

Soluble Problems for the Federal Judiciary: Curtailing the Expansion of Federal Jurisdiction and Other Matters

William H. Rehnquist

Editor's Note: In his annual report on the federal judiciary, released January 1, 1999, Chief Justice Rehnquist criticized a trend of federalizing crimes that have traditionally been handled in the state courts. Because his comments on the appropriate roles of the federal and state judiciaries are of broad interest, we are reprinting portions of his report, in which he addresses problems he perceives in the federal judiciary and needed solutions. The title placed on his essay is ours; all of the text is taken verbatim from his report. The full report of the Chief Justice can be found at the Internet site of the Administrative Office of the United States Courts, <http://www.uscourts.gov/whatsnew.html>.

I. OVERVIEW

The federal Judiciary enters the last year of the 20th century immersed in many of the same struggles that have defined our federal system of government for 210 years. The administration of justice is affected not only by the relationships among the Judiciary and the other two branches of the federal government, but also by the balance of power between the federal and state governments. In this, my 13th Year-End Report, I will address several of the problems affecting the Judiciary in 1998.

I am pleased to report on the progress made in 1998 by the Senate and the President in the appointment and confirmation of judges to the federal bench — a need that I raised in my 1997 Report as one for which both the Executive and Legislative Branches bore responsibility. The Senate confirmed 65 judicial nominees in 1998, a figure that is above the average number of judges nominated and confirmed in recent years. These appointments will help address the disparity between the courts' workload and their resources. I also note

my gratitude to senior federal judges who, despite their semi-retired status, continue to help ease backlogs in courts around the country.

I also extend my thanks to Congress for continuing to provide adequate financial support to the Judiciary as we work together to maintain a balanced budget. The Judiciary remains committed to fiscal responsibility, and for its part, requested the smallest percentage funding increase in 20 years for fiscal year 1999, even as it faces a growing caseload. The Third Branch is particularly appreciative of the appropriation for the construction of 13 new or expanded courthouse facilities for fiscal year 1999. The new courthouses will replace aging and obsolete facilities and are much needed to alleviate overcrowded conditions and reduce security risks.

Appointments, Jurisdiction, and Salaries

Although the Judiciary is strengthened by the progress made on important issues in 1998, serious problems continue to confront us. The most pressing of those problems are not new, but they have grown in importance either from the neglect or ambivalence of the other branches of government. They are: (1) the failure to appoint any Commissioners to the United States Sentencing Commission — all seven Commissioner positions are vacant; (2) the growing caseload in the federal Judiciary resulting from continued expansion of federal jurisdiction; and (3) the continuing relative decline in judicial salaries. There are, of course, many challenges facing the Judiciary. I focus primarily on these three problems, however, because they need immediate attention. All three are soluble.

Appointments to the United States Sentencing Commission

The political impasse on the appointments to the United States Sentencing Commission, which has been problematic for the past few years, has now reached stunning proportions. There currently are *no* Commissioners at the Sentencing Commission and *no* nominations are pending. The failure to fill these vacancies is all the more egregious when one considers the fact that the seven Commissioners authorized by statute have staggered six-year terms, and that there are additional statutory constraints to insure a bipartisan Commission. For example, at least three of the Commissioners must be federal judges, and no more than four can be members of the same political party. The fact that no appointments have been made to fill any one of these seven vacancies is paralyzing a critical component of the federal criminal justice system.

The Sentencing Commission was created under the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. Its principal purposes are to reduce disparity in sentencing in the federal courts; to establish sentencing policies and practices for the federal courts, including guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes; to advise and assist Congress and the Executive Branch in the development of effective and efficient crime policy; and to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the Executive Branch, the courts, criminal justice practitioners, the academic community, and the public.

