

JUDICIAL REFORM ACT OF 1998

APRIL 1, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. COBLE, from the Committee on the Judiciary,
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1252]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1252) to modify the procedures of the Federal courts in certain matters, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Purpose and Summary	10
Background and Need for Legislation	10
Hearings	11
Committee Consideration	11
Vote of the Committee	11
Committee Oversight Findings	15
Committee on Government Reform and Oversight Findings	15
New Budget Authority and Tax Expenditures	15
Congressional Budget Office Estimate	15
Constitutional Authority Statement	18
Section-by-Section Analysis	18
Agency Views	25
Changes in Existing Law as Made by the Bill, as Reported	42
Dissenting Views	58

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Judicial Reform Act of 1998”.

SEC. 2. 3-JUDGE COURT FOR ANTICIPATORY RELIEF.

(a) **REQUIREMENT OF 3-JUDGE COURT.**—Any application for anticipatory relief against the enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a United States district court or judge thereof upon the ground that the State law is repugnant to the Constitution, treaties, or laws of the United States unless the application for anticipatory relief is heard and determined by a court of 3 judges in accordance with section 2284 of title 28, United States Code. Any appeal of a determination on such application shall be to the Supreme Court. In any case to which this section applies, the additional judges who will serve on the 3-judge court shall be designated under section 2284(b)(1) of title 28, United States Code, as soon as practicable, and the court shall expedite the consideration of the application for anticipatory relief.

(b) **DEFINITIONS.**—As used in this section—

(1) the term “State” means each of the several States and the District of Columbia;

(2) the term “State law” means the constitution of a State, or any statute, rule, regulation, or other measure of a State that has the force of law, and any amendment thereto;

(3) the term “referendum” means the submission to popular vote, by the voters of the State, of a measure passed upon or proposed by a legislative body or by popular initiative; and

(4) the term “anticipatory relief” means an interlocutory or permanent injunction or a declaratory judgment.

(c) **EFFECTIVE DATE.**—This section applies to any application for anticipatory relief that is filed on or after the date of the enactment of this Act.

SEC. 3. INTERLOCUTORY APPEALS OF COURT ORDERS RELATING TO CLASS ACTIONS.

(a) **INTERLOCUTORY APPEALS.**—Section 1292(b) of title 28, United States Code, is amended—

(1) by inserting “(1)” after “(b)”; and

(2) by adding at the end the following:

“(2) A party to an action in which the district court has made a determination of whether the action may be maintained as a class action may make application for appeal of that determination to the court of appeals which would have jurisdiction of an appeal of that action. The court of appeals may, in its discretion, permit the appeal to be taken from such determination if the application is made within 10 days after the entry of the court’s determination relating to the class action. Application for an appeal under this paragraph shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.”

(b) **EFFECTIVE DATE.**—The amendment made by subsection (a) applies to any action commenced on or after the date of the enactment of this Act.

SEC. 4. PROCEEDINGS ON COMPLAINTS AGAINST JUDICIAL CONDUCT.

(a) **REFERRAL OF PROCEEDINGS TO ANOTHER JUDICIAL CIRCUIT OR COURT.**—Section 372(c) of title 28, United States Code, is amended—

(1) in paragraph (1) by adding at the end the following: “In the case of a complaint so identified, the chief judge shall notify the clerk of the court of appeals of the complaint, together with a brief statement of the facts underlying the complaint.”;

(2) in paragraph (2) in the second sentence by inserting “or statement of facts underlying the complaint (as the case may be)” after “copy of the complaint”;

(3) in paragraph (3)—

(A) by inserting “(A)” after “(3)”;

(B) by striking “may—” and all that follows through the end of subparagraph (B) and inserting the following: “may dismiss the complaint if the chief judge finds it to be—

“(i) not in conformity with paragraph (1);

“(ii) directly related to the merits of a decision or procedural ruling; or

“(iii) frivolous.”; and

(C) by adding at the end the following:

“(B) If the chief judge does not enter an order under subparagraph (A), then the complaint or (in the case of a complaint identified under paragraph (1)) the statement of facts underlying the complaint shall be referred to the chief judge of another judicial circuit for proceedings under this subsection (hereafter in this subsection referred to as the ‘chief judge’), in accordance with a system established by

rule by the Judicial Conference, which prescribes the circuits to which the complaints will be referred. The Judicial Conference shall establish and submit to the Congress the system described in the preceding sentence not later than 180 days after the date of the enactment of the Judicial Reform Act of 1998.

