospect of Supreme Court review of the particular issue and yet greater limitations imposed by the sheer weight and volume of the caseload.

This is why, ultimately, federal judges are destined to wear managerial hats, specializing increasingly in active conflict resolution. They will become more like state judges, with their traditionally heavy caseloads, except that they will be courts of statutory interpretation (as opposed to courts weaving the body of the common law). And that means that the federal judge of the future will openly, actively seek ways of efficiently resolving disputes, which bodes well for the future of alternative dispute resolution ("ADR").

36. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1989 ANNUAL REPORT 135 (1990) (reporting 5006 cases in 1984, 5158 cases in 1985, 5134 cases in 1986, 5268 cases in 1987, and 5657 cases in 1988).

Judges are already way ahead of the lawyers in this respect, as law practice becomes increasingly competitive and profit margins shrink.

This march toward ADR will become more intense, I believe, as pressures mount for greater access to the courts. That is, courts are very expensive right now, due in no small measure to the fact that legal services are expensive. The fee structure is such in this country that individuals of moderate means with modest claims (but beyond the level of small claims which they can litigate without lawyers) tend to be denied legal services, and they are thus frequently denied justice as well.

The pressures will therefore intensify in an environment demanding reform and demanding access by all people, particularly the middle class, for a new, more innovative approach to financing litigation in this country that will both reduce the very high transaction costs and empower individuals who cannot, in practical effect, afford a lawyer to litigate a \$4000 claim.

In short, federal judges will likely find themselves increasingly involved in the process of supervising the financing of litigation through fee awards, as we move to a system of fee shifting. This has already been signaled by the almost 200 fee shifting statutes now on the books.³⁷ But fee shifting has heretofore been one-way fee shifting, to encourage certain types of claims, say civil rights or environmental claims, to be brought, without fear that (absent a patently unmeritorious, frivolous claim brought for purposes of vexation) an unsuccessful plaintiff would find herself subject to a fee award against her.

With a few possible exceptions, however, we are likely to move gradually to a system of comprehensive fee shifting (characterized by the winner made whole rule) that will have, at least in theory, the dual effect of encouraging meritorious claims to be brought and marginal claims to be jettisoned.

This means that federal judges will increasingly be evaluators of legal claims, determining their bona fides and making at times

37. See, e.g., 5 U.S.C. § 552(a)(4)(E) (1988) (permitting courts to shift fees in cases under this section); 5 U.S.C. § 504(a)(1) (permitting fee shifting in administrative agency adjudications); 28 U.S.C. § 1912 (permitting appellate courts to shift appellate fees); 28 U.S.C. § 1927 (permitting courts to hold attorneys' personally responsible for opponents' fees if they were incurred because of attorney misconduct); 28 U.S.C. § 2412 (permitting fee shifting in civil cases against the United States); 15 U.S.C. § 1691e(d) (permitting fee shifting in cases brought under this section); 15 U.S.C. § 77www (permitting fee shifting in domestic securities cases); 15 U.S.C. § 15 (allowing fee shifting in antitrust cases).

difficult judgments as to how litigation will be financed.

The federal judge of the future will not only be the manager of litigation, a determiner of litigation finance, and the provider of an array of ADR services in a courthouse with multiple doors; the judge of the future will also be flexibly available to serve, at appropriate times, in places of acute need. The vagaries of the nomination and confirmation process are such, especially on a 1000-member bench, that vacancies will frequently be with us and at times those vacancies will prove quite nettlesome to fill. (Especially since every fourth year is an election year, when the confirmation process, for some strange reason, tends to slow down.) Some districts, however, will inevitably find themselves spared the inconvenience and burdens of backlog-creating vacancies; other districts will find that, for whatever happy confluence of reasons, their workload is such that they are not nearly so pressed as their colleagues in a more crowded jurisdiction. It thus is quite likely, if not inevitable, that federal judges — enjoying as they do national commissions — will find themselves increasingly asked to serve — at least temporarily — where the need is most acute, whether that be the Northern District of Ohio or the Southern District of New York. Indeed, the Administration has just yesterday introduced proposed legislation — the Access to Justice Act — that would do precisely that.³⁸

This means that the vision of the detached and passive — and immobile — federal judge will be moderated and tempered by the demands occasioned by heavy caseloads. The challenge will be to remain true to the fundamental moral vision of the federal judge as fiercely independent of the political branches (an assurance enshrined in the twin characteristics of life tenure and the assurance that compensation, however modest it may be, cannot be diminished).

But this modern image of the efficient, managerially oriented judge should be mere decision makers, as opposed to humane — and wise — men and women who love the law and who exemplify the traditional judicial virtues of temperament, integrity, and high competence. To the contrary, it is essential that we ensure that our judges enjoy the mental and spiritual refreshment that is critical to a person holding that high and vital — and now terribly demanding — lifetime office. This means not only continuing

38. H.R. 4155, 102d Cong., 2d Sess. § 8 (1992).

judicial education, as exemplified by the splendid programs sponsored by the Federal Judicial Center, but greater sensitivity and concern on the part of educational institutions more generally, as well as law schools more specifically Princeton's innovative program on the judiciary and the humanities is one powerful harbinger of the refreshing winds now beginning to blow, as well as thoughtful suggestions that judges should be permitted to take an occasional sabbatical (of short duration) from the rigors of the bench.

It also means that we must be willing to allow trial judges great latitude to get the conflict before them resolved; to permit the generous use of summary judgment in a time when law practice is characterized by remarkable litigation producing creativity. That is, federal district judges should not be the pioneering trailblazers when it comes to the development of the law; that should be the focus of the law-articulating courts, and especially of the Supreme Court with its greater leisure and its ability to see the entire system.

As federal courts become increasingly courts of criminal and statutory interpretation, the need will become increasingly acute to pay close attention to what the Supreme Court itself is doing. The Court resolves specific cases and controversies to be sure, but it also sets a tone, and provides a structure for the resolution of legal questions. It would take a rather dense observer of the Court not to conclude that this is a highly textualist Court, looking to the language of statutes, and their structure (and to a lesser extent, their history), as opposed to a Court guided by more general, less predictable principles. In an age of deconstructionism, this is, in short, a highly constructionist court. We saw this just last week in both the Voting Rights Act case arising under section 5,³⁹ authored by Justice Kennedy, and the labor case,⁴⁰ authored by Justice Thomas, involving the right of access by non-employee union organizers to an employer's private property.

And the tone and spirit of textualism is, incrementally, carrying the day. In short, we in the law speak less of the broad remedial purposes of legislation and speak instead of the literal language and the specific structure of the statute in question, which is, after all, the product of a very elaborate, professional process in the political branches.

39. *Presley v. Etowah County Comm'n.*, 112 S. Ct. 820 (1992).

40. *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992).

My broader point is that we need mechanisms for the entire federal judiciary to learn at the feet of the Supreme Court, and therein lies the role of the legal academy — to view itself both as teacher and student, to learn from judges and their vast experience and wisdom but also to help the judges continue to learn, from the world of science, technology, economics, and ethics to the basics of what is happening in courts across the land.

In short, it is for the legal academy to serve as a bridge between the Supreme Court and the remainder of the federal judiciary, to help enrich our understanding of an evolving Court and to impart that understanding to judges who must, in our federal system, be faithfully guided by what the Court does and to move in the direction that the Court chooses to signal. And the legal academy must also be the place where judges, tired and bedraggled from the demands of modern caseloads and the managerial model of judging, can find mental refreshment.