Help Wanted - Federal Judges: Judicial Gridlock; Solving an Immediate Problem and Averting a Future Crisis

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HELP WANTED—FEDERAL JUDGES: Judicial Gridlock; Solving an Immediate Problem and Averting a Future Crisis

Victor Williams*

INTRODUCTION

The federal judicial system is in a state of gridlock as 837 federal trial judges attempt to process the civil actions of a nation of over 200 million inordinately litigious citizens while adjudicating the criminal trials of a nation at war against drugs and violent crime.¹ The gridlock problem has been exacerbated in the past year, as up to 135 of our nation's trial and appellate judgeships have remained vacant owing to a breakdown in the appointment process.² Although the national judicial system is overloaded across the country, gridlock is particularly acute in metropolitan jurisdictions, where federal judges have to delay civil trials for years to accommodate onerous criminal trial schedules.³ Federal judges acknowledge that the quality of justice available in our national courts, for both civil and criminal litigation, is being eroded by the case overload.⁴ Some judges warn that they will actually have to begin dismissing criminal actions because of the system overload.


¹ Since 1960, federal case filings have increased approximately 900% in the courts of appeals and 250% in the district courts. Federal Courts Study Committee, Working Papers and Subcommittee Reports, 26-30 (1990) [hereinafter Working Papers].


⁴ See Working Papers, supra note 1, at 41-45.
and the consequent severe shortage of available trial time.\(^5\)

President Bush has escalated the nation's war on drugs with significantly increased funding for federal law enforcement officers, federal prosecutors, and federal prisons.\(^6\) The corresponding increase in federal criminal prosecutions has added dramatically to the national backlog in the criminal court dockets.\(^7\) The overload of criminal cases and the critical shortage of federal judges have combined to threaten defeat in the nation's war on crime.\(^8\)

Pursuant to the dictates of the Speedy Trial Act,\(^9\) the scheduling of criminal cases trumps that of civil cases, resulting in extended delays—lasting months and even years—of civil jury and nonjury trials. United States District Judge Charles Richey reflected on the problem: "I'm a drug judge five days a week and a civil judge at nights and on the weekend."\(^10\) Although civil gridlock threatens the interests of all civil litigants, the problem is especially detrimental to American businesses and \textit{pro se} litigants.\(^11\)

In Part I of this Article, the extent of judicial gridlock in the federal courts is described, and some of the causes of this problem are discussed. In Part II, the constitutional objective of ensuring and maintaining an efficient judiciary is discussed. In Parts III and IV, the impact of judicial gridlock on criminal and civil dockets, respectively, is discussed.

Finally, in Part V a tripartite solution to the problem of judicial gridlock is proposed. In the first section of Part V, the immediate creation of additional judgeships is called for. In the second section, the development of a nine-year plan for a fifty percent in-
crease in the number of judicial positions by the year 2001 is proposed. In the third section, it is proposed that the President employ the recess appointment power of Article II, Section 2, of the Constitution to fill vacant judicial positions.

I. JUDICIAL GRIDLOCK

In his most recent end-of-the-year judiciary report, Chief Justice Rehnquist warned that overloaded federal court calendars and unfilled judicial positions are combining to create federal judicial gridlock. He stated that this gridlock threatens "a degradation in the high quality of justice the nation has long expected of the federal courts."12

A. Overloaded Dockets

The United States has tripled its criminal drug prosecutions in the last decade.13 Drug prosecutions now make up forty-four percent of all federal criminal trials and fifty-nine percent of all pending cases before the Courts of Appeals.14 The Violent Crime Control Act, presently pending in Congress, calls for the federal prosecution of virtually any violent crime in which a firearm is used.15 This proposed law follows other tough crime legislation that has federalized the prosecution of criminal drug activity. Appeals by convicted criminals of trial court interpretations of and decisions regarding the new federal sentencing guidelines are clogging the appellate courts. Every significant battle in the war on crime and drugs now concludes not on our nation's streets but in our nation's federal courtrooms. An exponential increase in federal prosecutions is absolutely certain and necessary if the nation is to be victorious in the war on crime and drugs.

Contemporaneous with the explosion in the number of criminal actions is the dramatic increase in civil litigation in the federal system, which has almost tripled in the last thirty years, with more

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than 250,000 cases filed in 1990 alone. In a speech given in 1992, Chief Justice Rehnquist acknowledged that gridlock had reached a crisis level and predicted that "[u]nless actions are taken to reverse current trends, or slow them down considerably, the federal courts of the future will be dramatically changed." The uncertain economic times of the last years also has placed a great stress on the national courts, which exercise appellate jurisdiction over bankruptcy cases. An astonishing 900,000 bankruptcy cases are backlogged in the system. The United States Attorney from Chicago predicted this level of gridlock in 1990; before a public hearing of the Federal Courts Study Committee, he projected that "the civil docket will be wholly preempted in a year and a half at current rates of growth.

The civil caseload is rendered absolutely unmanageable by the Speedy Trial Act, which requires federal courts to give scheduling priority to criminal prosecutions. The consequential delay of civil justice for both individuals and businesses is staggering; every year there are more than 25,000 civil cases in the federal system that have been pending for three years or longer.

Congressional reaction to the gridlock problem has been curious and conflicting. While debating the problem and proposing limited judicial reforms, such as the Civil Justice Reform Act of 1990 and the pending Access to Justice Act, Congress has actively been passing legislation that promises to increase the future workload of the federal courts. The Civil Rights Act of 1991 is an archetypal example of Congress ensuring a dramatic increase in

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18. See Cullen, supra note 2, at 3.
22. See 1990 CT. MGMT. STAT., supra note 16.
24. The Access to Justice Act of 1992, S. 2180, H.R. 4155, 102d Cong., 2d Sess. (1992), was introduced in February 1992, by Senator Charles Grassley and Representative Hamilton Fish. Although the proposals for reform are positive, the actual reduction of federal jurisdiction will be limited, and the overall effect on the current level of growth of federal case filings will be minimal.
future federal case filings.\textsuperscript{26}

Congress has loaded work on the federal courts both by what its legislation provides in effecting profound alterations of the existing law and by what its legislation fails to provide in clear and definitive language. The Civil Rights Act of 1991 was a quickly accepted compromise of many proposed drafts, and it has left many gaps in the law that the courts will have to labor to fill.\textsuperscript{27}

\textbf{B. Congress Will Not Reduce the Workload}

Even if a measure such as Senator Grassley's Access to Justice bill were to be enacted into law, the Civil Rights Act of 1991 is clear evidence that Congress will not permit or facilitate an overall reduction in the workload of the federal courts; rather, Congress will continue to create new rights of action, spawning many new types of federal lawsuits. Unfortunately, the significant solutions to court gridlock thus far proposed in the literature and by policy makers are premised on the faulty assumption that Congress will act to reduce the jurisdiction and the overall workload of the federal court system.

In April 1990, for example, the Federal Courts Study Committee released its "long range plan for the future of the federal judici-

\begin{itemize}
\item The original stated purpose of the Act was to overturn five United States Supreme Court decisions: Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989). The final form of the statute goes far beyond renewal of pre-1989 precedent and ensures profound alterations in employment discrimination law and litigation.

In Title VII actions, the 1991 Act lessens an employee's \textit{prima facie} burden of proof by allowing for the shifting of the burden to the employer following proof that a given business decision has a "disparate impact on a protected group." \textit{Civil Rights Act of 1991, Pub. L. No. 102-166 §§ 2, 105 (1991).} Once the burden shifts, the employer must legally prove that the business decision is "job related for the position in question and consistent with business necessity." \textit{Id.} Moreover, although the Act expressly encourages alternative methods of dispute resolution, \textit{id.} at § 118, its provisions for civil jury trials and compensatory/punitive damages for both Title VII civil rights litigants and Americans with Disabilities litigants guarantee increased federal civil litigation in our already overburdened courts. The Act even allows prevailing plaintiffs to recover expert witness fees as a part of attorneys' fees, \textit{id.} at § 113, and amends \textit{42 U.S.C. § 1981} to prohibit discrimination in the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of contractual relationships." \textit{Id.} at § 101.