“(C) After expeditiously reviewing the complaint, the chief judge may, by written order explaining the chief judge’s reasons, conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.”;

(4) in paragraph (4)—

(A) by striking “paragraph (3)” and inserting “paragraph (3)(C)”; and

(B) in subparagraph (A) by inserting “(to which the complaint or statement of facts underlying the complaint is referred)” after “the circuit”;

(5) in paragraph (5)—

(A) in the first sentence by inserting “to which the complaint or statement of facts underlying the complaint is referred” after “the circuit”; and

(B) in the second sentence by striking “the circuit” and inserting “that circuit”;

(6) in the first sentence of paragraph (15) by inserting before the period at the end the following: “in which the complaint was filed or identified under paragraph (1)”; and

(7) by amending paragraph (18) to read as follows:

“(18) The Judicial Conference shall prescribe rules, consistent with the preceding provisions of this subsection—

“(A) establishing procedures for the filing of complaints with respect to the conduct of any judge of the United States Court of Federal Claims, the Court of International Trade, or the Court of Appeals for the Federal Circuit, and for the investigation and resolution of such complaints; and

“(B) establishing a system for referring complaints filed with respect to the conduct of a judge of any such court to any of the first eleven judicial circuits or to another court for investigation and resolution.

The Judicial Conference shall establish and submit to the Congress the system described in subparagraph (B) not later than 180 days after the date of the enactment of the Judicial Reform Act of 1998.”.

(b) DISCLOSURE OF INFORMATION.—Section 372(c)(14) of title 28, United States Code, is amended—

(1) in subparagraph (B) by striking “or” after the semicolon;

(2) in subparagraph (C) by striking the period at the end and inserting “; or”; and

(3) by adding after subparagraph (C) the following:

“(D) such disclosure is made to another agency or instrumentality of any governmental jurisdiction within or under the control the United States for a civil or criminal law enforcement activity authorized by law.”.

(c) EFFECTIVE DATE.—The amendments made by subsection (a) apply to complaints filed on or after the 180th day after the date of the enactment of this Act.

SEC. 5. LIMITATION ON COURT-IMPOSED TAXES.

(a) LIMITATION.—Chapter 85 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1369. Limitation on Federal court remedies

“(a) LIMITATION ON COURT-IMPOSED TAXES.—(1) No district court may enter any order or approve any settlement that requires any State, or political subdivision of a State, to impose, increase, levy, or assess any tax, unless the court finds by clear and convincing evidence, that—

“(A) there are no other means available to remedy the deprivation of a right under the Constitution of the United States;

“(B) the proposed imposition, increase, levying, or assessment is narrowly tailored to remedy the specific deprivation at issue so that the remedy imposed is directly related to the harm caused by the deprivation;

“(C) the tax will not contribute to or exacerbate the deprivation intended to be remedied;

“(D) plans submitted to the court by State and local authorities will not effectively redress the deprivations at issue;

“(E) the interests of State and local authorities in managing their affairs are not usurped, in violation of the Constitution, by the proposed imposition, increase, levying, or assessment; and

“(F) the proposed tax will not result in the loss or depreciation of property values of the taxpayers who are affected.

“(2) The limitation contained in paragraph (1) shall apply only to any order or settlement which—

“(A) expressly directs any State, or political subdivision of a State, to impose, increase, levy, or assess any tax; or

“(B) will necessarily require a State, or political subdivision of a State, to impose, increase, levy, or assess any tax.

“(3) If the court finds that the conditions set forth in paragraph (1) have been satisfied, it shall enter an order incorporating that finding, and that order shall be subject to immediate interlocutory de novo review.

“(4) A remedy permitted under paragraph (1) shall not extend beyond the case or controversy before the court.

“(5)(A) Notwithstanding any law or rule of procedure, any person or entity whose tax liability would be directly affected by the imposition of a tax under paragraph (1) shall have the right to intervene in any proceeding concerning the imposition of the tax, except that the court may deny intervention if it finds that the interest of that person or entity is adequately represented by existing parties.

