Judicial politics: readings from Judicature / Elliot E. Slotnick, Editor.—3rd ed.

Library of Congress Cataloging-in-Publication Data

Judicial politics: readings from Judicature / Elliot E. Slotnick, Editor.—3rd ed.
p. cm.
ISBN 1-56802-944-6 (alk. paper)

KF8775.A7J8  2005
347.73'1—dc22  2004028475
## CONTENTS

### The American Constitutional System and the Role of the Supreme Court in the American Polity  
1  
The place of judicial review in the American tradition: the emergence of an eclectic power,  
Elliot E. Slotnick  2  

Judicial review: the usurpation and democracy questions, Albert P. Mebane and George Mace  18  
The judiciary is too powerful, Clifford Taylor  30  
Interpreting the Constitution: the case for judicial restraint, J. Clifford Wallace  33  
Judicial review is exercised properly, Avern Cohn  38  
Interpreting the Constitution: the Supreme Court's proper and historic function, Jeffrey M. Shaman  41

### Actors in the Judicial Process  
47

#### Judges: Judicial Selection Systems and Their Consequences  
47

Judicial selection in the United States: a special report, Larry C. Berkson  50  
Interest groups and state court elections: a new era and its challenges, Clive S. Thomas, Michael L. Boyer, and Ronald J. Hrebenar  53  
A historical perspective on federal judicial selection, Elliot E. Slotnick  69  
The judicial confirmation process: mobilizing elites, mobilizing masses, Nancy Scherer  73  
W. Bush remaking the judiciary: like father, like son? Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni  86  
The decision-making behavior of George W. Bush's judicial appointees: far right, conservative, or moderate? Robert A. Carp, Kenneth L. Manning, and Ronald Stidham  112

#### Magistrates, Clerks, and Judicial Support Staff  
121

From U.S. magistrates to U.S. magistrate judges: developments affecting the federal district courts' lower tier of judicial officers, Christopher E. Smith  122  
Law clerks: their roles and relationships with their judges, David Crump  131  
Legal information vs. legal advice: developments during the last five years, John M. Greacen  138

#### Lawyers and Legal Practices  
145

The legal profession: a critical evaluation, Arlin M. Adams  146  
Truth, justice, and the client's interest: can the lawyer serve all three? Nathan L. Posner  154  
Contingency fee lawyers as gatekeepers in the civil justice system, Herbert M. Kritzer  157

#### Interest Groups  
166

Civil rights litigation by organizations: constraints and choices, Stephen L. Wasby  167  
Friendly fire: amici curiae and Webster v. Reproductive Health Services, Susan M. Behnwiak  179  
Nonlegal advice: the amicus briefs in Webster v. Reproductive Health Services, Jack E. Rossotti, Laura Natelson, and Raymond Tatalovich  193  
The solicitor general as amicus, 1953-2000: how influential? Rebecca E. Deen, Joseph Ignagni, and James Meernik  197

#### Juries  
209

... And then there were six: the decline of the American jury, Peter W. Sperlich  211
Jury Summit 2001, Robert Boatright and Elissa Krauss  227  
Complex scientific evidence and the jury, Robert D. Myers, Ronald S. Reinstein, and Gordon M. Griller  236
Scientific jury selection: what social scientists know and do not know,  
Shari Seidman Diamond  244  
The capital jury: is it tilted toward death?  William J. Bowers  252  
Is the grand jury worth keeping?  Susan W. Brenner  257  

The American Judiciary and the Politics of Representation  264  
Should there be affirmative action for the judiciary?  Sheldon Goldman  266  
Women and minorities on state and federal appellate benches, 1985 and 1999,  
Mark S. Hurwitz and Drew Noble Lanier  270  
Clinton and diversification of the federal judiciary,  Rorie L. Spill and Kathleen A. Bratton  280  
Voting behavior and gender on the U.S. courts of appeals,  Sue Davis, Susan Haire,  
and Donald R. Songer  286  
The Supreme Court and the grass roots: whom does the Court represent best?  
Thomas R. Marshall  293  

Trial Courts: Civil and Criminal Justice Processes  302  
Policy making by prosecutors: the uses of discretion in regulating plea bargaining,  
Alissa Worden  305  
Twenty years of sentencing reform: steps forward, steps backward,  Michael Tonry  314  
"Three strikes and you’re out": are repeat offender laws having their anticipated effects?  
John Clark, James Austin, and D. Alan Henry  319  
Race and crime: what evidence is there that race influences results in the criminal justice  
system?  Norval Morris  324  
Causes and consequences of wrongful convictions: an essay-review,  Hugo Adam Bedau  328  
The changing role of the trial judge,  Edmund V. Ludwig  333  

Appellate Court Processes  336  
Access and Docketing Decisions  336  
Deciding what to decide: how the Supreme Court sets its agenda,  D. Marie Provine  338  
Some thoughts on judicial restraint,  John Paul Stevens  350  
Some thoughts on the Supreme Court’s workload,  William J. Brennan Jr.  356  
Caseload, conflicts, and decisional capacity: does the Supreme Court need help?  
Arthur D. Hellman  361  
The Rehnquist Court’s shrinking plenary docket,  David M. O’Brien  379  
Federal court reform should start at the top,  Roger J. Miner  387  
Deciding what to decide: the Judges’ Bill at 75,  Edward A. Hartnett  394  

