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The Independence of the Federal Judiciary

Judith Resnik, Danny J. Boggs, and Howard Berman

On May 15, 2003, the Academy held its 1870th Stated Meeting in Washington, D.C. Librarian of Congress James Billington welcomed Fellows and their guests to the second in a series of meetings focusing on the relationship of Congress and the Court. This event is part of the Academy's project on Congress and the Court. The steering committee members of the project are: cochairs Jesse Choper (UC Berkeley) and Robert C. Post (Yale Law School), Linda Greenhouse (*New York Times*), Abner J. Mikva (University of Chicago Law School),

Nelson W. Polsby (UC Berkeley), and Leslie C. Berlowitz (American Academy). Mikva moderated the program.

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Judith Resnik

Conversations about judicial independence tend to take one of two forms. The first provides generalities praising the importance of an independent judiciary and delighting in the American example, centered on Article III of the United States Constitution. To ground that aspect of the discussion, the text of Article III, Section 1 is worth revisiting. It reads:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Under the provisions of Article III, life tenure and protected salaries are the markers of the independent federal judge.

The second sort of discussion about judicial independence is less celebratory and more anxious. Sparked by specific anecdotes anchored in particular moments in time, debaters argue that certain actions undermine judicial independence.

Examples abound. Begin with the process for appointing individuals to life-tenured judgeships. One concern is that a president, holding the constitutional power of nomination, may try to interfere with an independent judiciary by selecting people who are precommitted to certain worldviews or who pass specific litmus tests.

Another concern is that the Senate, constitutionally obliged to provide advice and consent, either is not living up to or is overstepping that mandate. In May of 2003, hearings in the Senate focused on these very questions, as we heard complaints from one quarter claiming a "crisis" of vacancies and from another quarter claiming "court packing."

Another area of concern relates to whether Congress has provided a sufficient number of life-tenured judgeships and funds adequate to pay for the salaries, the staff, the facilities, the security, the jurors, the marshals, the libraries, and the public defenders in the federal courts. Recently, members of the judiciary objected that Congress had set their salaries too low and that the Executive had budgeted too little for court renovations.

Control over jurisdiction is another arena of controversy. How many and what kinds of rights ought Congress to create by vesting new jurisdictional grants in the federal courts? What individuals ought to have access to the federal courts, as contrasted with state courts, agencies, or nothing? Are we “federalizing” too many cases or too few?

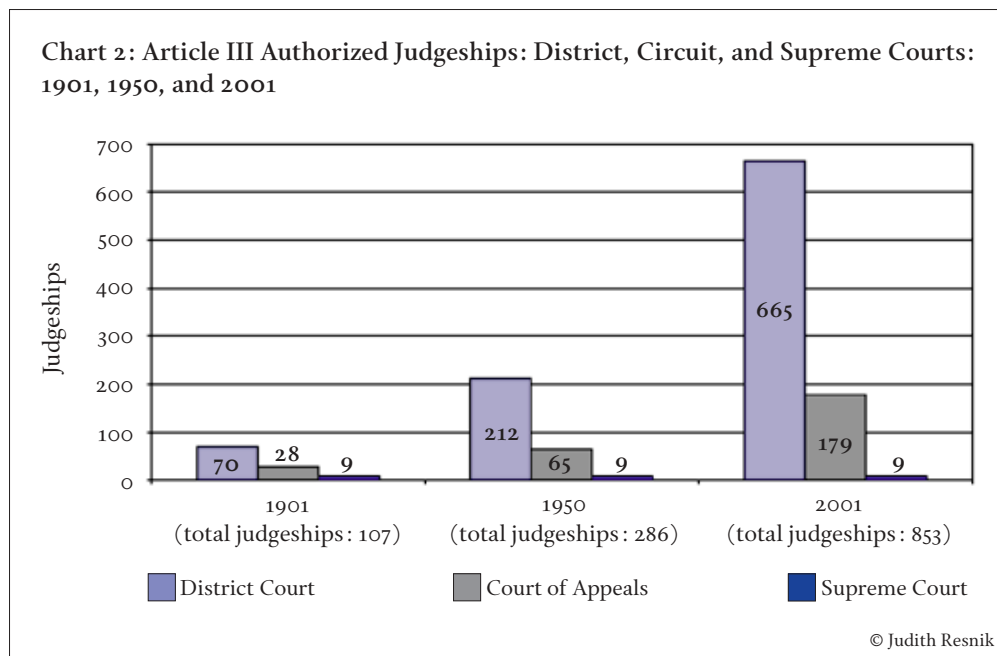
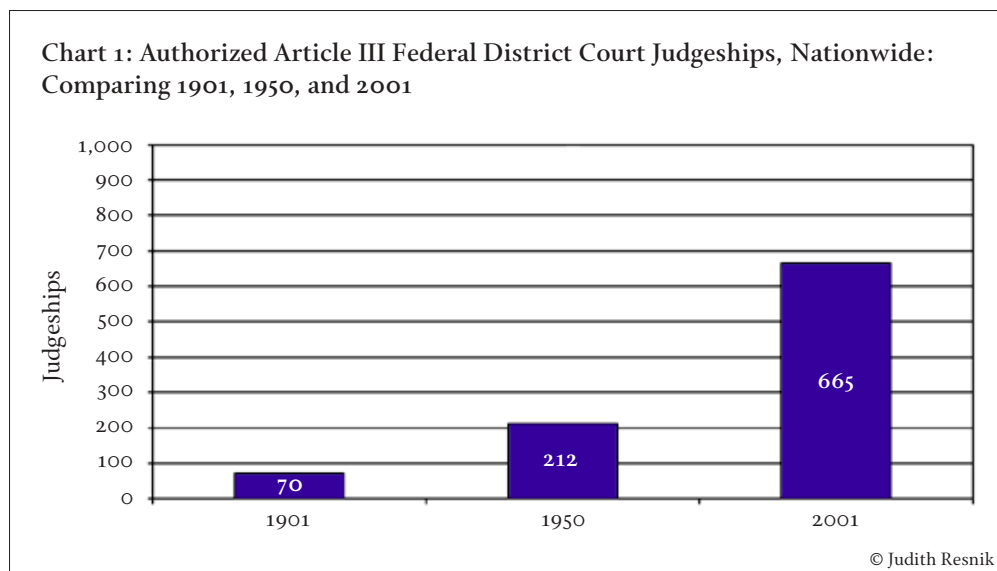
Other questions involve losing rights that already exist. Congress sometimes threatens to and occasionally does enact legislation limiting access to the federal courts, a practice objectors label “jurisdiction stripping.” Examples include bills about prayers in school and abortion rights.

Congress can also constrain the remedies that federal judges can order. Current issues arousing discord include whether Congress should cap tort damages and whether Congress should limit the power of courts to grant injunctive relief on environmental claims. Moving from legislation pending to that enacted, in the spring of 2003, Congress reduced the power of judges to make individualized decisions when sentencing criminal defendants.

Whether judicial independence is discussed in either a celebratory or an anxious mode, commentators recycle themes that have long been the focus: incursions from the Executive and the Congress. The fear of overreaching from other sectors of government stems from the English experience that predated the drafting of the United States Constitution. In seventeenth-century England, judges’ commissions expired when a king’s reign ended. (The 1701 Act of Settlement marked the beginning of the independence of judges from the Crown.)