“(B) A person or entity that intervenes pursuant to subparagraph (A) shall have the right to—

“(i) present evidence and appear before the court to present oral and written testimony; and

“(ii) appeal any finding required to be made by this section, or any other related action taken to impose, increase, levy, or assess the tax that is the subject of the intervention.

“(b) TERMINATION OF ORDERS.—Notwithstanding any law or rule of procedure, any order of, or settlement approved by, a district court requiring the imposition, increase, levy, or assessment of a tax pursuant to subsection (a)(1) shall automatically terminate or expire on the date that is—

“(1) 1 year after the date of the imposition of the tax; or

“(2) an earlier date, if the court determines that the deprivation of rights that is addressed by the order or settlement has been cured to the extent practicable.

Any new such order or settlement relating to the same issue is subject to all the requirements of this section.

“(c) PREEMPTION.—This section shall not be construed to preempt any law of a State or political subdivision thereof that imposes limitations on, or otherwise restricts the imposition of, a tax, levy, or assessment that is imposed in response to a court order or settlement referred to in subsection (b).

“(d) ADDITIONAL RESTRICTIONS ON COURT ACTION.—(1) Except as provided in paragraph (2), nothing in this section may be construed to allow a Federal court to, for the purpose of funding the administration of an order or settlement referred to in subsection (b), use funds acquired by a State or political subdivision thereof from a tax imposed by the State or political subdivision thereof.

“(2) Paragraph (1) does not apply to any tax, levy, or assessment that may, in accordance with applicable State or local law, be used to fund the actions of a State or political subdivision thereof in meeting the requirements of an order or settlement referred to in subsection (b).

“(e) NOTICE TO STATES.—The court shall provide written notice to a State or political subdivision thereof subject to an order or settlement referred to in subsection (b) with respect to any finding required to be made by the court under subsection (a). Such notice shall be provided before the beginning of the next fiscal year of that State or political subdivision occurring after the order or settlement is issued.

“(f) SPECIAL RULES.—For purposes of this section—

“(1) the District of Columbia shall be considered to be a State; and

“(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

(b) CONFORMING AMENDMENT.—The table of contents for chapter 85 of title 28, United States Code, is amended by adding after the item relating to section 1368 the following new item:

“1369. Limitation on Federal court remedies.”.

(c) STATUTORY CONSTRUCTION.—Nothing contained in this section or the amendments made by this section shall be construed to make legal, validate, or approve the imposition of a tax, levy, or assessment by a United States district court or a spending measure required by a United States district court.

(d) EFFECTIVE DATE.—This section and the amendments made by this section shall apply with respect to any action or other proceeding in a Federal court that is pending on, or commenced on or after, the date of the enactment of this Act, and the 1-year limitation set forth in subsection (b) of section 1369 of title 28, United States Code, as added by this section, shall apply to any court order or settlement

described in subsection (a)(1) of such section 1369, that is in effect on the date of the enactment of this Act.

SEC. 6. REASSIGNMENT OF CASE AS OF RIGHT.

(a) **IN GENERAL.**—Chapter 21 of title 28, United States Code, is amended by adding at the end the following:

“§ 464. Reassignment of cases upon motion by a party

“(a) **UPON MOTION.**—(1) If all parties on one side of a civil case to be tried in a United States district court described in subsection (e) bring a motion to reassign the case, the case shall be reassigned to another appropriate judicial officer. Each side shall be entitled to one reassignment without cause as a matter of right.

“(2) If any question arises as to which parties should be grouped together as a side for purposes of this section, the chief judge of the court of appeals for the circuit in which the case is to be tried, or another judge of the court of appeals designated by the chief judge, shall determine that question.

“(b) **REQUIREMENTS FOR BRINGING MOTION.**—(1) Subject to paragraph (2), a motion to reassign under this section shall not be entertained unless it is brought, not later than 20 days after notice of the original assignment of the case, to the judicial officer to whom the case is assigned for the purpose of hearing or deciding any matter. Such motion shall be granted if—

“(A) it is presented before trial or hearing begins and before the judicial officer to whom it is presented has ruled on any substantial issue in the case, or

“(B) it is presented by consent of the parties on all sides.