Internal Court Processes and Decisions on the Merits  402  
The functions and importance of appellate oral argument: some views of lawyers and federal  
judges,  Stephen L. Wasby  405  
Justice Brennan and the institutionalization of dissent assignment,  Beverly Blair Cook  416  
The spirit of dissent,  J. Louis Campbell III  425  
How Supreme Court justices respond to litigant requests to overturn precedent,  
Jeffrey A. Segal and Robert M. Howard  431  
Justice Frankfurter and Justice Reed: friendship and lobbying on the Court,  Bradley C. Canon,  
Kimberly Greenfield, and Jason S. Fleming  442  
Freshman opinion writing on the U.S. Supreme Court, 1921–1991,  Terry Bowen and  
John M. Scheb II  453
<table>
<thead>
<tr>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Courts and Their Publics</strong> 460</td>
</tr>
<tr>
<td><strong>Public Opinion and the Media</strong> 460</td>
</tr>
<tr>
<td>Philosopher kings or political actors? How the media portray the Supreme Court, Rorie L. Spill and Zoe M. Oxley 462</td>
</tr>
<tr>
<td>“The Supreme Court decided today” ... or did it? Elliot E. Slotnick and Jennifer A. Segal 471</td>
</tr>
<tr>
<td>Should we blame Judge Judy? The messages TV courtrooms send viewers, Kimberlianne Podlas 480</td>
</tr>
<tr>
<td>Supreme Court and public support for rights claims, Thomas R. Marshall and Joseph Ignagni 487</td>
</tr>
<tr>
<td>Public perception of the Supreme Court in the 1990s, John M. Scheb II and William Lyons 496</td>
</tr>
<tr>
<td>The impact of Bush v. Gore on public perceptions and knowledge of the Supreme Court, Herbert M. Kritzer 500</td>
</tr>
<tr>
<td>Public outreach: the cornerstone of judicial independence, Kevin M. Esterling 507</td>
</tr>
<tr>
<td><strong>Courts, Congress, and the Presidency</strong> 513</td>
</tr>
<tr>
<td>Interactions between legislatures and courts, Mark Miller 516</td>
</tr>
<tr>
<td>Congressional responses to federal circuit court decisions, Stefanie A. Lindquist and David A. Yalof 520</td>
</tr>
<tr>
<td>The Senate’s confirmation role in Supreme Court nominations and the politics of ideology versus impartiality, Albert P. Melone 529</td>
</tr>
<tr>
<td>The confirmation process: too much advice and too little consent, Wm. Bradford Reynolds 544</td>
</tr>
<tr>
<td>Supreme Court confirmation hearings: a view from the Senate, George Watson and John Stookey 547</td>
</tr>
<tr>
<td>The judicial confirmation process and the blue slip, Brannon P. Denning 562</td>
</tr>
<tr>
<td>Assessing the Senate judicial confirmation process: the index of obstruction and delay, Sheldon Goldman 571</td>
</tr>
<tr>
<td><strong>States and State Courts</strong> 579</td>
</tr>
<tr>
<td>The state of state courts, Shirley S. Abrahamson 580</td>
</tr>
<tr>
<td>Problem-solving justice: a quiet revolution, Greg Berman and John Feinblatt 583</td>
</tr>
<tr>
<td>The new federalism: state constitutions and state courts, Shirley S. Abrahamson and Diane S. Gutmann 585</td>
</tr>
<tr>
<td>State supreme court commitment to state law, Michael Esler 599</td>
</tr>
<tr>
<td><strong>Alternatives to Traditional Litigation</strong> 610</td>
</tr>
<tr>
<td>Arbitration vs. mediation—explaining the differences, John W. Cooley 611</td>
</tr>
<tr>
<td>ADR problems and prospects: looking to the future, Stephen B. Goldberg, Eric D. Green, and Frank E. A. Sander 621</td>
</tr>
<tr>
<td><strong>Judicial Policy Making and Judicial Independence in the United States</strong> 634</td>
</tr>
<tr>
<td>Reining in the federal judiciary, Edwin Meese III and Rhett DeHart 636</td>
</tr>
<tr>
<td>Judicial decision making and the impact of election year rhetoric, Jennifer A. Segal 642</td>
</tr>
<tr>
<td>Arrogation of power or accountability: &quot;judicial imperialism&quot; revisited, Stephen L. Washy 651</td>
</tr>
<tr>
<td>Why should we care about independent and accountable judges? Bruce Fein and Burt Neuborne 661</td>
</tr>
<tr>
<td>Attacks on judges: why they fail, Barry Friedman 668</td>
</tr>
</tbody>
</table>
Contributors

Shirley S. Abrahamson is chief justice of the Supreme Court of Wisconsin.

Arlin M. Adams is a retired judge of the U.S. Court of Appeals for the Third Circuit and a lecturer at the University of Pennsylvania School of Law.

