Chapter 10
Confronting the Alternative Future

PRESERVING the core values that have undergirded the federal courts' long tradition of excellence is the fundamental vision of this plan. By planning for the future, the courts will be able to meet with confidence the numerous challenges they face. Still, the courts cannot control the societal trends that have placed the core values at significant risk in recent decades.

This chapter considers how the judicial branch might adapt if caseloads increase at even half the rate suggested in the "alternative future" discussed in Chapter 3. Suppose, for example, that in the year 2020 only 500,000 cases are filed in the district courts or that there are only 336 appellate judges? Even that scenario is daunting and would have undesirable consequences.

As shown in Chapter 3, projections based on historical trends indicate that, in another 25 years, there would be as many as 1,660 appellate court judgeships and more than 1,060,000 cases commenced annually in district courts. This *four-fold* increase over present-day conditions could well result in the following court statistics in 2020:

- median time from filing to disposition for civil cases in the district courts exceeds 30 months, with 30% of cases pending more than 3 years

- trials are held in 44% of criminal cases; the median length for criminal trials reaches 4 days; and 80% of total district court judge time is consumed by criminal trials

- of the 174,500 criminal cases terminated in the district courts in 2019, 37% (47,000) are appealed

- of the 156,000 appeals terminated this year, 107,500 are procedural terminations; only 48,500 are terminated on the merits

- 10% of merit terminations occur after oral argument; the remainder are decided on submission of briefs

- slightly more than 20,000 petitions for review on writ of certiorari are received by the Supreme Court, of which 125, or 0.6% are granted.

This plan rejects drastic alternatives as neither desirable nor inevitable. The discussion in this chapter, then, must be viewed in the limited context of an undesirable alternative future that would require significant changes in federal court structure, jurisdiction, and resources. In sum, the alternatives presented here should be pursued only if the coming decades bring:

- great expansion in federal court jurisdiction and caseloads;

- substantial growth in the number of judges and supporting staff at all levels of the courts; and

- sharp increases in the courts' need for new buildings and equipment.

Threshold for Considering Changes

Efforts to streamline the trial and appellate processes should continue to be pursued before major structural change is considered. If innovations in court procedures and efforts to control jurisdictional expansion do not stem the rising caseloads, however, more radical changes may be required to allow the federal courts to carry out their mission. Moreover, experience shows that incremental changes in how the federal courts do business often produce inadvertent, but fundamental, changes in the quality of federal justice delivered.

For these reasons, the Judicial Conference should monitor a wide variety of statistical and other indicators to determine whether trial and appellate court structures remain adequate to meet the stresses of increasing caseload. The Conference should consider and evaluate the totality of relevant circumstances in gauging the apparent direction of the judicial system and determining what should be done. The choice of quantitative or qualitative indicators used for this purpose is, to some extent, arbitrary. The purpose, however, is not to seek authoritative harbingers of danger, but rather to study evolving conditions in order to identify whether the circumstances facing the judiciary require a fundamental change in strategy. No single indicator may point to a breakdown in the present system. Statistics are only *a starting point,* not the *end,* of the evaluative process.

A representative but non-exclusive group of statistical signposts might include the following:

- total numbers of filings in the courts of appeals and/or district courts
- number of judicial circuits and corresponding increases in intercircuit case law conflicts
- number of court of appeals judges in an individual circuit and corresponding increases in intracircuit conflicts
- average number(s) of merits participations per judge in the courts of appeals
- ratio of criminal to civil trials
- average number of lengthy trials (civil and criminal) per court
- number and percentage of cases in which trials are not held
- average number of trials (civil and criminal) per judge
- average number of criminal filings per judge
- rate at which district court judgments are reversed on appeal[1]
- number and percentage of civil cases pending over 3 years
- number and percentage of motions pending over 6 months
- number and percentage of bench trials in which a decision has been pending over 6 months
- median disposition times for courts of appeals and/or district courts
- percentage of district or magistrate judge hours spent on the bench
- average number of defendants per felony case

[1] Reversal rates should take into account all published and unpublished decisions in criminal and civil cases, cases presenting issues of first impression, and cases in which the decision below was affirmed or reversed in part. Above all, the significance of a particular reversal must be evaluated in light of the reasons stated by the appellate court. *See* Edward R. Becker, Patrick E. Higginbotham, and William K. Slate, II, *Why the Numbers Don't Add Up*, 73 A.B.A. J. 83 (Oct. 1987) (response to Brian L. Weakland, *Judging the Judges*, 73 A.B.A. J. 58-60 (June 1987) (discussing federal judges' affirmance and reversal records before the courts of appeals)).

- number of staff assigned to U.S. Attorneys' offices
- number of attorneys in active federal district court practice.

Restructuring Appellate Review

If caseload volume renders the courts of appeals unable to complete their tasks with dispatch and fairness, the Judicial Conference should consider fundamental revision of the appellate court structure.[2] There are two basic approaches to restructuring appellate justice. One method would increase the number of judicial officers responsible for adjudicating appeals. The other method would limit the number of judges required to decide an appeal. These approaches may be outlined as follows:

(a) Add to the number of judicial officers in the present courts of appeals by increasing the number of circuit judgeships, or by expanding the role of adjunct judicial officers, such as appellate commissioners.

(b) Add a new tier of appellate tribunals between the district and the circuit courts, and provide for discretionary review in the circuit courts.

(c) Assign certain appellate functions to district judges through an "appellate term" or "appellate division" at the district level.

(d) Reduce the size of appellate panels to two judges and/or allow single judges to review certain cases.

Simply expanding the number of circuit judges, and/or expanding the role of adjunct judicial officers (*e.g.*, appellate commissioners), may, however, lead to inconsistency and incoherence in circuit law. Likewise, if the addition of Article III judgeships results in the creation of more circuits, the system's capacity for resolving intercircuit conflicts must be expanded. Alternative means of resolving intercircuit conflicts have been described in the work of the Federal Courts Study Committee and the Federal Judicial Center.[3]

If the appellate bench grows significantly, realignment of the circuits to produce courts of appeals of relatively equal size and workload deserves serious consideration. Although the matter would require careful consideration, the need to maintain coherent, consistent precedent and administrative efficiency in the face of massive dockets may outweigh countervailing concerns.

Alternatively, the circuit-based courts of appeals could remain at approximately their present size and number if first-line appellate review were provided in a new tier of appellate tribunals established at an intermediate level between the districts and the circuit. If this approach were taken, the "circuit" courts would be in a position to maintain a relatively consistent and coherent body of circuit law through discretionary review of decisions rendered in the lower appellate courts.

Another method to expand the system's capacity for appellate review would be an "appellate term" or "appellate division" at the district level.[4] These panels would exist

[2] For a detailed discussion of various options, see JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 105-39 (Federal Judicial Center 1993).

[3] *Id.*; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 125-30 (1990).

[4] The idea of some appellate review being located at the district court level is not new. *See* Roscoe Pound, APPELLATE PROCEDURE IN CIVIL CASES 390 (1941); Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811, 825-826 (1989) (book review). Moreover, Roscoe Pound's proposal also would limit litigants in such a forum to the arguments already made in the trial court. *See* Letter

primarily to ensure correction of errors and screen legal issues for possible review in the court of appeals. Two elements would be key to implementing such a system. First, district judges should not review cases arising out of their own districts. Second, if current caseload conditions persist, the number of district judges and/or magistrate judges would have to be expanded significantly to carry out both trial and appellate functions. Since creation of additional district judgeships is not a desirable method to address a workload crisis at the appellate level, appellate panels should not be drawn from areas where district judges routinely carry a maximum trial-level caseload.

A district-level appellate panel might consist of one circuit judge and two district judges, perhaps from outside the circuit. District judges sitting on review panels could be assigned for substantial terms (*e.g.*, three years) to give them time to gain experience in their new role and to staff their chambers accordingly. Further review would be in the discretion of the courts of appeals on petition, unless the first appellate panel certified the case, or some portion of it, for review. The program would be instituted first on a pilot basis and, perhaps, limited to certain categories of cases (*e.g.*, diversity actions, social security disability claims). After assessing the results of the pilot program, jurisdiction of appellate panels might be expanded to additional categories of cases, or even to all matters originating in the district courts.

Finally, the appellate system could also address rising caseloads by limiting the number of appellate judges required to decide an appeal. Although the judiciary is currently committed to the principle of three-judge review as the standard for appeals, rising caseloads may require reducing the size of appellate panels to two judges, or allowing for single-judge review of some cases. Experiments with single-judge review might be conducted in cases that involve single issues and deferential standards of review, *i.e.*, "abuse of discretion" by the district court, or "substantial evidence" to support an agency order. Alternatively, courts organized on a geographic basis might move toward greater specialization by routinely assigning individual judges or panels to handle particular subject areas. Creating new courts with more limited subject-matter jurisdiction also might be considered.

Limiting the Right to Appeal

Fundamental restructuring of the appellate function is one possible approach to a dramatic increase in the appellate workload. It would likely require a reevaluation of the principle that each litigant is guaranteed at least one appeal as of right before a panel of three Article III judges. Thus, if conditions seriously deteriorate in the courts of appeals, it may be necessary to consider some limitations on the right to appeal. The right to appeal could be eliminated completely in certain types of cases, such as administrative cases in which the district court acts as the reviewer of agency action and certain types of "federal question" cases in which state law issues predominate. In all (or some) other cases appellate review could be discretionary.

These options should be pursued only as a last resort. It does not presently appear that the stress on the courts of appeals is serious enough to justify abandoning the statutory right to appeal in all case types. Except for certain agency cases and diversity actions, this plan does not identify discrete case types whose elimination from

from Professor Paul D. Carrington to the Honorable Edward R. Becker 2 (Nov. 3, 1993).

the *appellate* docket (while retaining district court jurisdiction) would be fair and workable, yet provide substantial caseload relief.

Discretionary review also could have the unintended effect of increasing the burden on district judges to provide more written support for decisions made at the trial level. It would pose difficulties in ensuring, and appearing to ensure, that all classes of litigants are treated fairly and are not cut off from the protections of the appellate process by virtue of their status.

Outright elimination of appellate review should be considered only for cases in which the "law declaration" function of appellate review is not at stake. Examples of such cases might include some administrative cases involving district court review of agency action, and cases raising primarily state law issues.[5]

Making Best Use of Trial Court Resources

A drastic increase in the workload of the district courts would require significant changes in the use of judicial resources. Such changes may include the following:

(a) Require judges to be more readily available for temporary assignment.

(b) Authorize adjunct judicial officers of the district courts (i.e.*, magistrate judges and bankruptcy judges) to conduct a wider variety of proceedings.*

A vastly expanded caseload will require the maximum utilization of existing judicial resources. Although a system of mandatory assignments may not be appropriate for Article III judges, incentives should be used to allow courts to make greater and more effective use of visiting judges, and to encourage judges to be available for temporary assignment. Another, more debatable, solution might be a system of "floating" assignments based on judgeships not permanently tied to a particular court, or rotation of judges between a permanent duty station and an extended period of temporary duty in various courts.[6]

Assuming that any constitutional questions could be resolved, magistrate judges and bankruptcy judges could be assigned, as needed, to conduct a wider variety of district court proceedings with the consent of the parties. For example, magistrate judges might expand on their current role in conducting civil and non-felony criminal proceedings by playing a greater part in felony prosecutions, including the conduct of trials and/or sentencing. Similarly, bankruptcy judges might be assigned cases on the regular district court docket (*e.g.*, complex commercial actions) in which their background and experience would be particularly relevant.

The Standing Committee on Rules of Practice and Procedure should also reexamine Federal Rule of Civil Procedure 53 to evaluate how support for judges in the district court might be expanded through the

[5] This plan also contains recommendations concerning the possibility of making appellate review discretionary in some types of administrative agency cases. See Chapter 4, Recommendation 9, and Chapter 5, Recommendation 20 *supra*.

[6] Federal judges have nearly always been drawn from, and identified with, the region or locality in which they serve. Use of "floater" judgeships, even on a limited basis, would constitute a departure from tradition that may be unacceptable, either on political or other grounds. The only previous experiment of this kind—the Commerce Court early in this century—was unsuccessful. It would be difficult to find qualified individuals who are willing to assume and remain in this kind of "roving" assignment. Rather than attempt to recruit new judges permanently for such positions, it might be more feasible to authorize the Chief Justice to assign existing judges to "floater" service for limited periods (*e.g.*, 18 months to two years).

greater use of special masters or other adjunct officers.

Diverting the Civil Caseload

If the increase in civil cases causes excessive delay in obtaining trial dates, the district courts could employ a broad range of alternative dispute resolution techniques—possibly including mandatory processes. If such a situation comes about, the Judicial Conference should seek legislation or otherwise adopt appropriate measures to:

Encourage each federal court to expand the scope and availability of alternative methods of dispute resolution.

Over the past decade the increase in civil causes of action in federal courts, the continuing federalization of many criminal offenses, implementation of sentencing guidelines, and other factors have made it more difficult for civil litigants to receive early and firm trial dates. Accordingly, in addition to reducing the time and costs of trials, each federal court should be able to provide its litigants expanded alternative methods of dispute resolution.

The availability of such alternative procedures would often allow litigants to resolve their disputes in a more efficient, expeditious and cost-effective manner. Along with allowing litigants to choose the dispute resolution procedure most appropriate to their cases, the provision of alternative procedures would conserve the judiciary's unique and precious resource—the trial, whether bench or jury—for those disputes in which it is most needed. The diversion of disputes from a traditional trial process to other methods of resolution will enable judges to concentrate on improving the management and conduct of cases that proceed to trial.[7]

Limiting Jurisdiction

If caseload volume renders the courts of appeals and district courts unable to deliver timely, well-reasoned decisions and speedy trials with procedural fairness, the Judicial Conference could consider seeking more extensive reductions in federal court jurisdiction to fulfill the mission of the federal courts, as listed below:

(a) Restore a minimum amount-in-controversy requirement for federal question cases, either generally or in specific categories.

(b) Eliminate or substantially curtail the jurisdiction of the district court in those categories of cases that may be appropriately resolved in federal administrative or state forums.

(c) Establish additional jurisdictional requirements, based on the nature and scope of the controversy, for litigating in federal court particular matters in which state courts have concurrent jurisdiction.

Restriction of federal jurisdiction is a step that should not be easily taken and, in practice, is likely to be taken only as a last resort. Nevertheless, it may become necessary to restrict access to the courts to the extent constitutionally permissible (*i.e.*, limit review to constitutional issues) so that the limited resources of the federal courts may be applied to those disputes that, under the

[7] It should be emphasized that traditional case management and trial procedures have been, and are, working well. Those procedures best preserve the core values undergirding the federal courts' long tradition of excellence. This chapter, however, is concerned with problems that may arise in the future

principles of judicial federalism (see Chapter 4 *supra*), ought to be resolved in that forum.

In addition to restoration of a minimum amount-in-controversy requirement for federal question cases, federal court jurisdiction could be curtailed in cases appropriately resolved in Article I tribunals, administrative agencies, or state courts. Examples of such case categories include social security benefit claims, contract claims, benefit claims under ERISA welfare plans, forfeiture proceedings, and cases primarily involving state law issues (*e.g.*, many FIRREA proceedings,[8] products liability, and ordinary tort claims). Finally, notions of comity might support enactment of additional criteria relating to the nature and scope of the controversy for invoking federal court jurisdiction in cases where concurrent state court jurisdiction exists.[9]

Maintaining Effective Governance

If federal court caseloads and the attendant need for judicial resources dramatically increase, governance of an expanded judicial system should emphasize (1) provision of administrative coordination and direction, and (2) preservation of a broadly participatory governance process encouraging expression of diverse perspectives.

Changes in governance might be required if the three branches are unable to avoid a great expansion in federal court jurisdiction and caseloads. These increases might require substantial growth in the numbers of judges and supporting staff members at all levels of court organization. The extent of this growth could also require greatly increased use of adjunct judicial officers and technologically different ways of doing business. Growth of this magnitude might be accompanied by a relative reduction in resource allocation from Congress. The historically adequate resource base afforded federal courts has been due in large part to the court system's modest size.

Under these conditions, structural changes in the courts' adjudicative framework would likely be required. For example, hard choices would have to be made among—

*(a) increasing the number of circuits while keeping each circuit relatively small (*e.g.*, no larger than any current circuit); or*

(b) keeping the numbers of circuits small while allowing each circuit to grow to contain more than 100 active circuit judges and several times that many district judges; or

(c) abandoning altogether the concept of regional circuits in favor of subject matter courts and traveling judges, perhaps serving in both trial and appellate capacities; or

(d) reconsidering the membership of the Judicial Conference to account for more circuits and the role of small specialized courts.

None of these alternatives is attractive from the viewpoint of protecting the best features of current court governance arrangements. Thus, they should not be taken as desirable alternatives—only as what may be the best among a series of bad choices. On the other hand, it bears emphasis that governance is merely instrumental. Governance structures should not dictate court jurisdiction or structure.

[8] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, as amended.

[9] If this approach were followed, the implementing legislation would have to be drafted carefully to avoid creating "satellite" litigation that merely replaces one workload burden for another. Objective criteria must be developed and applied so that courts do not decide subjectively which cases are litigated in a federal forum.

(e) Governance authority should increasingly be grounded in procedural rules and safeguards because an increased complement of Article III judges could know only a small fraction of their colleagues well, if at all.

Effective participation of a reasonable proportion of judges in governance might only be accomplished through some form of enhanced representational structures and procedures. There would be inevitable pressures to create democratic (electoral) procedures for the selection of governance representatives at national, regional, and local levels. These pressures would arise from competition for ever-scarcer resources to perform court work. Because judges could know only a small fraction of their colleagues well, if at all, governance authority grounded on personal acquaintance and trust would probably be replaced with authority grounded on hierarchy, procedural rules, and safeguards.

It is likely that judicial branch interest groups would become further stratified by category of judge (circuit, district, bankruptcy, magistrate, active, senior, or whatever other groups emerged through structural change, *e.g.*, national or local, permanent or floating) as well as by regional and local court units. The larger the judiciary becomes, the more formalized, impersonal, and bureaucratic the governance apparatus will become.

(f) Some judges should take on full-time management responsibilities, if judges are to remain as the courts' governors.

It is inconceivable that a judiciary of 3,000 to 5,000 or more life-tenured judges could function with the same degree of collegiality in administrative decision making as is now possible. Although some increase in executive authority would be necessary, the major changes contemplated here would require a fundamental change in governance arrangements. It would not be possible to manage the courts as a part-time job. If judges are to remain as the courts' governors, some of them might have to take on full-time management responsibilities from time to time, and the idea of a "chancellor" or "executive judge" to assume some of the Chief Justice's national leadership responsibilities could be revisited.[10]

(g) The judicial branch should protect the core decisional independence of judges in a vastly expanded administrative infrastructure supporting the operation of chambers, courtrooms, and judicial activities.

A greatly expanded federal court system could function efficiently only with a similar expansion of the courts' administrative apparatus. Such an expansion should be accomplished, however, without any loss of judicial autonomy with respect to the basic separation of powers among the three branches. In fact, if the judiciary were to gain control of its own space, facilities, and security programs, and retrieve from the executive branch the administration of bankruptcy estates, as recommended above, the courts would become a substantial administrative entity within the government generally.

It seems likely, however, that such an expanded federal court system would be under increased congressional scrutiny through authorizations, appropriations, and oversight. The executive branch also would be tempted to seek greater authority to monitor judicial branch operations in the name of government-wide economy. Within the judicial branch itself, establishment of strong, centralized administration might impinge on judicial independence if the new

[10] *Cf.* RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE 47-62 (Federal Judicial Center 1994) (discussing the idea of an "executive judge" for the federal courts).

administrators seek to impose uniformity in the timing and form of judges' decisions.

Even without increased oversight, there would be some risk of erosion of the independence of the individual judge's administrative decision making. Although regional and local administrative structures might vitiate some of the dangers of a vastly increased central support structure, changes instituted at either the national or regional level certainly would affect ongoing local court operations. Resource demands made by a judiciary of even 3,000 life-tenured judges would likely strain the capacity of the judicial support structure to provide the type of personalized services judges currently receive. Greater standardization and less room for exceptions to administrative rules would probably flow from the combination of large numbers and relatively reduced resources. Under these circumstances, the judiciary will face a major challenge in protecting the core decisional independence of judges from those responsible for managing the equipment, supplies, and reimbursements that constitute the administrative infrastructure of chambers, courtrooms, and judicial activities generally.

(h) The allocation of policy making and administrative authority should be reevaluated. If substantial reallocation of governance authority becomes necessary, the alternatives to be considered should include—

(1) concentrating authority in fewer hands at all levels,

(2) centralizing authority at the national level, and

(3) decentralizing authority to regional or local levels.

Even in a greatly expanded judiciary, national governance institutions should honor the principle that regional and local matters should be decided at regional and local levels. This principle assumes the procedures for establishing representative governance are fair, and are perceived to be fair, by judges generally. In that scenario, an appropriate balance of authority among court levels can be sustained, even though it will differ from the current balance. But there may be a need for greater executive authority nationally, as well as regionally, just by virtue of the greater numbers of people whose performance must be monitored and whose needs and legitimate interests must be met.

The accurate, reliable and efficient channeling of input about governance questions will have to be established within each level of governance and between them. This will require more governance "apparatus," which will create new overhead costs.

Even as a vast expansion in the judiciary will encourage a thrust toward increased centralization, it will also promote countervailing pressure for assigning more regional governance authority to the circuits—if the regional circuit structure survives such growth. Circuits as large as today's entire federal appellate bench may present powerful arguments for substantial reallocation of authority to the circuit level, including direct authority to seek and obligate appropriations (rather than only delegated authority to expend appropriated money).

Appointing Article III Judges

If judicial vacancies cannot be filled expeditiously, disabling the judiciary and leaving no other viable remedy, the political branches may have to consider alternative methods for appointing Article III judges that otherwise would be unacceptable (even

if constitutional revision is required). For example:

(a) The President and the Senate might each be authorized to act alone in filling judgeships that remain vacant due to inaction by the other branch in nominating or confirming new judges. For example—

(1) judicial nominations might be confirmed automatically, or recess appointments continued in effect until vacancies are filled, if the Senate fails to act on nominations within a prescribed time; and

(2) the Senate might appoint judges sua sponte if the President fails to submit a nomination (or make a recess appointment) within a prescribed period after a vacancy arises.

This alternative is premised on the likelihood that the present judicial appointment process would be overwhelmed by the massive increase in the size of the federal judiciary anticipated by some forecasts. If that process cannot continue to function, the need to consider an approach of the kind discussed here would be clear.

This approach would put "teeth" in any statutory time limits imposed on the President and the Senate with regard to making judicial appointments. It not only might provide impetus for more efficient procedures but also encourage resolution of political disputes that postpone nominee selection and confirmation proceedings. This approach may, of course, create additional problems in the appointment process.

Although delays sometimes occur in obtaining presidential decisions or in scheduling Senate committee or floor action, much of the delay in filling judicial vacancies arises at the preliminary stages in which executive and legislative branch staff identify and review potential or actual nominees. By focusing solely on the end result, a mechanism that eliminates either the President or the Senate from the appointment process in the event of delay might serve only indirectly to expedite the necessary staff work. Thus, rather than facilitate a desirable outcome, this approach might simply encourage hasty, ill-considered action by both parties.

Legislation that reallocates the power to appoint Article III judges raises serious constitutional concerns. Like other federal officers, judges must be appointed in accordance with the "Appointments Clause" (U.S. Const. art. II, § 2, cl. 2) which authorizes the President to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Although that clause also permits Congress to vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments," the legislative branch cannot reserve to itself the power to appoint "officers of the United States."[11] Therefore, no statute can authorize the Senate to act on its own initiative in making judicial appointments.

The constitutional issue does not end there. Although the matter has never been adjudicated, a persuasive argument can be made that Article III judges are "principal" (not "inferior")[12] officers whom the

[11] Buckley v. Valeo, 424 U.S. 1, 132-33 (1976). As defined by the Supreme Court, "officers of the United States" include "any appointee exercising significant authority pursuant to the laws of the United States." *Id*. at 126.

[12] Admittedly, circuit, district and Court of International Trade judges sit on "inferior courts" established by Congress under Article III, Section 1 of the Constitution. *See* Morrison v. Olson, 487 U.S. 654, 719-20 (1988) (Scalia, J., dissenting) (the Constitution's use of "inferior" in that

President must nominate and the Senate confirm.[13] If so, any statute purporting to authorize presidential appointment of judges without Senate confirmation (or appointment by any officer or authority other than the President) would be invalid under the Appointments Clause absent a constitutional amendment.[14]

(b) The Judicial Conference (or individual courts) might designate temporary judges to exercise Article III jurisdiction whenever circuit or district judgeships remain vacant beyond a prescribed time and the affected court demonstrates an urgent need for additional judge power that cannot be met otherwise through existing resources.

Like the preceding option, a measure that allows the courts to fill judicial vacancies would encourage the other two branches to act more promptly in nominating and confirming judges. Although it is unlikely that either the President or the Senate would relinquish the power to appoint judges, they might find it more acceptable to grant courts the authority to make interim appointments, particularly if such authority is reserved for filling vacancies in exigent circumstances. An analogy to that approach is the procedure by which district courts may appoint a person to serve as United States Attorney until a vacancy in that position is filled in the ordinary manner.[15] The key difference, of course, is that executive branch officials do not have constitutionally protected tenure.

As a means of ensuring that judicial vacancies are filled, though, the utility of this solution is uncertain. A court seeking to appoint a judge to serve on a permanent or interim basis would require the same if not a greater amount of time to identify and screen possible candidates. Although some time might be saved if persons already serving as non-life tenured judges were appointed, an FBI background investigation might still be required, at least to update the information on file.[16] To avoid the need for a full background investigation, a court or other judicial branch authority could either assign a bankruptcy judge or magistrate judge to sit temporarily on the affected court, or appoint a special master to conduct specified proceedings. The fundamental problem with either method would be the judicial officer's limited tenure and unprotected compensation—factors that, under

context "plainly connotes a relationship of subordination"). But "from the early days of the Republic '[t]he practical construction has uniformly been that [judges of the inferior courts] are not . . . inferior officers.'" Weiss v. United States, 114 S. Ct. 752, 768 n.7 (1994) (Souter, J., concurring) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 456 n.1 (1833)). Indeed, the Supreme Court's recent interpretation of the Appointments Clause suggests that an "inferior officer" must be "to some degree 'inferior' in rank and authority," have power to "perform only certain, limited duties," hold an office "limited in jurisdiction," and enjoy "limited . . . tenure"—attributes not easily reconciled with the independent status and broad authority of circuit, district and Court of International Trade judges. *See Morrison*, 487 U.S. at 671-72 (upholding court appointment of "independent counsels" under the Ethics in Government Act).

[13] An exception to this rule applies in the context of "recess" appointments under article II, section 2, clause 3. On two occasions, courts of appeals have upheld the historical practice of using the recess appointment power to fill judicial vacancies pending the completion of Senate action on the President's nominations. *See* United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

[14] A different question might be presented by a policy under which judicial nominations are deemed confirmed without formal action if the Senate fails to act on them within a prescribed time period. Since each House of Congress possesses broad authority to "determine the Rules of its Proceedings" (U.S. CONST. art. I, § 5, cl. 2), it seems plausible that the Senate might adopt a rule (or consent to legislation) that either makes confirmation "automatic" or accords a nomination priority over all other business (thus requiring some kind of action) if the Senate does not confirm or reject a judicial nominee within a certain time after his or her name is received.

[15] See 28 U.S.C. § 546(d) (1988).

[16] *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); CFTC v. Schor, 478 U.S. 833 (1986); Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

existing law, could preclude exercise of full Article III jurisdiction.

Again, the idea of an alternative or "backup" mechanism for making judicial appointments presents difficult constitutional questions. Legislation that shifts the power of appointing judges to a court or other judicial branch authority would pose the same issue of whether a life-tenured Article III judge can be an "inferior officer" within the meaning of the Appointments Clause. In addition, the Article III requirements of "good behavior" tenure and undiminished compensation preclude Congress from authorizing interim (*i.e.*, limited-term) appointments to the bench.[17]

Conclusion

This chapter has focused on alternatives that should be confronted if the less fundamental changes outlined in this plan prove inadequate to allow the courts to meet the stresses of an increasing caseload. These are strategies that must be *considered* if the courts are to be prepared for the future, but they should be *pursued* only if essential to maintaining a viable judicial system. The premise of this plan is that rapid and drastic change in the federal court system is neither desirable nor necessary today. Nonetheless, it is prudent to identify possible alternatives should the plan's vision not be achieved.

[17] U.S. CONST. art. III, § 1. Although recess appointments to the bench (see note 13 *supra*) are limited in duration, they are based on express constitutional language. *See* United States v. Woodley, 751 F.2d at 1014 ("We must therefore view the recess appointee . . . as the extraordinary exception to the prescriptions of article III.").