“(2) **Notwithstanding paragraph (1)—**

“(A) a party joined in a civil action after the initial filing may, with the concurrence of the other parties on the same side, bring a motion under this section within 20 days after the service of the complaint on that party;

“(B) a party served with a supplemental or amended complaint or a third-party complaint in a civil action may, with the concurrence of the other parties on the same side, bring a motion under this section within 20 days after service on that party of the supplemental, amended, or third-party complaint; and

“(C) rulings in a case by the judicial officer on any substantial issue before a party who has not been found in default enters an appearance in the case shall not be grounds for denying an otherwise timely and appropriate motion brought by that party under this section.

“(3) No motion under this section may be brought by the party or parties on a side in a case if any party or parties on that side have previously brought a motion to reassign under this section in that case.

“(c) **COSTS OF TRAVEL TO NEW LOCATION.**—(1) If a motion to reassign brought under this section requires a change in location for purposes of appearing before a newly assigned judicial officer, the party or parties bringing the motion shall pay the reasonable costs incurred by the parties on different sides of the case in traveling to the new location for all matters associated with the case requiring an appearance at the new location. In a case in which both sides bring a motion to reassign under this section that requires a change in location, the party or parties bringing the motions on both sides shall split the travelling costs referred to in the preceding sentence.

“(2) For parties financially unable to obtain adequate representation, the Government shall pay the reasonable costs under paragraph (1).

“(d) **DEFINITION.**—As used in this section, the term ‘appropriate judicial officer’ means—

“(1) a United States magistrate judge in a case referred to such a magistrate judge; and

“(2) a United States district court judge in any other case before a United States district court.

“(e) **DISTRICT COURTS THAT MAY AUTHORIZE REASSIGNMENT.**—The district courts referred to in subsection (a) are the district courts for the 21 judicial districts for which the President is directed to appoint the largest numbers of permanent judges.

“(f) **3-JUDGE COURT CASES EXCLUDED.**—This section shall not apply to any civil action required to be heard and determined by a district court of 3 judges.”.

(b) **CLERICAL AMENDMENT.**—The table of contents for chapter 21 of title 28, United States Code, is amended by adding at the end the following new item:

“464. Reassignment of cases upon motion by a party.”.

(c) **MONITORING.**—The Federal Judicial Center shall monitor the use of the right to bring a motion to reassign a case under section 464 of title 28, United States Code, as added by subsection (a) of this section, and shall report annually to the Congress its findings on the basis of such monitoring.

(d) **SUNSET.**—Effective 5 years after the date of the enactment of this Act, section 464 of title 28, United States Code, and the item relating to that section in the table of contents for chapter 21 of such title, are repealed, except that such repeal shall not affect civil cases reassigned under such section 464 before the date of repeal.

SEC. 7. RANDOM ASSIGNMENT OF HABEAS CORPUS CASES.

Section 2241 of title 28, United States Code, is amended by adding at the end the following:

“(e) Applications for writs of habeas corpus received in or transferred to a district court shall be randomly assigned to the judges of that court.”.

SEC. 8. AUTHORITY OF PRESIDING JUDGE TO ALLOW MEDIA COVERAGE OF APPELLATE COURT PROCEEDINGS.

(a) **AUTHORITY OF APPELLATE COURTS.**—Notwithstanding any other provision of law, the presiding judge of an appellate court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(b) **AUTHORITY OF DISTRICT COURTS.**—Notwithstanding any other provision of law, any presiding judge of a district court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(c) **ADVISORY GUIDELINES.**—The Judicial Conference of the United States is authorized to promulgate advisory guidelines to which a presiding judge, in his or her discretion, may refer in making decisions with respect to the management and administration of photographing, recording, broadcasting, or televising described in subsections (a) and (b).

(d) **DEFINITIONS.**—As used in this section:

(1) **PRESIDING JUDGE.**—The term “presiding judge” means the judge presiding over the court proceeding concerned. In proceedings in which more than one judge participates, the presiding judge shall be the senior active judge so participating or, in the case of a circuit court of appeals, the senior active circuit judge so participating, except that—

(A) in en banc sittings of any United States circuit court of appeals, the presiding judge shall be the chief judge of the circuit whenever the chief judge participates; and

(B) in en banc sittings of the Supreme Court of the United States, the presiding judge shall be the Chief Justice whenever the Chief Justice participates.