Larry Aspin is professor and chair of the Department of Political Science at Bradley University.

James Austin is executive director of the JFA Institute.

Hugo Adam Bedau is professor emeritus, Department of Philosophy, Tufts University.

Larry C. Berkson served as director of educational programs for the American Judicature Society from 1976 to 1982. He is currently in private business in New Hampshire.

Greg Berman is director of the Center for Court Innovation.

Robert Boatright is an assistant professor of government and international relations at Clark University.

Terry Bowen was an associate professor of political science at the University of North Florida.

William J. Bowers is principal research scientist at the Criminal Justice Research Center, College of Criminal Justice, Northeastern University.

Michael L. Boyer is an assistant professor of law sciences at the University of Alaska, Southeast.

Kathleen A. Bratton is an assistant professor of political science at Louisiana State University.

William J. Brennan Jr. was an associate justice of the U.S. Supreme Court from 1956 to 1990.

Susan W. Brenner is NCR Distinguished Professor of Law and Technology at the University of Dayton School of Law.

J. Louis Campbell III is an associate professor of speech communication at Pennsylvania State University, Altoona.

Bradley C. Canon is a professor of political science at the University of Kentucky.

Robert A. Carp is a professor of political science at the University of Houston.

John Clark is deputy director of the Pretrial Services Resource Center in Washington, D.C.

Avern Cohn is a senior judge on the U.S. District Court for the Eastern District of Michigan.

Beverly Blair Cook is emeritus professor of political science at the University of Wisconsin—Milwaukee.

John W. Cooley is adjunct professor at Northwestern University School of Law. He is a former U.S. magistrate who has served as a settlement master, mediator, and arbitrator.

David Crump is a professor of law at the University of Houston.

Sue Davis is a professor of political science at the University of Delaware.

Rebecca E. Deen is an associate professor of political science at the University of Texas at Arlington.

Rhett DeHart was former special counsel at the Heritage Foundation.

Brannon P. Denning is an associate professor at Samford University's Cumberland School of Law.

Shari Seidman Diamond is Howard J. Trienens Professor of Law and a professor of psychology at Northwestern University and senior research fellow at the American Bar Foundation.

Michael Edel is a professor of politics and government at Ohio Wesleyan University.

Kevin M. Esterling is an assistant professor of political science at the University of California, Riverside.

Bruce Fein is a constitutional lawyer and international consultant in Washington, D.C., at Bruce Fein and Associates and the Lichfield Group.

John Feinblatt is criminal justice coordinator of New York and founding director of the Center for Court Innovation.

Contributors

Jason S. Contra

Barry the New

Stephens University

Sheldon Unive

John M.

Eric D

Kimber Lexing

Gordon group

Gerard

University

Diane

Susan the Un

Edwar

Consit Unive

Arthur

Pittba

D. Alx

Rober

scien

Ronall
direct

Mark of Poli

Joseph at the

Elissa

Court tem u
Contributors

Jason S. Fleming is assistant county attorney for Christian County, Hopkinsville, Kentucky.

Barry Friedman is Jacob D. Fuchsberg Professor of Law at the New York University School of Law.

Stephen B. Goldberg is a professor of law at Northwestern University School of Law.

Sheldon Goldman is a professor of political science at the University of Massachusetts, Amherst.

John M. Greacen is a court consultant.

Eric D. Green is a professor of law at Boston University.

Kimberly Greenfield is co-owner of Trinity Health Care in Lexington, Kentucky.

Gordon M. Griller is vice president in the justice practice group with ACS, Inc.

Gerard Gryski is a professor of political science at Auburn University.

Diane S. Gutmann is an attorney in Madison, Wisconsin.

Susan Haire is an associate professor of political science at the University of Georgia.

Edward A. Hartnett is the Richard J. Hughes Professor for Constitutional and Public Law and Service at Seton Hall University School of Law.

Arthur D. Hellman is a professor of law at the University of Pittsburgh School of Law.

D. Alan Henry is executive director of the Pretrial Services Resource Center in Washington, D.C.

Robert M. Howard is an associate professor of political science at Georgia State University.

Ronald J. Hrebenar is professor and chair of the Department of Political Science, University of Utah, and interim director of the Hinckley Institute of Politics.

Mark S. Hurwitz is an assistant professor in the Department of Political Science at the University at Buffalo, SUNY.

Joseph Ignagni is an associate professor of political science at the University of Texas at Arlington.

Elissa Krauss is a research coordinator in the Office of Court Research in the New York State Unified Court System and a founding member of the National Jury Project.

Herbert M. Krizner is a professor of political science and law at the University of Wisconsin–Madison.

Drew Noble Lanier is an associate professor of political science at the University of Central Florida.

Stefanie A. Lindquist is an associate professor of political science and law at Vanderbilt University.

Edmund V. Ludwig is a judge on the U.S. District Court for the Eastern District of Pennsylvania.

William Lyons is a professor of political science at the University of Tennessee, Knoxville.

George Mace is an emeritus faculty member at Southern Illinois University, Carbondale, and is currently on the faculty of John A. Logan College in Carterville, Illinois.

