COMMENTS ON THE VOLUME OF LITIGATION IN THE FEDERAL COURTS†

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I. INTRODUCTION

Perhaps the single, most immediate problem confronting the federal judiciary is the overwhelming caseload of the federal courts. In recent years there has been a steady growth in the amount of work of the federal courts, more complex litigation, more novel cases, and hence more problems. According to Clement F. Haynsworth, Jr., Chief Judge of the Court of Appeals for the Fourth Circuit: "The biggest change, of course, is the expansion of the system and the revolutionary change in the kind of cases we get. This is largely a consequence of congressional enactments during the last two decades but there have also been self-inflicted wounds by the courts." Judge Haynsworth is not the only one to echo fears of recent expansion in federal jurisdiction. Chief Justice Burger of the United States Supreme Court has made this concern a priority. The Chief Justice has remarked that just in the past decade, Congress has enacted not less than seventy new statutes enlarging the jurisdiction of federal courts.1

These problems and concerns have brought numerous calls for fundamental change and remedies. Among the proposals have been the elimination of diversity jurisdiction, requests for Congress to establish temporary panels to resolve intercircuit conflicts and a tripartite

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2. Id. at n.3.
commission to study long-range solutions for managing the caseloads of the courts.

Commentators have focused attention on the effect of the enormous caseload upon the quality of justice administered and have registered serious concerns. There has been increasing pressure on the federal courts to expeditiously dispense with a more crowded docket, which in turn must affect the quality of justice. Other concerns have been the increased delay and expense in the adjudication of pending litigation in the federal courts and possible damage to uniformity of federal law.

The responses to these concerns have been calls for the exercise of judicial restraint in making available a forum in the federal system to resolve disputes that traditionally have been settled by other institutions. Also, there have been calls for restraint in the recent expansion in federal jurisdiction. Serious consideration must be given to these proposals. In light of the concerns, it is appropriate first to analyze the number and types of cases currently reaching the federal bench.

II. EVER-INCREASING LITIGATION

In evaluating the role of the federal courts in 1983, the flood of ever-increasing litigation during the past century is effecting changes in our judicial system. To use the language of United States Attorney General William French Smith:

In 1882, there were less than 4000 total criminal prosecutions pending in all United States District and Circuit Courts. One hundred years later, there were nearly 21,000—or more than five times as many.

In 1882, there were fewer than 2500 civil cases in which the United States was a party pending in all United States District and Circuit courts. One hundred years later, there were nearly 60,000—or almost twenty-four times as many.

In 1882, there were less than 30,000 total cases pending in the United States district and circuit courts. One hundred years later, there were nearly 240,000—or more than eight times as many.

3. See infra note 11 and accompanying text.

In 1882, the United States was involved in less than ten percent of all civil cases pending in the United States District and Circuit courts. One hundred years later, it was involved in nearly twenty-eight percent.

In 1882, there was no federal bankruptcy act. One hundred years later, nearly 700,000 bankruptcy estates were pending in the U.S. bankruptcy courts—and the United States Supreme Court had found the federal system of bankruptcy courts unconstitutional.

A tremendous acceleration in litigation, leading to these dramatic increases in caseloads, began in the 1960s. As one commentator observed in a recent book:

The tide of federal cases has been out of all proportion to any growth in population and reflects the outpouring of Congressional enactments from the mid-1960s on that reach to the roots of private activity.

The Supreme Court’s docket itself is now nearly two and one-thirds times what it was in 1960. Even more dramatic and important, however, has been the growth of cases in the lower courts, which cannot control the size of their dockets. Annual civil filings in the federal district courts more than tripled between 1960 and 1981. During the same time, appeals increased sevenfold.

More significantly, the number of cases per judge has increased dramatically. Despite the Omnibus Judges Bill of 1978, which added 152 judges to the federal bench, the growth of the federal judiciary has not kept pace with the litigation boom. At the district court level, the judges today must process fifty percent more new filings each year than in 1960. Judges at the appeals level must hear almost four times as many cases today as in 1960. In addition, litigation is more complex and time-consuming than ever before. In 1960, for example, only thirty-five federal trials took more than one month. In 1981 there were five times that number.