(2) **APPELLATE COURT OF THE UNITED STATES.**—The term “appellate court of the United States” means any United States circuit court of appeals and the Supreme Court of the United States.

(e) **SUNSET.**—The authority under subsection (b) shall terminate on the date that is 3 years after the date of the enactment of this Act.

SEC. 9. ADJUSTMENT OF SALARIES OF FEDERAL JUDGES.

(a) **FUTURE ADJUSTMENTS.**—Section 461(a) of title 28, United States Code, is amended to read as follows:

“(a) Effective as of the first day of the applicable pay period beginning on or after the date on which an adjustment takes effect under section 5303 of title 5 in the rates of basic pay under the General Schedule (or under any other provision of law in lieu thereof), each salary rate which is subject to an adjustment under this section shall be adjusted by an amount equal to the percentage of the adjustment under such section 5303, rounded to the nearest multiple of \$100 (or if midway between multiples of \$100, to the next higher multiple of \$100).”.

(b) **REPEAL.**—Section 140 of Public Law 97–92 (95 Stat. 1200; 28 U.S.C. 461 note) is repealed.

(c) **PAY FOR ADMINISTRATIVE LAW JUDGES.**—

(1) **IN GENERAL.**—Section 5372 of title 5, United States Code, is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following:

“(c)(1) Any reference in this section to the rate of basic pay for level IV of the Executive Schedule shall be considered a reference to the greater of—

“(A) the rate of basic pay then currently in effect under section 5315; or

“(B) the rate of basic pay in effect under section 5315 on the effective date of this subsection, as adjusted under paragraph (2).

“(2) Each time that rates of pay for the General Schedule are adjusted, whether under section 5303 or another provision of law in lieu thereof, the rate under paragraph (1)(B) (as last adjusted under this paragraph) shall be adjusted by the same

percentage, and as of the same date, as are the rates of pay for the General Schedule.”.

(2) CONFORMING AMENDMENT.—Subsection (a) of section 5372 of title 5, United States Code, is amended to read as follows:

“(a) For the purposes of this section—

“(1) the term ‘administrative law judge’ means an administrative law judge appointed under section 3105; and

“(2) the term ‘the rate of basic pay for level IV of the Executive Schedule’ is used as described in subsection (c).”.

SEC. 10. MULTIPARTY, MULTIFORUM JURISDICTION OF DISTRICT COURTS.

(a) BASIS OF JURISDICTION.—

(1) IN GENERAL.—Chapter 85 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1370. Multiparty, multiform jurisdiction

“(a) IN GENERAL.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed \$50,000 per person, exclusive of interest and costs, if—

“(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

“(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

“(3) substantial parts of the accident took place in different States.

“(b) SPECIAL RULES AND DEFINITIONS.—For purposes of this section—

“(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

“(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;

“(3) the term ‘injury’ means—

“(A) physical harm to a natural person; and

“(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

“(4) the term ‘accident’ means a sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons; and

“(5) the term ‘State’ includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

“(c) INTERVENING PARTIES.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

“(d) NOTIFICATION OF JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.”.

(2) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following new item:

“1370. Multiparty, multiform jurisdiction.”.

(b) VENUE.—Section 1391 of title 28, United States Code, is amended by adding at the end the following:

“(g) A civil action in which jurisdiction of the district court is based upon section 1370 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.”.

(c) MULTIDISTRICT LITIGATION.—Section 1407 of title 28, United States Code, is amended by adding at the end the following:

“(i)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1370 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so

transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

“(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

“(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

“(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

“(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.”.

(d) REMOVAL OF ACTIONS.—Section 1441 of title 28, United States Code, is amended—

(1) in subsection (e) by striking “(e) The court to which such civil action is removed” and inserting “(f) The court to which a civil action is removed under this section”; and

(2) by inserting after subsection (d) the following new subsection:

“(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

“(A) the action could have been brought in a United States district court under section 1370 of this title, or

“(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1370 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1370 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

“(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(i) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

“(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

“(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

“(5) An action removed under this subsection shall be deemed to be an action under section 1370 and an action in which jurisdiction is based on section 1368 of

this title for purposes of this section and sections 1407, 1660, 1697, and 1785 of this title.