Kenneth L. Manning is an associate professor of political science at the University of Massachusetts, Dartmouth.

Thomas R. Marshall is a professor of political science at the University of Texas at Arlington.

James Meernik is chair of the Department of Political Science at the University of North Texas.

Edwin Meese III served as U.S. attorney general from 1985 to 1988 and is now the Ronald Reagan Fellow at the Heritage Foundation.

Albert P. Melone is a professor of political science at Southern Illinois University, Carbondale.

Mark C. Miller is associate professor and chair of the Department of Government and director of the Law and Society Program at Clark University.

Roger J. Miner is a senior judge of the U.S. Court of Appeals for the Second Circuit.

Norval Morris was the Julius Kreeger Professor of Law and Criminology Emeritus at the University of Chicago.

Robert D. Myers is chief counsel of the Arizona Department of Corrections.

Laura Natelson is a former Ph.D. candidate in the School of Public Affairs at American University.

Burt Neuborne is the John Norton Pomeroy Professor of Law at New York University School of Law and director of the Brennan Center for Justice.
David M. O'Brien is the Leone Reaves and George W. Spicer Professor of Government at the University of Virginia.

Zoe M. Oxley is an associate professor of political science at Union College.

Kimberly Podlas is an assistant professor of media law in the Department of Broadcasting and Cinema at the University of North Carolina at Greensboro.

Nathan L. Posner was a partner in the Philadelphia law firm of Fox, Rothschild, O'Brien, and Frankel and served as chancellor of the Philadelphia Bar Association from 1975 to 1976.

D. Marie Provine is director of the School of Justice and Social Inquiry at Arizona State University.

Ronald S. Reinstein is a judge of the Arizona Superior Court in Maricopa County.

Wm. Bradford Reynolds was assistant attorney general for the Civil Rights Division, U.S. Department of Justice, from 1981 to 1988 and counselor to the attorney general of the United States from 1987 to 1988.

Jack E. Rossoni is a professor in the School of Public Affairs at American University.

Frank E. A. Sander is Bussey Professor at Harvard Law School.

John M. Scheb II is a professor of political science at the University of Tennessee, Knoxville.

Nancy Scherer is an assistant professor in the Department of Political Science at Ohio State University.

Sara Schiavoni is a doctoral candidate in political science at Ohio State University.

Jeffrey A. Segal is a professor of political science at State University of New York, Stony Brook.

Jennifer A. Segal is an assistant professor in the Department of Government at American University.

Jeffrey M. Shaman is St. Vincent de Paul Professor of Law at DePaul University.

Elliot E. Slotnick, editor of Judicial Politics: Readings from Judicature, is a professor of political science at Ohio State University and associate dean of the graduate school.

Christopher E. Smith is a professor of criminal justice at Michigan State University.

Donald R. Songer is a professor of political science at the University of South Carolina.

Peter Sperlich is professor emeritus of political science at the University of California, Berkeley.

Rorie L. Spill is an assistant professor of political science at Oregon State University.

John Paul Stevens is an associate justice of the Supreme Court of the United States.

Ronald Stidham is a professor of political science and criminal justice at Appalachian State University.

John Stookey is a member of the law firm Osborn Maledon and a former professor of political science at Arizona State University.

Raymond Tatalovich is a professor of political science at Loyola University Chicago.

Clifford Taylor is a Michigan Supreme Court justice.

Clive S. Thomas is a professor of political science at the University of Alaska, Southeast.

Michael Tonry is Marvin J. Sonosky Professor of Law and Public Policy at the University of Minnesota and a professor of law and public policy and director of the Institute of Criminology, University of Cambridge.

J. Clifford Wallace is a judge on the U.S. Court of Appeals for the Ninth Circuit.

Stephen L. Washby is professor emeritus of political science, University at Albany, SUNY, and visiting scholar, University of Massachusetts, Dartmouth.

George Watson is a political science professor in the Walter Cronkite School of Journalism at Arizona State University.

Alissa Worden is a professor in the School of Criminal Justice at the University at Albany, SUNY.

David Yalof is an associate professor of political science at the University of Connecticut.

Gary Zuk was a professor of political science at Auburn University.

Contributors
Federal court reform should start at the top
Roger J. Miner

An increase in the number of cases decided by the Supreme Court and changes in its decision-making process would help ease the caseload of the lower federal courts, an appellate judge suggests.

There can be little doubt that the federal courts are confronting a caseload crunch of mammoth proportions. How could it be otherwise, with more and more attorneys filing more and more lawsuits as the result of more and more causes of action created by Congress? Let's look at the numbers. In 1981, approximately 180,000 civil cases were filed in the U.S. district courts. In 1991, the number was nearly 208,000. In 1981, approximately 31,000 criminal cases were filed in the district courts, and in 1991 the figure was about 46,000. During the same decade, Congress authorized increases in district judgeships from 516 to 649. The circuit courts of appeals had 132 authorized judgeships and about 26,000 filings in 1981. By 1991, filings had increased by roughly 16,000 cases to 42,000, but there were only 35 more judgeships than there were in 1981.