What do all these statistics portend for our federal judicial system? Moreover, what are the effects of this mounting burden on the process of deciding cases and on the quality of justice available from our federal courts?

The probable effects were most clearly and forcefully articulated at the 1976 Pound Conference, which was a gathering of the most distinguished scholars of the judicial
process to consider the present and future problems of the federal judiciary. As Robert Bork, then Solicitor General and now a member of the D.C. Circuit, noted there:

The proliferation of social policies through statute and regulation creates a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model.

As the workload has increased, the attention that each case receives from the court has declined. The incidence of decisions without written opinions increases. The availability of oral argument declines. Judges must rely increasingly on the work of an expanding cadre of law clerks, magistrates, and other court personnel.

The time has long since arrived to improve the efficiency and effectiveness of our courts by reducing their burdens.⁵

A few statistics indicate the extent of the Federal Judicial Establishment as it exists today. There are 566 district court judges and 132 court of appeals judges.⁶

The United States District Court for the Eastern District of Pennsylvania pays $4,346,000 per year in rent alone for the space it uses in the Federal Courthouse at Philadelphia. The rent for the space in that courthouse used by the U.S. Court of Appeals for the Third Circuit exceeds $844,000 per year.

The Rand Institute for Civil Justice estimates $752,000 as the average annual government expenditure for one federal district court judge.⁷

A massive expansion of the federal judiciary could create even more problems.⁸ Increasing the number of the decision-makers issu-

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⁵ Smith, Role of the Federal Courts, 88 Case & Com. 10 (1983) [hereinafter cited as Smith].
⁶ Further it has been suggested that the need for increase in the personnel of these courts could be diminished by the creation of special tribunals to decide certain types of factual disputes arising in the administration of welfare and regulatory programs.
⁷ J. Kakalik, Costs of the Civil Justice System (1982).
⁸ See Barton, Behind the Legal Explosion, 27 STAN. L. REV. 567 (1975).

As implausible as it may appear, exponential extrapolation of increases over the last decade suggests that by the early 21st century the federal appellate courts alone will decide 1 million cases each year. That bench would include over 5,000 active judges, and the Federal Reporter would expand by more than 1,000 volumes each year.
ing decisions threatens uniformity, even-handedness and stability in the application of the law. Approximately 25,000 decisions were issued by the courts of appeals in 1981 and over 200,000 decisions at the district court level.\(^9\) I agree with Judge Henry Friendly, of the U.S. Court of Appeals for the Second Circuit, that we must "avert the flood by lessening the flow."\(^10\) Also, I join in the analysis of Chief Justice Burger in his 1982 Annual Report on the State of the Judiciary:

One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.\(^11\)

Commenting on the above language, United States Attorney General Smith states:

It is the supreme irony that our use of courts to enforce so many newly created rights may actually erode their usefulness in protecting the most essential rights of our citizens. Forcing federal courts to do too big a job has jeopardized the effectiveness of the job they have historically performed.

The problem of federal judicial overload is, of course, in large measure caused by the Congress. Each Congress enacts more legislation that gives rise to new litigation. Though Chief Justice Burger has, since 1972, called on Congress to require a judicial impact statement for each piece of legislation affecting the courts, Congress has seldom given adequate attention to the judicial burdens imposed by new legislation. It is difficult to recall any statute in recent years that has eliminated any significant category of litigation. As the burden of government regulation has accumulated, the opportunities and incentives for litigation seem to have expanded geometrically.\(^12\)

Also, judicial activism has resulted in the judiciary inviting far

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9. Smith, supra note 5, at 12.
10. Id. at 14.
12. Id.
greater use of the courts to address society's problems. We need a more regular application and stricter construction of the "case or controversy" requirement of Article III[13] and of the doctrines of standing, ripeness, and mootness.[14] Greater doctrinal self-restraint is required by the courts and is being suggested to them by the Department of Justice.

The Attorney General of the United States has recently made the following suggestions:

One quarter of civil filings in the district courts and about fourteen percent of appeals are diversity cases. Over four percent of all civil cases in district courts and nearly six percent of all appeals are habeas corpus cases filed by state prisoners. To diminish the staggering burden on the federal courts—and for other substantial policy reasons familiar to all of you—the time has come to eliminate federal diversity jurisdiction and to place reasonable limits on federal habeas corpus review of state convictions. The Administration is strongly urging these reforms upon the Congress. The elimination of federal diversity jurisdiction alone would very dramatically lessen the federal caseload, allowing swifter justice and more thorough consideration of other cases that truly should be heard by federal courts.

There are also other proposals that we will pursue to reduce the workload of the federal courts even further. Approximately one quarter of the cases argued before the Supreme Court arose from its mandatory jurisdiction. We believe that the mandatory jurisdiction of the Supreme Court should be abolished because the Court could better super-

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13. Section 2 of article III states:

[1] The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2.

vise the development of law in the federal circuits if it had complete discretion over its own docket. We are also considering the proposal to create special tribunals to decide certain types of factual disputes arising in the administration of welfare and regulatory programs. The creating of such tribunals was proposed over five years ago by a Justice Department Committee headed by Judge Bork. The growing caseload of the federal courts makes renewed attention to this proposal particularly appropriate.¹⁵

In view of the widespread interest in the proper functioning of the federal courts, I call attention to these recent Supreme Court decisions restricting the flow of cases through the federal courts.

III. Legal Principles That May Decrease the Flow of Cases to and Through the Federal Courts

A. Article III Standing and Injury in Fact Principles

In order to have standing in the federal courts, the plaintiff must show that he will be perceptibly harmed by the challenged action; not that he can imagine circumstances in which he could be affected by the agency action.¹⁶

The plaintiff must also demonstrate that injury or threat of injury is "real and immediate," not conjectural or hypothetical.¹⁷

In Valley Forge College v. Americans United,¹⁸ the Court used this language:

We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition. But of one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States. Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits"

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¹⁵. Smith, supra note 5, at 16.
¹⁶. Sierra Club, 405 U.S. at 687.
of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals. 19

B. Doctrine of Mootness

The Doctrine of Mootness is the common law doctrine which states that courts lack power to decide abstract questions in cases where no dispute exists. 20

In Murphy, District Judge v. Hunt, 21 a defendant had been sentenced to consecutive terms on two counts of an indictment and had not sought bail on other pending state charges but appealed to the Nebraska Supreme Court from the above-mentioned sentences. 22 Since the defendant had other similar counts charging first degree sexual offenses pending against him, he then brought a section 1983 23 action in the district court, alleging that a Nebraska statute limiting bail in cases of first degree sexual offenses was unconstitutional. 24 The district court dismissed his complaint on the ground that, due to the state court convictions, the issue of bail was moot. 25 The circuit court of appeals reversed the district court and held that exclusion of availability of bail at the pretrial stage where violent sexual offenses were involved violates the excessive bail clause of the eighth amendment. 26 The Supreme Court vacated the judgment of the court of appeals on the

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19. Id. at 475, 476.
22. Id. at 480.
23. 42 U.S.C. § 1983 states:
   Civil action for deprivation of rights
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
24. Murphy, 455 U.S. at 480.
25. Id. at 481.
26. Id.
ground that his constitutional claim to pretrial bail became moot following his convictions in the state court.27

In Weinstein v. Bradford,28 the Supreme Court stated that this situation did not fall within the recognized exception to the general rule of mootness which was allowed for situations which are "capable of repetition yet evading review."29 The Court held that this doctrine was limited to "situations where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."30

Since Hunt's counsel had stipulated that "the proof of guilt was evident and the presumption great,"31 the Court said: "We cannot say that there exists a reasonable expectation or demonstrated probability that . . . all three of Hunt's convictions will be overturned on appeal."32 The Supreme Court noted that Hunt had not asked for damages or brought a class action on behalf of pretrial detainees.33

C. Recent Supreme Court Cases Increasing the Requirements a Plaintiff Must Show to Prove State Action in a Suit Under 42 U.S.C. § 1983 (Civil Rights Act of 1871)34

In Polk County v. Dodson35 an indigent defendant sued his offender advocate, the county, its board of supervisors, and Ms. Shepard, an attorney in the Offender Advocate's Office. The Court held:

1. A public defender does not act "under color of state law" when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding. Because it was based on such activities, the complaint against Shepard must be dismissed.
   (a) From the moment of Shepard's assignment to represent respondent, their relationship became identical to

27. Id. at 482 ("[The defendant] no longer had a legally cognizable interest in the result of this case.").
29. Id. at 149.
30. Id. at 150.
31. Murphy, 455 U.S. at 483.
32. Id. (citing Arnold J., 648 F.2d at 1166 (showing the great improbability of a reversal)).
33. Id. at 482.
34. See supra note 23.
that existing between any other lawyer and client, except for the source of Shepard's payment. The legal system posits that a defense lawyer best serves the public, not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client. This is essentially a private function for which state office and authority are not needed.

(b) Cases in which this Court assumed that state-employed doctors serving in supervisory capacities at state institutions could be held liable under § 1983 are not controlling. O'Connor v. Donaldson, 422 U.S. 563, and Estelle v. Gamble, 429 U.S. 97, distinguished.

(c) Although the employment relationship between the State and a public defender is a relevant factor, it is insufficient to establish that a public defender acts under color of state law within the meaning of § 1983. A public defender is not amenable to administrative direction in the same sense as other state employees. And equally important, it is the State's constitutional obligation to respect the professional independence of the public defenders whom it engages.

(d) It is the ethical obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals. Respondent has no legitimate complaint that Shepard failed to prosecute a frivolous appeal on his behalf.36

In Barbara Blum, Commissioner of the New York State Department of Social Services v. Yaretsky,37 New York, a participating state in the Medicaid program, provides Medicaid assistance to eligible persons receiving care in private nursing homes.38 The homes are reimbursed by the state for the reasonable cost of services.39 Each home has a review committee of physicians who periodically assess whether each patient is receiving the appropriate level of care and whether continued stay in the home is justified.40

The Court held that respondents (Medicaid patients in nursing homes bringing a class action) failed to establish state action in the nursing homes, using this language:

36. Id. 312-13.
38. Id. at 994.
39. Id.
40. Id. at 994-95.
First, although it is apparent that nursing homes in New
York are extensively regulated," [t]he mere fact that a
business is subject to state regulation does not by itself con-
vert its action into that of the State for purposes of the Four-
teenth Amendment." Jackson v. Metropolitan Edison Co., 419
U.S., at 350. The complaining party must also show that
"there is a sufficiently close nexus between the State and
the challenged action of the regulated entity so that the ac-
tion of the latter may be fairly treated as that of the State
itself." Id., at 351. The purpose of this requirement is to
assure that constitutional standards are invoked only when
it can be said that the State is responsible for the specific con-
duct of which the plaintiff complains. The importance of
this assurance is evident when, as in this case, the com-
plaining party seeks to hold the State liable for the actions
of private parties.

Second, although the factual setting of each case will
be significant, our precedents indicate that a State normally
can be held responsible for a private decision only when
it has exercised coercive power or has provided such signifi-
cant encouragement, either overt or covert, that the choice
must in law be deemed to be that of the State. Mere ap-
proval of or acquiescence in the initiatives of a private party
is not sufficient to justify holding the State responsible for
those initiatives under the terms of the Fourteenth Amend-
ment.

Third, the required nexus may be present if the private
entity has exercised powers that are "traditionally the ex-
clusive prerogative of the State."

... The decisions about which respondents complain
are made by physicians and nursing home administrators,
all of whom are concededly private parties. There is no sug-
gestion that those decisions were influenced in any degree
by the State's obligation to adjust benefits in conformity with
changes in the cost of medically necessary care.

... This case, therefore, is not unlike Polk County v.
Dodson, 454 U.S. 312 (1981), in which the question was
whether a public defender acts "under color of" state law
within the meaning of 42 U.S.C. § 1983 when representing
an indigent defendant in a state criminal proceeding.
Although the public defender was employed by the State and appointed by the State to represent the respondent, we concluded that "[t]his assignment entailed functions and obligations in no way dependent on state authority.\textsuperscript{41}

In \textit{Rendell-Baker v. Kohn},\textsuperscript{42} employees were discharged from a private school specializing in dealing with troubled high school students.\textsuperscript{43} Ninety percent of the school's budget came from private funds.\textsuperscript{44} The school was subject to state and local regulations.\textsuperscript{45} A discharged employee sued under the 1871 Civil Rights Act\textsuperscript{46} alleging a discharge in violation of civil rights.\textsuperscript{47} The district court granted a motion by the school for summary judgment.\textsuperscript{48} Later, five other discharged employees brought a similar suit. A motion to dismiss was denied and a different district judge held this action was under color of state law.\textsuperscript{49} The Court of Appeals for the First Circuit upheld the action in the first case and reversed the holding in the suit by the five employees.\textsuperscript{50} The court held that the private school did not act under color of state law when it discharged the employees, and therefore the employees did not state a claim for relief under 42 U.S.C.S. § 1983, since (1) the decisions to discharge the employees "were not compelled or even influenced by any state regulation,"\textsuperscript{51} and (2) "the school's fiscal relationship with the State [was] not different from that of many contractors performing services for the government," there being no "symbiotic relationship" between the school and the state.\textsuperscript{52}

In \textit{Lugar v. Edmondson Oil Co.},\textsuperscript{53} the court examined whether (1) the constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute. And if the challenged conduct of the creditor constitutes state action, as delimited by the court's prior decisions, then that conduct is also action under color of state law and would support a suit under section

\begin{enumerate}
\item Id. at 1004-05, 1008-09 (citations and footnotes omitted).
\item 457 U.S. 830 (1982).
\item Id. at 834.
\item Id. at 832.
\item Id. at 833.
\item 42 U.S.C.S. § 1983.
\item 457 U.S. at 834-35.
\item Id. at 835.
\item Id. at 836.
\item Id. at 836-37.
\item Id. at 841.
\item Id. at 843.
\item 457 U.S. 922 (1982).
\end{enumerate}
1983, and whether (2) the allegation of the creditor that deprivation of his property resulted from the creditor's misuse or abuse of state law did not state a cause of action under section 1983 but only challenged a private action. But the allegation that the deprivation of property resulted from a state statute that was procedurally defective under the due process clause stated a cause of action under 42 U.S.C.S. § 1983 since the statutory scheme was a product of state action, as "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment."

D. Limitations on Justiciable Issues Where Political Questions Are Involved

Baker v. Carr involved the apportionment of the Tennessee legislature which the plaintiffs claimed resulted in a violation of equal protection of the laws. The Supreme Court held that the district court had jurisdiction because justiciable issues had been presented on the facts of that case. In discussing the political question doctrine, the Court set forth the following standards for determining when a case involves a political question that is not justiciable:

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
(2) or a lack of judicially discoverable and manageable standards of resolving [the issue];
(3) or the impossibility of deciding [the claim] without an initial policy determination of a kind clearly for non-judicial discretion;
(4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
(5) or an unusual need for unquestioning adherence to a political decision already made;
(6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

54. Id.
55. Id. at 923.
56. 369 U.S. 186 (1962).
57. Id. at 187-88.
58. Id. at 198-204.
59. Id. at 217.
Other cases discussing the political questions doctrine include *Powell v. McCormack* and *Goldwater v. Carter*.

**IV. Conclusion**

The ever-increasing caseload is effecting changes in the judicial system such that fundamental alterations may be required. The federal courts have come to recognize this issue as a grave problem that can cause a diminution in the quality of justice being administered. One need not ponder too long to realize that the over-crowded dockets will put pressure on the judiciary in such a way that the time for reflection and thoughtful decision making will give way to demands of efficiency and expeditious disposition of litigation. If the current tide of litigation is not somehow channeled, these courts’ effectiveness as arbiters of justice will simply be eroded. It is imperative that there be more cooperation between the judiciary and Congress in fixing and defining more precisely the jurisdiction of the federal courts.

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