“(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.”.

(e) CHOICE OF LAW.—

(1) DETERMINATION BY THE COURT.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1660. Choice of law in multiparty, multiforum actions

“(a) FACTORS.—In an action which is or could have been brought, in whole or in part, under section 1370 of this title, the district court in which the action is brought or to which it is removed shall determine the source of the applicable substantive law, except that if an action is transferred to another district court, the transferee court shall determine the source of the applicable substantive law. In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include—

“(1) the place of the injury;

“(2) the place of the conduct causing the injury;

“(3) the principal places of business or domiciles of the parties;

“(4) the danger of creating unnecessary incentives for forum shopping; and

“(5) whether the choice of law would be reasonably foreseeable to the parties.

The factors set forth in paragraphs (1) through (5) shall be evaluated according to their relative importance with respect to the particular action. If good cause is shown in exceptional cases, including constitutional reasons, the court may allow the law of more than one State to be applied with respect to a party, claim, or other element of an action.

“(b) ORDER DESIGNATING CHOICE OF LAW.—The district court making the determination under subsection (a) shall enter an order designating the single jurisdiction whose substantive law is to be applied in all other actions under section 1370 arising from the same accident as that giving rise to the action in which the determination is made. The substantive law of the designated jurisdiction shall be applied to the parties and claims in all such actions before the court, and to all other elements of each action, except where Federal law applies or the order specifically provides for the application of the law of another jurisdiction with respect to a party, claim, or other element of an action.

“(c) CONTINUATION OF CHOICE OF LAW AFTER REMAND.—In an action remanded to another district court or a State court under section 1407(i)(1) or 1441(e)(2) of this title, the district court’s choice of law under subsection (b) shall continue to apply.”.

(2) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 111 of title 28, United States Code, is amended by adding at the end the following new item:

“1660. Choice of law in multiparty, multiforum actions.”.

(f) SERVICE OF PROCESS.—

(1) OTHER THAN SUBPOENAS.—(A) Chapter 113 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1697. Service in multiparty, multiforum actions

“When the jurisdiction of the district court is based in whole or in part upon section 1370 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.”.

(B) The table of sections at the beginning of chapter 113 of title 28, United States Code, is amended by adding at the end the following new item:

“1697. Service in multiparty, multiforum actions.”.

(2) SERVICE OF SUBPOENAS.—(A) Chapter 117 of title 28, United States Code, is amended by adding at the end the following new section:

“§ 1785. Subpoenas in multiparty, multiforum actions

“When the jurisdiction of the district court is based in whole or in part upon section 1370 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.”.

(B) The table of sections at the beginning of chapter 117 of title 28, United States Code, is amended by adding at the end the following new item:

“1785. Subpoenas in multiparty, multiforum actions.”.

(g) **EFFECTIVE DATE.**—The amendments made by this section shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of this Act.

SEC. 11. APPEALS OF MERIT SYSTEMS PROTECTION BOARD.

(a) **APPEALS.**—Section 7703 of title 5, United States Code, is amended—

(1) in subsection (b)(1), by striking “30” and inserting “60”; and

(2) in the first sentence of subsection (d), by inserting after “filing” the following: “, within 60 days after the date the Director received notice of the final order or decision of the Board,”.

(b) **EFFECTIVE DATE.**—The amendments made by subsection (a) take effect on the date of the enactment of this Act and apply to any administrative or judicial proceeding pending on that date or commenced on or after that date.

PURPOSE AND SUMMARY

The “Judicial Reform Act of 1997,” H.R. 1252, constitutes a restrained legislative response to specific examples of unfair practices and procedures, many of which violate the separation-of-powers doctrine, that exist in the federal court system.

BACKGROUND AND NEED FOR LEGISLATION

Since the late 1950’s, a growing legion of critics has become increasingly vocal about the prevalence of “judicial activism” on the federal bench. As defined by these critics, an “activist” judge is one who reads his or her personal convictions of a social or political nature into decisions that are otherwise not supported by case law precedent or the Constitution. In effect, these judges legislate by judicial fiat when their professional and constitutional mission is limited to interpreting the law. Worse still, an activist federal judge appointed for life cannot be recalled by the voters as legislators or many state judges can.