\item For example, the Act does not provide crucial definitions of terms such as "business necessity" or "job related for the position," nor does it contain an "effective date" provision. The retroactivity issue alone will place an unconscionable burden on the court system, as every federal trial court, and then every federal circuit court, \textit{legislates} a positive or negative retroactivity provision into the law. \textit{Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).}
\end{itemize}
The committee proposed over 100 reforms in the judicial system to "prevent the system from being overwhelmed by a rapidly growing and already enormous caseload and . . . [to] preserve access to the system for those who most need it."29

The most important recommendation of the committee was its call for the abolition of diversity jurisdiction. In fiscal year 1990, diversity cases accounted for forty percent of all trials, jury and nonjury, and fifty-three percent of jury trials.30 Furthermore, diversity cases accounted for over one-half of all cases that had been pending for over three years.31

Scholars contend that if diversity jurisdiction were abolished, the caseload of the federal courts would be curtailed drastically, and the gridlock problem solved for the short term.32 That is a big "if," however, since state courts face a caseload crisis similar to the one that is plaguing the federal courts. Advocates of shifting this burden onto the various state court systems will face unquestionable opposition. The proponents of retaining federal diversity jurisdiction, moreover, are well organized and well financed. They will aggressively fight any attempt by Congress to abolish such longstanding jurisdiction—jurisdiction which, in fact, is conferred by Article III of the Constitution.33

In his 1991 judiciary report, Chief Justice Rehnquist focused criticism on diversity jurisdiction and advocated many of the reforms recommended by the study committee, such as expanding the authority of Article I courts to handle specialized matters, encouraging the development and use of alternative dispute resolution vehicles, and reforming habeas law by limiting collateral appeals.34 As the Chief Justice acknowledged, however, the pending legislation in Congress seeks to expand rather than to curtail federal jurisdiction.35

28. This Committee is a fifteen-member, congressionally created branch of the Judicial Conference. Its members were appointed by the Chief Justice. See Baker, supra note 19, at 32.
29. Id.
30. See Coffin, supra note 14, at 34.
31. Id. at 34-35.
32. Id. at 35 ("A detailed study by the Federal Judicial Center in 1988 concluded that abolishing diversity jurisdiction would eliminate 193 district judges (30 percent of the 636 district judgeships authorized as of December 1, 1990) and 22 appellate judges . . . .").
33. See Baker, supra note 19, at 32.
34. See Supreme Court and Society, supra note 17, at 9.
35. See ABA Midyear Meeting, supra note 13, at 1. Chief Justice Rehnquist specifically noted that the pending Violence Against Women bill seeks to establish a private federal cause of action regarding crime against women, and warned that this could involve the federal courts in a variety of domestic relations cases. Id. at 2.
Although he does not necessarily disagree with certain reform proposals to reduce federal jurisdiction, this author makes the political calculation that Congress will not so act. Federal court gridlock will reach absolute crisis severity by the turn of the century without a substantial increase in the number of federal judgeships and without a reassertion of the President’s full constitutional authority in the appointment process.\textsuperscript{36}

\textbf{C. Vacant Judicial Positions}

In 1990, the federal case overload led Congress to establish eighty-five new judicial positions; by the end of 1991, however, few of those new positions had been filled. An additional thirty to forty retirements are expected in 1992 alone.\textsuperscript{37} In his end-of-the-year judiciary report, Chief Justice Rehnquist specifically charged that the gridlock problem was being exacerbated by the failure of the political branches to fill the empty federal judicial positions.\textsuperscript{38}

At the time the Chief Justice warned of the danger of empty judicial positions, the United States Senate had been away from the Capitol for over a month in recess for the holidays. When the Senate recessed its session on November 16, 1991, it abdicated its responsibility to give advice and consent regarding over 150 pending judicial and executive officer nominations that had been submitted by the President for Senate consideration.\textsuperscript{39}

In late 1991, confirmations were purposely stalled during a deadlock between the Administration and the Senate over the appointment process—specifically, regarding Senate staff access to FBI reports\textsuperscript{40}—as the President demanded reform of the Senate’s confirmation procedures\textsuperscript{41} and the Senate conducted its own appoint-

\textsuperscript{36} For a review of earlier work addressing the gridlock issue, see David W. Neubauer, \textit{Are We Approaching Gridlock? A Critical Review of the Literature}, 11 JUST. SYS. J. 363, 364-65 (1986).

\textsuperscript{37} See Cullen, supra note 2, at 3.

\textsuperscript{38} He noted that in addition to the remaining unfilled judicial positions approved by Congress in the last year, routine vacancies caused by retirements and resignations continue to occur at a steady rate. See \textit{Supreme Court and Society}, supra note 17, at 9.


\textsuperscript{40} See \textit{Varied Issues}, supra note 39, at B9.

\textsuperscript{41} See John W. Mashek, \textit{White House and Senate in Accord on Rights Bill}, BOSTON GLOBE, Oct. 25, 1991, at 1. While announcing his proposals for reforming the Senate confirmation process, President Bush publicly rebuked Congress for being a privileged class that exempts itself from federal law and damages the reputations of nominees. Re-
While the nation was attempting to conduct a war on crime and while the legal profession was openly protesting the federal civil case backlog, over sixty judicial nominations languished in the Senate. Shortly after an agreement regarding the Senate’s use of FBI reports on nominees was reached in early February 1992, some confirmations trickled down Capitol Hill; however, during the impasse, more vacancies were added to the growing list of empty judicial positions.

II. GRIDLOCK’S EFFECT ON FUNDAMENTAL CONSTITUTIONAL OBJECTIVES

The deficiency in the number of active federal judges should not be allowed to obstruct the Founders’ ideal of an efficient, accessible national system of justice. The Framers of our Constitution met in Philadelphia in 1787 to create a political structure that would efficiently protect citizens from domestic disorder, enforce constitutional liberties, and facilitate interstate and international commerce.

The Preamble to the Constitution reflects that mission, expressly stating that the Constitution was intended both to “establish justice” and to “insure domestic tranquility.” The Framers, in fact, sought to implement their Preamble “policy statement” by including a clause in the text of the Constitution to ensure that the na-
tional government would aid the states in protecting citizens against domestic violence. Since the Articles of Confederation did not establish a national judiciary, the Framers also were determined to institute a comprehensive national court system to enforce and protect the rights guaranteed by the Constitution and to conserve the political system. Today, the progress of two hundred years of constitutional history toward making the national legal system available to all litigants through the recognition of a right of access to courts must be seen as mandating an effective national court system.

A. Creation of a National Court System

The stated purpose of the 1787 Constitutional Convention was to examine and correct the defects of the Articles of Confederation. The insufficiency of the Articles as a basis for a dynamic republic's political system was evident from the lack of provisions for a national court system. The convention delegates unanimously agreed to create this third branch of government and committed much time and energy to the task. As Professor Farrand succinctly noted: "[t]hat there should be a national judiciary was readily accepted by all."

The Framers granted expansive authority to the new judiciary, authorizing jurisdiction over both law and equity cases arising from national law, cases involving admiralty, cases in which the United States was a party, cases between the states and between citizens of different states, and cases involving foreign ambassadors and counsel. Although they imbued the national court system with substantial authority and varied responsibilities, they wisely did not set in stone a given number of federal courts or judges. Rather, the Constitution charges the political branches with the

48. U.S. CONST. art. V.
49. See GOEBEL, supra note 46, at 196-250.
51. Under the Articles of Confederation, the legislature did establish a three-member Court of Appeals in Cases of Capture. This confederate court operated from 1780-1786. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 50 (1966).
52. See GOEBEL, supra note 46, at 196-250.
55. Id.; see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 119-20 (Max Farrand ed., 1911) [hereinafter 1 FEDERAL CONVENTION OF 1787].
responsibility for defining the contours of the federal court system's jurisdiction and maintaining sufficient judicial resources to empower that system.

Beginning with the Judiciary Act of 1789, the political branches have consistently expanded the jurisdiction of the federal courts and enacted volumes of national law requiring judicial interpretation and enforcement. The present court gridlock results from that consistent expansion, those enactments, and the failure of the political branches to staff the court system correspondingly.

Federal courts have long recognized both a state and a federal government responsibility to ensure a "right of access to courts" for criminal defendants and certain civil litigants. That guarantee has taken the form of providing prisons with law libraries and supplies, allowing poor plaintiffs to bring certain civil suits without payment of court fees, and requiring timely, meaningful judicial hearings when certain rights are alleged to have been deprived. Certainly, this fundamental due process right of access to courts can and should be extended to include a right of criminal and civil litigants to a timely adjudication of their federal lawsuits. As the queue outside the federal court becomes so long that litigants can no longer see the courthouse door, sometimes waiting years for justice, fundamental due process concerns are jeopardized.

B. Protection Against Violence Clause of Article IV

In the spring before the Constitutional Convention, James Madison wrote William Randolph suggesting that "[a]n article... be inserted expressly guaranteeing the tranquility of the States against internal as well as external dangers." Mr. Madison's concern with protecting the new nation against domestic violence was shared by many others as the Founders convened to respond to the domestic and commercial discord that existed under the Articles of Confederation.

As noted, the Constitution was written to "establish justice" and

60. See 2 WRITINGS OF JAMES MADISON 336, 340 (Galliard Hunt ed., 1900) [hereinafter WRITINGS OF JAMES MADISON].
“insure domestic tranquility”;61 its drafting, in fact, followed episodes of rebellion and violence62 which threatened the safety and security of the new Republic’s citizens.63 The Convention was concerned with the lawlessness symbolized by the Shays’ Rebellion64 and the Vermont uprisings.65 Indeed, the month before the meeting convened in Philadelphia, the fledgling confederation was shocked by the terrorist bombing of a Pennsylvania courthouse.66 This was the environment in which it was decided that the national government should help the states maintain law and order.