But now, more than two hundred years later, structural changes in the American judiciary require that the discussion of judicial independence be reframed – to take into account new foes of, as well as new friends for, judicial independence.

A fast glimpse at the past one hundred years of interaction between the Congress and the courts demonstrates the need to return to the discussion of judicial independence to include narratives of cooperation as well as those of conflict. Further, we must focus on challenges not extant centuries ago. The power of the private sector to affect judicial independence needs to be understood, as does the growth of lower echelon jurists who wield federal adjudicatory power outside the parameters of Article III and are, therefore, vulnerable to incursions from all quarters. Finally, we must consider how the developments within the judi-



cial branch have resulted in an agenda-setting judiciary, taking an active role in policymaking that undermines the rationales for judicial independence.

The Cooperative Expansion of Federal Judicial Authority and Personnel

Focus first on the remarkable growth of and commitment to federal adjudication. Congress and the courts, working together over a hundred years, have created a substantial, important judicial system. Congress has repeatedly looked to the federal courts to enforce new rights. Congress has endowed the federal judiciary with significant resources. Congress and the federal judiciary have worked together to invent whole new sets of federal judges and to empower them to decide hundreds of thou-

sands of federal claims. The joint venture of the creation of the federal judiciary as we understand it today came in part through a re-reading of the constitutional text of Article III – rendering legal the adjudicatory authority of federal judges who lack life tenure and protected salaries.

As Chart 1 indicates, a hundred years ago, about 70 trial judges were dispersed across the United States. In several states – such as Maryland, Indiana, and Massachusetts – a single district judge presided. Today, more than 665 judgeships exist. As Chart 2 makes plain, in 1901 fewer than 30 judges staffed the appellate courts; today some 180 serve.

The number of judges has grown, and so has their jurisdiction. During the twentieth century, Congress created federal securities law, federal environmental law, federal civil rights

law, federal consumer law, and much more. Because of this production, we are all federal rights holders, possessing new and important rights that affect our lives in many ways – from taxes and pensions to the water we drink and our personal security.

The power of the federal judiciary does not come from its size and docket alone. During the second half of the twentieth century, life-tenured judges (constitutional judges) gained the power to appoint magistrate and bankruptcy judges (statutory judges), who serve for fixed and renewable terms. Specifically, in 1968, the Congress created the position of federal magistrate.

As Chart 3 illustrates, that job was once conceived as primarily part time (with 450 part-time positions in 1971). But today it is primarily a full-time job (with more than 470 serving

as full-time judges in 2001). In addition, in 1984, Congress created another group – bankruptcy judges, now numbering more than 330, as Chart 4 details. Magistrate and bankruptcy judges serve for fixed and renewable terms of eight and fourteen years, respectively.

Unlike Article III judges who have life tenure and protected salaries, the jobs of the statutory judges could be abolished and their salaries cut. But magistrate and bankruptcy judges have courtrooms in federal courthouses, and they do a good deal of the same work as life-tenured judges. For example, magistrates can preside, with parties’ consent, at jury trials; both magistrate and bankruptcy judges have the power of contempt. Also, bankruptcy judges may sit on panels to provide appellate review to decisions made by individual bankruptcy judges.

Structural changes in the American judiciary require the discussion of judicial independence to be reframed to take into account new foes of, as well as new friends for, judicial independence.

Chart 5 puts all of these positions together to show all of the judges sitting in federal courthouses around the United States. Those without life tenure outnumber those with life tenure.

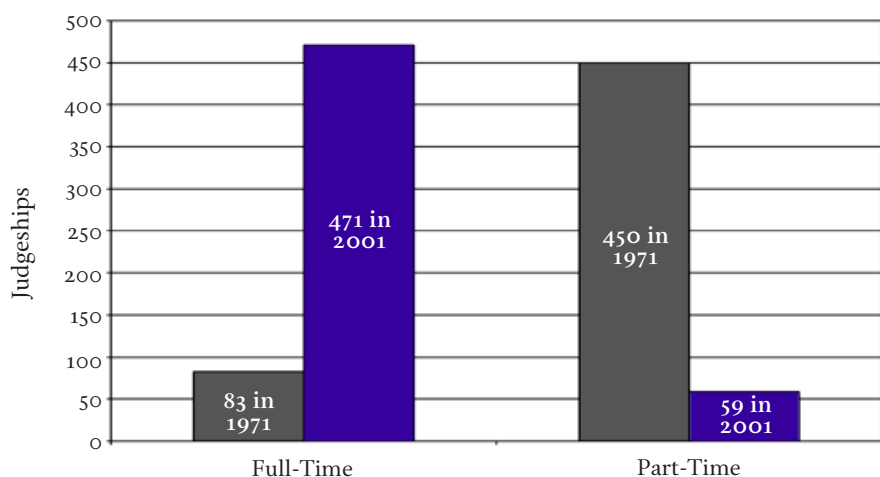
In the early part of the twentieth century, the Supreme Court was loath to permit too much devolution of the “essential attributes of judicial power.” By century’s end, however, the Court had reread Article III to enable the shift of significant amounts of federal adjudicatory power to non-Article III judges. Under such interpretations, yet another cohort of judges – termed Administrative Law Judges (ALJs) and today numbering about 1,400 (as is detailed in Chart 6) – make thousands of adjudicatory decisions in federal agencies. Thus, much of federal adjudication occurs outside buildings labeled federal courthouses, and hundreds of judges important to the lives of claimants do not have life tenure.

A caveat is in order. The charts do not include all those who do judging in federal agencies, but show only those judges chartered under the 1946 Administrative Procedure Act (APA) and therefore protected through special selection and dismissal provisions. Hundreds of others – called presiding officers, administrative judges, hearing officers, or examiners (constituting what Professor Paul Verkuil has called “the real hidden judiciary”) – are line agency employees who decide thousands of cases but without the protections that the APA provides to both ALJs and disputants.

Today we take for granted the purpose and power of the lower federal courts. We even have a shorthand for it: “don’t make a federal case out of it.” But that phrase was not common much before the 1950s. In short, the lower federal courts as we know them today did not exist a hundred years ago.

