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COMMENTARY

JUDICIAL INDEPENDENCE AND  
ARTICLE III: TOO LITTLE  
AND TOO MUCH\*

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I. TWENTIETH CENTURY TRANSFORMATIONS IN THE KINDS,  
PLACES, AND ACTIVITIES OF FEDERAL JUDGING

The contemporary conversation about judicial independence does not much attend to transformations in the structure and function of the federal judiciary in the United States or to the proliferation of various kinds of federal judges. My contribution to this symposium is therefore to sketch some of the salient changes and to consider how they affect discussions of judicial independence.

The idea of *change* is also central to the article by Dr. Frances Zemans,<sup>1</sup> whom I have been asked to follow. With characteristic thoughtfulness, and relying on a mixture of empiricism and analysis, Dr. Zemans urges readers to consider the distinctions between decisional independence and institutional independence as well as the differing settings of Article III and non-life-tenured judges.<sup>2</sup> Her central argument is that judges

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1. See Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625 (1999).

2. See *id.* at 628-54.

should change the way they express—if not the way that they think about—judicial independence. Dr. Zemans proposes that judges relate to the public through a variety of means, including through the media, by education, and in their written decisions. She also suggests that judges deploy different “voices,”<sup>3</sup> less arrogant, more explanatory, and more readily accessible.<sup>4</sup>

The changes, occurring over this century, that are my focus alter the common depictions of the federal judiciary. Start with life tenure. Dr. Zemans’ essay complains that much of the rhetoric of judicial independence erroneously equates life tenure with independence. As she points out, Article III often serves as the paradigm for judicial independence.<sup>5</sup>

I agree that consideration of judicial independence should not center exclusively on life tenure, but my attention does not shift solely to state courts, in which most judges do not have life tenure. Instead, I return to the federal system, which is increasingly populated with non-life-tenured judges. In United States trial courts today, about 850 district judges (holding either active or senior status) have life tenure; I call these judges federal “constitutional judges.”<sup>6</sup> These 850 trial judges are joined by an almost equal number (about 770<sup>7</sup>) of other federal judges, magistrate and bankruptcy judges (federal “statutory judges”), serving fixed (and renewable) terms, and appointed by life-tenured judges.<sup>8</sup> In terms of sheer num-

3. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

4. See Zemans, *supra* note 1, at 642.

5. See Zemans, *supra* note 1, at 628.

6. See 1997 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 33 tbl.12, (1998) [hereinafter 1997 ANNUAL REPORT] (reporting 647 authorized judgeships, 69 vacancies, and 278 senior judges).

7. See *id.* at 34-35 tbls.13 & 14. As of September 1997, 326 bankruptcy positions were authorized, with 313 filled and another 22 “recalled” judges serving that court. See *id.* There were 432 full-time magistrate judges and 75 part-time magistrate judges serving, for a combined total of 767 full-time statutory judges. See *id.*

8. See 28 U.S.C. § 152(a)(1), (b) (1994) (requiring appellate judges of each circuit to appoint bankruptcy judges for 14-year terms); *id.* § 631(a), (e) (requiring district judges to appoint magistrate judges for eight-year terms).

As Professor Daniel Klerman pointed out in his oral comments at the symposium, a promotion system is evolving in the federal judiciary, in which a statutory judgeship (magistrate or bankruptcy) becomes a route to a constitutional judgeship and a lower court judgeship becomes a route to, and increasingly a requirement for, a higher court judgeship. See Daniel Klerman, Comments at the Judicial Independence and Accountability Symposium at USC Law School, Program & Webcast Archive (last modified Nov. 21, 1998) <<http://www.usc.edu/dept/law/>>. Anecdotal evidence suggests that judicial clerkships have also begun to follow a similar pattern, whereby recent graduates go first to an appellate court before to the Supreme Court, and some district court clerks proceed to an appellate court clerkship.

bers, the docket of the non-tenured judges far exceeds that of the life-tenured judges.<sup>9</sup>

And those are not the only federal judges of relevance. Almost 1,400 judges work in agencies, such as the Social Security Administration, the Securities Exchange Commission, and the Equal Employment Opportunity Commission.<sup>10</sup> These administrative law judges (“ALJs”) decide a volume of cases comparable to that of the life-tenured judiciary.<sup>11</sup> In addition to ALJs, yet another group of federal judges exist who are, in one commentator’s view, the “hidden judiciary.”<sup>12</sup> Some 2,000 such judges—sometimes called “presiding officers,” sometimes “administrative judges,” sometimes “hearing officers” or “examiners”—work with federal agencies but without the classification as an ALJ as specified by the Administrative Procedure Act.<sup>13</sup>

Given these hundreds of “federal judges,” created by statute without constitutional protections, Dr. Zemans might chastise those commentators

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9. In 1997, 1,367,364 bankruptcy petitions were filed. See *Judicial Business of the United States Courts 1997* tbl.F (visited Mar. 24, 1997) <<http://www.courts.gov/dirprt98/index.html>>. Magistrate judges handled more than 500,000 matters. See *id.* at tbl.S-19.