Article IV, Section 4, of the Constitution states:

*The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*67

In contemporary commentary, Article IV, Section 4, of the Constitution is usually referred to only for its Guarantee Clause, which states that the national government will guarantee a republican form of government to the various states.68 The second clause has been virtually ignored or merged into the first clause by those

61. U.S. CONST. pmbl.
62. Clearly, George Washington, who served as head of the Constitutional Convention, took quite seriously the role of the national government in protecting the domestic tranquility of the Republic. In response to the criminal violence of the Whiskey Rebellion which occurred during his term of office, President Washington took command of the state militia which had been called into federal service and personally led the militia west to restore law and order. See *Frederick T. Wilson, Federal Aid in Domestic Disturbances* 1787-1903 33 (2d ed. 1969) (reprinting a report to the Senate by the United States Adjutant-General made in 1903). Could the Framers and ratifiers of the Document have imagined the present level of crime and violence in the nation, as they sought explicitly to ensure the national government’s role in protecting citizens from criminal violence by enforcing the rule of law? Certainly not; these were leaders of will and courage who would have never allowed the current level of crime and crime to endanger the lives of the nation’s children.
63. See *Writings of James Madison*, supra note 60, at 336.
scholars who do not view violence and crime as a national constitutional concern. The inclusion of the Protection Against Violence Clause in Section 4, however, was deliberate and purposeful. According to William Randolph, a Convention delegate, Article IV, Section 4, was to have two different purposes: "The Resolution has 2 Objects. 1. to secure Republican government. 2. to suppress domestic commotions." He urged the necessity of both these provisions. 69

Constitutional commentators have failed to explore the historical purpose, contemporary importance, and substantial authority of the Protection Against Violence Clause. 70 A more advanced and detailed analysis of this clause is required before the clause can be used as authority in the fight against domestic criminal violence. 71 The text and history of the clause, however, certainly support the thesis of this section of this Article: a fundamental purpose of the Constitution is to maintain a national judiciary for the guarantee of political order, efficient commerce, and domestic peace in the Republic.

III. THE EFFECT OF GRIDLOCK ON CRIMINAL CASES

The political branches of the government violate a basic covenant with the people when they allow an inadequately staffed federal judiciary to hinder efforts to end the scourge of violent crime. As Attorney General Barr recently articulated: "I believe deeply that the first duty of government is providing for the personal security of its citizens." 72 In announcing a Department of Justice policy shift toward an even more aggressive stance in fighting violent crimes, Attorney General Barr stated: "I think public servants should respond to the citizens' most pressing concern, and right now people are threatened by violent crimes and they are right to be worried about it." 73

69. 1 FEDERAL CONVENTION OF 1787, supra note 55, at 47 (emphasis added).
70. For an interesting article that examines the use of the Guarantee Clause of Article IV, Section 4 to fight public corruption, see Adam H. Kurland, The Guarantee Clause As A Basis for Federal Prosecutions of State And Local Officials, 62 S. CAL. L. REV. 367 (1989).
71. This author has such a work in progress which seeks answers to such questions as: What is "domestic violence?" Does the United States have to be reduced to anarchy because the executive and legislative branches take action to curb or eliminate internal discord? Are 3000 murders in the nation's capital city over a five year period sufficient to justify an invocation of the Protection Against Violence Clause?
73. Id. This epidemic of criminal violence is typified by the war zone, the killing field
The threat of violent crime has become one of our citizens’ greatest concerns; yet, the federal courts, where drug traffickers and other violent criminals are prosecuted, remain understaffed. Now the federal case gridlock is approaching the point at which the criminal laws cannot be enforced because of the shortage of federal judges. In his 1989 report on the judiciary, Chief Justice Rehnquist predicted the creation of an “hourglass-shaped” federal criminal justice system by our having added resources to prosecute crimes and to punish criminals but not to try criminal cases.

A. Freedom from Fear of Violent Crime as the First Civil Right

As Americans complete a five-year celebration of the 200th anniversary of the Constitution and the Bill of Rights, too many citizens are being denied the civil right to be protected from violent crime. This fundamental right, which was central to the purpose of, and is explicit in the text of, the United States Constitution, must be enforced by the federal courts. In his 1991 State of the Union speech, President Bush declared that “freedom from crime and the fear which stalks our cities” was a “fundamental civil right” of citizens.

that is Washington, D.C., where 3,000 American citizens have been murdered in the last five years. Violence—The Answer is Us, WASH. POST, Jan. 26, 1992, at C8. If 3,000 American citizens were murdered on foreign soil, the President and the Congress would spare no expense and waste no time dispatching the Marines to restore law and order. Yet, 3,000 citizens are murdered in the federal legal jurisdiction of the District of Columbia and the government is not even providing an adequate court system in which to try criminals.


75. As United States District Judge Keep from San Diego stated: “We here in the Southern District of California are sinking in a mire of criminal cases. . . . Very soon after our court bumps the civil cases into infinity, and we are all handling only criminal trials, we are going to have to start dismissing criminal cases that we can not get tried. It is as simple as that. And as awful.” Abrahamson, supra note 45, at B1.

76. Chief Justice Rehnquist observed:

Huge personnel assets have been added to bring about more prosecutions, and huge assets have been devoted to prisons to house the convicted; but without the judge power to handle the added workload, there will be a bottleneck in the middle of the system substantially lessening our ability to win the war on drugs.

See Moore, supra note 5, at 502.
77. See supra notes 46-71 and accompanying text.
Criminal violence has become so rampant in the United States that many citizens are denied the freedom even to step outside their homes at night.\textsuperscript{79} Crime shockingly violates and corrupts our nation's children—the most defenseless and truly innocent members of our society.\textsuperscript{80} Violent crime has increased so greatly in both suburban and rural areas that "domestic tranquility" now may be found only behind the secured walls of the housing developments of the wealthiest citizens.\textsuperscript{81} 

Attorney General Thornburgh has made these remarks about our right to be free from fear of violence:

\begin{quote}
The carnage in our own mean streets must be halted now . . . [T]he odds of becoming a victim of violent crime are now greater than becoming involved in an automobile accident . . . [W]e may well jeopardize what I have always called the first civil right of every American—the right to be free from fear in our homes, on our streets, and in our communities.
\end{quote}


\textsuperscript{80} In 1990, Karl Zinsmeister published a shocking article, revealing that "[h]omicide is now the leading cause of death among children in many American inner cities." Karl Zinsmeister, \textit{Growing Up Scared}, \textit{THE ATL. MONTHLY}, June 1990, at 49. The author reported that 2,000 minors were murdered in 1988, double the number murdered in 1965 when there were 6.5 million more minors in the United States. Violent crime is taking a particularly hard toll on African-American youth. In 1988, more than 1,000 African-American children were murdered, fifty percent more than in 1985. \textit{Id.}; see also Crime Law—"The School Yard Statute"—Enhanced Penalties for Drug Transactions Within 1000 Feet of School, 22 \textit{SUFFOLK U. L. REV.} 209 (1980) (discussing the problem of drug trafficking at elementary schools). Over one-third of urban junior high and high school students have been threatened with physical violence, and thirteen percent of such students have been attacked on school property. See Zinsmeister, \textit{supra} at 64; see also Deadly Lessons: Guns and Schools, \textit{NEWSWEEK}, March 9, 1992, at 22. Violent crime is even scaling the walls that separate towns and campuses, terrifying American college and university students. See \textit{Twin Fears of Campus Crime}, \textit{USA TODAY}, Sept. 28, 1990 at 1A; Rebecca Hogelin, 21,000 Victims of Campus Crime, \textit{USA TODAY}, Mar. 14, 1991, at 1A; \textit{Campus by Campus Crime Statistics}, \textit{USA TODAY}, Dec. 3, 1992, at 1A. In urban areas, elementary school children are wearing bulletproof clothing and carrying bulletproof book satchels and clipboards, as they "run a dangerous gauntlet" to and from school. See Bethany Kandel, \textit{NYC Kids Caught in Drug Crossfire}, \textit{USA TODAY}, Sept. 28, 1990, at A7; see also Zinsmeister, \textit{supra} at 49. In New York, Mayor Dinkins made a desperate public appeal from Saint Patrick's Cathedral, urging New Yorkers to form "citizen patrols" to "take back our streets by night as well as by day" in an effort to combat the criminal violence that "threatens to tear our city apart." Mayor Dinkins' statement followed international exposure of the violent crime which left Brian Watkins dead in a New York City subway train. Watkins went to New York City with his family to attend the U.S. Open Tennis Tournament. When his mother was brutally attacked by a gang of criminals in a subway car, he courageously came to her defense and was murdered. Constance L. Hays, \textit{Dinkins Issues Call to Citizens to Fight Crime}, \textit{N.Y. TIMES}, Sept. 10, 1990, at A1.

The national judiciary must be adequately staffed in order to enforce the national criminal laws that protect our first civil right. Senator Bob Graham of Florida recently pleaded for more federal judges for his state and for the nation in order to enforce this right. In requesting the 1990 increase in the federal judiciary, Chief Justice Rehnquist stated what every inner-city resident must know: "the war on drugs will fail if the judiciary is not given the judgeships necessary to do the job." Judicial gridlock obstructs the nation's ability to eviscerate crime.

In championing an immediate end to the problem of crime, public attention must be focused on those in society who bear the true burden of crime. Providing courts of justice for the enforcement of law and order is not a partisan issue, nor is it a liberal or conservative issue; fundamentally, it is an issue of societal compassion. If only for the coldly capitalistic reason that a nation is only as economically strong as its next generation of workers, the national judicial system must be adequately armed to protect the nation's children by adjudicating the war on crime.

B. The Destructive Impact of Crime on the Nation's Political and Economic Welfare

Just as violent crime destroys the life of the victim and often devastates the lives of the victim's family and friends, crime also debilitates the political and economic foundations of the Republic.

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statistics referred to above, former Attorney General Thornburgh observed that "[a] citizen of this Country is today more likely to be a victim of a violent crime than an auto accident. . . . [T]hat goes doubly and even triply for our minority populations." See Okie, supra note 74, at A6.


83. As Karl Zinsmeister notes in his recent article: "Crime does not wash over all Americans equally. It especially terrorizes the weakest and most vulnerable among us. . . . These are the people who suffer most when law and order decay." Zinsmeister, supra note 80, at 49.