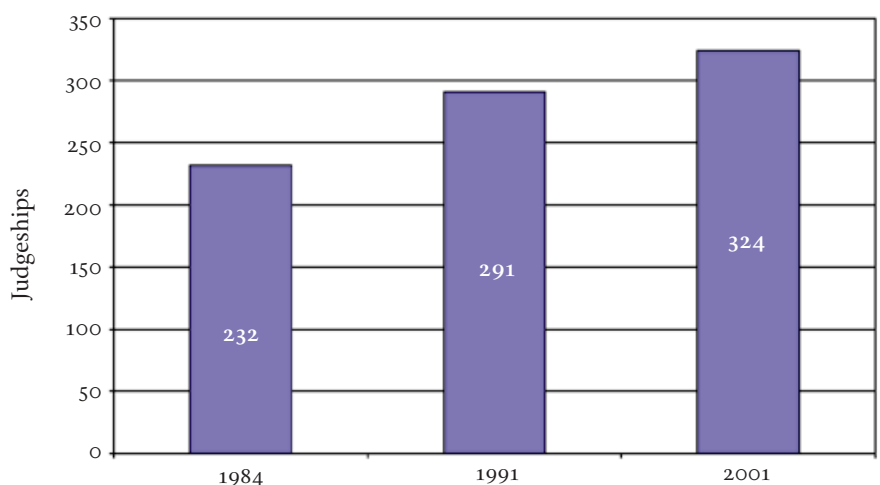
Consider this enormous expansion of judicial resources and notice how much of it came about through reliance on good will among all three branches. Dozens of shared initiatives pro-

Chart 3: Magistrate Judgeships: 1971 and 2001



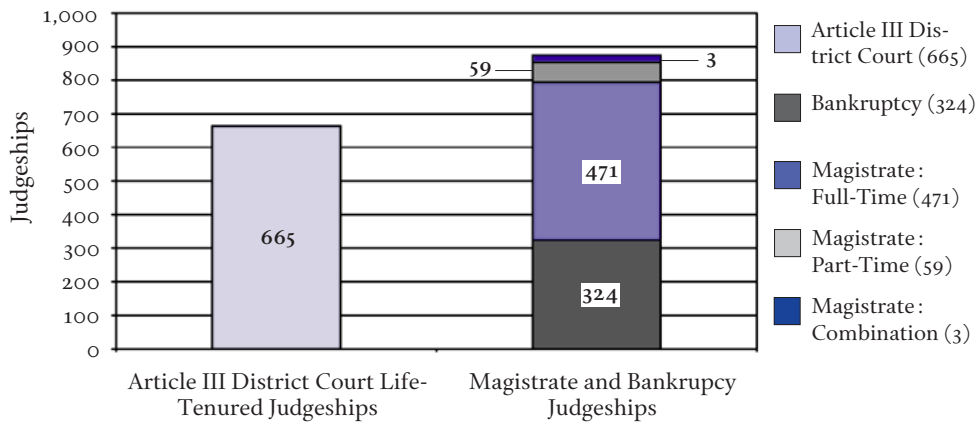
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Chart 4: Authorized Bankruptcy Judgeships: 1984, 1991, and 2001



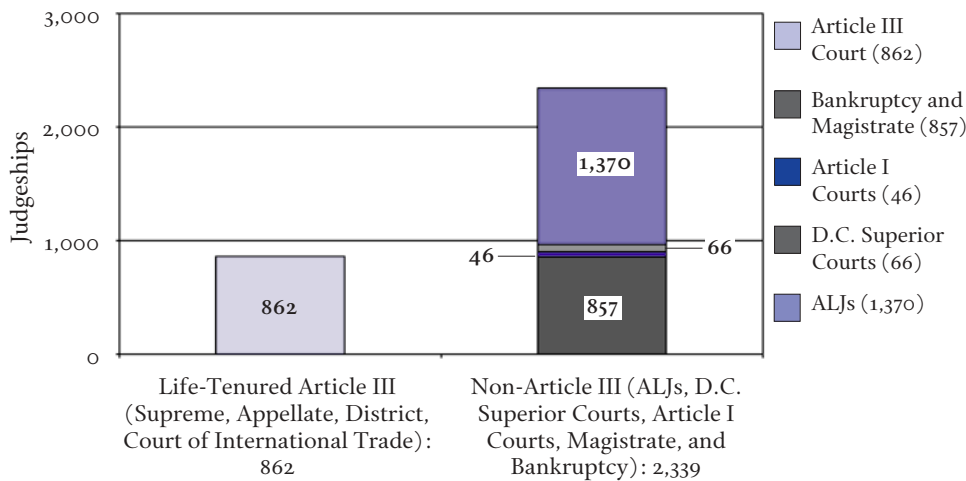
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Chart 5: Authorized Trial-Level Federal Judgeships in Article III Courts, Nationwide: 2001



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Chart 6: Authorized Federal Judgeships, Including Article I Courts and Administrative Law Judges, Nationwide: 2001



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duced the current landscape, with more than 550 federal courthouses, more than 300,000 annual civil and criminal filings and a million bankruptcy filings in the federal courts, as well as tens of thousands more in federal agencies, resulting in decisions articulating the meaning of and enforcing rights under federal law. The cooperative work of Congress, the courts, and the Executive has equipped this nation with more than 4,000 judicial officers in a judicial hierarchy at whose top sit life-tenured Article III judges.

New and Old Tensions

What is the import of this manufacture of judges when, instead of cooperation, we enter periods of conflict between the courts and Congress? Sometimes, either Congress or the Executive objects to decisions by individual judges

in individual cases, dislikes decisions by the Supreme Court, or rejects the idea of Americans holding federal rights. Sometimes, Congress or the Executive seeks to retract rights and remedies by limiting the power of federal judges, by requiring that disputants use privately sponsored dispute-resolution programs, or by permitting disputants to be heard only in specially created courts run by the president.

We have many recent examples. As I mentioned, Congress has just limited the power of judges over sentences. In the last decade, federal legislation divested federal courts of some jurisdiction over cases involving aliens and prisoners, and limited redress for certain kinds of securities law violations. In the last few years, the president has chosen to go outside of both the federal court and the military justice system altogether to create new military commissions with broad jurisdictional authority.

Return then to Article III – our emblem of judicial independence in the United States – and revisit its text. While popular understandings imagine three robust branches of government, significant separation of powers, and judges able to make rulings on the merits of cases without fear of losing their jobs or their resources, the constitutional text says less than might be expected.

Article III provides only for life tenure and individual salary protection and does so, today, for just a subset of our federal judges. Even for the constitutionally protected judges, Article III misses completely the idea of budgets, of salary-setting independent of Congress, and of the institutional needs of a judiciary as a provider of services to the millions of litigants in need of its attention. Economically, the judiciary is dependent on Congress. Furthermore, as the judiciary has expanded, it is ever more reliant on Congress – for staff, for surrogate and subsidiary judges, indeed, for its very ability to work. Conscious of that dependence, federal judicial officers provide detailed explanations to Congress of the judiciary’s needs and budgetary priorities.

And if we are to worry about conflict between Congress and those judges with life tenure, look again at the “pictures” I have provided of the federal courts and stare hard at those bar graphs where the tallest bar represents all those judges who do not have life tenure.

No mention is made of such persons in Article III, but through creative interpretations of Article III, these judges today hold a good deal of federal power. They exist by virtue of statute and can be decommissioned by statute.

For judges who work in administrative agencies, their vulnerability to Congress was made plain when, in the 1990s, Congress stopped funding the Administrative Conference of the United States (ACUS), an institution that had been dedicated to evaluating and supporting the administrative judiciary. Administrative judges are also worried about incursions from the Executive. Agencies are now trying to avoid using ALJs (who gain some independence through the Administration Procedure Act) by relying instead on other employees to serve as temporary judges. Indeed, Attorney General John Ashcroft took the position that he had unfettered authority to treat immigration law judges (who were not APA-charted ALJs) as ordinary employees of the Department of Justice and to reassign them as he thought appropriate.