10. As of September 30, 1997, 1,387 administrative law judges (“ALJs”) were assigned to federal agencies. See U.S. Office of Personnel Management, *Federal Civilian Workforce Statistics, Occupations of Federal White-Collar and Blue-Collar Workers as of Sept. 30, 1997*, 100-01 tbl.W-E (1998). See also Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343 (1992) (noting that as of the early 1990s, about 1,200 ALJs were “assigned to more than 30 agencies,” and ALJs’ numbers were then “approximately equivalent to the number of judges on the federal trial bench”).

11. Measuring the workload volume is difficult given that the kinds of disputes, the numbers of parties, and that the complexity of cases varies from agency to agency and from agency to court. One commentator has concluded that “ALJs probably decide more ‘cases’ each year than do their federal judicial counterparts.” Verkuil, *supra* note 10, at 1341.

In the 1997-98 fiscal year, ALJs in the Social Security Administration handled 500,000 cases and the Appeals Council considered 101,000 appeals. See Social Sec. Admin. (SSA), *About SSA’s Office of Hearings and Appeals* (visited Dec. 11, 1998) <<http://www.ssa.gov/oha/overview.htm>>. In fiscal year 1998, the Equal Employment Opportunity Commission (“EEOC”) received 12,218 requests for administrative hearings and resolved 7,494 appeals. In addition, the EEOC receives about 75,000 charges annually, with 48,000 discrimination charges getting resolved through state and local programs. See Equal Employment Opportunity Comm’n, *EEOC Enforcement Activities* (visited Dec. 11, 1998) <<http://www.eeoc.gov/enforce.html>>.

12. Verkuil, *supra* note 10, at 1341.

13. See *id.* at 1345-46 (discussing judges who exist outside of the protections of the Administrative Procedure Act (the “APA”), and who, according to a 1989 survey conducted by the Administrative Conference of the United States, decided about 350,000 cases). The largest set of cases (about 150,000) were decided by immigration “administrative judges,” employed by the Department of Justice. The Department of Health and Human services relied on “presiding officers employed by insurance carriers . . . [to decide] 68,000 cases per year;” and the Department of Veterans Affairs handled 58,000 cases. *Id.* at 1346. Those agencies’ judges employed “procedures that range from the equivalent of formal APA hearings to informal processes from which there is no appeal.” *Id.* at 1347.

who equate judicial independence with life tenure for ignoring not only state judges but many “federal judges” as well. Moreover, those who invoke “the federal model” of judicial independence should now clarify whether the reference is to the life-tenured federal judiciary, to the statutory federal judiciary sitting within Article III and serving renewable terms, or to the administrative federal judiciary serving within agencies and only sometimes falling under the Administrative Procedure Act.

The creation of tiers of federal judges could not have occurred without evolution of doctrine about who can be a “federal judge.” The congressional authorization over this century of these new federal judgeships—magistrate, bankruptcy, ALJs, hearing officers—has been challenged by litigants arguing their “right” to an Article III judge who enjoys life tenure and a guaranteed salary. The statutory schemes providing for alternative federal judges have thus required life-tenured judges to interpret the requirements of Article III.

Pause for a moment to think about the stakes. Plainly, the experience in the United States of judging does not depend on life tenure. That is the point of several commentators, Dr. Zemans included, who urge us to focus on state court judges.<sup>14</sup> Yet in the federal system, Article III authorizes not only judging but also (as Robert Stevens points out<sup>15</sup>) the creation of an entire branch of government. On paper, that branch is notably weak—no budget, no courthouses, no lower federal judgeships, and few clear jurisdictional mandates—thus prompting the characterization of the federal judiciary as a “dependent judiciary.”<sup>16</sup>

However, Article III has within it one (potential) safety net: a combination of life tenure and protected salaries for those who achieve the status of “federal judge.” Those judges hold the power of federal adjudication free of threats—either popular or governmental. One might therefore expect that life-tenured judges would have been fierce guardians of their distinctive mandates, not only as a means of reading texts but also as a “bulwark” to protect—and perhaps enhance—their power. Life-tenured judges might have therefore read Article III’s text to prohibit or to curtail assign-

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14. See Zemans, *supra* note 1, at 628-32. See also Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 331-335 (1999); Kathryn Abrams, *Some Realism About Electoralism: The Case of Judicial Campaign Financing*, 72 S. CAL. L. REV. 505, 512-15 (1999); Deborah R. Hensler, *Do We Need an Empirical Research Agenda on Judicial Independence?*, 72 S. CAL. L. REV. 707, 712-13 (1999).