Although the staff of the Commission

has been able to carry on the Commission's routine functions, in its present state the Commission is unable to perform some of its core and crucial responsibilities. For example, there are no Commissioners to propose guideline amendments or to take action on Congressional directives or implement legislation. There are no Commissioners to resolve or address circuit conflicts in Sentencing Guidelines interpretations. Every commission needs to make adjustments or respond to changing circumstances or new information. The Sentencing Commission is unable to do so until Commissioners are appointed. With criminal cases in federal courts reaching historic levels, the Judiciary needs a fully functioning Sentencing Commission. If we are going to have Sentencing Guidelines, the Sentencing Commission must be empowered to do its work. The President and the Senate should give this situation their immediate attention.

Caseload and Expanding Jurisdiction

The number of cases brought to the federal courts is one of the most serious problems facing them today. Criminal case filings in federal courts rose 15% in 1998 — nearly tripling the 5.2% increase in 1997. (The details of the federal courts' caseload appear at pp. 6-7, *infra*.) Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws. A series of such laws have been enacted in the past few years, including, to name a few, the Anti-Car Theft Act of 1992, the Child Support Recovery Act of 1992, the Animal Enterprise Protection Act of 1992, and the recent arson provisions added to Title 18 in 1994.¹

The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system. The

pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level. Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems. While there certainly are areas in criminal law in which the federal government must act, the vast majority of localized criminal cases should be decided in the state courts which are equipped for such matters. This principle was enunciated by Abraham Lincoln in the 19th century, and Dwight Eisenhower in the 20th century — matters that can be handled adequately by the states should be left to them; matters that cannot be so handled should be undertaken by the federal government.

Recently, the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Retired Justice Byron R. White, noted that the structure and alignment of the appellate courts is affected by the volume of appeals, which is in turn driven by the jurisdiction of the federal courts. The Commission said in its *Final Report* that "significant changes need to be made in the jurisdiction of the federal courts," and emphasized the importance of "restraint in conferring new jurisdiction on the federal courts, particularly in areas traditionally covered by state law and served by state courts...."

In 1995, the Judicial Conference of the United States, after much study, adopted the *Proposed Long-Range Plan for the Federal Courts* for the next century. Recommendation 1 of the *Long-Range Plan* reads as follows: "Congress should commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our sys-

tem of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters." In accordance with this principle, the *Long-Range Plan* recommends that federal courts should only have criminal jurisdiction in five types of cases:

- (1) offenses against the federal government or its inherent interests;
- (2) criminal activity with substantial multi-state or international aspects;
- (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;
- (4) serious high level or widespread state or local government corruption; and
- (5) criminal cases raising highly sensitive local issues.

Although Congress need not follow the recommendations of the Judicial Conference, this *Long-Range Plan* is based not simply on the preference of federal judges, but on the traditional principle of federalism that has guided the country throughout its existence.

Similarly, Justice White and Judge Gilbert Merritt included a separate statement in the *Final Report* of the Commission on Structural Alternatives for the Federal Courts of Appeals that describes the core functions of federal courts, the role federal courts should appropriately have in criminal matters, and the factors that should be considered before assigning new responsibilities to the federal courts. Those factors include determining whether the proposed legislation would assign work to the federal system that is within its core functions; whether states are inadequately addressing the perceived need; whether the federal courts have the capacity to take on new business without additional resources or restructuring; and the extent to which proposed legislation is likely to affect the caseload,

Footnotes

1. In contrast, the effect that the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act are having on habeas corpus proceedings and prisoners' actions continues to appear positive. See note 5, *infra*.

and in turn whether the federal courts have the capacity to perform their core functions and fulfill their mandate for "just, speedy, and inexpensive determination" of actions. Other factors include the cost of delay to litigants and whether the perceived needs are, or could be, served as well by alternatives such as alternative dispute resolution or administrative proceedings.

Many others have written on how Congress might appropriately balance jurisdiction between state and federal courts. A common element of the recommended threshold standards for federal criminal legislation is remedying demonstrated state failure. Such an approach would reduce the likelihood that a particularly high profile or egregious event would be enough on its own to justify new federal laws. Such an approach also is more consistent with judicial federalism and with Alexander Hamilton's observation in the *Federalist No. 82* that "the national and State systems are to be regarded as ONE WHOLE."

A re-examination of diversity jurisdiction is also warranted. Diversity jurisdiction was originally enacted as part of the Judiciary Act of 1789 when there was reason to fear that out-of-state litigants might suffer prejudice at the hands of local state court judges and juries, and there was legitimate concern about the quality of state courts. Conditions have changed drastically in two centuries. At the very least, there simply is no need to allow in-state plaintiffs to avail themselves of diversity jurisdiction to remove matters to federal court. These lawsuits account for a substantial percentage of the federal caseload, and as state law is applied in such cases in any event, there is no good reason to keep them in federal court.

I have requested Chairman Howard Coble of the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee to conduct hear-

ings in the next session of Congress on the issue of the general expansion of federal jurisdiction caused by federalizing state crimes, and on curtailing federal diversity jurisdiction. Chairman Coble has demonstrated an interest in the federal courts' caseload and, in the most recently concluded session of Congress, sponsored the Alternative Dispute Resolution Act, which directs federal courts to provide alternatives to litigation in court and gives them flexibility in how to do so.

Judicial Salaries

For the fifth time in the past six years, Congress has denied federal judges, top officials in the Executive Branch, and its own members cost-of-living salary adjustments. Since January 1993, the value of the salaries for these positions has declined 16% when measured against the Consumer Price Index. The relative cumulative loss of purchasing power during this period for a federal district judge exceeds \$77,000.

Federal judges, who have made a lifetime commitment to federal service, should not be required to bear these continuing financial penalties. The vast majority of career government employees and retirees receive inflation adjustments annually. Career employees may also receive added locality pay adjustments. Denying cost-of-living adjustments to top officials is a regressive approach to compensation and is counter-productive to the common sense goal of encouraging capable individuals to enter the Judiciary. The 1989 law providing for annual cost-of-living salary increases for these positions should be allowed to operate as intended.

Panel Attorney Compensation

Another issue of concern is the rate of pay that court-appointed attorneys receive to defend individuals in criminal cases. By statute, the Judiciary bears the

responsibility for ensuring that defendants in federal criminal cases receive legal representation. If the defendant is unable to pay, the Judiciary must provide a lawyer to vindicate the defendant's rights. This responsibility is met through Federal Defender Offices, Community Defender Offices, and attorneys in private practice who are appointed by the court, generally referred to as "panel attorneys."

Congress established maximum hourly rates of compensation for panel attorneys in 1964 with the passage of the Criminal Justice Act. Since the first adjustments to those rates in 1970, the maximums have fallen far behind inflationary effects. In 1986, Congress authorized the Judicial Conference to set higher maximum hourly rates of up to \$75. Since then, the Judicial Conference has approved the higher rate in 93 of 94 judicial districts upon a finding of demonstrated need. However, Congress has appropriated funds only sufficient to pay up to the \$75 rate in part or all of 16 districts. In other districts, because of a one-time authorized increase, panel attorneys may only be paid \$65 for in-court work and \$45 for out-of-court work.

The Judiciary's budget request for fiscal year 2000 will include funds sufficient to pay all panel attorneys at the \$75 rate. I respectfully urge Congress to give very serious consideration to this request. Inadequate compensation for panel attorneys is seriously hampering the ability of judges to recruit attorneys to provide effective representation. The Judiciary, in turn, is taking steps to insure that defender services' costs are reasonable....

II. THE YEAR IN REVIEW

The Federal Courts' Caseload

For the first time in 26 years, criminal filings experienced a double-digit increase, growing by 15%.² Filings in

2. In 1998, filings of criminal cases grew 15% to 57,691 cases. This means that, on average, each authorized federal judge handles 89 criminal filings per year. Not since 1972 have the criminal filings risen by double digits. That year, filings rose 14%, and the courts received more immigration cases than fraud cases. Twenty-six years later, immigration filings have once again exceeded the number of fraud filings, making immigration-related offenses the sec-

ond most significant offense category after drug law violations. The increase in filings related to drugs and immigration occurred primarily along the southwestern border districts, although drug-related filings rose or remained stable in more than 57 districts across the nation. Nationwide, immigration filings rose 40% to 9,339 cases, and drug filings rose 19% to 16,281 cases.

U.S. courts of appeals and U.S. bankruptcy courts also rose, by 3%³ and 5%,⁴ respectively. In contrast, civil filings declined 6%.⁵

The Supreme Court of the United States — Caseload Statistics

The total number of case filings in the Supreme Court increased from 6,634 in the previous term to 6,781 in the 1997 Term — an increase of slightly more than 2.2%. Filings in the Court's *in forma pauperis* docket increased from 4,578 to 4,694 — a 2.5% rise. The increase in the Court's paid docket was by only 30 cases, from 2,055 to 2,085 — a 1.46% increase. During the 1997 Term, 96 cases were argued and 91 signed opinions were issued, compared to 90 cases argued and 80 opinions issued in the 1996 Term. No cases from the 1997 Term were scheduled for re-argument in the 1998 Term.

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VII. CONCLUSION

As we prepare to complete the work of this millennium and embark upon the next, the Judiciary may take a fair measure of satisfaction in that, despite the challenges we face, the United States court system continues to serve as a global standard of excellence. We must dedicate ourselves to maintaining the

splendid tradition of our Judiciary, and to preserving a proper balance with the other branches of government and the states as we continue to work together.

Chief Justice William H. Rehnquist was appointed to the United States Supreme Court by President Nixon in 1971, taking his oath of office, following confirmation, on January 7, 1972. He became the nation's 16th Chief Justice in



1986 on appointment by President Reagan. A Stanford law graduate, he clerked for Justice Robert H. Jackson in 1952-53. Rehnquist practiced law in Phoenix and served as an Assistant U.S. Attorney General prior to his appointment to the Court.

3. Appeals filed in the 12 regional courts of appeals rose 3% in 1998 to a record level of more than 53,800. The overall increase resulted from civil and bankruptcy appeals, which rose 6% and 4%, respectively. Criminal appeals remained stable, while administrative agency appeals and original proceedings dropped 14% and 8%, respectively.
4. Although bankruptcy petitions increased from approximately 1,350,000 to more than 1,400,000, attaining a record high for the 11th consecutive quarter, the 5% increase represented a slowing of the double-digit growth seen in the two previous years. Filings under Chapter 7 accounted for more than 70% of all bankruptcies and, with a 7% growth, were the main cause of the continued climb in the bankruptcy numbers. Chapter 13 filings, which made up 28% of all bankruptcy filings, rose a modest 1%. Chapter 11 filings and Chapter 12 filings, each of which constitutes less than 1% of all bankruptcy filings, dropped 22% and 9%, respectively.
5. The number of civil filings in the U.S. district courts was 256,787. The 6% decline in filings was attributable primarily to decreases in federal question litigation, filings involving the United States as a defendant, and diversity of citizenship filings. Federal question litigation filings dropped 6% from 156,596 to 146,827. The overall decline in these filings was largely a result of a 22% decline in personal injury cases, of which the 4,300-case decline in product lia-

bility filings (mostly breast implant cases) had the greatest effect. In addition, a significant decline in federal question litigation involved state prisoner petitions, which dropped by more than 3,200. The overall reduction in state prisoner petitions likely results from the continuing effects of the Prison Litigation Reform Act, which, among other provisions, places limitations on how prisoner petitions may be filed. Filings with the United States as defendant fell by 12% from 39,038 to 34,463. This decline stemmed chiefly from a 34% decrease in prisoner petitions filed by federal prisoners. Motions to vacate sentence decreased 46% (nearly 5,400 filings), mostly as a result of the subsiding effects of the *Bailey v. United States* Supreme Court ruling, which restricted the imposition of enhanced penalties for using firearms in violent crimes or drug trafficking offenses, and the 1996 Antiterrorism and Effective Death Penalty Act, which provided a one-year limitation period for filing state habeas corpus petitions and federal motions to vacate sentence. Diversity of citizenship filings declined 6% (more than 3,200 cases) largely because of the drop in personal injury/product liability filings related to breast implants.