Defenders of jurists so accused assert that reasonable men and women can and do disagree on the meaning of statutes, ordinances, regulations, and the Constitution. It is not fair to discipline these judges, they argue, for simply issuing decisions, oftentimes on controversial matters, that invariably result in one side winning and the other side losing. Defenders of the status quo also believe that any effort to compromise the independence of the federal judiciary will cause far greater harm than any assortment of “activist” judges ever could.

None of the witnesses at the Subcommittee hearings articulated a new standard of review by which the House of Representatives could impeach sitting federal judges for indulging in extreme “activism” or other forms of misconduct. By favorably reporting H.R. 1252, the Committee does not intend to interfere with the adjudication of specific disputes or to prevent the federal courts from interpreting the constitutionality of state or federal laws. Rather, the Committee has identified a limited number of practices in the federal courts that, when invoked, constitute an abuse of power that compromises the rights of voters, taxpayers, and litigants, while derogating the authority of Congress to make public policy. The Committee therefore believes that H.R. 1252 will inhibit activism

to the extent that it relates to the judicial abuse which was the subject of Subcommittee and Committee consideration.

HEARINGS

The Committee's Subcommittee on Courts and Intellectual Property held one day of legislative hearings on H.R. 1252 on May 14, 1997, and an additional day of oversight hearings on the related issue of judicial misconduct on May 15, 1997. Over the two-day period, testimony was received from eight Members of Congress and 14 other witnesses representing 12 organizations.

COMMITTEE CONSIDERATION

On June 10, 1997, the Subcommittee on Courts and Intellectual Property met in open session and ordered favorably reported the bill H.R. 1252, as amended, by a vote of eight to seven, a quorum being present. On March 10, 1998, and March 24, 1998, the Committee met in open session and ordered reported favorably the bill H.R. 1252 with amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

The following rollcalls were taken during Committee deliberations on H.R. 1252 (March 10 and March 24, 1998).

1. An amendment by Mr. Delahunt to the amendments considered en bloc offered by Mr. Canady to limit court-imposed taxes to any order or settlement which "expressly directs" (rather than "requires") any state, or political subdivision of a state, to impose, increase, levy, or assess a tax. The Delahunt amendment was defeated by a rollcall vote of 10-12.

AYES	NAYS
Mr. Conyers	Mr. Gekas
Mr. Frank	Mr. Smith of Texas
Mr. Berman	Mr. Canady
Mr. Nadler	Mr. Goodlatte
Mr. Scott	Mr. Bryant of Tennessee
Mr. Watt	Mr. Chabot
Mr. Meehan	Mr. Jenkins
Mr. Delahunt	Mr. Hutchinson
Mr. Wexler	Mr. Pease
Mr. Rothman	Mr. Cannon
	Mr. Rogan
	Mr. Hyde

2. An amendment offered by Mr. Delahunt to the amendments offered en bloc by Mr. Canady to limit the standing provisions governing the ability of persons or entities wishing to intervene in a court-imposed tax proceeding to U.S. citizens, legal aliens admitted for permanent residence, and U.S. corporations in which more than 50% of the capital stock is owned by U.S. citizens, legal aliens admitted for permanent residence, or U.S. corporations. The Delahunt amendment was defeated by a rollcall vote of 10-12.

AYES	NAYS
Mr. Conyers	Mr. Gekas

Mr. Frank	Mr. Smith of Texas
Mr. Berman	Mr. Canady
Mr. Nadler	Mr. Goodlatte
Mr. Scott	Mr. Bryant of Tennessee
Mr. Watt	Mr. Chabot
Mr. Meehan	Mr. Jenkins
Mr. Delahunt	Mr. Hutchinson
Mr. Wexler	Mr. Pease
Mr. Rothman	Mr. Cannon
	Mr. Rogan
	Mr. Hyde

3. An amendment offered by Mr. Berman to H.R. 1252 to strike the three-judge panel section of the bill. The amendment was defeated by a rollcall vote of 10–14.

AYES	NAYS
Mr. Conyers	Mr. Gekas
Mr. Frank	Mr. Smith of Texas
Mr. Berman	Mr. Canady
Mr. Nadler	Mr. Goodlatte
Mr. Scott	Mr. Bryant of Tennessee
Mr. Watt	Mr. Chabot
Mr. Meehan	Mr. Barr
Mr. Delahunt	Mr. Jenkins
Mr. Wexler	Mr. Hutchinson
Mr. Rothman	Mr. Pease
	Mr. Cannon
	Mr. Rogan
	Mr. Graham
	Mr. Hyde

4. An amendment offered by Mr. Delahunt to H.R. 1252 to authorize a Government Accounting Office (GAO) report on the judicial confirmation process. The amendment was defeated by a rollcall vote of 10–14.

AYES	NAYS
Mr. Conyers	Mr. Gekas
Mr. Frank	Mr. Smith of Texas
Mr. Nadler	Mr. Canady
Mr. Scott	Mr. Goodlatte
Mr. Watt	Mr. Bryant of Tennessee
Ms. Jackson Lee	Mr. Chabot
Mr. Meehan	Mr. Barr
Mr. Delahunt	Mr. Jenkins
Mr. Wexler	Mr. Hutchinson
Mr. Rothman	Mr. Pease
	Mr. Cannon
	Mr. Rogan
	Mr. Graham
	Mr. Hyde

5. An amendment offered by Mr. Rogan and Mr. Frank to H.R. 1252 to strike the reassignment-of-case-as-of-right section of the bill. The amendment was defeated by a rollcall vote of 11–13.

AYES

Mr. Rogan
 Mr. Graham
 Mr. Conyers
 Mr. Frank
 Mr. Nadler
 Mr. Scott
 Ms. Lofgren
 Ms. Waters
 Mr. Delahunt
 Mr. Wexler
 Mr. Rothman

NAYS

Mr. Gekas
 Mr. Smith of Texas
 Mr. Gallegly
 Mr. Canady
 Mr. Goodlatte
 Mr. Bryant of Tennessee
 Mr. Chabot
 Mr. Barr
 Mr. Jenkins
 Mr. Hutchinson
 Mr. Pease
 Mr. Cannon
 Mr. Hyde

6. An amendment offered by Mr. Nadler to the amendment offered by Mr. Chabot to permit televised proceedings in U.S. district courts provided that any witness (other than a party) in a trial proceeding may have his or her voice disguised or obscured upon request. The amendment was defeated by a rollcall vote of 9–9.

AYES

Mr. Gekas
 Mr. Coble
 Mr. Smith of Texas
 Mr. Bryant of Tennessee
 Mr. Chabot
 Mr. Jenkins
 Mr. Nadler
 Mr. Scott
 Mr. Delahunt

NAYS

Mr. Gallegly
 Mr. Canady
 Mr. Buyer
 Mr. Hutchinson
 Mr. Pease
 Mr. Rogan
 Mr. Frank
 Mr. Watt
 Mr. Rothman

7. An amendment offered by Mr. Chabot to H.R. 1252 to permit televised proceedings, in the discretion of the presiding judge, in any U.S. district court as part of a three-year pilot program. The amendment was agreed to by a rollcall vote of 12–6.

AYES

Mr. Gekas
 Mr. Coble
 Mr. Smith of Texas
 Mr. Gallegly
 Mr. Bryant of Tennessee
 Mr. Chabot
 Mr. Jenkins
 Mr. Pease
 Mr. Rogan
 Mr. Nadler
 Mr. Delahunt
 Mr. Rothman

NAYS

Mr. Canady
 Mr. Buyer
 Mr. Hutchinson
 Mr. Frank
 Mr. Scott
 Mr. Watt

¹Ms. Jackson Lee, who was absent on official business, indicated that had she been present she would have voted “aye” on the Chabot amendment to H.R. 1252.

8. An amendment offered by Mr. Watt to H.R. 1252 to strike the pilot program feature of the reassignment of case as of right section of the bill. The amendment was defeated by a rollcall vote of 6–12.

AYES

Mr. Buyer
Mr. Frank
Mr. Nadler
Mr. Scott
Mr. Watt
Mr. Delahunt

NAYS

Mr. Gekas
Mr. Coble
Mr. Smith of Texas
Mr. Gallegly
Mr. Canady
Mr. Bryant of Tennessee
Mr. Chabot
Mr. