

Comment

The Future of the Federal District Courts

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The title of my lecture promises more than it can produce. Predicting the future of the federal district courts is, at best, a highly speculative venture—a task calling for oracular powers which I do not possess.

It has been said that “[t]he future is like a corridor into which we can see only by the light from behind.”¹ Even with twenty-eight years to my credit on the federal bench, it would be foolhardy on my part to have you believe that by my acceptance of the challenge of my topic for discussion that I could predict the future of the federal district courts. Therefore, I shall merely share some of my thoughts with you as to what I perceive to be in store for the federal district courts and perhaps a few of my notions for improvement in the district court system. Before embarking on that subject, however, I would like to briefly examine some important historical developments in our federal judicial system.²

I. THE DEVELOPMENT OF THE FEDERAL JUDICIARY

The present institutions and powers of the federal judicial system are firmly rooted in article III of the United States Constitution and the Judiciary Act of 1789.³ However, the Constitutional Convention was initially unresolved as to the structure of the federal court system. Those supporting the establishment of the Supreme Court and inferior tribunals were opposed by those who raised the issues of additional expense and the adequacy of direct appeal from the state courts to the Supreme Court. Eventually the Convention reached a compromise, now embodied in article III, to the effect that the Constitution should empower the national legislature to create the lower federal courts, rather than expressly create those courts in article III. Thus, under the present system, Congress may establish or disestablish the inferior federal tribunals,⁴ including, of course, the federal district courts.

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¹Goldman, Hooper & Mahaffey, *Caseload Forecasting Models for Federal District Courts*, 5 J. LEGAL STUD. 201, 233 (1976).

²For an excellent and more detailed discussion of the history of the federal judiciary, see generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 1 (3d ed. 1976).

³Act of Sept. 24, 1789, 1 Stat. 73 (now generally codified as amended at 28 U.C.C. §§ 1-2906 (1970 & Supp. V 1975)).

⁴U.S. CONST. art. III, § 1.

In the course of the two centuries following the Constitutional Convention, Congress has fashioned a bi-level lower court system of varying jurisdictions and proportions. The Judiciary Act of 1789⁵ instituted a six-member Supreme Court, three circuit courts, and at least one district court per state. Circuit courts had original jurisdiction in diversity cases, most criminal cases, and larger cases to which the United States was a party. They also had appellate jurisdiction over civil district court cases involving up to \$50 in controversy, and admiralty cases in which the amount in controversy exceeded \$300.

Under the 1789 Act, the district courts were entirely courts of original jurisdiction authorized to hear admiralty cases, minor criminal cases, and some other rather limited classes of cases. The district courts had no jurisdiction for review of administrative agencies' decisions, because there was really no occasion for such reviews. The Act granted the Supreme Court appellate jurisdiction over the circuit courts in civil cases involving over \$2000 in controversy and over the state courts in cases raising federal questions, in addition to the original jurisdiction provided by the Constitution. The Court did not possess jurisdiction to review federal criminal cases.

It is interesting to note that

Congress proceeded immediately to give the circuit courts jurisdiction in diversity cases, but that no jurisdiction was conferred on the lower courts in cases arising under the Constitution or laws of the United States. Except for a grant in 1801 that lasted little more than a year, not until 1875 was there a general grant of federal question jurisdiction; such cases could only be brought in the state courts.⁶

In 1875, Congress finally granted the district courts original jurisdiction nearly as broad as the constitutional grant over cases arising under the Constitution, laws, and treaties of the United States.⁷ Because the circuit courts received no judges of their own under the 1789 Act, district court judges and Supreme Court justices manned the circuit court bench until 1869, when Congress appointed the first circuit court judges, concurrently relieving the Supreme Court justices from most circuit duties and releasing the district court judges from all such duties.⁸ In the Evarts Act of 1891,⁹ Congress

⁵Act of Sept. 24, 1789, 1 Stat. 73.

⁶C. WRIGHT, *supra* note 2, at 4.

⁷Act of March 3, 1875, § 1, 18 Stat. 470.

⁸Act of Apr. 10, 1869, 16 Stat. 44.

⁹Act of March 3, 1891, 26 Stat. 826.

created a circuit court of appeals in each circuit and eliminated the appellate jurisdiction of the circuit courts. This enactment resulted in two federal courts of exclusive original jurisdiction, until 1911 when Congress abolished the circuit courts and transferred their jurisdiction to the district courts.¹⁰

The Evarts Act also introduced the principle of discretionary appellate review by means of the writ of certiorari, a principle expanded upon in the "Judges' Bill" of 1925.¹¹ This latter piece of legislation, drafted by a committee of Supreme Court justices with the aim of reducing the Court's caseload, enabled the Supreme Court to use full discretion with regard to the review of federal and state appellate cases, except in those cases involving exceptional urgency or a clash within the Supremacy Clause.¹² Aside from the recodification of the Judicial Code in 1948¹³ and subsequent amendments, the provisions of the Judges' Bill essentially gave rise to the federal judicial system as we know it today. Against the structural background, we should shift our emphasis to reasons why the system has changed and why there is continued pressure for reform.

II. PRESSURE FOR REFORM

In 1928, Felix Frankfurter and James M. Landis stated that "the range and intensity of governing political, social and economic forces are accurately reflected in the volume and variety of federal litigation."¹⁴ Others have offered variants to that theme, but each "can be summed into an elementary proposition: the business of the courts—whether trial or appellate—flows from processes in our social, economic, and political life."¹⁵

Professor Phillip M. Hauser, Director of the Population Research Center at the University of Chicago, has demonstrated in bold relief that "demographically, we [Americans] are very different from those who created our basic legal institutions."¹⁶ According to his data,

in the two centuries between 1790 and the year 2000, we shall have grown from 4 to 275 million persons. While our

¹⁰Act of March 3, 1911, §§ 24, 289, 36 Stat. 1087.

¹¹Act of Feb. 13, 1925, 43 Stat. 936.

¹²*Id.* § 1.

¹³Act of June 25, 1948, 62 Stat. 869 (now generally codified as amended at 28 U.S.C. §§ 1-2906 (1970 & Supp. V 1975)).

¹⁴F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY OF THE FEDERAL JUDICIAL SYSTEM* 56 (1928).

¹⁵Goldman, Hooper & Mahaffey, *supra* note 1, at 202.

¹⁶Schwartz, *Introduction*, in *LAW AND THE AMERICAN FUTURE* 2 (Schwartz ed. 1976) (citing Hauser, *Demographic Changes in the Legal System*, in *LAW AND THE AMERICAN FUTURE* (Schwartz ed. 1976)). This matter is used with permission of the publisher, Prentice-Hall, Inc., Englewood Cliffs, New Jersey.

annual birth rate has declined from 55 persons per 1,000 to 14, our life expectancy has increased from less than forty years at birth to over seventy. . . . We have moved from rural areas in which 95 percent lived in 1790, to the urban environment, where 75 percent lived in 1970.¹⁷

Today we are also very different in our racial distribution. Pointing to the massive migration of blacks from southern rural areas to the cities, Professor Hauser has noted that in 1910, 89% of blacks lived in the South; by 1970, only 53% lived there. In 1910, 73% of blacks lived in rural areas throughout the country; by 1970, 81% lived in urban areas.¹⁸ During that same time, growth of the black population exceeded that of the white population. For example, between 1960 and 1970, the black population increased by 23%, as contrasted to a 12.3% increase in the white population.¹⁹ And, as Professor Murray L. Schwartz has stated, drawing on Professor Hauser's data, "We are an aging, urban, increasingly nonwhite population, with smaller families and fewer children—a far cry from the population which ratified the Constitution of the United States and the Bill of Rights."²⁰

Our leadership in advanced technology has led us to the world's highest standard of living, but at great cost in the expenditure of our finite resources. We are paying heavily, and in the future we shall have paid even more heavily, in ecological and environmental changes brought on by these technological advancements.

Our present mass society, in contrast to the folk society of yesteryear, is characterized by considerable division of labor and specialization in function. The social and economic order have become much more interdependent and therefore more vulnerable to disruption. New risks to the individual have emerged, including the risk of disrupted income flow through unemployment and the risk of consumer exploitation, while increased chronic illness and physical impairment have accompanied the extension of life expectancy.

In short, as Professor Hauser has stated, the social morphological revolution *has greatly diminished the ability of the individual for self-determination* in the sense that it has greatly increased his dependence on the smooth functioning of the highly interdependent economy and society. As a result of this dependence, ever increasing numbers of aggrieved persons are seeking access to the courts to resolve their disputes, resulting in a tremendous in-

¹⁷*Id.* at 2-3.

¹⁸Hauser, *supra* note 16, at 21.

¹⁹*Id.* at 22.

²⁰Schwartz, *supra* note 16, at 3.

crease in lawyer population, a principal indicator of pressure on the courts.²¹ Witness, for example, the fact that the number of law students in the nation's law schools has increased from 53,000 in 1950 to over 125,000 in 1976. Predictably the number will be 150,000 shortly after the turn of the century.²²

As these populations increase, it is apparent that there will be more cases brought before the federal courts and, concomitantly, a need for more federal judgeships. At my request, officials of the Administrative Office of the United States Courts²³ have made an unofficial projection of the number of judgeships and caseloads in the federal district courts in the year 2000. Their projection indicates that if the growth in caseload continues, following the pattern of the past thirty years, and if Congress responds with more judgeships, the number of district judges in the year 2000 will have grown from the present 401 to 880, and these judges will have an annual combined civil and criminal caseload of 288,000, or 327 cases per judgeship. In 1977, the number of filings was 163,492, or 411 per judgeship.²⁴

III. RESHAPING THE FEDERAL JUDICIARY

A. Powers of Magistrates

One of the areas where the district courts are experiencing significant changes is in the area of its supporting personnel, particularly magistrates.²⁵ In 1968, Congress passed the Federal Magistrates Act. It was designed to replace the United States Commissioner system and to provide an upgraded system of judicial officers with greater responsibilities and greater qualifications. The Act established three types of jurisdiction for United States magistrates. First, it gave magistrates all the duties which were formerly performed by the United States Commissioners.²⁶ These duties generally related to the initial proceedings in criminal cases, such as the issuance of arrest and search warrants, conduct of bail hearings, and preliminary examinations. Second, the Act gave magistrates expanded trial jurisdiction. Under 18 U.S.C. § 3401,

²¹Hauser, *supra* note 16, at 24.

²²Conversation with William F. Harvey, Dean of Indiana University School of Law—Indianapolis, in Indianapolis (April 10, 1978).

²³Among the duties of the Director of the Administrative Office of the United States Courts is the responsibility for preparing statistical information relating to the state of business of the courts, court dockets and the business which has come before the various United States magistrates. 28 U.S.C. § 604(a), (b), (d) (1970 & Supp. V 1975).

²⁴Letter from Joseph F. Spaniol, Jr., Deputy Director of the Administrative Office of the United States Courts (March 7, 1978).

²⁵Pub. L. No. 90-578, 82 Stat. 1108 (1968) (codified in scattered sections of 18, 28 U.S.C.).

²⁶28 U.S.C. § 636(a)(1) (1970).

magistrates have jurisdiction to try and sentence defendants in "minor offense" cases.²⁷ A "minor offense" is defined as any federal misdemeanor for which the maximum penalty does not exceed one year's imprisonment or a \$1,000 fine, or both.²⁸ Third, the Act authorized the district courts to establish rules under which a full-time magistrate or a specially designated part-time magistrate may be assigned such "additional duties" as are not inconsistent with the Constitution and laws of the United States. Under the 1968 Act, the additional duties authorized by rule could include, but were not restricted to (1) service as a special master in appropriate civil actions, pursuant to applicable provisions of Title 28 and the Federal Rules of Civil Procedure; (2) assistance to a district court in the conduct of pretrial or discovery proceedings in civil or criminal actions; and (3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses and submission of a report and recommendation to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.²⁹

By July 1, 1971, the magistrates system had been established in every federal district. From the very beginning, jurisdictional questions developed because the Act was vague and broad. A diversity of opinion developed in the decisional case law among the appellate courts as to the type of duties which could be appropriately delegated by judges to the magistrates. Several court decisions invalidated references of duties to magistrates.³⁰ A number of courts from the outset made very extensive use of magistrates to expedite the caseloads of the courts. Nevertheless, the uncertainty in the law led several courts to hold back in assignment of duties to magistrates.

Finally, in June 1974, the Supreme Court, in *Wingo v. Wedding*,³¹ held that a magistrate could not conduct an evidentiary hearing in a habeas corpus case, based on the language of the Habeas Corpus Act and the Magistrates Act as then written.³²

As stated by Peter G. McCabe, Chief of the Magistrates Division, Administrative Officer of the United States Courts, a propitious group of factors converged in 1974 and 1975 to provide im-

²⁷18 U.S.C. § 3401(a) (1976).

²⁸*Id.* § 3401(f).

²⁹28 U.S.C. § 636(b) (1970) (amended 1976).

³⁰*Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973), *aff'd*, 418 U.S. 461 (1974); *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972); *T.P.O., Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972).

³¹418 U.S. 461 (1974).

³²*Id.* at 469-72 (citing Habeas Corpus Act, 28 U.S.C. § 2243 (1970), and Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1970)).

petus to the Judicial Conference of the United States to seek substantive changes in the jurisdictional provisions of the Act.³³ First of all, Chief Justice Burger dissented vigorously in *Wingo* and expressly invited the Congress to enact new legislation to clarify the law.³⁴ Second, the caseload of the district courts continued to grow at a rapid rate. In addition to the normal increase in caseload, Congress had passed a series of laws which brought new causes of action into the federal trial courts.³⁵

The Judicial Conference of the United States concluded that although additional judges were needed, the courts could not continue to cope with the problem of growing caseload by merely periodically increasing the number of judges, together with their supporting staffs of law clerks, secretaries, criers, deputy clerks, and court reporters, and concurrently allocating tremendous amounts of additional space to the federal court system. Moreover, a magistrate position costs substantially less than half the cost of a federal judgeship. Thus, in light of the limited resources that will always be available, the Judicial Conference adopted, and continues to adopt, the view that the courts must make full use of the magistrates.³⁶ magistrates.³⁸

Additionally, in 1974, a privately funded delegation of federal trial judges went to England to study the use of masters in the British system. Upon their return, they submitted a report in which they praised the British system and expressed confidence that the use of masters could be duplicated by the use of magistrates in our federal system to expedite the disposition of civil litigation.³⁷

In 1976, Congress responded to these pressures by expanding the duties of the magistrates to allow them to perform pretrial and special master duties at the discretion of, and under the supervision of, the district court.³⁸ In the Senate Judiciary Committee hearings leading to the 1976 amendment of the Magistrates Act, the Commit-

³³*Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 before the Sub-Comm. on Improvements in Judicial Machinery of Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 14 (1975) [hereinafter cited as S. 1613 1612 & S. Hearings] (statement of Peter G. McCabe).*

³⁴418 U.S. at 487 (Burger, C.J., dissenting).

³⁵The Speedy Trial Act of 1974, 88 Stat. 2076 (1975) (codified in scattered sections of 18, 28 U.S.C.), has heightened the existing docket pressures and has required adjustments in court procedures and scheduling. The Speedy Trial Act has spurred the use of magistrates and will continue to do so.

³⁶*See S. 1612 & S. 1613 Hearings, supra* note 33, at 14-17 (statement of McCabe).

³⁷*Id.* at 47 (Exhibit B) (Report of Committee to Study the Role of Masters in the English Judicial System). *See S. 1612 & S. 1613 Hearings, supra* note 33, at 15 (statement of McCabe).

³⁸Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729 (codified at 28 U.S.C.A. § 636(b) (Supp. 1978)).

tee made the observation that multi-tiered court systems have developed "simply in recognition of the fact that certain cases and judicial functions are of differing importance so as to justify different treatment by the court system."³⁹ The 1976 amendments to the Act dealt only with the "additional duty" jurisdiction of magistrates and the various means by which they could assist the judges.

For example, a magistrate may now *hear and determine* all pretrial matters in civil and criminal cases upon reference from a judge, except for eight enumerated case-dispositive motions: In criminal proceedings, a magistrate may not rule on (1) motions to dismiss or quash an indictment or information made by the defendant, or (2) motions to suppress evidence. In civil proceedings, a magistrate may not hear or determine (3) motions for injunctive relief (temporary restraining orders and preliminary injunctions), (4) motions to dismiss for failure to state a claim upon which relief may be granted, (5) motions to involuntarily dismiss an action (and the review of default judgements), (6) motions to dismiss or to permit the maintenance of a class action, (7) motions for judgment on the pleadings, or (8) motions for summary judgment. A magistrate may be assigned to hear and *recommend* disposition of any of the above motions, as well as applications to revoke probation, including the conduct of the final probation revocation hearing.⁴⁰

A magistrate does *not* have the power to *determine dispositive matters*. Rather, he must prepare proposed findings and recommendations and file them with the court. A copy is thereupon mailed to the parties, who have ten days after receipt thereof within which to file specific objections in writing to the magistrate's report. The ultimate adjudication of the matter rests with the district judge to whom the entire case has been assigned. The judge must give "fresh" consideration to those issues as to which there have been specific objections. He must make a "de novo" determination, but he need not conduct a new hearing on the contested issues.⁴¹

In 1977, two Senate bills, S. 1612⁴² and S. 1613,⁴³ were introduced to further enlarge magistrates' jurisdiction. S. 1612 was a recommendation of the Judicial Conference of the United States and is more limited in scope than S. 1613, which was drafted by the Department of Justice. Under existing law, the district courts may

³⁹*Jurisdiction of U.S. Magistrates*, S. REP. NO. 94-625, 94th Cong., 2d Sess. 6 (1976).

⁴⁰See 28 U.S.C.A. § 636(b)(1)(A), (B) (Supp. 1978).

⁴¹*Id.* § 636(b).

⁴²95th Cong., 1st Sess., reprinted in *S. 1612 & S. 1613 Hearings*, supra note 33, at 4.

⁴³95th Cong., 1st Sess., 123 CONG. REC. S12651 (daily ed. July 22, 1977).

designate magistrates to try and sentence persons accused of certain minor offenses for which the penalty "does not exceed imprisonment for a period of one year or a fine of not more than \$1,000.00, or both."⁴⁴

S. 1612, the Judicial Conference draft, would amend the definitions of a "minor offense" to include all misdemeanors when the penalty does not exceed imprisonment for period of one year or a fine of \$5,000 or both.⁴⁵ The Judicial Conference has concluded that there are a number of misdemeanors in the United States Code not presently included in the term "minor offense" which could properly be tried by the magistrates.⁴⁶ These misdemeanors include the illegal possession of untaxed alcohol⁴⁷ and the illegal possession of certain controlled substances.⁴⁸

Additionally, S. 1612 would eliminate the requirement, now found in 18 U.S.C. § 3401(b), that a defendant in a federal minor offense case may waive in writing his right to be tried by a district judge, as well as his right to trial by jury, and consent to be tried before a United States magistrate.⁴⁹ It is the view of the Judicial Conference that the present requirement of a written consent by the defendant to trial before a magistrate is constitutionally unnecessary and creates a needless administrative burden for the magistrate and his staff.⁵⁰

S. 1612 would also make clear that the Juvenile Delinquency Act does not apply in "petty offense"⁵¹ cases. The largest number of petty offenses are traffic violations committed within the federal enclaves, which are generally handled by United States magistrates.⁵²

⁴⁴18 U.S.C. § 3401(f) (1976).

⁴⁵S. 1612, 95th Cong., 1st Sess., reprinted in *S. 1612 & S. 1613 Hearings, supra* note 33, at 4. A "minor offense" is currently defined, with several exceptions, as a federal misdemeanor, the penalty for which does not exceed imprisonment for a period of one year or a fine of not more than \$1,000 or both. 18 U.S.C. § 3401(f) (1976). The proposal does not affect misdemeanors other than "minor offenses," nor does it restrict any right that a defendant may have to a trial by jury.

⁴⁶See *S. 1612 & S. 1613 Hearings, supra* note 33, at 28 (statement of McCabe).

⁴⁷26 U.S.C. § 5686 (1970).

⁴⁸21 U.S.C. § 841(b) (1976).

⁴⁹18 U.S.C. § 3401(b) (1976). See *S. 1612 & S. 1613 Hearings, supra* note 33, at 28-29 (statement of McCabe), for a discussion of the waiver of consent requirement with reference to authorities on the subject.

⁵⁰*S. 1612 & S. 1613 Hearings, supra* note 33, at 28-29.

⁵¹A "petty offense" is defined as a federal misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500. 18 U.S.C. § 1 (1976).

⁵²The United States magistrates disposed of 103,061 minor and petty offense cases during fiscal year 1976, including 69,419 traffic cases, 13,231 illegal entry cases, and 6,511 violations of hunting, fishing, and camping regulations on federal lands. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT 289-90 (1977).

However, magistrates are without authority to conduct juvenile proceedings. At present, the Juvenile Delinquency Act does not clearly exempt petty offenses from the definition of "juvenile delinquency."⁵³ Application of the Act to petty offense cases currently requires juveniles who wish to have their cases conducted by a magistrate to undergo a complicated waiver procedure, which is generally unsatisfactory to all concerned. The proposed amendment would clearly allow magistrates to process petty offenses involving juveniles,⁵⁴ particularly traffic violations within federal enclaves.

S. 1613,⁵⁵ the bill recommended by the Department of Justice, while not as limited as S. 1612, is, however, like S. 1612, a logical extension of the original magistrate system. One purpose of the bill is to "improve access to the federal courts"⁵⁶ for all groups, especially the less advantaged, *e.g.*, the Social Security black lung disability claimants, and others seeking review of administrative agency decisions. Four major changes would be effected by S. 1613. First, the bill would remove the current \$1,000 penalty ceiling on magistrates' criminal jurisdiction⁵⁷ and would delete current exemptions of certain offenses. Magistrates would then be able to try all misdemeanors. Second, a defendant charged with a misdemeanor carrying a penalty of six months' or less imprisonment, or a \$500 fine, or both, would no longer be able to elect to have a trial before a district judge, but would be tried by a magistrate without a jury. If, however, the possible maximum punishment would exceed a \$500 fine, or six months' imprisonment, or both, then either the defendant or the government would be given the election of a trial by jury before either the magistrate or the district court. Third, magistrates would be permitted to sentence under the Youth Correction Act. Fourth, appeals of right would be to the district court as to all decisions of the magistrate.

S. 1613 would explicitly give magistrates case-dispositive jurisdiction over all civil actions in which the district court and the parties concur as to such a disposition.⁵⁸ In this regard, the district court might promulgate a rule designating certain cases for magistrate determination. The bill would provide an appeal of right to the district court and further discretionary review by the court of appeals and the Supreme Court. The appeal to the district court would lie as to all factual and legal issues. The standard of review

⁵³Juvenile Delinquency Act, § 1, 18 U.S.C. § 5031 (1976).

⁵⁴S. 1612 & S. 1613 Hearings, *supra* note 33, at 142.

⁵⁵95th Cong., 1st Sess., 123 CONG. REC. S12651 (daily ed. July 22, 1977).

⁵⁶123 CONG. REC. S12647 (daily ed. July 22, 1977).

⁵⁷18 U.S.C. § 3401(f) (1976).

⁵⁸S. 1613, 95th Cong., 1st Sess., 123 CONG. REC. S12651 (daily ed. July 22, 1977).

would be the same as that employed by the court of appeals if the case had been initially litigated in the district court. Further appellate review by the court of appeals would be confined to discretionary review of matters of law decided by the district court.⁵⁹ In the interest of judicial economy, sponsors of the bill feel that no additional factual review is necessary or desirable. They point out that in many cases the administrative findings of fact would already have been reviewed twice—first by the magistrate and again by the district court.⁶⁰

The court of appeals would grant or deny leave to appeal in much the same way it acts on a petition for allowance of appeal in some bankruptcy cases and interlocutory appeals.⁶¹ Refusal to grant such an appeal would not be reviewable by the Supreme Court under the bill. Only determinations of law by the courts of appeals, made after the granting of leave to appeal, would be so reviewable. The bill provides, however, that the court of appeals may review any action when it appears from the petition for leave to appeal that a prejudicial error of law has been committed.⁶²

A salient feature of S. 1613 is the provision requiring the Judicial Conference of the United States to fix standards and procedures for the judicial councils of the various circuits for the councils' use in preparing lists of persons deemed qualified to serve as United States magistrates. The district judges would then be required to appoint magistrates from the certified list.⁶³

In hearings before the Subcommittee on Improvements in the judicial Machinery of the committee on the Judiciary of the United States Senate, Charles M. Metzner, the Chairman of the Committee on the Administration of the Magistrates System of the Judicial Conference, pointed out that magistrates are already empowered to hear and determine all civil litigation when the parties and the district court concur, including the use of jury trials for that purpose. Objection was voiced that it was unfair to permit the government the advantage of being able to elect whether it would try the more serious misdemeanor case before the magistrate, in a manner resembling the current defendant's election. Moreover, Metzner flatly declared that the bill would not work if the final judgment of the magistrate in civil cases was not appealable directly to the court of appeals. His view was that the parties would not agree to follow the more cumbersome and

⁵⁹S. 1613, 95th Cong., 1st Sess. § 2(c), 123 CONG. REC. S12651 (daily ed. July 22, 1977).

⁶⁰123 CONG. REC. S12650 (daily ed. July 22, 1977) (remarks of Sen. DeConcini).

⁶¹28 U.S.C. § 1292 (1970).

⁶²S. 1613, *supra* note 59.

⁶³*Id.* § 3(a).

expensive route involving an initial appeal to the district court and a subsequent appeal to the court of appeals. He observed that although the sponsors of the bill had sought to relieve appellate pressure by having the district court review the magistrates' final judgments in the first instance, it was unlikely that litigants would accept the more expensive and time-consuming route to final judgment following the appellate review. Additionally, he expressed the view that the procedure for appeal to the district court may very well dampen the enthusiasm for the suggested improved access to the federal courts. He noted that these cases are presently being tried by the district courts with the right of appeal to the court of appeals.⁶⁴

B. The Petit Jury

In recent years, efforts to streamline the disposition of civil litigation in federal courts has focused on the modification or outright elimination of the use of petit juries in civil cases. Although only a few years ago the subject was roundly debated, today, however, the debate in federal circles has all but ceased with the adoption of civil juries of less than twelve in nearly all the federal districts. At last count, the use of juries of less than twelve had been adopted in 87 of the 94 districts; a few still require eight-member juries.⁶⁵

Those favoring abandonment of juries in civil cases point to the British system and contend that the virtual elimination of civil juries in the Mother Country has not diminished the quality of justice. They argue that bench trials are less costly and time-consuming, and that the awards are more predictable in comparable cases. On the other hand, those supporting the retention of civil juries argue the positive points of the jury system as an institution. As pointed out by Professor Hans Zeisel at the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, these positive points are that:

- (1) the jury provides an important civic experience for the citizen;
- (2) because of popular participation, the jury makes tolerable the stringency of certain decisions;

⁶⁴*S. 1612 & S. 1613 Hearings, supra* note 33, at 12-14 (statement of Hon. Charles M. Metzner, Judge, United States District Court for the Southern District of New York, and chairman of the Committee on the Administration of the Magistrates System of the United States Judicial Conference).

⁶⁵This statistic was supplied by Hon. Edward Devitt, Chief Judge, United States District Court for the District of Minnesota, and co-author of E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE & INSTRUCTIONS* (3d ed. 1977).

(3) because of its transient personnel, the jury acts as a sort of lightning rod for animosity and suspicion which otherwise might center on the more permanent judge; and

(4) the jury is a guarantor of integrity, since it is said to be more difficult to reach twelve men than one.⁶⁶

Professor Zeisel stresses that

[t]he Anglo-American jury is a remarkable political institution. We have had it with us for so long that any sense of surprise over its main characteristics has perhaps somewhat dulled. [The jury institution] recruits a group of twelve laymen, chosen at random from the widest population; it convenes them for the purpose of the particular trial; it entrusts them with great official powers of decision; it permits them to carry on deliberations in secret and to report out their final judgment without giving reasons for it; and, after their momentary service to the state has been completed, it orders them to disband and return to private life. The jury represents a deep commitment to the use of laymen in the administration of justice—a commitment that finds its analogue in the widespread use of lay judges in the criminal courts of other countries.⁶⁷

There was a time when I too favored abandonment of civil juries. However, in more recent years I have come around full circle to the conclusion that the petit jury system is too much a part of our legal order to be abandoned, even in civil trials. As so eloquently stated by Alexis de Tocqueville: "It would be a very narrow view to look upon the jury as a mere judicial institution; for, however great its influence may be upon the decision of the courts, it is still greater on the destinies of society at large."⁶⁸

In my own experience, I have found, as I am sure other judges have found, that trial by jury often achieves faster results than a trial to the court without a jury, especially in cases that must be taken under advisement while the court ponders the evidence, considers the post-trial briefs, and makes its findings and conclusions. I do not foresee the use of less than twelve-member juries in criminal cases in the federal trial courts.

C. *The Grand Jury*

Changes which pending legislation would make in the grand jury system may also have significant impact on the federal district

⁶⁶Zeisel, *The American Jury*, in THE AMERICAN JURY SYSTEM 65, 67 (1977) (published by the Roscoe Pound—American Trial Lawyers Foundation).

⁶⁷*Id.* at 66.

⁶⁸Bennett & Koskoff, *Foreward* to THE AMERICAN JURY SYSTEM, *supra* note 66, at 11 (quoting de Tocqueville).

courts. Among the changes which would be worked by the proposed Grand Jury Reform Act of 1977, H.R. 94,⁶⁹ and which would have impact on the courts as well as prosecutorial authorities, is the switch from use immunity to transactional immunity. The bill would also allow a grand jury witness to have counsel present during testimony before a grand jury and would allow counsel to disclose what had transpired during his presence. The size of the federal grand juries would, under the Reform Act, be lessened from the present minimum of sixteen and maximum of twenty-three to a minimum of nine and a maximum of fifteen. The Act would impose additional instruction and supervision burdens upon the district courts, while requiring new procedures regarding subpoenas, notice thereof, and the quashing and clarifying of subpoenas.⁷⁰

D. Diversity Jurisdiction

One of the areas of federal jurisdiction which is often examined when reform of the federal judicial system is considered is diversity-of-citizenship jurisdiction.

On February 28, 1978, a bill to abolish diversity of citizenship as a basis of federal district court jurisdiction was passed by the House of Representatives. The bill, H.R. 9622,⁷¹ provides for the amendment of the diversity statute by striking the words "citizens of different States," but would not affect the language conferring upon the district courts original jurisdiction of civil actions where the matter in controversy exceeds \$10,000 and is between citizens of a state and citizens of a foreign state, or between a foreign state as plaintiff and citizens of a state or different states.

Although the bill as passed by the House would retain alienage jurisdiction under 28 U.S.C. § 1332,⁷² it would, however, raise the jurisdictional amount from \$10,000 to \$25,000.⁷³ The bill would also abolish the requirement that there be \$10,000 in controversy in federal question cases. Congress amended 28 U.S.C. § 1331 in 1976 to provide that no amount in controversy is required in any federal question case brought against the United States;⁷⁴ however, the amount-in-controversy requirement still applies in a small number of federal question cases. The elimination of the amount-in-controversy requirement in these federal question cases would not have an appreciable effect on the federal caseload. As amended by the bill, section 1331 would provide: "The district courts shall have original

⁶⁹95th Cong., 1st Sess. (1977).

⁷⁰*Id.*

⁷¹95th Cong., 2d Sess., 124 CONG. REC. H1553 (daily ed. Feb. 28, 1978).

⁷²28 U.S.C. § 1332(a)(2) (1970).

⁷³H.R. 9622, *supra* note 71, § 1(a).

⁷⁴28 U.S.C.A. § 1331 (Supp. 1978).

jurisdiction of all civil cases wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."⁷⁵

The bill retains statutory interpleader⁷⁶ as a basis for federal jurisdiction. The House Report accompanying the bill stated that this is a recognition that section 1335 interpleader "serves a valuable function, providing a federal forum for suits in which no single state court could obtain jurisdiction and in which there are widely scattered, competing claimants."⁷⁷

Whether the bill passes the Senate remains to be seen. My guess is that the bill will encounter a less favorable reception in the Senate. It must be remembered that the bill was passed by the House under a suspension of the rules, the bill having been placed on the suspension calendar where normally noncontroversial issues are placed to get rid of them.

One member of the House, Congressman Glickman from Kansas, found it absolutely incredible that a bill of its magnitude was being passed under a suspension of the rules. He felt there were times when members of the House had their priorities mixed up. He stated,

We spend hours on noncontroversial pieces of legislation in the full House and then we get a bill like this that has a monumental impact on our judicial system and we have 40 total minutes time to debate it. We cannot even amend the bill on the floor and we are asked to make this kind of review.⁷⁸

He hoped the suspension of the rules would be beaten so as to bring the bill back to the House for full discussion and with a variety of amendments. It concerned him greatly that the House was considering the bill which, in his words, "directly relates to provisions of the Constitution."⁷⁹ Diversity, he stated, has served as a basis for federal jurisdiction for nearly 200 years, and he did not think the House "should decide to do away with it without the benefit of full floor debate and amendment."⁸⁰

It was incredible to Congressman Glickman that the bill was being considered in such a manner, for, in talking to lawyers throughout the country as one of his colleagues from Missouri had

⁷⁵H.R. 9622, *supra* note 71, § 2(a).

⁷⁶28 U.S.C. § 1335 (1976).

⁷⁷*Abolition of Diversity of Citizenship Jurisdiction*, H.R. REP. NO. 95-893, 95th Cong., 2d Sess. 8 (1978).

⁷⁸124 CONG. REC. H1556-57 (daily ed. Feb. 28, 1978).

⁷⁹*Id.* at H1557.

⁸⁰*Id.*

done, it was found that attorneys generally knew nothing about the bill. He claimed that they were shocked to find out what was happening on the floor of the House and that none of them knew anything about the fact that the legislation would shift the "bulk load" of litigation to the state courts. There had been no testimony or findings in the committee reports that dealt with the issue of the *quality* of justice in a transfer of this "great bulk load of cases to the state courts." He argued that the House had just created an additional 140 judges. Further, he questioned whether we would have a more efficient system "just in the type of decision made by the State judges"⁸¹ by adding the additional federal judges and then taking away a substantial percentage of their caseload.

Previously, in addition to the above remarks, Congressman Glickman has urged the following five points upon his colleagues in favor of retaining diversity jurisdiction in some instances, particularly in the large urban areas, where the backlog of cases pending before the state courts was greater than those before the federal courts: (1) A reduction of congestion in the federal system would merely shift that congestion to the state system without any kind of advance analysis; (2) the House Judiciary Committee has unequivocally stressed its concern about the quality of justice in our system of justice, but there was no indication that the bill analyzed factors other than efficiency in any detail; (3) the House had just approved bankruptcy legislation giving relief to the federal courts; (4) state courts, unlike federal courts, cannot generally enforce their decisions beyond their jurisdictional boundaries; (5) the elimination of diversity jurisdiction could pose serious jurisdictional problems with reference to venue statutes and create "unnecessary inconvenience" in others.⁸²

Certainly there are persuasive arguments in favor of removing diversity jurisdiction from the federal district courts. It would, in the words of the Chief Justice, be a great step toward achieving "a proper balance . . . between the federal and state court systems."⁸³ It would also turn back nearly 32,000 cases from 400 federal district judges to some 6,000 state trial judges,⁸⁴ thereby having a substantial impact in saving federal courts from insidious court congestion and allowing the federal courts to resolve disputes in traditional federal subject matter areas basic to civil and constitutional rights.

⁸¹*Id.*

⁸²*Id.*

⁸³*State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 7 (1977) (statement of Chief Justice Warren E. Burger (quoting Chief Justice Earl Warren)).*

⁸⁴124 CONG. REC. H1554 (daily ed. Feb. 28, 1978).

The state courts are capable of providing a fair and impartial forum in these cases. In 1977, the Conference of Chief Justices stated, "Our State court systems are able and willing to provide needed relief to the Federal court system, [including] . . . [t]he assumption of all or part of the diversity jurisdiction presently exercised by the Federal courts."⁸⁵ Modern benefits of diversity jurisdiction are hard to discern. The historic argument in favor of the use of diversity—that is, the potential for bias in state courts and state legislatures—was derived from a time in our history when regional feelings were far stronger. Diversity cases involving questions of state law would be resolved in state courts and federal law questions would be adjudicated in federal courts, regardless of the amount in controversy.

The legislation received broad-based support from individuals and organizations interested in improving the administration of justice in both the federal and state judicial systems. To be specific, as stated by Congressman Kastenmeier of Wisconsin, H.R. 9622 is enthusiastically supported by the Conference of State Chief Justices, the Judicial Conference of the United States, the National Senior Citizens Law Center, the NAACP Legal Defense and Education Fund, the American Civil Liberties Union, the Department of Justice Committee on Revision of the Federal Judicial System and the Department of Justice itself, the Legal Services Corporation, the American Bar Association Committee of Coordination of Federal Judicial Improvements, and the Council on Public Interest Law. Congressman Kastenmeier notes that the list of individuals who expressed support for the legislation reads like an index of "Who's Who in American Law" and includes Professor and former Solicitor General Robert Bork, Professor Charles Alan Wright, Dean Erwin Griswold, Chief Justice Warren Burger, Attorney General Griffin Bell, and Judge Shirley Hufstedler.⁸⁶

E. Civil Arbitration

While innovations in the Magistrates system have helped to relieve some of the pressures on the district courts, another plan has been introduced in Congress which could aid in processing civil cases in the federal district courts.

Last October, Congressman Peter Rodino, Chairman of the House Committee on the Judiciary, introduced H.R. 9778,⁸⁷ a bill to amend title 28 of the United States Code in order to encourage prompt, informal, and inexpensive resolution of civil cases by the

⁸⁵Resolution of the Conference of Chief Justices (Aug. 30, 1977), reprinted in H.R. REP. NO. 95-893, *supra* note 64, at 21.

⁸⁶124 CONG. REC. H1554 (daily ed. Feb. 28, 1978).

⁸⁷95th Cong., 1st Sess. (1977).

use of arbitration in the United States district courts. The bill would allow any district to adopt arbitration for the resolution of certain types of private cases, as well as cases involving the government where the Attorney General has provided by regulation that they should be submitted to arbitration. The bill limits money damages to \$50,000. It also provides that arbitration shall be implemented on a test basis for three years in no fewer than five nor more than eight representative districts to be designated by the Chief Justice, after consultation with the Attorney General. The Judicial Conference would be authorized to develop model procedures under the Act. The Federal Judicial Center is to advise and consult with the Judicial Conference and the district courts in connection with their duties under the Act. Finally, the Federal Judicial Center, in consultation with the Attorney General and the Administrative Office of the United States Courts, is to transmit to Congress, on or before the expiration of three years from the effective date of the Act, a report on the use, effectiveness, and benefits of arbitration in the test districts and such other districts in which cases are referred to arbitration under the Act.⁸⁸

Recently the Justice Department announced that three federal district courts are implementing pilot programs in cooperation with the Judicial Center and the Department of Justice to test the effectiveness of arbitration in those districts. The program was commenced in the District of Connecticut and the Northern District of California on April 1, 1978. The program had already been commenced in the Eastern District of Pennsylvania at Philadelphia. In each of these districts under the plans adopted, arbitration is to be applied in most personal injury cases, property damage, and contract cases, involving, in the Eastern District of Pennsylvania, not more than \$50,000, and, in the District of Connecticut and the Northern District of California, not more than \$100,000. Under the local plans adopted by the pilot program district courts, arbitration is mandatory but nonbinding. The parties may reject the procedure after the clerk has referred the case to a panel of arbitrators and has asked for a trial de novo. This may be done even after the entry of judgment on the award has been entered, provided the request for trial de novo has been made within the specified time. Otherwise, the judgment stands and there is no appeal from it.⁸⁹

IV. SUMMARY

In conclusion, I would like to recap eight areas covered in my remarks on the future of the federal district courts. First, as I envi-

⁸⁸*Id.*

⁸⁹See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6 (1978).

sion the future of the federal district courts, barring surprise events that could change the entire course of history, I see the courts in a supertechnological environment, and, I might add, an intrinsically dangerous environment, with an urban population of 275 million, as compared to a rural population of 4 million in 1790, a demographic and ecological environment far different from that from which came those who ratified our Constitution and Bill of Rights. Our interdependent social and economic order will be continually more vulnerable to disruption, causing increased numbers to seek the courts to resolve their disputes.

Second, following the pattern of the past thirty years, if Congress responds with more judgeships, based on unofficial figures projected by the Administrative Office of the United States Courts, the number of district judges in the year 2000 will have grown from the present 401 to 880, with an annual combined civil and criminal caseload of 288,000, or 327 cases per judgeship.⁹⁰

Third, I see the role of the United States magistrate emerging prominently, both in respect to their number and their powers. By the twenty-first century, their number and their authority will have been greatly increased, and far more of the district judges' responsibilities will have been shifted to them. The ratio of full-time magistrates to district judges will have increased greatly—even to the point where the magistrates will outnumber the district judges.

The reviewing responsibilities of the district judge will have increased greatly, both as to administrative tribunal rulings through suits for the purpose and as to rulings of magistrates, arbitrators, special masters, and probably rulings of bankruptcy judges. While the bankruptcy court may be made a separate court from the district court, I doubt seriously that direct appeal from the bankruptcy court to the court of appeals will be permitted.

Thus, I believe that the number of baseline adjudicators without article III powers will have been increased greatly, but the number of article III nontenured district judges will have been increased only sparingly. In other words, the supporting base of the federal judicial system will have been broadened horizontally, but without a corresponding broadening of the tier of district courts above it in the judicial pyramid. This conclusion seems apparent, for not only is it less costly to increase the number of magistrates than it is to increase the number of district judges, but it is also far less inconvenient. By spreading the caseload to a broader base below with intermediate review by the district court, an appreciable amount of appellate pressure on the appellate courts can be avoided. Caseload pressure must first be relieved below, not only to afford greater ac-

⁹⁰See text accompanying note 24 *supra*.

cess to the trial courts, but to maintain efficiency in, and our awesome respect for, the higher courts.

Fourth, the petit jury system will remain largely as it is today—twelve-member juries in criminal cases, and less than twelve-member juries in civil cases in all but a few districts, if not in all of them. In other words, the civil jury will not be abandoned in exchange for bench trials, as some would have it. There was a time when I too favored abandonment of civil juries. However, in more recent years I have come around full circle to the conclusion that the petit jury system is too much a part of our legal order to be abandoned, even in civil trials.

Fifth, I see in the future a limited reform in the federal grand jury system. The grand jury, I believe, will be reduced in number from the present required minimum of sixteen and maximum of twenty-three, to perhaps a minimum of nine and a maximum of fifteen, as presently proposed in Congress. Subject to well-defined restrictions, I believe witnesses before the grand jury will some day be allowed to have counsel with them when called to produce information or testify, largely as witnesses are permitted to be represented by counsel in congressional and other investigatory hearings today.

Sixth, although there are persuasive arguments for and against the abolition of diversity of citizenship as a basis for federal district court jurisdiction, I find it difficult to believe that the bill that has passed the House of Representatives will receive the same favorable reception in the Senate that it received in the House. I believe that the effects of the bill's passage on the nation's system of justice in the state and federal courts will receive very critical analysis in the Senate before it is passed in its present form. The relief it would bring to the federal courts' caseload would be welcomed by the federal judiciary, but serious questions are presented as to the effect it will have on some state court backlogs, especially in the larger urban areas.

Seventh, as a means to achieve prompt, informal, and inexpensive resolution of civil cases, mandatory civil arbitration will be widely, if not universally, adopted in the federal district courts.

Finally, I see for the federal courts, both trial and appellate, vastly enlarged central staffs of supporting research personnel, including screening personnel, staff attorneys, law clerks, and other para-judicial personnel, to handle the overwhelming cascade of paperwork flowing upon the federal courts, much of which will be cases filed by individuals acting pro se. National research data centers will serve each of the federal courts to enable them to keep momentarily abreast of the latest appellate and Supreme Court decisions.