15. See Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597 (1999).

16. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 376 (1999).

ment of federal adjudicatory activities to non-Article III judges. Such an interpretation would also have put pressure on Congress to increase the numbers of life-tenured judges to meet adjudicatory demands, thus increasing the ranks of life-tenured judges.

But as is well known, that is not this country's story. Instead, life-tenured judges have read the Constitution to permit the transfer of many tasks of federal judging to non-life-tenured judges.<sup>17</sup> Both case law and other judicial commentary<sup>18</sup> by life-tenured judges approve and encourage Congress to expand the non-Article III judiciary, which now decides a host of cases at both the trial and appellate levels.<sup>19</sup> The physical embodiment of this shift in authority can be seen in federal courthouse construction. In buildings, such as the one that my symposium co-panelist, the Honorable Nancy Gertner, now occupies,<sup>20</sup> magistrate judges' courtrooms are not only built into the design, but their dimensions—like the powers of magistrate judges—have increased. The 1997 design manual for construction of federal courthouses requires that magistrate judge courtrooms be larger than before, growing from 1,500 to 1,800 square feet.<sup>21</sup>

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17. See the evolution from *Crowell v. Benson*, 285 U.S. 22 (1932), permitting initial factfinding by a hearing officer but retaining Article III authority to review jurisdictional facts de novo, to *Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986), upholding the Commodities Futures Trading Commission's jurisdiction to decide related state claims. See generally Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1981).

18. See *infra* notes 32, 35, 43-44 and accompanying text.

19. See, e.g., 28 U.S.C. § 158(b)(1) (1994) (creating the bankruptcy appellate panels ("BAPS")). Some commentary has suggested that protection of Article III "values" requires that a litigant have access—if not initially, at least eventually—to a life-tenured judge to provide appellate review. See, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988). While many statutes provide such access in theory, in practice, layers of non-Article III judges review each others' work, making such access not only statistically rare but also in some instances unavailable. For example, of 1,367,364 bankruptcy filings in 1997, only 1,362 (approximately one-tenth of one percent) were reviewed on appeal. See *Judicial Business of the United States Courts 1997*, *supra* note 9, at tbl.S-14. See generally Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 GEO. MASON L. REV. 1 (1995).

For an example of the absence of a right of appeal from other federal decisionmakers, see *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568 (1985) (upholding provisions in the Federal Insecticide, Fungicide and Rodenticide Act which commit final decisionmaking, absent claims of fraud, to arbitration).

20. The opening of this courthouse, designed by Harry Cobb and incorporating 21 wall panels by Ellsworth Kelly, occurred on September 23, 1998. See Dennis E. Curtis & Judith Resnik, *The Iconic Courtroom* (paper presented at the Art and Architecture in Public Spaces Symposium held in conjunction with the opening of the Federal Courthouse for the First Circuit, Boston, Mass.) (Sept. 23, 1998) (on file with author).

21. For the new requirements, see SECURITY AND FACILITIES COMM. OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, COURT DESIGN GUIDE, available from the U.S. Dep't of Commerce, Accession No. PB97-152466, at 4-41. That guide was first published in 1991. See *id.* The current guide also details the prior space requirements. See *id.*

The courtrooms—or hearing rooms—of administrative law judges are not so large, but their existence is important to the discussion of judicial independence. Not only have the numbers and tiers of federal judges increased, but the actual locations of federal adjudication have diversified. “Courts” are now located not only in federal courthouses, but also inside agencies’ buildings. While these agency courts do not look much like the picturesque courthouses of popular imagery, both statutory obligations and Supreme Court interpretations of the due process clause require that these agency-courts act much like traditional courts.<sup>22</sup> In sum, a first packet of changes stems from the creation of a range of federal judges, many of whom lack life tenure and work in venues other than federal courthouses.

A second set of changes occurring over this century relates to transformations in the functioning of the institution of the federal courts itself. During the same period in which agencies functioned more like courts when dealing with claimant disputes, the federal courts developed an institutional structure that has enabled them to act more like an agency. Today, the federal judiciary functions as an entity that not only can organize itself but that also can represent—and in practice define—its own interests.

The idea of “interest groups” is already a part of the discussion of the utility of judicial independence. Some of the literature on judicial independence posits that an independent judiciary can serve to arbitrate disputes *among* special interests.<sup>23</sup> My point, in contrast, is that over this century, the federal court system has gained a corporate structure enabling it to function in some respects *as* an interest group.

A quick summary of the infrastructure and the agendas of the federal courts is necessary as background to understanding why this transformation is relevant to the issue of judicial independence. In 1915, some 120 federal judges were dispersed across the United States, with, for example, only a single district judge in Indiana or Maryland or Massachusetts.<sup>24</sup> These judges used different rules when deciding cases in their courts, and they had no institutional means of talking with each other, let alone anyone

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For a chart detailing the increase in kinds and quantity of matters handled by magistrate judges through a comparison of their work in 1972, 1986, and 1994, see RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52 (4th ed. 1988).

22. See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 554, 556-557 (1988), discussed in George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

23. See, e.g., Ferejohn, *supra* note 16, at 375-76; William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975).

24. See 220 Federal Reporter nos. 5-7 (1915) (listing the district judges and their assignments).

else. The Attorney General of the United States gave Congress reports on the federal courts and asked Congress for the judiciary's funds. As then Chief Justice William Howard Taft put it, each judge had "to paddle his own canoe."<sup>25</sup>

However, during the first half of the twentieth century, a group of reformers, comprised of judges, academics, and lawyers, undertook efforts to make courts, both state and federal, more professional and to make the federal courts into a national institution.<sup>26</sup> Their work has rendered Taft's boating image obsolete. In the 1920s, Congress created an official policymaking body of judges—now called the Judicial Conference of the United States—through which twenty-seven judges, with the Chief Justice of the Supreme Court presiding, adopts official policy positions.<sup>27</sup> The Judicial Conference takes positions by voting on a range of subjects, such as whether to support pending legislation. In 1939, at the behest of life-tenured federal judges, Congress created the Administrative Office of the United States Courts, which collects data, submits budgets, and runs the facilities for the federal court system.<sup>28</sup> In 1967, Congress created another judicial entity, the Federal Judicial Center, in order to focus on education and research.<sup>29</sup> Under Warren Burger's tenure, Chief Justices began to make "state-of-the-judiciary" speeches.<sup>30</sup> In 1991, the judiciary set up an Office of Judicial Impact Assessments to file "estimates" or predictions on the effects of new causes of action on court dockets.<sup>31</sup> A few years thereafter, via a "futures-planning process," the Judicial Conference approved ninety-three recommendations to Congress as part of an official document, a first ever *Long Range Plan*, issued in 1995.<sup>32</sup>

In short, over the last few decades, the federal judiciary has become an organization with some 2,000 judges, some 30,000 staff, and a budget

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25. William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602 (1922).

26. See Zemans, *supra* note 1, at 628.

27. See Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838 (codified at 28 U.S.C. § 331 (1994)) (creating the Conference of Senior Circuit Judges).

28. See Act of Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223 (codified as amended at 28 U.S.C. §§ 601-612).

29. See Act of Dec. 20, 1967, Pub. L. 90-219, § 6101, 81 Stat. 664 (codified as amended at 28 U.S.C. §§ 620-629).

30. See William Rehnquist, *Chief Justice Recaps 1995 in Year-end Report*, THIRD BRANCH, Jan. 1996, at 1 (describing the tradition of making such remarks).

31. See CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS 5-6 (A. Fletcher Mangum ed., Federal Judicial Center 1995).

32. See JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* (1995), reprinted in 166 F.R.D. 49 (1995) [hereinafter *LONG RANGE PLAN*].

of two-tenths of one percent of the federal budget.<sup>33</sup> As a corporate entity, the federal judiciary educates, plans, lobbies, and opines about the shape, nature, and future of judging. Turning to the positions taken in the last few years, the federal judiciary has argued for limited growth in the number of life-tenured judges,<sup>34</sup> expansion of the statutory federal judiciary,<sup>35</sup> less federal jurisdiction,<sup>36</sup> and a presumption against the creation of federal rights if enforced in federal court.<sup>37</sup>

A third set of changes during this century has occurred with respect to the transformation of the roles of trial and appellate judges. Over the last few decades, trial judges have redefined their roles by focusing on case and lawyer management and by promoting settlement.<sup>38</sup> I will not detail that evolution here. Included are changes in the practices, rules, and the self-conscious deployment of the federal judiciary as an educational institution that teaches judges what "good" judging means.<sup>39</sup> Two recent illustrations capture the current judicial view of judging. Consider a recent decision of the Court of Appeals of the District of Columbia, which held that a court-appointed mediator, working in an alternative dispute resolution program, was entitled to judicial immunity (that is, to protection from a

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33. See *Omnibus Appropriations Bill a Mixed Bag for Judiciary*, THIRD BRANCH, Nov. 1998, at 1, 5 (describing "total [fiscal year] obligations of \$4.06 billion for the Judiciary," and summarizing the allocations to salaries, expenses, defender services, juror fees, and court security).

34. See LONG RANGE PLAN, *supra* note 32, Recommendation 15, at 98 ("The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction.").

35. See *id.*, Recommendation 10, at 94 ("Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefits or regulatory cases that typically involve intense fact-finding."). See also *id.*, Recommendation 65, at 161 ("Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy.").

36. See *id.* at 83. Recommendation 1 provides:

Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system 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.

*Id.* See also *id.*, Recommendations 2-5, at 84-88 (discussing criminal jurisdiction); *id.*, Recommendations 6-10, at 88-94 (discussing civil jurisdiction).

37. See *id.*, Recommendation 6, at 88 ("Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests."). For explanation and analysis, see Judith Resnik, *Trial as Error: Transformations of the Federal Judiciary*, Arthur Liman Professorship Inaugural Lecture, Yale Law School (Nov. 5, 1998) (manuscript on file with author).

38. See Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

39. See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 158-79 (1997).

civil suit for damages).<sup>40</sup> The appellate court reasoned that what the court-appointed mediator did was no different from what a judge might have done.<sup>41</sup> A second example comes from a district judge who, unhappy about the trend toward the use of federal judges as conciliators, has argued that the word “judge” should be used as a “verb as well as a noun and adjective.”<sup>42</sup>

Turning to the appellate courts, I will also not provide great detail. But, as many other commentators have shown, the appellate level has also experienced significant transformations.<sup>43</sup> As one federal appellate judge recently reiterated, “Appellate courts now process criminal appeals rather than decide them.”<sup>44</sup> That judge described members of the appellate bench as more akin to administrators than judges because they supervise “law clerks or indirectly . . . staff attorneys who delve into” cases.<sup>45</sup> This description is reflected in the aggregate data. Consider the difference between decisions of appellate courts and cases argued, or between decisions and published opinions. As of 1997, of 51,000 cases that were terminated, oral argument was held in one of five.<sup>46</sup> Of 25,840 terminations on the merits after oral argument or after briefs were submitted, some

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40. See *Wagshal v. Foster*, 28 F.3d 1249, 1252-53 (D.C. Cir. 1994). See also *Butz v. Economou*, 438 U.S. 478 (1978) (holding that executive official performing adjudicative decisionmaking had immunity from suit like a judge); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886-87 (2d Cir. 1990) (holding commercial organizations sponsoring contractual arbitration immune from civil liability).

41. See *Wagshal*, 28 F.3d at 1252-54.

42. See Hon. William R. Wilson, Jr., *Where Has All the Civility Gone?*, ARK. TRIAL LAW. MAG., Summer 1990, at 5.

43. See, e.g., William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891 (1993). See also Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603 (1985).

44. Hon. Carolyn Dineen King, *Statement Before the Commission on Structural Alternatives for the Federal Courts of Appeals Delivered Mar. 25, 1998* (visited Dec. 11, 1998) <<http://app.comm.uscourts.gov/hearings/dallas/king.htm>> (quoting a speech by Chief Justice Rehnquist entitled “The Cult of the Robe” presented to the American Bar Association). Judge King also described a practice in which “a panel of three judges sits [for a few days] to dispose of approximately thirty cases per day” and uses a “summary calendar,” in which more than 50% of fully briefed cases are decided by a rotation through three judges. *Id.* She commented that “as a practical matter, . . . these cases can easily become one-judge cases, with the other members of the screening panel doing little more than reading the Staff Attorney’s memo and the writing judge’s proposed opinion.” *Id.*

45. *Id.*

46. See 1997 ANNUAL REPORT, *supra* note 6, at 77 tbl.B-1 (reporting that of the total 51,194 dispositions, only 10,357 dispositions occurred after oral arguments). As is detailed therein, circuits vary somewhat in the percentage of cases in which they hold oral argument.

5,622 opinions were published; another 3,413 decisions went unpublished.<sup>47</sup>

## II. ALTERING THE MEANS OF PROTECTING FEDERAL JUDICIAL INDEPENDENCE

I have tracked a host of changes occurring in this century through which the federal judiciary has emerged as a multi-tiered, variously staffed organization. The federal judiciary functions as one of several venues of federal adjudication. The judiciary focuses increasingly on dispute management and settlement. The judiciary has gained the capacity to act—vis-à-vis Congress and the Executive—as a planning and agenda-setting entity with the ability to develop and communicate its views.<sup>48</sup> Now, let me show the relevance of the diversification of federal judges, the revamping of judicial processes, and the transformation of the federal judiciary into a corporate entity to the topic of this symposium, judicial independence.

As often mentioned,<sup>49</sup> judicial independence includes at least two distinct but sometimes blurred concepts: the role of a judiciary as a branch of government, and the freedom of a judge to decide a case without fear of retribution.<sup>50</sup> Take first the concept of judicial independence that relates to separation of powers—a goal that is vivid in the federal system as well as in some state systems,<sup>51</sup> although not necessarily relevant in other countries.<sup>52</sup> One could read the transformations of the last several decades as enabling the federal judiciary to finally come “into its own” as a truly separate branch of government. Through the Judicial Conference, the judiciary can make policy. With the Administrative Office, the judiciary can implement its own procedures and mandates, and, by means of the Federal Judicial Center, it can educate and thereby perpetuate its views. These structures, crafted by agreements of the judiciary and Congress (and with

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47. See *id.* at 40 tbl.S-3. See also Judith Resnik, *Statement Before the Commission on Structural Alternatives for the Federal Courts of Appeals Delivered Apr. 24, 1998* (visited Jan. 27, 1999) <<http://app.comm.uscourts.gov/hearings/newyork/0427RES.htm>>.

48. For additional discussion, see Judith Resnik, *Trial as Error: Transformations of the Federal Judiciary over the Twentieth Century* (1998) (unpublished manuscript, on file with author).

49. See, e.g., Zemans, *supra* note 1, at 626-27; Burbank, *supra* note 14 at 339-49.

50. As to the desirability of that “liberty,” see generally Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535 (1999).

51. See, e.g., The Hon. Shirley S. Abrahamson, *Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence* (Dec. 13, 1996), in 12 ST. JOHN’S J. LEGAL COMMENT. 69 (1996).

52. See Stevens, *supra* note 15 (noting that England lacks reliance on the judiciary as an independent branch of government comparable to the role taken by the federal judiciary in the United States).

the acquiescence, and sometimes the support of the Executive), the judiciary has become (in contemporary parlance) “a player” on the federal policymaking scene.

But the trajectory is also complex. Over the last few decades, not only has the judiciary come to function more like an agency, it has also come to be treated—on some occasions—more like one. In the last few years, Congress has queried the judiciary about use of courtrooms (whether each judge should have a courtroom of his or her own),<sup>53</sup> judicial time spent on travel and conferences,<sup>54</sup> and the size of its staff.<sup>55</sup>

When confronted with such scrutiny, the federal judiciary responds as might any agency seeking support from Congress; the federal judiciary has provided detailed explanations of its needs and of its budgetary priorities in an effort to demonstrate its capacity to economize. Federal judges, nervous about the next questionnaire coming from Congress, appear ready to placate and to mollify. As Ronald Garet might remind us,<sup>56</sup> these are not “Coverian judges” speaking truth to power,<sup>57</sup> but realpolitik judges, aiming to respond to and minimize conflict with those who fund their budgets. (As one judge recently explained, one of the pressing problems facing the federal judiciary in the coming years is how to pay the rent. The federal courts have more than 500 facilities, for which they pay sums to the General Services Administration.<sup>58</sup>)

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53. See GENERAL ACCOUNTING OFFICE, GAO/GGD-97-39, COURTHOUSE CONSTRUCTION: BETTER COURTROOM USE DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING (1997); GENERAL ACCOUNTING OFFICE, GAO/T-GGD 96-19, FEDERAL COURTHOUSE CONSTRUCTION: MORE DISCIPLINED APPROACH WOULD REDUCE COSTS AND PROVIDE FOR BETTER DECISIONMAKING (1995).

54. See *Now the Judges Face the Questions*, LEGAL TIMES, Feb. 5, 1996, at 8 (describing responses by judges to questionnaires sent by Senator Charles E. Grassley, Chair of the Senate Judiciary's Oversight Committee); *GAO Releases Report on Noncase-Related Travel by Judges*, THIRD BRANCH, Apr. 1998, at 6 (discussing a report, also requested by Senator Grassley, that reviewed “non-case related trips” of 64 appellate and 254 district court judges “encompassing 3,200” appellate workdays and 9,832 district court workdays, most of which were spent on court seminars and meetings).

55. See *Courthouse Funding Delay Jeopardizes Judicial System*, THIRD BRANCH, July 1998, at 1 (describing testimony by judges urging Congress to approve construction projects); *Omnibus Bill Funds Courthouses in 1999*, THIRD BRANCH, Nov. 1998, at 1, 5 (describing the authorization and appropriation of \$460 million for 13 new projects and another \$25 million for repairs, as well as the lack of assistance from the White House in obtaining these funds).

56. See Ronald R. Garet, *Judges as Prophets: A Coverian Interpretation*, 72 S. CAL. L. REV. 385 (1999).

57. See Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985); ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

58. According to staff at the Administrative Office of the U.S. Courts, 351 federal buildings have courts and related functions such as probation and parole facilities, 68 other facilities are post offices with courts, and another 289 facilities are leased. See Telephone Interview with staff in the Office of the Space and Facilities Division of the Administrative Office of the United States Courts (Nov. 1998).

As I watch the interactions between Congress and the federal courts,<sup>59</sup> I am struck by how much reliance there is on the good will of both branches.<sup>60</sup> The Constitution provides few structural protections for the judiciary as an entity. In conversations about judicial independence, a common assumption is that Article III is not only the *paradigm* of independence but also the *pinnacle* of how such independence can be achieved. Yet, in terms of separation of powers, Article III looks thin. It provides *only* for life tenure and individual salary protection, and misses the institutional needs of a judiciary, functioning in an administrative state either as a branch of government or as a provider of services to the millions of litigants that seek its attention. As the judiciary transforms itself, in part to meet those needs, it is ever more reliant on Congress—for staff, for surrogate and subsidiary judges, for its very ability to work, let alone to be a player in governance.

Article III is also “too little” from the second perspective (close to Dr. Zemans’ heart<sup>61</sup>)—ensuring decisional integrity. Return to the needs for federal adjudication, now provided by some 2,000 judges (statutory and constitutional) within the Article III branch and another, larger number outside it in administrative agencies. Assume, as I do, that the political wherewithal or desire was never available to produce the 4,000 plus life-tenured judges—the minimum number<sup>62</sup> necessary to respond to the demands of claimants contesting decisions relating to federal statutory enactments of this century. The life-tenured judiciary’s reading of Article III to permit judges lacking life tenure to make decisions has been a useful adaptation. The elasticity of Article III doctrine, with its now expansive definition of who can hold the federal power of judging, enables disputants to obtain adjudicatory decisionmaking in their many encounters with the administrative state. One might thus applaud—or at least appreciate—the consensus over these past decades between the federal courts and Congress that has permitted the creation of federal judges other than life-tenured judges.

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59. See Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589 (1998).

60. See Ferejohn, *supra* note 16, at 356-57 (discussing the conditions under which the agreement of mutual cooperation between the courts and Congress can be undone). My point is that the vulnerability of the courts to Congress has grown over the past decades, that the judiciary is not only dependent but increasingly so.

61. See Zemans, *supra* note 1.

62. That number is drawn from considering the numbers of contemporary non-life-tenured judges in both courts and in agencies. See *supra* notes 6-13 and accompanying text.

But, the judgeships thus manufactured exist outside of Article III, and here again, Article III seems “too little.” It does not articulate a concept of judging sufficiently robust to cover the numbers of judges required to staff contemporary adjudicatory procedures. How could these judges be equipped with the power, authority, elan, sense of self and import presumed to enable wise and deliberate decisions? How are these judges to be engaged in the public dialogue to which Dr. Zemans aspires? Given that the federal system relies on structural protections of life tenure and salary protections, can those mandates be translated into protections for those “other” federal judges?

One possibility is that when making doctrinal interpretations of Article III, life-tenured judges should condition the transfer of adjudicatory authority from life-tenured judges on a concomitant transfer of some forms of structured independence. For example, one might read the Constitution as guaranteeing federal adjudicatory power with independence and requiring any person holding the federal power of judgment to remain insulated from attacks (such as dismissal based on decisions) and from pressures (such as directives to resolve cases in a particular fashion).

Additionally, sources other than Article III can shore up the independence of those federal judges who adjudicate outside its contours. Some equipage may come from the impartiality mandates read into the due process clause,<sup>63</sup> common law doctrines such as immunities from suit, and from the amalgam of constitutional and common law rights that guarantee the public access to some adjudicatory proceedings.<sup>64</sup> If all kinds of federal judges have mandates to decide impartially and openly, if the public has a presumptive place in the process (be it located in courts or agencies), and if judges know that they have special protections from litigants unhappy with their rulings but were subject to careful review by hierarchically superior judges, then perhaps those first tier judges will make more careful, deliberate, and better reasoned judgments.

My purpose is to alter the focus by moving the discussion of judicial independence beyond federal life-tenured judges, the level of their salaries, their cost-of-living increases, and their stature. This shift will hopefully allow the many sub-Article III judges, who make decisions of great import in the lives of many disputants, to share the iconic status of “judging.” With such judges in mind, it becomes plain that Article III provides (at

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63. See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 257-59 (1985).

64. See Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

best) only a part of the equipage required. The expansive doctrinal work sketched above might help generate forms of “cultural capital” for non-life-tenured judges so that they see themselves—and become seen by others—as significant actors obliged to be accountable for their decision-making. What is needed is elaboration of the gestalt of judging for the sub-Article III judges—one that takes them seriously, as the centrally important decisionmakers in the United States polity that they are.

To do so, both law and practice must shift to enable such judges to achieve and to merit that cultural capital. For example, if part of the rationale for judicial independence rests on the public aspect of judicial work, “courts” in agencies provide little opportunity for such interactions. Cases are heard in tiny hearing rooms with neither space nor plan for public attendance. Decisions by many administrative law judges and hearing officers are not routinely available to the public and can be found, if at all, by labor-intensive scrutiny of transcripts or court files. Much work must be done to take some of the equipage that belongs to the life-tenured federal judges and to some state court judges and expand its aegis to reach low visibility state court judges, lower tier federal judges, and the administrative judiciary. Those judges, in turn, must reorient themselves to bring the public into their work.

In some respects, such a project resembles efforts earlier in this century to professionalize the judiciary, both in terms of its administrative capacity and of the behavior of lower echelon judges whose jobs frankly were not held in high esteem. For example, one of the first “schools” for judges was started in the 1940s by the American Bar Association in conjunction with a department of Northwestern University to improve traffic courts.<sup>65</sup> Parallel efforts were also made for family-court judges. Subsequently, the agendas of judicial education came to include the training of appellate judges,<sup>66</sup> state trial court judges,<sup>67</sup> federal district court judges,<sup>68</sup> and new Article III judges about the norms of judging.<sup>69</sup>

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65. See INSTITUTE OF JUDICIAL ADMIN., NEW YORK UNIV., PROJECT EFFECTIVE JUSTICE, AN APPRAISAL 10-11 (1964).

66. See FANNIE J. KLEIN, CHANGING THE SYSTEM: THE TWENTY-FIVE YEAR CRUSADE OF THE INSTITUTE FOR JUDICIAL ADMINISTRATION FOR EQUAL JUSTICE IN AMERICAN COURTS, AN HISTORICAL PROSPECTIVE (1977).

67. See V. Robert Payant, *Ethical Training in the Profession: The Special Challenge of the Judiciary*, 58 LAW & CONTEMP. PROBS. 313 (1995) (providing the history of the National Judicial College begun in 1963); Hon. Frank J. Murray, *Trial Judges' College Influence Major Factor for Next Generation*, 1 TRIAL 75 (1964) (describing the classes).

68. See, e.g., Hon. Alfred P. Murrah, *Foreword: Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges*, 21 F.R.D. 395 (1958) (discussing the education

Those norms of judging are now in issue. What does the profession of judging entail? Return to my point about the transformation of the role of the federal district court judge, into settler, mediator, facilitator, and case manager. Return to the D.C. Circuit opinion that confers judicial immunity on a mediator by explaining that a mediator and a judge have essentially the same job.<sup>70</sup> If both have the same job, which one gets life tenure? The judge? The mediator? Both? Neither? If the job of a judge is simply to manage a docket and settle cases privately, without reasons and without public accountability, why should that job be granted constitutional status and that person freed from risk of removal? Return also to the transformations at the appellate level in which much of what is decided is never reduced to a written document provided to the public.

*The Federalist Papers* explain that the judicial branch holds “merely” the power of judgment.<sup>71</sup> Dr. Zemans wants accountable judging and argues that the purpose of judicial independence exists to protect judges when rendering decisions, thereby enabling them to remain loyal to the rule of law.<sup>72</sup> She wants judges to write better, clearer, less arrogant opinions. I share her goals and admire her work, but I think the task is harder for her—and for most of us—than it has been in the past. The judicial embrace of roles previously held by other social actors—the homogenization of different dispute resolvers—has made it more difficult to explain why judges (be they life-tenured or administrative law judges, in federal or state courts) should be specially protected, specially insulated, and specially respected. At issue is what forms of independence are appropriate to the array of tasks now incorporated within “judging.” In this respect, Article III may be too much, rather than too little, in that it protects judges who have shifted their focus away from deliberate, difficult decisionmaking and, while talking with litigants, render no judgments for public review.

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of district court judges to manage large-scale litigation).

69. See Hon. Alfred P. Murrah, *Foreword: Reports of the Conference for District Court Judges*, 59 F.R.D. 205 (1973); *Proceedings of Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89 (1976).

70. See *supra* notes 40-41 and accompanying text.

71. See THE FEDERALIST NO. 78 (Alexander Hamilton).

72. See Zemans, *supra* note 1, at 628.