Thus, developments of the last century have produced hundreds of federal judges who have less structural insulation from actions of an aggressive Executive and an aggressive Congress. Moreover, changes during the last century have also produced the possibility that the judiciary itself can pose threats to judicial independence.

The more the judiciary takes policy positions outside of adjudication, the harder it is for the judiciary to stay separate from, and independent of, a certain form of politics.

One question addresses the wisdom of creating a system in which constitutional judges have the power to “clone” – that is, to select the statutory judges who serve inside our federal courts. The hundreds of magistrate and bankruptcy judges obtain their charters (of eight and fourteen years, respectively) from other judges, who can reappoint them or not. Thus far, a distinguished group of individuals has come to play an important role, but we have not come to grips with two issues: whether a significant proportion of federal judges should be selected with little democratic input, and how to decide what behavior merits reappointment.

Other questions relate to the role that this collection of thousands of judges ought to take in our polity. Over the past hundred years, we have not only manufactured judgeships but also, for the first time in history, created the possibility for a judiciary that has the administrative and technological capacity to act strategically over time – not only in individual cases but as agenda setters and lobbyists in Congress. The federal courts have gained a corporate structure that permits the judiciary to function in some respects as an interest group.

A quick summary of the infrastructure and the agendas of the federal courts is necessary to understanding why this transformation is relevant to the issue of judicial independence. The second chart showed some hundred life-tenured judges in 1901. Those judges had little institutional means of talking with each other, let alone to anyone else. The attorney general gave Congress reports on the federal courts and asked Congress for the judiciary’s funds.

As Chief Justice William Howard Taft put it, each judge had “to paddle his own canoe.”

Of course, judges needed to become organized. But the question is organized to do what? In the 1920s, Congress created an official policy-making body of judges, now called the Judicial Conference of the United States, through which 27 judges, with the chief justice of the Supreme Court presiding, adopt official policy positions through a vote of that body. In 1939, Congress created the Administrative Office of the United States Courts, which collects data, submits budgets, and oversees the need for facilities for the federal court system. In 1967, the Federal Judicial Center was established to focus on education and research.

In the early days, the Judicial Conference avoided taking positions on matters of what it termed “legislative policy,” such as whether Congress should create new federal rights. Beginning in the 1950s, under Earl Warren, the Judicial Conference occasionally raised questions about some federal jurisdictional provisions but often demurred on the grounds that such issues were matters for Congress.

Under Warren Burger’s tenure, chief justices began to make “state of the judiciary” speeches. Thereafter, via a “futures planning process,” the Judicial Conference – the official policy arm of the federal judiciary – approved 93 recommendations to Congress as part of an official document, entitled the *Long Range Plan for the Federal Courts*, issued in 1995.

Specifically, the Judicial Conference has argued for limited growth in the number of life-tenured judges, for greater reliance on adjudication by judges lacking life tenure, for less federal jurisdiction, and for a presumption against creation of federal rights if enforced in federal court.

For example, the Judicial Conference told Congress – while legislation was pending – that it should not create new rights enforceable in federal courts if computers crashed in Y2K, that Congress should not give veterans access to life-tenured judges to challenge benefit awards, and that Congress should not vest jurisdiction in federal courts for challenges to health-care providers.

Moreover, both before and after the passage of the Violence Against Women Act, the chief justice raised objections to it. Subsequently, in 2000, he wrote the five-person majority opinion in *United States v. Morrison* that held the civil rights remedy of that act unconstitutional. In short, over the last few decades, the federal judiciary as a corporate entity has taken on

the roles of education, planning, and lobbying about the shape, nature, and future of judging and the role of federal law.

These new roles leave the judiciary open to a form of politicization that we have only begun to acknowledge. Insiders in the adjudicatory system know that the judiciary is an organization that takes positions in Congress.

Therefore, sophisticated repeat players (such as the government, insurance companies, corporations, and civil rights groups) now attempt to lobby the judiciary to take certain positions – for example, to support a bill to take class actions pending in state court and federalize them. The more the judiciary takes policy positions outside of adjudication, the harder it is for the judiciary to stay separate from, and independent of, a certain form of politics.

Taking Up the New Challenges

I began by providing a cheerful picture of the tremendous and useful development of the lower federal courts. I then described how a dynamic of cooperation produced the important federal judicial system that is familiar today.

But I have also analyzed how the inventions of the last century have created new sets of judges more vulnerable than the iconic judges imagined by reading our constitutional text. I then raised new questions about how challenging it is to respond to the high demands for judges and about what kind of behavior is appropriate when judges use their voice not to adjudicate individual actions but rather to develop agendas on social policy.

I hope we live in a world in which my uncheerful scenarios are rare. They are not, however, forbidden by constitutional text. Rather they are dependent on culture – and that culture is, I think, at risk from all three branches. In my view, no branch is always either a hero or a villain.

My hope is that we will consider how to promote a culture that cherishes judging, respects individual judgments when rendered after deliberation, obliges judges to take responsibility for their decisions through explanation and publication, and constrains judges when they move outside their role as adjudicators. We must make self-conscious decisions to ensure that the federal judiciary will not become just another agency, pushing its own worldview and agendas, and to ensure that the executive branch and Congress will appreciate the seriousness of purpose when individual judges try to do their best.

Danny J. Boggs

In my remarks on the independence of the federal judiciary, I will try to adhere strictly to the topic of judicial independence and true threats to that independence, as distinguished from things that may annoy the federal judiciary, hinder or promote the effectiveness of the federal judiciary, or advance or retard the reputation of one or more members of the federal judiciary. I so limit myself because I believe that it is too easy to say that anything that judges don't like is a threat to their independence. What may be a threat to good government or to good use of taxpayers' money or to any number of other desirable things is not necessarily a threat to the independence of the judiciary as contemplated in the Constitution and other founding documents.

My basic theme today will be that the independence of the judiciary remains intact and largely unthreatened. I find my colleagues on the bench to be as independent as the proverbial hog on ice. With respect to my own activities, I know that efforts may be undertaken that appear to be an attempt to intimidate me or to affect my decisions in an improper way, but my perception is that the effect of such activities is zero. Observing my colleagues, I have at times questioned their reading of a record or their logical deductions or their understanding of constitutional history, but I have never thought that their opinions represented anything other than their actual, even if at times wrongheaded, execution of their judicial duties.

So, what are some of the possible or proposed threats to judicial independence, and how should we assess them? I will mention several in this list, but I will not have time to address each of them in my ten minutes: judicial pay; delays in the nomination or confirmation of judges; attacks upon, or abuse of, persons nominated to the federal bench; abuse of, or attacks upon, persons now holding judicial office; attendance at conferences by judges, or attempts to limit what judges attend, read, or say; and congressional intrusion upon judges by requiring reports on or by them.

With respect to the process of appointing judges, I will not take a position on the specifics of the controversy currently embroiling that process or on the variety of controversies that have occurred in that same process for at least the past quarter-century. I will say that it does appear to me, from knowing a fair amount about my colleagues on the federal bench and quite a number of the nominees, that there is a considerable lack of alignment between the

actual talents, qualifications, and positions of nominees and the manner in which they are treated in the confirmation process. In other words, the attacking, delaying, or defeating of nominees on the basis of their supposed extremism or lack of qualifications or lack of temperament is a process that is, to paraphrase a comment once made by Justice Potter Stewart in regard to the death penalty, "freakishly and wantonly imposed" in the "same way that being struck by lightning is."

Rufus Choate, 150 years ago, said that if judges in Massachusetts were to be elected, they would be "abused by the press, abused on the stump, and charged ten thousand times over with being very little of a lawyer and a good deal of a knave or a boor." Though we do not have election of federal judges, it does sometimes seem that very little has changed in the past 150 years. Granted, certain judges nominated by the current president and by past presidents have been accused, perhaps correctly, of some measure of extremism. Yet throughout the years, nominees who have been attacked as extremists have rarely differed radically in actual qualities from those who have glided through the confirmation process as moderates.

Indeed, looking at the broad range of persons of my knowledge nominated and appointed over this same period, it seems to me that the judges nominated to the bench by presidents of either party represent a fair bell curve of legal attitudes and opinions – a curve whose central point approximately matches the position of the publicly active lawyers who have supported the appointing president. Although attacks may be made on nominees for being too far to the right or left of most Americans, that does not represent a threat to the independence of the judiciary, because nominees of both parties will not commit to particular positions. They will be attacked for their failure to commit, and then defended, and their attackers and defenders will change sides, along with the administration. But this would be a threat only if nominees did commit to a position. Justice Anthony M. Kennedy, speaking recently at the University of Virginia, warned both parties that they should start thinking about the dangers they pose to judicial independence by insisting on nominees who have particular views.

Abraham Lincoln made what is perhaps the best statement on this matter in a conversation with George Sewall Boutwell, who included it in his *Reminiscences of Sixty Years in Public Affairs*. Lincoln, who had just nominated Salmon P. Chase as chief justice, candidly said that he wanted Chase to rule certain ways – for example, by upholding the Emancipation Proclama-

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tion – but added, "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it." I think that declining to answer is indeed the proper answer, and I think that it will continue to be the answer that nominees of both parties will give.

The history of attacks on the sitting judiciary, of course, is a rich and varied one, from the attacks on Federalist judges and "midnight justices," to the Senate's initial refusal to confirm Justice Roger B. Taney, to Teddy Roosevelt's attack on his own appointee, Oliver Wendell Holmes (he said he could have carved a justice with a firmer backbone out of a banana), to Franklin D. Roosevelt's efforts against "the four horsemen" (the Supreme Court justices who persisted in voting against his New Deal laws), to the attacks on Earl Warren, and up to the present. These activities may certainly have threatened the digestion of the judges involved, but in what sense can we say that they affected their independence?

Clearly, many such efforts are designed to change the judicial opinions of judges for reasons outside the court record or other documents that judges should legitimately consult. For example, Tony Mauro recently reported in *Legal Times* (May 12, 2003) that a certain organization "has announced plans to demonstrate wherever Supreme Court justices speak in public, until the Court hands down its decision in the University of Michigan . . . cases" concerning affirmative action. He quoted a representative of that organization as saying, "It won't be something the justices can just push aside." Well, despite that statement, I confidently expect that the demonstrations will have no effect whatsoever on those judges.

In a similar vein, during the circuit argument on one of those cases, our chief judge, Boyce Martin, with whom I had substantive disagreements on the case, was confronted by a counsel who began her argument as follows (and this is from the transcript): "I come before you with over there on the table some fifty thousand petition signatures representing fifty thousand plus Americans . . ."

At that point, Martin burst out, "I don't think petitions are what decide lawsuits. We decide the case on the law and the facts, and we want it very clear that we are not policymakers, we

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are not a legislative body. . . . So the petitions are not of any benefit in our decision making.” This was a position in which, I know, all of our judges concurred.

Now, I must say that bad decisions and unindependent decisions are not necessarily the same. In the early 1990s, as part of a group of American judges, I had the honor of spending a total of six weeks with some Russian judges, whom we visited on three separate occasions before, during, and after the collapse of the Soviet Union. During our early visits, in 1991, we were told that their great fear was “telephone justice,” wherein a party would call the judges and tell them how to decide. One of the more cynical dissident defense attorneys said, “You know, they talk about telephone justice, but that’s just for the stupid ones. The smart ones don’t have to be called.”

With respect to pay, it should be noted that the founders were quite concerned about the ability of Congress to affect judges’ decisions by the manipulation of the pay scale. As Alexander Hamilton stated in *The Federalist Papers*, no. 79, “A power over a man’s subsistence amounts to a power over his will.” In our modern, inflation-prone society, this phenomenon has taken a variety of forms. It would obviously be a challenge to independence for Congress to randomly cut judges’ salaries by 3 percent one year and by 14 percent another; however, simply refusing to raise salaries in order to match the debasement of the currency would create the same effect. In 1967, a year not usually thought to embody judicial extravagance, judicial salaries and congressional salaries were \$42,500 – a figure that, when adjusted for inflation, would require a pay raise of over \$70,000 dollars to match today. While I now feel little embarrassment over that, especially given that my youngest child graduated from college last June, the direction of that effect, as well as the effects of quite a number of other individual measures, could, if driven to extremes, threaten judicial independence. For example, had there been no pay raises since 1967, the result would have

been equivalent to a pay cut of over 80 percent. So there are things that nibble around the edges, but I think they only become true threats if taken to extremes. In the same way, a total refusal by the president to nominate, or by the Senate to confirm, new judges – so that the judiciary would be staffed only by a shrinking cadre of persons whose proclivities were thought to be known – could also have a negative effect.

I will conclude simply by saying that the actions of federal judges are subject to legitimate criticism and are not immune from illegitimate criticism – but those actions are the independent actions of the judges. As was said of another controversial group, in a mocking ditty, “You cannot hope to bribe nor twist / Thank God, the British journalist / But seeing what unbribed he’ll do / There really is no reason to.”

Howard Berman

The congressional-judicial relationship involves a certain degree of inherent conflict. Congress controls the resources (funds, buildings, etc.) that courts need to function; controls the number of judgeships; advises and consents on judicial vacancies; and determines the jurisdiction of the courts. The federal courts, for their part, interpret and sometimes overturn the laws Congress writes.

I suppose much of the conflict created by congressional regulation of the courts could be avoided if Congress simply acceded to the demands of the judicial branch on issues under congressional control. But from my perspective, there is a certain amount of congressional regulation of the courts that is both appropriate and constitutionally mandated. At the same time, there is no doubt that Congress can go, and at times has gone, too far in regulating courts.

It is probably impossible to establish a bright line between appropriate and inappropriate congressional regulations of the courts. In fact, the checks-and-balances system of government established by the founding fathers ensures that a bright line cannot be drawn. But in general terms, I believe it is appropriate for Congress to regulate administration of the judicial branch, but not appropriate for Congress to regulate the judicial function.

I can best explain my thinking on appropriate congressional regulation of the courts by discussing specific examples:

- Courthouse construction. Courts need to do a better job of being efficient and minimizing requests for dwindling federal dollars. For example, even though a new federal courthouse was built in Los Angeles just a decade ago, there is now a need for a new one. Why wasn’t a sufficiently large courthouse built a decade ago, when it would have been much cheaper to build it? Why won’t judges agree to courtroom sharing when there are insufficient resources to build a separate courtroom for every judge?

- Advising and consenting on judicial vacancies.

- Creation of new judgeships. Judiciary Subcommittee Chair Lamar Smith requested a General Accounting Office (GAO) study to “analyze merits of weighted filings and adjusted case filing methods used by Judicial Conference.”

- Statutory requirements that judges disclose travel junkets and personal finances. While such statutory requirements are appropriate, it is also appropriate for courts to have the ability to redact those disclosures, and Congress has given courts the ability to do such redactions.

- Judicial pay. I support paying judges more and restoring missed judicial Cost of Living Adjustments (COLAs). I also support repeal of Section 140, which requires Congress to pass additional authorization each year for increases in judicial pay, including COLAs. I would have supported an amendment to repeal Section 140 if the Judiciary Committee had marked up the Federal Courts Improvement Act of 2003 at its meeting of May 7, 2003.

Even though it may be appropriate for Congress to regulate courts in certain areas, that does not mean that Congress always has to exercise its authority. In many circumstances, the federal courts can exercise this authority, and if the courts do so responsibly, Congress should defer to such judicial self-regulation. However, if the courts fail to self-regulate responsibly, Congress has the responsibility to step in and exert its own authority.

The process for amending the federal rules of evidence, civil procedure, appellate procedure, and criminal procedure is a great example of how judicial self-regulation can work.

Unpublished decisions are another example of successful self-regulation. As a result of significant public outcry, the Subcommittee on Courts, the Internet, and Intellectual Property held hearings and had discussions about legislation. The federal courts effectively pre-

empted congressional regulation by adopting their own new rules on unpublished opinions through the Judicial Conference.

Unexplained decisions may end up being a similar success. HR 700, introduced by Representative Ron Paul, would amend the federal rules of appellate procedure to require federal appeals courts to issue written opinions in certain cases, and thus prohibit appeals courts from engaging in the practice of affirming lower-court decisions in one sentence. A committee of the Judicial Conference has begun the preliminary process of examining whether to recommend that the Judicial Conference adopt such a change.

However, the judicial privacy issue is one example of an area in which judicial self-regulation was not working. Several federal judges expressed concern that the Administrative Office of the Courts (AO) was monitoring their electronic communications. When those federal judges and several members of Congress, including myself, expressed concern about this, the AO was not cooperative and resisted addressing these concerns. I proposed legislation that prohibited AO interception of electronic communications unless pursuant to Judicial Conference policy. Even though this legislation left it to the courts to regulate themselves, the AO fought against it. I tried to work with AO on a compromise judicial privacy amendment, but the AO continued to oppose it. Finally, I went so far as agreeing to withdraw my compromise amendment if AO would send a letter disavowing its intent to monitor and declaring that it did not have authority to monitor unless the Judicial Conference directed it to do so. However, the letter the AO eventually sent was missing the critical language providing these assurances.

In such circumstances, it is entirely appropriate that Congress reclaim its authority to regulate the administration of the courts. Where the courts don't self-regulate responsibly, Congress has the responsibility to step in.

There are also adequate examples of improper congressional interference with judicial functions.

Mandatory minimum sentences improperly tie the hands of judges. The central and crucial judicial function is to look at the facts of a case, interpret the law, and, on the basis of the facts and law, decide what outcome will serve justice. Only the judge who has sat through the trial can determine how to serve justice. Certainly, members of Congress cannot decide, years before a crime has ever been committed, the appropriate punishment for that crime.

Where the courts don't self-regulate responsibly, Congress has the responsibility to step in.

As inappropriate as it is for Congress to tie the hands of courts through mandatory minimums, it is exponentially more inappropriate for Congress to seek to pressure judges who don't share its perspective on mandatory minimums. Yet this Republican Congress has done just that to a federal judge from the District of Minnesota. Because that judge testified at a congressional hearing in opposition to mandatory minimums at the invitation of the Democratic minority, the majority has engaged in a campaign to hound him. The Judiciary Committee issued a far-ranging subpoena to demand records related to the judge. Furthermore, the chair of the Judiciary Committee has commissioned a GAO study of this judge's practices regarding downward departures from mandatory minimums.

Legislation to limit judicial review of statutes is also inappropriate. There are a variety of examples of such legislation:

- The Healthy Forests Restoration Act of 2003, HR 1904, which establishes a fifteen-day time limit for filing appeals, directs courts to defer to agency determinations on balance of harm and public interest when considering requests for preliminary injunctions, requires courts to render a final determination within one hundred days, and limits lengths of preliminary injunctions to forty-five days.
- NextWave bankruptcy legislation from the 106th Congress, which would have created a specialized, expedited review process for proposed statutory settlement of the NextWave litigation, in particular requiring courts to act within specified time periods and limiting courts to review of constitutional questions.
- The Class Action Fairness Act of 2003, HR 1115, which provides the right to seek an interlocutory appeal of a decision on class certification, and provides an automatic stay of that decision until the appeal is decided.

What possesses Congress when it steps over the appropriate bounds of appropriate regulation of the courts? While I do not mean to justify congressional overregulation of the courts, the courts should understand its roots. One example of what inspires congressional ire toward the courts is judicial activism, wherein the courts use their judicial power to make law and/or policy.

Judges reduce public and congressional respect for the judicial branch when they engage in either conservative or liberal judicial activism. The perception of impartiality is critical to the public's respecting and obeying judicial decisions.

State sovereign immunity decisions display conservative judicial activism. Courts, particularly the Supreme Court, are ignoring the specific words of the 11th Amendment and crafting a theory of state sovereign immunity from "fundamental postulates" that underlie the constitutional scheme. Yet these same judges claim to be strict constructionists and reject the idea that a right to privacy can be inferred from the constitutional scheme.

The courts' positions on state sovereign immunity, contrasted with their positions on privacy, are totally inconsistent and lead many to the conclusion that the courts have a political agenda.

Questions and Answers

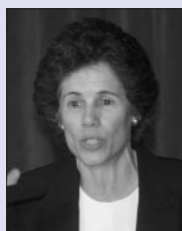
Jesse Choper: It strikes me that the issue of adequate judicial compensation is much more connected to the quality of the judiciary and to its diverse nature than it is to judicial independence. If Congress is going to limit travel funds for judges, then it is likely that Congress is not going to give them salary raises that keep pace with inflation, and this will affect judges regardless of their voting records or whether their rulings agree with the prevailing political majority. I'm wondering why, back in the eighteenth century, the drafters of the Constitution provided against reduction in judicial compensation in Article III. Was it to protect quality? Or was it to secure independence?

Danny J. Boggs: I think the constitutional provision was included in light of the British king having had the power to cut off people's salaries, or cut them in half, or cut them to one-tenth; that was the immediate evil being addressed. If you read *The Federalist Papers*, no. 79, you'll see that the founders also understood that the debasement of our currency was a potential problem. As I indicated in my remarks, I don't see this as a major threat today – it's just something that's nibbling around the edges. But I can certainly see people saying that if we judges collectively make a lot of decisions that annoy Congress, then Congress is unlikely to put its neck out by raising our pay to compensate for the restrictions. No individual judge at the circuit level is likely to annoy Congress that much all by himself or herself. Lots of federal judges share the view that if

they were collectively more complacent about Congress's bills in terms of interpreting them or their constitutionality, then Congress would be more cooperative in approving pay raises and other kinds of judicial funding.

Abner J. Mikva: A Canadian Supreme Court decision says that questions of financing must be handled outside of both the Congress and the courts. The government generates a more or less independent commission to address any such issue, and there's a minimal judicial review of the outcome. Around the world, as people worry about independence, they worry about resources for the judiciary. Here in the United States, I think we have to look at the resources not only as the actual salary line for someone holding a federal judgeship, but also as the individual's ability to do the work. A judgeship conferred through Congress is not only more expensive in terms of dollars; it also requires a congressional act. The federal judiciary can decide internally to create more magistrate judgeships, but new bankruptcy judgeships require Congressional approval of a salary line. If we want more independent actors, however, and if we think that independence derives from some degree of economic freedom, we need to recognize that we aren't moving in that direction under the current system. Other judiciaries around the world, in constitutional democracies, are trying to develop mechanisms to create more structural space. Actually, in this country, some state courts have taken the view that the separation of powers assumes that resources are essential to the idea of the judiciary as a functioning institution.

Robert C. Post: I'd like to ask a question about judicial independence. It is certainly the case that judges must have a free and independent mind in order properly to decide a case. This is the sense of judicial independence referred to by Judge Boggs. But there is a second sense of judicial independence that was referred to by Professor Resnik. If we think of the federal judiciary as the third branch of government, which is organized to accomplish discrete objectives, then we have to also imagine judges as connected to each other in the service of these objectives. We might believe, for example, that judges who are underutilized should be required to transfer to districts that are severely in arrears, so that the judicial branch of government can fulfill its institutional mission of offering prompt and efficient justice. I'd like to ask the speakers to comment on how they imagine judicial independence working in this second sense. How does the judicial independence necessary for making discrete decisions fit with the interdependence neces-



Judith Resnik



Danny J. Boggs



Howard Berman



Abner J. Mikva

sary for the judicial branch as a whole to realize its organizational objectives?

Judith Resnik: Your question brings me to another aspect of judicial independence: valuing the activity of judging itself. In my view, we are at risk of losing the understanding that judging is a desirable and a good kind of decision making. The risk is coming, in part, from judges who – in their eagerness to support “alternative dispute resolution” – insist that a “bad settlement is better than a good trial.” That very sentiment (and those words) can be found in published opinions and in commentary by judges teaching other judges how to settle cases. As of 2003, of one hundred civil cases that are filed, fewer than three begin a trial. Today, we are in an era in which many judges themselves do not have a positive attitude toward the activity of adjudication.

Let me turn to another pressure on the model of fair and deliberate judgment: aggregate decision making. An example from a case last term involved persons convicted of certain crimes and thereafter labeled as at risk of committing future crimes. Rather than requiring a case-by-case decision about each individual, the Supreme Court upheld a statutory presumption that bundled all individuals who had been convicted of certain crimes and placed them in a single category – with their names up on a website. Similarly, in sentencing, the trend is toward aggregate, grid-based guidelines, rather than individual decision making. Let me be clear: I am for guidelines and norms and review, but I do not believe it is wise to reduce the decision about the length of time a person spends in prison to a formula. So a real threat that I see – coming from within the branches of government and from outsiders – is a threat to the belief in the activity of judging itself.

Here is why having enough judges makes a difference. Here is why the non-Article III judges today are so important, for they make tens of hundreds of decisions in individual cases, involving immigration, benefits, social security, and the like. We must pay attention to these judges and find ways to give them the cultural, political, and judicial “capital” to make their decisions wisely and transparently. We need to find ways to have them work in rooms accessi-

ble to the public, to report decisions in a way that makes them known to the public, and to bring them into public discussions of the federal judiciary. These are people making central judgments for so many in the United States, so many holders of federal rights, and they work relatively invisibly.

Boggs: That's obviously a very broad topic, and Professor Resnik has given a very broad answer. I think, in a sense, it comes back to the notion of the functions with which we want to endow the judiciary. As a broad proposition, I don't think that the term “judicial independence” speaks to the breadth of matters that we want the federal judiciary to handle. There are arguments about the judiciary's role in such areas as expanding criminalization or contracting economic regulation, but by and large, these are matters that Congress decides.

Professor Resnik spoke about the toleration of aggregate decision making. I would note that legislation is an aggregate judgment. For example, if we say that a person in Minnesota has to have the same air conditioner as a person in Mississippi, which some energy regulation does, that's an aggregate judgment. You may think it's stupid, but it's still a piece of legislation, and unless somebody declares it unconstitutional, you abide by it.

In terms of the broad activity she attributed to all the non-Article III judges, I think one of the real questions – keeping in mind that Congress established the Administrative Procedures Act – is the extent to which something really is an Article I function. Many administrative law judges, in the end, are speaking in the name of a cabinet secretary. Congress can limit some activity to the secretary, or Congress can permit, or even require, that other officials handle it. While it might have been nice for those people to be called judges (so magistrates became magistrate judges, and hearing officers became administrative law judges), it was basically a political judgment under the structure that Congress set up. I can preach that either way without saying that it disturbs the functions with which we want to endow the judiciary. Some members of Congress may want the judiciary to handle certain matters, and others may not.



Jesse Choper



Robert C. Post



Linda Greenhouse



Nelson W. Polsby

Post: The distinction that Congressman Berman made between the administration of the judiciary and the functioning of the judiciary calls to mind a memorandum that Chief Justice William Howard Taft wrote to President Coolidge in 1927. There was at the time a bill pending before the House that would have prohibited federal judges from commenting to the jury on the judge's understanding of the evidence. In his memorandum, Taft said this bill would be unconstitutional because it would infringe on the independence of the judiciary. Now, quite apart from whether the bill was in fact constitutional or not constitutional, Taft's argument does require us to think a little bit about the distinction between the prerequisites of independent judgment and the administration of the judiciary.

Howard Berman: It seems to me that part of this is about the judiciary's ability to make discrete decisions – not that we are not interfering with, or retaliating for, the exercise of that function. That does seem to be at the heart of it. I was thinking of your question in the context of a recent letter – I could be wrong, but I believe there's a recent letter from the Chief Justice, or maybe it's from the Judicial Conference as a whole, that essentially challenges the wisdom of passing class-action legislation that would essentially federalize huge amounts of class-action cases, because of the consequences of the workload increase on the federal judiciary. I love that letter. I'm going to find that letter, and, when we mark up that bill, I want to use that letter in my debate.

I'm also thinking, what if I were sitting in Congress in 1938, considering a bill that would take what's essentially a contract issue – a labor agreement between a union and an employer – and federalize it, so that our appellate courts would have to hear appeals from this administrative agency all the time. That would really burden our appellate courts. I might have had a different attitude in 1938 than I would today; we view these things differently now.

I'd also like to comment on the notion of an administrative officer speaking for a cabinet secretary. We're finding that there are a lot of legislative initiatives to try and cut the courts out of almost any kind of review of fundamen-

tal decisions about rights – I see it in the area of asylum litigation, for example. Instead of allowing for a sensible administrative process with some level of judicial review, with tilts to the decision of the administrative agency, these initiatives would deprive the courts of any power to act on things that I think are ultimately judicial questions.

Resnik: The exchange between the Congress and the Judicial Conference about whether to federalize certain class actions currently litigated in state courts – raised just now by Congressman Berman – points to an important question about what role the Judicial Conference ought to take when asked to comment on proposed legislation. At times, in its history, the Conference has taken the position that it ought not to comment on certain matters of “legislative policy.” At other points, the Conference has noted that a particular proposal would likely increase judicial workload, but then not said more. And at other times, the Conference has registered its opposition to a specific proposal. Several questions emerge. First, if the Judicial Conference is to comment, how should it decide how to formulate its views? Currently it relies on a committee structure, but it does not seek the views of all of the judges before forwarding opinions to Congress. Second, ought the Judicial Conference provide a singular view or forward a range of responses on the pros and cons of a proposal? Third, how might we think about what meaning to make of a comment such as the Judicial Conference is “for” or “against” federalizing certain class actions? Should some collective assessment by life-tenured judges about either opening or closing the federal courts to more cases be encouraged? As these questions suggest, as the judiciary gains its corporate voice, serious questions result about how, why, and when to use it. I am concerned about the harm to the judiciary if it becomes too involved in assessing the wisdom of legislative proposals. Note that many alternatives exist to the request for an opinion from the Conference as a whole. For example, one could invite judges to comment when their expertise would be helpful without positing those judges as “speaking for” the Article III judiciary as a whole.

Mikva: In response to Jesse Choper's earlier question regarding the relationship between independence and compensation: One point that didn't come up, but that I think needs to be raised, is that the implicit bargain in the life-tenure provision of Article III should be thought of as two-way; that is to say, the judge will stay a judge. As a litigant, I would not want to appear before a judge who might not be a judge next year, or who might be a practicing lawyer or have some other ambition that could color his or her judgment. That, I think, very much undermines the value of an independent judiciary. Also, I'll note that it's conventional, in this debate about compensation, to look at departure rates, at the numbers of people leaving the bench – not retiring, but leaving to do something else – sometimes something unrelated, but usually the practice of law. The numbers are inherently small, but they've been larger in the past ten or fifteen years than they have been historically – and that, it seems to me, is a reason for concern.

Linda Greenhouse: I think that if you asked most judges for their personal thoughts on the question of judicial independence, their responses would touch on two current controversies. One concerns sentencing guidelines, or sentencing discretion, which has been alluded to, although I'd like to hear Judge Boggs comment on that issue. The other controversy centers on a bill that I believe came to the legislative floor in the last session of Congress. I don't think anything's happening with it right now; maybe it was shot down. The bill, sponsored by Senators Kerry and Feingold, sought to limit the ability of judges to attend various kinds of seminars in educational venues, in response to certain specific situations. Many judges to whom I spoke thought this was an intolerable infringement on judicial independence, and I'd like to hear comments about how that fits under the rubric of our discussion today.

Boggs: The first issue you mentioned was that of sentencing guidelines. I have not served as a district judge, so I don't have the visceral feeling for the sentencing process that some judges do. I know that the whole process of having guidelines that are appealable greatly increased our workload for a long time, but ultimately we seem to have coped with it – and since I haven't seen any cases under the new statute, I certainly wouldn't want to opine about it. It's something that I'll have to deal with as it comes up.

With respect to the Kerry-Feingold bill, there was some local controversy over it. My personal take on that bill was that it was so con-

trary to the notion we should have of evenhandedness. That is, most of the legislation flatly said, “Law schools, good; bar associations, good; everybody else, bad.”

I’m getting expenses to come to this Stated Meeting. It’s really wonderful, because my wife works in Washington, and it’s much more of a perk for me to come up and see her than to go off to, say, South Dakota. Does this mean that any legislation that’s enacted should list the Academy as one of the groups that’s capable of suborning judges? Of course, law schools constitute the only group that really can provide patronage to judges. Law schools can pay us up to \$25,000 a year to teach, and they can decide whether we teach one hour a week or ten hours a week for our \$25,000, and those law schools litigate, in their own name, in front of us.

I could tell you some evenhanded things that could be enacted: for example, you could limit all compensation to the federal per diem rate, and that would get rid of the notion of plush expenses. I don’t think I’ve ever had a conference expense that didn’t come in under the federal per diem rate. But that would be evenhanded. A bill that would set up a commission to approve what judges can and can’t go to would be problematic – but I haven’t seen that legislation go very far.

Berman: As one of the people who have strong views about the rules that ought to control judges attending those conferences, I’m strongly opposed to any legislation in the field. I think this is something that the Judicial Conference can handle, taking into account the problems that Judge Boggs just noted.

Mikva: What about disclosure?

Berman: There certainly should be disclosure, but I don’t think that’s a problem.

Mikva: Some people don’t like disclosure, though.

Resnik: There’s been a real problem with disclosure, and the issue came up because some repeat-player litigants with great resources can put on conferences for judges. These are not just mixed-audience conferences at which judges are invited to speak, but conferences at which judges are asked to teach law and economics, or antitrust law, or civil rights law. As it turns out, the civil rights folks are not too well heeled, and the people with other resources are more well heeled – and, over a period of decades, they have made an energetic, focused project of inviting both state and federal judges to teach particular areas of law. I think the congressional response, essentially, is to view that as improper.

Nelson W. Polsby: This has been an eye-opener for me. Let me simply sing you an old song, and you can tell me whether this is wrong. The old song goes this way: “It’s congressional salaries that stink, and there’s no way to raise them unless you can piggyback on the independence of the judiciary and the senior civil service.” Therefore, judicial pay is the choo-choo train that’s pulling senior civil service and congressional salaries in its wake. Has that political dynamic completely changed?

Boggs: I think it goes both ways. I think different branches rise in public favor at different times, or at least they think so. I think judges believe that Congress believes that the judiciary and Congress need to be tied together, or else Congress would never get a raise. I think that view was stronger in times when we

thought the public’s perception of Congress was lower. During an era when judges are being heavily attacked from one side or another, that same linkage may not apply. I think it’s prudential and experiential, not fundamental.

Berman: There’s another function that wasn’t stated initially in the discussion – one that, I think, is never stated but exists: the envy aroused by the notion that judges should make more money than members of Congress. I think that’s nuts – not for judicial independence reasons, but for reasons of quality and diversity in the judiciary – but there’s always an element that wants constantly to tie congressional and judicial pay together. I don’t know who’s pulling whom right now, but in the past three or four terms, we have steeled ourselves and not denied ourselves the automatic pay increase, and this year we granted the judicial Cost of Living Adjustments – although I think that the section requiring us to do it every year is pointless if we’re not even doing it for ourselves. ■

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The remarks of Judith Resnik and the charts by Judith Resnik are based on a series of essays, including “Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III,” *Harvard Law Review* 113 (2000): 924; “Uncle Sam Modernizes His Justice: Inventing the District Courts,” *Georgetown Law Journal* 90 (2001): 607; and “Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power,” *Indiana Law Journal* 78 (2003): 223.



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