In the 100 years since the U.S. courts of appeals were formed, authorized judgeships in the Second Circuit have gone up from 3 to 13, an increase of 435 percent. During the same period, however, filings in the circuit have gone up from 196 to 4,165, an increase of more than 2,000 percent. As filings increase, without any corresponding increase in the number of judges, each judge must handle more cases, and the median disposition time for each case necessarily becomes longer.

If the mission of the lower federal courts is to provide for the just, speedy, and inexpensive determination of every dispute brought before them, their present overburdened condition calls into question their ability to perform the mission. There are two options. The first is to continue the present course, with the expectation of incremental increases in the caseload and with expansion of the judiciary continually lagging behind need. The other option is reform, including changes in such areas as court structure, procedural rules, case management techniques, the decisional process, subject matter jurisdiction, and methods of alternate dispute resolution. It seems clear that the time for reform is at hand.

Reforms
Three years ago, the Federal Courts Study Committee, created by Congress to assess the developing crisis and to make appropriate recommendations, rendered its final report. In the report, the committee noted the existence of "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion." The committee did not recommend any increase in the number of judges, although that would seem to be a logical place to start. A lively debate is now in progress between those who believe that there should be a "cap" on the number of federal judges and those who think expansion is in order, with excellent arguments on both sides. However that question may be resolved, the fact is that in recent years the president and Senate have had a great deal of difficulty in filling current vacancies. At this moment, there are 106 unfilled slots in the district courts and 20 unfilled slots in the courts of appeals.

In 1975, the Hruska Commission proposed the establishment of a National Court of Appeals, a new court to be interposed between the Supreme Court and the regional courts of appeals. It would receive cases on reference from the Supreme Court and by transfer from the regional courts. The study committee rejected the idea of a national intermediate appellate court but did present five structural change possibilities for further inquiry and discussion: A single unified National Court of Appeals operating through regional divisions; a four-tier system, with the first appellate tier consisting of 25 to 30 regional appellate divisions hearing appeals of right from the district courts and the second-tier appellate court taking cases on a discretionary basis from the first; national appeals courts structured according to subject matter, as in the federal circuit; a single, centrally organized court of appeals; and consolidation of existing courts into five jumbo circuits. All these proposals have their unique problems, as the study committee indicated.
There are those who see merit in giving the courts of appeals discretion as to what cases they will accept. My chief judge, Jon Newman, has a different approach. He favors a system of discretionary access to federal courts at both the trial and appellate levels in order to reallocate jurisdiction between state and federal courts. Under his proposal, discretion as to access would be vested in the federal courts and would be exercised for individual cases and designated categories. Proposals have been made to modify or severely curtail diversity jurisdiction, to replace with a workers’ compensation scheme the statutes allowing injured railroad workers and seamen to sue in federal courts, and to establish a special court to adjudicate claims under the Social Security Act.

Other suggestions for reform have included a small claims procedure for certain federal tort claims, the creation of an Article III appellate division of the United States Tax Court with exclusive jurisdiction over federal income, estate, and gift tax cases, a requirement for exhaustion of state administrative remedies prior to the commencement of prisoners’ civil rights suits, and mandatory use of alternative dispute resolution mechanisms.

The federal judiciary, with the assistance of the Federal Judicial Center, long has experimented with case management techniques. The authority of judges to take hold of a case in its earliest stages and to keep the case under close supervision, with established deadlines, has proved to be essential to the achievement of maximum efficiency in court operations. Despite the fact that the lower federal courts are running as fast as they can and have been refining management techniques and administrative procedures over the years, Congress enacted the Civil Justice Reform Act in 1990. The act requires each district court in the nation to create an expense and delay reduction plan. Just what the courts needed at a time when they are understaffed and underfunded: a congressional requirement to micromanage the courts and to reinvent the wheel. What a waste!

Congress’s responsibility
It is Congress, of course, that is responsible for all this mess in the first place. Justice Sandra Day O’Connor once referred to the “underdeveloped capacity [of Congress] for self-restraint.” Nowhere is the lack of self-restraint more evident than in the federal criminal laws. I have been writing and speaking about the federalization of crimes for more than a decade, but nobody seems to listen. There are about 3,000 separate provisions scattered throughout the U.S. Code criminalizing various forms of conduct. Do you know that it is a federal offense to reproduce the image of Woody’s Owl and Smokey the Bear? To impersonate a H Club member? To transport water hyacinths in interstate commerce? To bring false teeth into a state without the permission of a local dentist? Every time Congress meets, more state crimes are made federal crimes in response to the problems of the moment. Last year it was car jacking. This year it looks like it will be domestic violence, a quintessential state crime. Is it any wonder that the number of assistant U.S. attorneys has increased two-and-one-half fold since 1980? If the number of Article III judges had increased at that rate, we would have 1,620 judges instead of the 816 we now have.

Criminal statutes have not alone been responsible for the increase in business in the federal courts. Congress continues to create new sources of civil litigation as well. Last year, Congress established a civil cause of action providing for the recovery of damages from any individual who engages in torture or killing under color of the law of any foreign nation. It appears that any victim of state terrorism may sue here if there is no remedy in the place where the conduct occurred. And there is a 10-year statute of limitations. Congress has decided to turn loose on world terrorism the mightiest force it could think of—lawyers pursuing civil litigation. That ought to strike fear into their hearts! In passing that legislation, Congress had no idea how many suits the new statute would spawn or what impact it would have on the federal judicial system.

Such is the way with all congressional legislation. When I was a member of the Judicial Conference Committee on Federal-State Jurisdiction, I participated in the preparation of a checklist for Congress to consider in reviewing proposed legislation. The checklist was designed to identify technical and interpretive problems, duplicative and unnecessary legislation, and the general impact of legislation on the courts. The checklist has, I fear, come to naught.

The Supreme Court’s role
One of the major reasons for the inundation of the federal district and circuit courts is the uncertainty of the law. The Scriptures ask this question: “If the trumpet give an uncertain sound, who shall prepare himself to the battle?” My answer is: “Every lawyer worth his salt.” If the law is not settled, there is every incentive to litigate.
Federal court reform should start at the top

In our judicial system, only one body can resolve uncertainty—the U.S. Supreme Court. Yet the Court seldom takes the trumpet to its lips, and when it does, the sound often is very weak. I respectfully suggest that, at the Supreme Court level, an increase in the number of cases decided and some changes in the decision-making process itself would go far toward alleviating the caseload problems of the lower federal courts. Federal court reform should start at the top.

The Supreme Court is lumbering into the 21st century at the leisurely pace of the 19th century, seemingly oblivious to the needs of the federal judicial system. The trial and appeals courts are overwhelmed by caseload growth, but the Supreme Court actually is deciding fewer cases each year. This year, 116 cases were decided, 127 the year before, and 125 the year before that. Back in the 1980s, the figure reached as high as 151. The Court certainly is trimming its docket in the face of an explosive growth of cases in the lower courts. This makes no sense. We need to get the Supreme Court up to speed. The interesting part of it is that the shrinkage has come as the Court has gained more and more control over its docket, culminating in the 1988 legislation that effectively eliminated the Court's mandatory appellate jurisdiction. As most lawyers know, the only way to get there on appeal now is by cert. And the justices are not granting enough cert petitions. For one thing, more cases should be taken in order to settle the law where circuit courts of appeals are in conflict.

Intercircuit conflicts

In the Judicial Improvements Act of 1990, Congress directed the Federal Judicial Center to undertake a study of the problems created by intercircuit conflicts, including economic costs, forum shopping among circuits, unfairness to litigants, and non-acquiescence by federal agencies. The study has not yet been completed, but preliminary reports indicate that the number of conflicts has been greater than originally thought. Justice Byron White, who recently retired, has been in the vanguard of those who believe that the Supreme Court should do more to resolve intercircuit conflicts. He frequently dissented from the denial of cert, pointing out the conflicts and urging his colleagues to resolve them. His dissents include language such as this:

One of the Court's duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country. The Court is surely not doing its best when it denies certiorari in this case, which presents an issue on which the Courts of Appeals are recurringly at odds.

and this:

I agree with petitioner and the Government that the outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried.

and this:

Because a uniform rule should be announced by this Court on this important and recurring issue, I would grant the petition.

Clearly, allowing circuit conflicts to continue generates litigation, because the law remains unsettled, and attorneys take their cases to the forum most favorable. Where the Supreme Court has not spoken on an issue, but some circuits have resolved the question in one way and some in another, litigation is encouraged in those circuits that have not yet spoken. Clients doing business nationally may have their conduct regulated one way in one place and another way in another and continue to challenge unfavorable precedent. Government agencies, charged with the administration of national law in a uniform way, follow policies of non-acquiescence, refusing to accept the views of a circuit that rejects the agency position.

Aside from the fact that fairness is lost and justice is not seen to be done, the lower courts become clogged with cases that would not be brought if the law was clearly stated. The Supreme Court is the only place where the conflicts can be resolved, and the resolution must be accomplished more frequently and in greater numbers of cases. And I think that a greater number of important issues that have not yet festered into intercircuit conflicts should be identified and decided by the Supreme Court in an effort to head off the inevitable clogging of the pipeline that comes from unsettled questions of law. Included in the issues that need to be resolved are thorny questions of statutory interpretation.

An uncertain trumpet

As a frequent consumer of Supreme Court services, I often am a confused victim of the Supreme Court's uncertain trumpet. For example, in 1990 the Supreme Court decided Grady v. Corbin in a 5-4 opinion by Jus-
Several other cases decided this term do not fully resolve the questions presented. In TXO Production Corp. v. Alliance Resources Corp., the vote was 6–3 to uphold an award of punitive damages, but the reasoning was all over the lot and no one opinion attracted a five-vote majority. The qualifications of expert witnesses were left to the discretion of the district judges in Daubert v. Merrell Dow Pharmaceuticals, but little guidance was given as to how that discretion should be exercised. And, despite the strong language about gerrymandering used in Shaw v. Reno (another 5–4 decision), acceptable methods of drawing congressional district boundary lines are still very much up in the air.

Thus do cases proliferate in the lower federal courts for failure of the Supreme Court to resolve intercircuit conflicts, to identify and decide important procedural and substantive issues before they ripen into intercircuit conflicts, and to provide clear, crisp, and certain opinions for the guidance of the lower courts, the bar, and the American citizenry. As I see it, a greater volume of cases fully decided at the Supreme Court level as well as more brevity and clarity in the Court’s opinions would do much to relieve the congestion in the lower courts.

Proposals for reform

To achieve these ends, I propose consideration of the following possibilities:

- More attention by the individual members of the Court should be paid to cert petitions in an effort to identify the most important conflicts and issues for review. There is some basis for the belief that the present cert pool of law clerks from the various chambers is not the most effective way of handling these matters. More cert petitions should be granted.

- The newest justice has stressed the importance of collegiality, which sometimes includes the need to submerge one’s views in unimportant matters for the good of the institution and of the consumers of its products. Let us hope that Justice Ruth Bader Ginsburg is able to persuade her colleagues of the importance of one voice. Too often is heard the cacophony of what appears to be nine separate courts.

- Each Supreme Court opinion need not read as if it were the History of the World, Part I. If brevity is a virtue for judges of other courts and for lawyers, it should be for the Court. I also believe that major justice writing his own majority opinion could be a solution to the decision issue.

- The efficacy of the Court recess is a disuse. The Supreme Court should probably recess only to work on serious cases that are not ready for a decision.

- The Court’s Rule 25, which requires cert petitions to be filed in the Supreme Court over any case in the lower courts in which a lower court’s decision is directly in conflict, should be replaced with a lengthier rule that would limit the number of petitions filed to a just few, or by the dedication of a few more justices to write the cert pool.

- The Supreme Court should be paid to cert petitions in an effort to identify the most important conflicts and issues for review. There is some basis for the belief that the present cert pool of law clerks from the various chambers is not the most effective way of handling these matters. More cert petitions should be granted.
should also be a virtue for justices of the Supreme Court. The necessary increase in production can also be achieved through per curiam opinions and summary orders. Many an intercircuit conflict could be resolved by a brief opinion adopting the decision of one of the circuits that considered the issue.

- The effort to increase production in the Supreme Court might be assisted by cutting the summer recess from three months to two. That lengthy recess really is a relic of the 18th century, and I know of no justice who must return to the farm at harvest time.

- There is a statutory provision allowing certification of questions of law to the Supreme Court by the courts of appeals. This provision has fallen into disuse, but should be revived, even though the Supreme Court has the right to reject the matter certified.

- The Court should be alert to the availability of its Rule 11, which allows it to grant cert before judgment in the court of appeals. This allows the Court to take up an important case without delay, as it did in Mistretta v. United States. In that case, it was important to deal with the constitutionality of the Sentencing Reform Act of 1984 quickly, since some district courts throughout the nation were sentencing under the new act, and some were sentencing under the old law.

- Some mandatory appellate jurisdiction might be restored in an effort to increase the Court's production. The erosion of mandatory jurisdiction over the years has been gradual, and the end result seems to be fewer cases decided. Perhaps cases that involve the declaration of unconstitutionality of federal statutes would be a good place to start with mandated appeals.

- The Supreme Court certainly could address more issues if it divided itself into panels to hear cases of a more routine nature. Three panels of three judges each can decide more cases more efficiently and faster than can an en banc panel of nine. Hearings by the full Court could be reserved for cases in which a panel is in disagreement or for important constitutional issues.

- The number of Supreme Court justices is fixed by Congress. Despite the explosion in federal litigation, the number of justices has been fixed at nine since 1869. Before that, the number varied between 5 and 10. There is nothing sacrosanct about the number nine. In light of the potential business that the Court should be addressing, an addition of at least three seems to be warranted. The rejected proposal of Franklin D. Roosevelt to increase the number of justices was known as a Court-packing plan and was highly political in nature. What is called for now is a Court-expanding plan to take care of additional work.

- I suppose there is no way to mandate the issuance of clear and thoughtful opinions in one voice by the Supreme Court. But the observations of one justice on the subject of clarity of opinions is most illuminating. The New York Times recently published a photograph of Justice White and, in a caption underneath the picture, noted his retirement after 31 years of service. The caption continued: "He said that he intended to sit on Federal appeals courts during his retirement, and that he hoped that the Supreme Court’s opinions would be clear and easy to follow."

I hope that Justice White comes to sit in the Second Circuit as Justice Thurgood Marshall did after his retirement. I hope that I have the opportunity to sit with him and to join him in applying Supreme Court precedent. We will then see if his subtle message to his former colleagues got through. We both can hope, can’t we?

Notes

This article originally appeared in Volume 77, Number 2, September–October 1993, pages 104-108.

This article is adapted from Judge Miner’s speech at the American Judicature Society-National Conference of Bar Presidents joint luncheon, August 7, 1993, in New York.

2. Ibid.
3. Ibid. at 90.
4. Ibid.
5. Ibid. at 81.
6. Ibid.

44. See Study Committee Report, supra n. 10, at 117-123.
15. See ibid.
18. Ibid.
19. See, e.g., Sloviter, “Diversity Jurisdiction through the Lens of Federalism,” Judicature 76 (1992), 90; Study Committee Report, supra n. 10, at 38; Miner, supra n. 7, at 717 n. 288 (citing sources).
21. See ibid. at 55-59.
22. See ibid. at 81.
23. See ibid. at 69.
24. See ibid. at 48-50.
25. See ibid. at 83-85.
29. See ibid. §711.
30. See ibid. §916.
31. See ibid. §46.
32. See ibid. §1821.
37. See id. §2(b), 106 Stat. at 73.
38. See id. §2(c), 106 Stat. at 73.
39. See Miner, supra n. 7, at 722-723.
40. I Corinthians 14:8.
41. These statistics were provided by the Office of the Solicitor General (on file with author).
46. Taylor v. United States, 112 S. Ct. 2982, 2982 (1992) (White, J., dissenting) (circuit split over whether indictments against defendants should be dismissed after state officials technically violate the Interstate Agreement on Detainers).
47. Toma/ v. United States, 112 S. Ct. 1997, 1998 (1992) (White, J., dissenting) (circuit split regarding “whether the weight of uninjectable waste material should be included in calculating the weight of a ‘mixture or substance’ containing a detectable amount of a controlled substance for purposes of [U.S.C.G. §2D1.1]).
51. See United States v. Calderone, 917 F.2d 717, 718-722 (2d Cir. 1990) (Pratt, J.), vacated, 112 S. Ct. 1657 (1992);
eral court reform should start at the top

id. at 722-726 (Newman, J., concurring); Ibid. at 726-729 (Miner, J., dissenting).


53. See United States v. Calderone, 982 F.2d 42 (2d Cir. 1992).


56. 113 S. Ct. 1710 (1993).

57. Ibid. at 1713.


60. 61 U.S.L.W. 4805 (U.S. June 28, 1993).


64. See “Promoting Public Understanding of the Supreme Court,” Judicature 76 (1992), 4.


70. U.S. Const. art. Ill., §1.

71. See generally Frankfurter and Landis, The Business of the Supreme Court: A Study in the Federal Judicial System (1927); Surrency, supra n. 68.

72. See Act of Sept. 24, 1789, ch. 20, §1, 1 Stat. 72, 73 (six justices); Act of Feb. 13, 1801, ch. 4, §3, 2 Stat. 89, 89 (repealed 1802) (five justices); Act of Feb. 24, 1807, ch. 16, §5, 2 Stat. 420, 421 (seven justices); Act of Mar. 3, 1837, ch. 34, §1, 5 Stat. 176, 176 (nine justices); Act of Mar. 3, 1863, ch. 100, §1, 12 Stat. 794, 794 (ten justices); Act of July 23, 1866, ch. 210, §1, 14 Stat. 209, 209 (seven justices); Act of Apr. 10, 1869, ch. 22, §1, 16 Stat. 44, 44 (nine justices).

73. See N.Y. Times, June 29, 1993, at Al.

74. Ibid.

“Elliot Slotnick combines the informed commentary and empirical studies appearing in *Judicature* over the years in this well-constructed reader that students in public law classes, especially those gearing up for law school, will find both helpful and insightful. This new edition of *Judicial Politics* includes recent selections that illustrate the latest in scholarship and illuminate current political controversies about courts and their work. Students will be both challenged and captivated by these readings.”

—Jan P. Vermeer, *Nebraska Wesleyan University*

“I am very excited about this new edition of *Judicial Politics*. The table of contents proves this is an excellent supplement that is even better than the last edition, if that is possible. The readings will enable me to expose undergraduates in my judicial process class to the classics and also prepare them exceptionally well for graduate school or law school.”

—Diane E. Wall, *Mississippi State University*

“The third edition of *Judicial Politics* is an excellent combination of classic and recent material concerning the judiciary and its intersection with the U.S. political environment. Almost every section contains material with new insight into the judiciary’s roles in society.”

—Steven Puro, *Saint Louis University*

“This third edition of *Judicial Politics*, edited by Elliot Slotnick, performs a unique function for the community of scholars teaching courses in judicial politics. Compiling wonderfully literate articles from *Judicature*, Slotnick provides an insightful and up-to-date compilation of essays on key aspects of the judicial system.”

—Steven A. Peterson, *Pennsylvania State University–Harrisburg*

Elliot E. Slotnick is professor of political science and associate dean of the graduate school at Ohio State University, where he has taught since 1977. He earned a Ph.D. from the University of Minnesota in 1976. Slotnick is coeditor of *Readings in American Government and Politics, Third Edition* (1998) and coauthor of *Television News and the Supreme Court: All the News That’s Fit to Air?* (1998). He has published widely in numerous political science, law, and policy journals. Slotnick currently is collaborating with Sheldon Goldman on a series of articles on judicial selection during the Bill Clinton and George W. Bush administrations. He has been a recipient of Ohio State University’s Outstanding Teacher Award as well as the Mentoring Award from the Law and Courts section of the American Political Science Association.
Dear Judge McInerney,


Sincerely,

[Signature]