84. See e.g., Robert D. McFadden, Employee Slain In Robbery at Midtown Clothing Store, N.Y. TIMES, Jan. 26, 1992, at 24.

85. Violent crime is a cruel reward and a poor pension for our elderly, the most deserving members of our society. Many of our nation's senior citizens live behind locked, even barricaded doors, afraid to come out on the very streets which their tax dollars built and paved. Similarly, the sick and infirm—those described by Senator Humphrey as being in the shadows of life—do not even consider leaving their sick beds. Crime is an ultimate barrier to our nation's physically disabled—among the most courageous members of our society. Ironically, Congress has passed legislation protecting the civil rights of the disabled; however, those citizens' first civil right to be protected from violent crime remains jeopardized.
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Vigilantism increases as the courts are unable to handle the caseload of criminal cases adequately and prosecutors decide against bringing individuals to justice. Vigilantism challenges the very rule of law that is the basis of any civilized society. There is a nationwide, understandable, yet awfully disturbing trend toward citizen self-protection.

In failing to maintain an adequate justice system, the national government encourages the movement toward self-protection as the chief means of citizen safety. In doing so, the national government violates the most basic of the constitutional covenants between the government and its citizens.

Court gridlock also prevents the efficient prosecution of nonviolent but nevertheless economically destructive crimes, such as the fraudulent acts of the robber barons of the 1980s, who looted over 690 now-defunct savings-and-loan institutions. As more savings-and-loans become insolvent, and the American deficit increases to underwrite banking-system losses, the courts will continue to be deluged with the resulting criminal prosecutions and civil financial litigation.

In 1990, United States attorneys from Texas testified before Congress, imploring the national legislature to provide more federal judges and courts for the state in which over one-third of the savings-and-loan fraud cases were being litigated. In making his plea for relief, the United States Attorney from the Northern District of Texas stated: "We can pour more and more cases into the

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86. The chief executive officers of America's corporations now calculate the crime rate of geographic areas when making decisions regarding where to locate enterprises. See CEO-Life Index, 36 SITE SELECTION AND INDUS. DEV. MAG. 800 (1991).

87. One might argue that the backlog serves the positive function of making federal prosecutors more selective in their prosecutions. This idea, however, underestimates the severity of the case overload and reflects an insensitivity to the effects of all crime.


mouth of the funnel but every single case must pass through the narrow neck of the judiciary. 91

The economic health of the country and the ability of the nation to compete in a global market are impaired when the nation's criminal and civil regulations, governing myriad economic and business transactions, cannot be resolved both quickly and definitively by national courts. 92 The multiplicity of securities, banking, antitrust, environmental, intellectual property, and consumer protection laws under which the American economic system struggles cannot be efficiently administered as long as federal court gridlock exists. As will be discussed, an understaffed federal judiciary also damages the political and economic welfare of the country by hindering the timely resolution of individual and commercial civil litigation. 93

IV. THE EFFECT OF GRIDLOCK ON CIVIL CASES

Citizens certainly lose faith in a system that does not provide basic access to civil justice in its national courts. As noted, civil litigation in the federal system has almost tripled in the last thirty years, with more than 250,000 cases filed in 1990. 94 Increased criminal prosecutions and the Speedy Trial Act exacerbate the problem. In major metropolitan areas, civil litigants routinely expect to wait years for the resolution of their disputes. 95

As Congress continues to propose and enact tough federal anti-crime legislation, such as the pending Violent Crime Control Act, but fails to increase judicial resources, civil gridlock will worsen. 96 In acknowledging that criminal prosecutions delay civil cases, this author does not assert that such prosecutions should be curtailed;

91. Id.
92. Incredibly, the Bush Administration is even considering resorting to federal courts to help it fight its trade war with Japan. Keith Bradsher, Bush Plans Trade-Policy Change Soon, N.Y. TIMES, Mar. 11, 1992, at D6.
93. See infra notes 94-109 and accompanying text.
94. 1990 CT. MGMT. STAT., supra note 16.
95. In states such as Florida, California, and Texas which have particularly heavy criminal caseloads, civil cases are often not even being scheduled for action. Last year, for example, in the Southern District of California at San Diego, the federal court system tried fewer than 50 of the 1,000 civil cases filed. Hinds, supra note 3, at A1.
96. Pacifists against the nation's war on crime attempt to use civil gridlock as a weapon to prevent future federal anti-crime laws and to retard enforcement of present laws. Such attempts are typified by Anthony Lewis' statement: "To move even a modest share of [gun crime prosecutions from state court] would mean that Federal Courts could no longer perform their essential function of deciding constitutional questions in civil cases. In fact, Federal judges would have no time to hear any civil cases." Anthony Lewis, Abroad at Home; Profiles in Cowardice, N.Y. TIMES, Aug. 19, 1991, at A15.
rather, he demands that an adequate judicial system be maintained to "establish justice" and "insure domestic tranquility."

A. Business Litigants Do Not Get Their Day in Court

For the business litigant, delayed civil justice often results in commercial confusion or even financial destruction.97 Although it is difficult to calculate the precise financial cost of the nation's judicial overload on American business and industry, the drain on American commerce is evident and must be curtailed if our economy is to regain its strength.98

A central purpose of the 1787 establishment of a national court system was to facilitate interstate and international commerce through the timely and equitable resolution of commercial disputes.99 American businesses must be given their day in court to settle commercial disputes, to resolve regulatory demands, and to defend against litigious consumers and employees.

Arguably, the ability of the United States to compete in the new global marketplace is in serious jeopardy when long delays prevent the resolution of commercial conflicts. Potential trading partners will become increasingly reluctant to engage in economic inter-

97. For a fascinating, informative description of the oldest, untried civil case in the nation, see Allyson Lee Moore, U.S. Courts Still Crowded After All These Years, N.J. L.J., Apr. 25, 1991, at 1. The following situation is described:

Louis Walter is a frustrated man. In 1985, The California entrepreneur and his family and associates went to U.S. District Court in Camden seeking a $1 billion fraud award against their former partner, Holiday Inns, Inc. More than five years and three formal trial dates later, the case has become the oldest, untried active case in the system. Walter now fears that some plaintiffs may die, and memories of witnesses will fade by the time of trial.

How frustrated was Walter's group? At one point the investors offered to build a courtroom to solve one obstacle—a shortage of courtrooms in Camden. Ultimately, they took the unusual step of moving at the district level for a trial date order, when that failed, tried to force a date by petitioning the Third U.S. Circuit Court of Appeals for a writ of mandamus. The writ was denied, on April 3, but it may have served its purpose anyway, for on March 27, six days after the writ was filed, U.S. District Judge Joseph Rodriguez finally set another trial date. The bad news, however, is that the date is five months away. Such are the vagaries of federal civil court. Criminal cases continue to crowd the district courts, making it extremely difficult to get civil trial dates. Unfilled judicial vacancies exacerbate the situation.

Id.


99. U.S. Const. art. I.
course with an overly litigious nation, one that cannot even provide sufficient forums for the resolution of such litigation. For the political branches of government to neglect their constitutional responsibility to maintain a fully staffed judiciary—one that can efficiently and effectively manage civil commercial litigation and bolster the international economic life of the nation’s businesses—is a criminal act.  

The American Bankruptcy Institute has reported that bankruptcy filings have increased 340 percent in the last eleven years, while the number of bankruptcy judges has increased by only twenty-five percent. The past year has seen nearly a million bankruptcy filings in the Article I court system. Those filings threaten an avalanche of work on Article III federal courts, which have appellate jurisdiction over bankruptcy court determinations. The future success of American business and industry is dependent upon the creation of additional bankruptcy and Article III judgeships and expeditious appointment of jurists to such posts.

100. In a recent article, attorney Sheldon Elsen criticized judicial vacancies and the Speedy Trial Act’s preemption of federal civil cases: “The[se] are the federal courts, which corporate America has come to rely on. These courts suffer from a paralyzing overload of cases and a shortage of judges . . . .” Sheldon H. Elsen, Why Business Can’t Get Its Day In Court, FORTUNE, Apr. 22, 1991, at 251. Mr. Elsen observed that “the judges there appear to be overwhelmed” while business clients are paying expensive legal fees for the production of essential legal briefs which “seem to have been merely skimmed or to have gone unread entirely.” Id. The article stated:

These problems are becoming widely recognized. In one speech, Judge Robert Sweet pointed to how few civil jury trials were being heard in the Southern District [of New York]. The chief judge of a neighboring federal court, the Eastern District of New York in Brooklyn, recently said that in the past two years he had been able to try only one civil jury case . . . .

. . . . During the week in which I finished trial preparation for a $12 million case for foreign clients, only to be told by a conscientious judge that the wait for a trial would be years, there were six vacancies among 27 judgeships in the Southern District. My clients, Chinese from Malaysia, accustomed to British justice, were politely nonplussed.

Id.

The Chief Judge of the Southern District of New York responded to the article stating: “I believe it is unfilled judicial vacancies, now seven in number (one of which dates back to 1988), that are the principal cause of our difficulties.” Charles L. Brieant, Court Business, FORTUNE, June 3, 1991, at 222.


102. Id.

B. Individual Litigants

For the individual litigant, especially pro se and civil rights plaintiffs, civil justice delayed is often justice denied. Individuals who are denied the right of access to the halls of justice for a prompt resolution of race, gender, or employment discrimination often do not have the resources to wait out the process. The government is defaulting on its special obligation to provide efficient, effective justice to individual litigants who are forced to sue the government.¹⁰⁴

A breakdown in the civil judicial system eventually will undermine citizen confidence in the entire political system. Clearly, Congress' much-debated 1991 Civil Rights Act¹⁰⁵ and the much-celebrated Americans with Disabilities Act¹⁰⁶ are of little value to aggrieved citizens when the federal courts are too overloaded to address the resulting civil lawsuits. As Bruce Fein, former Associate Deputy Attorney General, aptly noted: “The federal judiciary has far less time to spend addressing civil rights cases.”¹⁰⁷

As discussed, the Supreme Court has long recognized a fundamental, constitutional due process right of access to the federal courts.¹⁰⁸ At what point does gridlock jeopardize that due process right? Consider the statement of Chief Judge Lawrence King of the United States District Court for the Southern District of Florida: “It’s gotten to the point where we’re very close to not having a civil court. The ordinary citizen then has no place to go if his spouse has contracted asbestosis working in a Navy shipyard and is

¹⁰⁴ The following passage illustrates the problem of judicial gridlock for individual litigants:

[L]awyers representing federal employees went to court with a First Amendment challenge to a law barring all federal employees from accepting outside income from speaking engagements or writing. The lawyers asked the judge to stop the law from going into effect on Jan. 1 but U.S. District Judge Thomas Penefield Jackson denied that request on narrow procedural grounds. The plaintiffs then asked for another hearing, hoping to argue the merits of the case more fully and change Jackson’s mind before being forced to appeal. Jackson bluntly told them to forget getting a hearing date any time soon. “I have seven drug trials scheduled for January,” he said. “I wish you Godspeed to the fifth floor”—the D.C. Court of Appeals. Increasingly, judges say, courts are having to push those kinds of cases, as well as important federal contract disputes or administrative law issues, to the back burner to accommodate criminal drug cases.

Thompson, supra note 3, at A1.


¹⁰⁷ Hinds, supra note 3, at A1.

¹⁰⁸ See supra part II.
dying . . . Where do those people go?””

V. A TRIPARTITE SOLUTION TO COURT GRIDLOCK

The following three-part solution addresses both the existing gridlock problem and the future gridlock crisis. The solution calls for an immediate significant increase in the size of the federal judiciary, the development of a nine-year plan for a substantial increase in the size of the judiciary and the supporting judicial infrastructure by 2001, and restoration of the President’s full authority under Article II, Section 2, to guarantee prompt judicial appointments.

A. Immediate Creation of Additional Judgeships

In May 1991, the General Accounting Office completed a study of federal court gridlock, reporting that the national judicial system was understaffed and unable to handle its caseload. This report led Florida’s Senator Bob Graham to call for the creation of new federal judicial positions. The report, produced by the investigative arm of Congress, documents what the entire legal profession knows: the nation needs more judges.

The present federal case backlog mandates the immediate creation of at least an additional 55 bankruptcy judgeships, 125 district level judicial positions, and 55 appellate positions. Equally important, the distribution of these judgeships, between and within the various states, must be based on changing population demographics and existing metropolitan caseload burdens rather than on the political influence of the ranking members of Congress. New federal judgeships are not pork projects to be brought back home to constituents by powerful congressional

111. Senator Says Judges Needed, supra note 8, at A2.
112. United States Representative Lamar Smith, from Texas, stated that the 1990 Biden Bill, which gave his state only four new judges when it needed at least ten, “place[d] judges based on politics and not on need. I consider the Biden Bill better than nothing but misdirected.” Mark Ballard, Bill to Add U.S. Judges Shortchanges Texas by 6, TEX. LAW., June 18, 1990, at 4. The article continued:

“While the Biden bill shortchanges Texas by six seats, the measure allots 10 new judgeships to districts where the Judicial Conference says they are unnecessary. . . . The patronage move apparently is designed to drum up support for an unpopular part of Biden’s bill,” said Chief U.S. District Judge Aubrey E. Robinson Jr. of Washington, D.C., who is on the Judicial Conference committee that tracks federal legislation. Robinson said June 12, “It’s really an unfor-
“leaders” on legislative recess. Genuine leadership is desperately needed in Congress to ensure that the nation is provided with federal judges in its most overloaded jurisdictions.

B. Nine-Year Plan for Fifty-Percent Increase in the Judiciary and Refurbishing the Judicial Infrastructure

Many proposed reforms, even if implemented, are not likely to have a significant impact on reducing the present and projected federal judicial caseload. As evidenced by the poorly drafted and expansive 1991 Civil Rights Act, Congress will continue to create new rights of action and continue to add to the workload of the courts. The dynamic nature of the nation’s population and economy is certain to result in tremendous civil litigation growth during the next decade.

The federal caseload of our 837 trial and appellate judges is certain to reach absolute crisis proportions in this decade. This “inexorably increasing federal litigation” necessitates a fifty percent increase in the present number of federal judges by 2001. The President and Congress must develop a nine-year plan for the gradual addition of these judicial positions so that the federal courts can be fully operational as the nation enters the twenty-first century. Of course, this plan must provide for a corresponding rebuilding and reinforcing of the nation’s judicial infrastructure to accommodate the increasing numbers of judges. The plan should incorporate many of the managerial and administrative reforms suggested by the Federal Courts Study Report and should provide additional law clerks for active judges. This growth must be accomplished, not to increase the power of the judicial

tunate situation that we do not have the resources allocated where they are needed."

While not commenting directly on the patronage aspects of the measure, Robinson said that in the past Biden has doled out plums in one part of his bills to obtain support for another more controversial portion.

Id.

113. Efforts to persuade the Congress to terminate or limit federal diversity are well-intentioned but politically frivolous. See supra notes 30-36 and accompanying text.

114. As Circuit Judge Frank Coffin recently observed: “Increasing population, developments in science and technology, new products, environmental pressures, and demands for privacy and autonomy ensure an unceasing flow of federal statutes and entitlement, resulting in inexorably increasing federal litigation.” Coffin, supra note 14, at 34.

115. For example, the plan must provide for the implementation of the latest technological advancements in courtrooms, chambers, and staff offices.

116. District court judges have only two law clerks and appellate court judges have only three clerks. Compare this support staff to the legislative, office, constituent, and committee support staff of a typical congressperson.
bureaucracy, but to ensure that prompt, effective justice is available to all litigants in the next century.\textsuperscript{117}

Critics of an increase in the number of federal judges warn that a federal judiciary of over 750 to 1,000 in number will lead to an unmanageable judicial bureaucracy.\textsuperscript{118} In a 1989 \textit{University of Chicago Law Review} article, United States Circuit Judge Jon O. Newman, of the Second Circuit Court of Appeals, asserted: "My own view is that we have now reached, and may have passed, the point where the increase in federal court cases poses a serious and substantial risk to the nature and quality of the federal judicial system."\textsuperscript{119} Although Judge Newman correctly assessed the severity of the caseload problem and advised that diversity jurisdiction be eliminated, he warned against increasing the membership of the federal judiciary. He asserted that such an increase would lead to the selection of less qualified judges by the Senate, because the appointees would be given less scrutiny as their numbers increased.\textsuperscript{120} Of even greater concern to Judge Newman was his fear that "as the court expands, it becomes easier to make at least occasional appointments of inadequate distinction."\textsuperscript{121}

Although Judge Newman's desire to have the most qualified judges appointed to the bench is commendable, his objections to increasing the size of the federal judiciary are unpersuasive, and the results of his proposal to keep membership to the judicial club small are perhaps perilous to the future of the judiciary and the nation. With a measured, carefully orchestrated increase in the size of the federal judiciary, the mediocrity forecasted by Judge Newman can be avoided. Stopgap emergency additions to the judiciary, such as those made in 1990, are far more threatening to the integrity of the selection process than is planned growth. The proposed ceilings on the number of federal judges are unrealistic, and proponents ignore the exigencies of our present legislative and social trends. Such propositions to constrain the growth of one of three equal branches of the federal government threaten to sabo-

\textsuperscript{117} For background discussion by federal judges against increasing the number of federal judges, see \textsc{Richard A. Posner, The Federal Courts: Crisis and Reform} (1985); \textsc{Henry J. Friendly, Federal Jurisdiction: A General View} (1973); Felix Frankfurter, \textit{Distribution of Judicial Power Between United States and State Courts}, 13 \textsc{Cornell L.Q.} 499, 515 (1928).


\textsuperscript{119} \textit{Id.} at 762.

\textsuperscript{120} \textit{Id.} at 763.

\textsuperscript{121} \textit{Id.}
tage the Framers’ vision of creating a dynamic national court system that could respond to and engender development of an organic republic.122

Again, the political probability that Congress will curtail diversity jurisdiction and reduce the workload of the courts is nil; therefore, without additional judges, gridlock will worsen dramatically until it reaches a crisis level. Since the publication of Judge Newman’s article, the gridlock problem, in fact, has worsened just as he projected.123 Nevertheless, in a 1991 speech to the Connecticut Bar Association, Judge Newman reiterated his same arguments against an increase in the size of the judiciary.124

Judge Newman’s concern that a larger federal judiciary “will be indistinguishable from the judiciary of most states”125 and will have “within its ranks an unacceptable number of men and women not sufficiently qualified to be the primary adjudicators of federal law”126 is unfounded. His comments are unfair to the state court systems, which do the lion’s share of work in providing criminal and civil justice for the nation. The concern is also curious, considering that the President has always had an extraordinarily qualified pool of attorneys, scholars, legislators, state jurists, and businesspersons from which to select the most qualified judicial appointees.

Throughout the nation’s legal history, the best and brightest lawyers have considered the opportunity to sit on the federal bench to be the pinnacle of their professional lives. Interestingly, gridlock is now causing some judicial candidates to question the attractiveness of accepting a job with a tremendous backlog.127 A failure to properly manage an orderly increase in the size of the judiciary will inevitably precipitate a deterioration in the quality of the judiciary and, consequently, in the quality of federal justice.128

122. See supra part II.
126. Id.
127. Indeed, the caseload of the federal system has prompted some federal judges to quit. District Judges J. Lawrence King and Thomas E. Scott recently left the bench because of the backlog. See Thompson, supra note 3, at A1.
128. Judge Newman revealed his true preferences regarding an ideal membership in the judicial club when he wrote: “Although I might prefer an earlier era when there were only 200 or 300 federal judges, I would not be alarmed for the future if I had any confidence that today’s 750 was the likely limit.” See Newman, Restructuring Federal Jurisdictions, supra note 118, at 767. Referencing remarks made by Justice Felix Frankfurter, among others, Newman observed that his concern with the size and quality of the judiciary was “as old as the Republic.” Id. at 765. Although perhaps well-intended, such
After considering present and projected gridlock, it is readily ap-
parent that a thousand-judge ceiling\textsuperscript{129} is as dangerous as it is arbi-
trary.\textsuperscript{130} As noted, the number of federal judges must increase in
the future to a level sufficient to maintain an orderly system of
national justice.\textsuperscript{131} Considering the certain future growth of the
federal caseload, this author's proposed nine-year plan\textsuperscript{132} for a
substantial increase in judicial resources is a modest
recommendation.\textsuperscript{133}

\section*{C. A Reassertion of the Executive's Sole Authority to Select
Judges Pursuant to Article II, Section 2}

Recognizing the great importance of maintaining fully staffed ju-
dicial and executive offices, the Framers of the Constitution wisely
drafted the document to provide two different methods of
appointment:

\begin{quote}
He \textit{[the President]} shall have Power, by and with the Advice and
Consent of the Senate, to make Treaties, provided two thirds of
the Senators present concur; and he shall nominate, and by and
with the Advice and Consent of the Senate, shall appoint Ambas-
sadors, other public Ministers and Consuls, Judges of the
supreme Court, and all other Officers of the United
States.\textsuperscript{134}
\end{quote}

resistance by Newman and other members of the judiciary against increasing the size of
their club seems to be premised on a "those were the days" attitude. The resistance
seems to reflect a desire to return to judicial happy days; a desire to return to a time when
the federal judicial club was more elite and the responsibilities of each judge were more
limited. The exclusivity factor indeed may be a significant reason why some United
States Court of Appeals Circuits are reluctant to accept desperately needed additional
judges. The Circuit Judges have input in controlling the number of judges on their court
and a Circuit Judge's \textit{en banc} vote, and judicial power is diluted by every additional
degeship added to their court. The cold reality is as opposite and harsh as the closing
verse of the song: "those days are gone, my friend." \textit{See id.}

\textsuperscript{129} \textit{Id.} at 763.
\textsuperscript{130} Recently appealing for additional federal judges and discrediting judicial criti-
cism of additional federal crime laws, Senator Alfonse D'Amato from New York im-
plored: "Judges are talking about clogging their courts; they should join the real world,
where people are suffering, they are bleeding, they are living in fear." Michael deCourcy
\textsuperscript{131} \textit{See supra} parts III and IV.
\textsuperscript{132} \textit{See supra} notes 113-17 and accompanying text.
\textsuperscript{133} Congress is beginning to listen to the many voices that are calling for more
federal judges. As noted above, Senator Graham of Florida has become a spokesperson
for planned, managed growth in the federal court system. Senator Graham stated that
the 1991 General Accounting Office report on the national courts "points out the need
for the Judicial Conference to be anticipatory, to be looking at future needs, not just
waiting for the past." \textit{As U.S. Spends More on Courts, Backlog Grows}, \textit{N.Y. Times}, May
\textsuperscript{134} U.S. \textit{Const. art. II, § 2}, cl. 2.
and

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.\textsuperscript{135}

1. The Framers gave the President "a sole and undivided responsibility" to select federal judges.

The Framers of the Constitution unequally divided the power of appointing federal judges between the President and the Senate in Article II, Section 2, Clause 2 appointments. The President, the one elected official who has campaigned successfully before the entire national electorate, alone is charged with selecting women and men to serve on the national courts. Through this mandate, the President exercises what Alexander Hamilton called "a sole and undivided responsibility"\textsuperscript{136} to select lifetime judges. The Senate, in contrast, is given the limited power\textsuperscript{137} of either accepting or rejecting the President's choice.

What happens when the Senate negligently fails, or indeed, intentionally refuses, to confirm or reject the President's nominations of Section 2, Clause 2 appointments? Does such Senate inaction serve as an excuse for the President to avoid exercising his sole and undivided responsibility to select federal judges? Are the wheels of

\textsuperscript{135} U.S. CONST. art. II, § 2, cl. 3.

\textsuperscript{136} \textit{The Federalist} No. 76, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In Number 76 of \textit{The Federalist} papers, Mr. Hamilton explicated the appointment authority of the President:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the person who may have the fairest pretensions to them.

\textit{Id.}

\textsuperscript{137} For an excellent article suggesting a limited role for the Senate in traditional Article II, Section 2, Clause 2 appointments, see Bruce Fein, \textit{A Circumscribed Senate Confirmation Role}, 102 HARV. L. REV. 672 (1989); see also W. Bradford Reynolds, \textit{Visiting the Confirmation Process Only To Find It in the Same State of Disrepair}, 75 JUDICATURE 192 (1992); W. Bradford Reynolds, \textit{The Confirmation Process: Too Much Advice and Too Little Consent}, 75 JUDICATURE 80 (1991).

\textsuperscript{138} Most academic analysis of the Senate's advice and consent role extends the Senate's authority far beyond what the Framers and ratifiers intended for it to be. For a comprehensive research bibliography of commentary on the Senate's role in appointments, see Michael J. Slinger et al., \textit{The Senate Power of Advice and Consent of Judicial Appointments: An Annotated Research Bibliography}, 64 NOIRE DAME L. REV. 106 (1989); see also Albert P. Malone, \textit{Too Little Advice, Senate Responsibility and Confirmation Politics}, 75 JUDICATURE 187 (1992); Albert P. Malone, \textit{The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality}, 75 JUDICATURE 68 (1991).
American justice to become torpid because of dilatory, partisan gamesmanship by members the Senate Judiciary Committee, or because the President does not have the political capital to invest in campaigning for the confirmation of judges while juggling with the practice of senatorial courtesy?

Clearly, in such situations the President must exercise his independent constitutional responsibility to select federal judges. The Senate's role in giving advice and consent certainly does not give it the right to delay or frustrate the appointment process. Nor should the Senate's limited role of giving advice include the contemporary practice of senatorial courtesy, which allows a Senator to select a nominee from his home state or to compile a list of potential home-state nominees from which the President may choose.

Senatorial courtesy is an unacceptable, nonconstitutional practice that abrogates the Executive's lone responsibility to select the nation's judges. The practice often masks political blackmail: Senators may refuse to confirm any judges for any state unless they can choose particular judges for their own states. As a strong signal of reassertion of the Executive's constitutional authority to select judges, the President should terminate any vestiges of the senatorial courtesy practice and should vehemently denounce requests for patently unconstitutional pre-nomination consultations.

The Constitution explicitly gives the President the power to appoint federal judges without either the advice or the consent of the Senate at any time that body recesses. The Section 2, Clause 3 recess appointment process is as legitimate a constitutional method of filling judgeships as is the Section 2, Clause 2 appointment process outlined in the same article of the Constitution. In giving the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate," the Framers reinforced the President's sole responsibility to select principal officers. The recess appointment clause, adopted without debate at the Convention, was intended to ensure the continuous functioning of the govern-

139. See supra notes 40-45 and accompanying text.

140. In early 1992, a Senate Task force, composed of various Senate committee chairpersons, made an incredible demand for a standard practice of pre-nomination consultations between the President and Senate regarding potential nominations. See, e.g., Fred Strasser & Marcia Coyle, Task Force Calls for Nomination Cooperation, Nat'l J., Feb. 17, 1992, at 29. ("BLAME BUSH? A Senate Democratic task force has called for immediate consultations between the president and Senate leaders on future Supreme Court and high-level executive branch nominations in order to avoid the kind of bruising conflict that surrounded last year's nomination of Clarence Thomas to the nation's high court."); see also Confirmation Cooperation, Wash. Post., Feb. 14, 1992, at A24.
The Framers granted the President a generous time period for making the appointment, providing for the commission to "expire at the End of [the Senate's] next Session" rather than to terminate immediately after the Senate reconvened.  

The Federalist papers make it clear that the recess appointment clause applies to judicial positions, stating that the clause "is to be considered as supplementary to the [clause] which precedes" and that the vacancies referred to "must be construed to relate to the officers' described in the preceding [clause]." The antecedent clause expressly provides for the nomination and appointment of judges to the Supreme Court, among other principal officers of the United States.

2. Cases challenging recess appointments

The authority of recess appointment judges has been challenged only twice in recent history. In 1963, in United States v. Allocco, the Second Circuit Court of Appeals rejected a habeas petitioner's challenge to his criminal conviction made on the basis that his case had been tried before an Eisenhower recess-appointed judge. In 1985, in United States v. Woodley, the en banc Ninth Circuit Court of Appeals reversed a panel opinion of the same court that had rejected the argument that recess-appointed judges enjoyed full Article III powers.

(a) United States v. Allocco: Preventing "a roadblock in the orderly functioning of government"

In a habeas corpus action, Dominic Allocco appealed his conviction and sentence for narcotics trafficking, challenging District Judge John M. Cashin's authority to have presided over the...
In August 1955, President Eisenhower issued a recess appointment to John Cashin to fill a judicial vacancy that had occurred the previous July. Judge Cashin was given the oath of office in September, while the Senate was on mid-term recess. Mr. Allocco was later tried before Judge Cashin and a jury of his peers, found guilty of three narcotics violations, and sentenced by the interim judge to ten years in prison. A collateral attack on Mr. Allocco's conviction was rejected by the United States District Court, and Mr. Allocco appealed to the Second Circuit.

On appeal, Mr. Allocco framed three arguments. First, he asserted that the Executive had no power to appoint "temporary" judges. Second and alternatively, he maintained that if the President did have such power, the "temporary" judges should not preside over criminal trials. Finally, citing Section 2, Clause 3, he argued that the President was not permitted to fill vacancies arising while the Senate was in session.

After rejecting the government's contention that the habeas action was procedurally barred, the Second Circuit panel addressed and rejected the merits of each of Mr. Allocco's claims. The court concluded that the text and the history of the Constitution supported the recess judicial appointment power of the President. Further, the court held that recess judges, though interim, exercised full Article III powers, including the authority to preside over criminal trials.

In addressing the petitioner's claim that the judicial vacancy in fact had arisen while the Senate was in session, the court recog-
nized that the President was empowered to make recess appointments anytime the Senate was in recess, regardless of when the vacancy arose. Referring to a litany of Attorney General opinions, circuit Judge Kaufman asserted that the court "had not been directed to a single instance of behavior by any President which might be termed an 'abuse' of the recess power." He further noted that fourteen of the fifteen recess appointments to the Supreme Court had been nominated and confirmed later by the Senate as life-tenure justices and maintained that Congress had "implicitly recognized" the President's recess-appointment power by allocating salaries to interim judges.

(b) United States v. Woodley: "Permitting the unbroken orderly functioning of our judicial system."

In 1983, a three-judge panel of the Ninth Circuit Court of Appeals sua sponte considered whether Article III of the Constitution directly conflicted with the recess appointment of federal judges. In United States v. Woodley, Janet Woodley appealed a recess-appointed judge's denial of a motion to suppress evidence in her trial for narcotics violations.

(i) Panel opinion

The panel reversed the conviction, concluding that the President did not have the power to make recess judicial appointments. In so doing, the panel rejected the reasoning of the Allocco court, holding that the Second Circuit court had not properly considered the political dependence of recess-appointed judges, who do not enjoy Article III life tenure. The court stated: "Colonial history is replete with examples of royal abuse of judicial power. Judges who did not follow the wishes of the King or royal governor were summarily discharged." In reaction to the excesses of the colo-

157. Allocco, 305 F.2d at 710.
158. Id. at 713 (citations omitted).
159. Id. at 714.
160. Id.
161. United States v. Woodley, 726 F.2d 1328 (9th Cir. 1983), reh'g granted en banc, 732 F.2d 111 (9th Cir. 1984), vacated United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc) [hereinafter "Woodley I"]).
162. Id. at 1339.
163. Id.
nial courts, the Framers emphasized strongly and repeatedly the need for an independent judiciary.165 The panel further reasoned that the life-tenure provision of Article III could not be squared with the commissioning of interim recess judges.166

(ii) En banc majority opinion

In 1985, however, the Ninth Circuit, sitting en banc, reversed the panel’s decision with a six-to-four vote.167 The majority opinion, written by Judge Breezer, began by stating: “We take this case en banc to address the constitutionality of a practice followed by the Executive for nearly 200 years.”168 The opinion continued by outlining the political and procedural events that had led up to the appeal.

Judge Walter Heen, who had denied the motion to suppress and conducted the bench trial that concluded in Ms. Woodley’s narcotics conviction, was nominated for appointment to the federal bench by President Carter in February 1980.169 The Senate Judiciary Committee had not taken final action on the nomination when the Senate recessed in December 1980. President Carter, who had lost his reelection effort the month before, commissioned Walter Heen as a district judge on New Year’s Eve 1980, pursuant to the Section 2, Clause 3 recess appointment power.170 The day after he was inaugurated, President Reagan withdrew Walter Heen’s nomination; however, Judge Heen continued sitting as a district judge until December 16, 1981, when the first session of the Ninety-seventh Congress terminated.171

After analyzing the text and the history of the Constitution, the Ninth Circuit resolved the apparent conflict between Article II, Section 2, Clause 3, and Article III, reasoning that the appointment of interim federal judges was an “extraordinary exception” to the life-tenure provision.172 The majority opinion expressed an un-

165. Woodley I, 726 F.2d at 1331.
166. For a complete discussion of the panel opinion as well as historical information on the use of the recess appointments see Thomas A. Curtis, Note, Recess Appointment to Article III Courts: The Use of Historical Practice in Constitutional Interpretation, 84 Colum. L. Rev. 1758 (1984).
167. Woodley II, 751 F.2d 1008.
168. Id. at 1009.
169. Id.
170. Id.
171. Id.
172. Id. Writing for the majority, Judge Breezer observed:

A recess appointee lacks life tenure and is not protected from salary diminution. As a result, such an appointee is in theory subject to greater political
derstanding of the importance of the clause. The court noted that recess appointees facilitated the "unbroken orderly functioning of our judicial system." The majority agreed with the *Allocco* court that the President's power also extended to the filling of vacancies occurring during the Senate's session. The majority recognized the "President's power to fill all vacancies that exist during a recess of the Senate." Addressing Ms. Woodley's argument that the recess appointment clause was merely a "housekeeping measure," the majority noted: "This clause prevents the Executive from being incapacitated during the recess of the Senate. This in turn prevents extended judicial vacancies, which can cause the denial of the important right of access to the court." The majority opinion explicitly supports the public policy premise of this author: that the recess appointment of Article III judges is both constitutional and wise.

(iii) *En banc* dissenting opinion

The *en banc* dissent, like the first panel opinion, is important and useful for its enumeration of the leading arguments against the contemporary use of the recess appointment power. Judge Norris, writing for the dissenting members of the *en banc* court, assailed what he perceived to be an unreasonable reliance by the majority on historical practice, asserting that the majority failed to balance the competing constitutional values represented by Section 2, Clause 3 and Article III. Judge Norris framed the question...
before the court as a conflict between Article III provisions and Article II, Section 2, Clause 3 recess appointments. The valuation of recess appointments was limited to concerns of efficiency and convenience. Thus, Judge Norris determined that the principle of separation of powers should control.\(^{180}\)

3. The Executive's contemporary utilization of Clause 3 authority

A strong reassertion of the Executive's constitutional power to select judges and maintain a full judiciary will undoubtedly test any President's political will. This final discussion of the third component of the solution provides a brief review of the use of the recess appointment power by past Presidents and a consideration of the political dynamics that would be involved in the use of this executive prerogative by a current president.

In the history of the Republic, more than 300 judges have been commissioned by Presidents through the recess appointment procedure.\(^{181}\) These appointments have included such notable jurists as Earl Warren, Thurgood Marshall, and William Brennan.\(^{182}\) Recess appointments have been made by every President from George Washington to James Earl Carter;\(^{183}\) curiously, however, neither

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\(^{180}\) Id. at 1033. Judge Norris reasoned:

These choices are not easy, but they must be made. And when we choose with reverence for the Constitution and respect for our proud heritage of constitutional interpretation, our choices are ultimately clear. The fundamental principle of separation of powers must prevail over a peripheral concern for governmental efficiency, and core constitutional values must prevail over uncritical acceptance of historical practice.

\(^{181}\) Id. For student comments on the case which adopt the dissenting opinion's rationale and findings, see Paul F. Solomon, Comment, Answering the Unasked Question: Can Recess Appointees Constitutionally Exercise the Judicial Power of the United States?, 54 U. CIN. L. REV. 631 (1985); Virginia L. Richards, Note, Temporary Appointments to the Federal Judiciary: Article II Judges?, 60 N.Y.U. L. REV. 702 (1985).


\(^{183}\) Throughout our history, fifteen recess appointments have been made to the United States Supreme Court, and hundreds more have been made to the inferior courts. See id. at 114-15. During the recess between sessions of the first Congress, George Washington relied on the recess appointment clause to commission three judges to the district court that just recently had been created by the Judiciary Act of 1789. 30 The Writ-
President Reagan nor President Bush have used this power.  
Of course, any President’s exercise of the recess appointment power promises to raise the rancor of a dilatory Senate, especially if delay tactics are purposefully circumvented by immediate appointments. Senators no doubt understand the political difficulty in justifying a negative confirmation campaign against a sitting federal judge who is doing a good job. In the past, in fact, Presidents have preempted the nonconstitutional, though widespread, practice of senatorial courtesy by using the recess appointment power.  

In 1960, the Senate passed a resolution condemning the Presidents of George Washington, 457-58, 473, 485 n.75 (J. Fitzpatrick ed., 1939). President Washington later used the recess appointment power to name Justice Johnson and Chief Justice Rutledge to the Supreme Court. See Chase, supra note 182, at 114-15. More recently, Presidents Dwight Eisenhower and John Kennedy each made twenty-five recess judicial appointments. Id. The commissions represent fourteen percent of President Eisenhower’s judicial appointments and twenty-two percent of President Kennedy’s judicial appointments. Id. Between them, Presidents Lyndon Johnson and James Carter, who both served with cooperative Senate majorities, made only five recess judicial appointments. Id. President Johnson, who strong-armed Justice Arthur Goldberg off the Supreme Court in order to name Abe Fortas to the court, later offered and then withdrew a recess appointment to Mr. Goldberg to become Chief Justice in 1968, after the Senate had rejected Abe Fortas for the job. Id. Although a substantial percentage of recess-appointed judges subsequently were nominated and confirmed to life-tenured posts, the eventual confirmational success of those judges was not the primary concern of Presidents who made the recess appointments. Id.

184. President Reagan used the recess appointment power to fill various other governmental positions. All directors of the Legal Services Corporation under the Reagan Administration were appointed by recess appointments and President Bush has continued this practice. See More Recess Appointments, N.Y. TIMES, Jan. 7, 1991, at A16. He made 30 such appointments in November, 1988. 32 Are Appointed to Agencies During Congressional Recess, N.Y. TIMES, Nov. 23, 1988, at D20. Curiously, however, he was not prepared to use this legitimate executive power to fill judicial positions. The President’s use of the recess appointment power would have served as a strong reassertion of executive will. As one public policy analyst noted, recess appointment power is an “executive prerogative” expressly granted to the President enabling him to make judicial appointments in the face of “an intransigent or dilatory Congress.” William Lucas, Missed Opportunity, NAT’l J., Sept. 15, 1989, at 14.

185. For example, the Senate would have had great difficulty attempting to portray Robert Bork as a wild radical if President Reagan had made the tactical decision to name him to the high court during a Senate recess—before actually nominating him to that court. As a sitting Supreme Court Justice, Robert Bork would have been much less likely to suffer defamation and damnation in the press.

186. See notes 140-42 and accompanying text.


188. The resolution stated:

That it is the sense of the Senate that the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should not be made except under unusual circum-
dent's use of recess appointments to the Supreme Court after Earl Warren and William Brennan were placed on the nation's highest court by recess appointments.\textsuperscript{189} Of course, the Senate's complaint, having only rhetorical value, was of no legal consequence,\textsuperscript{190} since neither a resolution nor a statute can trump the President's constitutional authority to select women and men for recess or traditional judicial appointments.\textsuperscript{191}

Rumblings from Senate majority leaders or from the fourth estate against recess judicial appointments are ordinary and expected. However, when the Senate fosters appointment delays in the interest of patently partisan politics, such noise should not diminish the President's will to fulfill his or her constitutional responsibilities.\textsuperscript{192}

A President who has sufficient political courage to commission a significant number of recess judicial appointments certainly will expend a great amount of his or her political capital exercising that courage. Strong Presidents often have been successful in bypassing Congress by going directly to the American public. For practical political reasons, recess judicial appointments should be an-

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\item This resolution was preceded by complaints by members of the Harvard Law School faculty regarding the recess appointments of Warren and Brennan. See Statement of Professors Paul Freund, Benjamin Kaplan, Henry Hart, Ernest J. Brown, and Arthur Sutherland, HARV. L. SCH. REC., Oct. 8, 1953, at 1, Col. 3; at 2, col. 2.
\item For an incredible proposal that the Senate pass a resolution to persuade the President to select only those judicial nominees who have a sufficient paper and constitutional trail in order for the Senate to fully judge a nominee's constitutional philosophy, see Louis Fisher, Adopt A Resolution, LEGAL TIMES, Oct. 7, 1991, at 26.
\item Congress could attempt to terminate the salary of all recess-appointed judges as a more practical expression of their displeasure with the exercise of the Executive's power, as they have done for recess appointments to vacancies which occurred when the Senate was in session. See 5 U.S.C. § 5503 (1988). This action would be a patent violation of the separation of powers doctrine, however, as it would be no more constitutional for Congress to withhold salary from a recess judge than from a life-tenured judge. If the Congress was temporarily successful in such a power trump, as a practical political matter, the Executive could simply guarantee recess appointee judges that their salary would be raised from other sources.
\end{enumerate}
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nounced by the Executive directly to the American people.193

Any President planning to use this authority must be fully prepared for a strong reaction from the press and from the Senate to such a robust exercise of executive will. The President should expect a general lack of public understanding regarding the recess appointment clause and the nature of interim judges. The Administration should be prepared to respond to all criticism and misrepresentation of the recess appointment clause.194 In sum, the President’s administration should explain to the American public, in exhaustive detail, why the recess appointment of federal judges is necessary for the “unbroken orderly functioning of our judicial system.”195

Because of the crisis of financial institutions and the general economic instability, the public, the press, and Congress readily accepted President Bush’s recess appointments of the chairperson of the Federal Reserve Board,196 members of the Federal Home Finance Board,197 and chairperson of the Resolution Trust Corporation.198 The American public would similarly understand and embrace judicial recess appointments as being “necessary for the public service” if such appointments were depicted as necessary for

193. President Roosevelt knew well how to go directly to the American people regarding appointments to the judiciary and changes in the political system. See A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary. Washington, D.C. March 9, 1937, in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122 (Samuel I. Rosenman comp., 1941).

194. Alexander Hamilton performed much the same job during the Constitution’s ratification debates, when the recess appointment clause was criticized by foes of the Constitution as giving the President too much power and was deliberately misrepresented by Antifederalist writers: “Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation, calculating upon the aversion of the people to monarchy . . . .” Mr. Hamilton succeeded in refuting the misrepresentations of the Antifederalists, and he clarified the importance of giving the Executive an alternative method of appointment when vacancies occurred during Senate recesses. THE FEDERALIST, supra note 143, at 407. In FEDERALIST No. 67, he stated:

The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President singly to make temporary appointments.

Id.

195. Woodley II, 751 F.2d at 1014.
197. See Paul Muolo, Re-recess for Member of the FHFB?, NAT’L MORT. NEWS, Nov. 18, 1991, at 12.
victory in the war on crime and drugs.199

In October 1991, President Bush stated that the Senate's advice and consent authority would not be interpreted to "give a group of Senators veto power over a nominee."200 The Senate's winter recess in November 1991, was a classic missed opportunity for the President to act on this constitutional mandate to appoint judges.201 The President could have given a holiday surprise to the Senate, a holiday tonic to the judicial system, and an important holiday gift to the American people if he had made recess appointments to every judicial vacancy that existed on January 1, 1992.202

CONCLUSION

So that domestic tranquility might be resecured and civil justice reestablished, Americans must demand that the federal government properly maintain the national court system. Without the provision of additional federal judges and courtrooms, the nation's war on drugs and violent crime will continue to be jeopardized. The civil and constitutional rights of all Americans are also threatened when civil litigants are forced to wait months or years to see the inside of a federal courtroom. American businesses, which are fighting to survive and succeed in the global marketplace, must be given an opportunity to resolve their normal commercial disputes, litigate and clarify voluminous government economic regulations, and defend themselves against the most litigious polity in the world.

The tripartite solution advocated in this Article is a direct and

199. Although the Constitution's Section 2, Clause 3 appointment authority may be utilized during any Senate recess of duration, such appointments have an optimal length when made as soon as possible after the beginning of one of the two congressional sessions. For example, the commission would last for 18 months if made in late June, 1993, as the appointment would not expire until the end of the "next session" in December, 1994.


201. See, e.g., Lucas, supra note 182.

202. During past presidential election years, the confirmation process has been repeatedly delayed. Judicial nominations often languish and vacancies continue during the months immediately preceding a presidential election. These nominations and other vacancies become ripe for an interim appointment when the Senate recesses for its extended winter vacation. See Jeffrey Stinson, Federal Bench Vacancies Could Be Election Issue, Gannet News Service, Jan. 16, 1992, available in LEXIS, Nexis Library, Gannet File; Mark Ballard, Bush-Senate Standoff Ending Presidents First 1992 Judicial Nominees Include 3 Texans, TEX. LAW., Feb. 3, 1992, at 4 ("All three Texas choices are controversial, an important factor considering that the judicial confirmation process traditionally slows to a crawl in the spring of presidential election years and stops by mid-summer.").
effective answer to the problem lamented by the entire legal system. The present court gridlock necessitates the immediate establishment of at least 55 bankruptcy judicial positions, 125 additional district court judgeships, and 55 appellate court positions. The increase in federal case filings that is certain to occur during this decade guarantees that court gridlock will reach crisis proportions unless the number of federal judges is increased by fifty percent and the supporting infrastructure is strengthened and refurbished.

New judicial positions can help ensure the "unbroken orderly functioning of our judicial system" only if they are expeditiously filled after their creation. Therefore, the reassertion of the presidential authority to select federal judges, without regard to "senatorial courtesy," is required for the success of this solution. In the future, every administration should have an active waiting list of president-approved judicial nominees selected from a national pool of the most qualified candidates, without regard to state affiliation. Thus, upon learning of an empty judgeship, the President could act immediately to fill the vacancy, with or without the consent of the Senate. To make judicial selections in order to maintain a fully staffed judiciary is both the constitutional right and the political duty of the President of the United States.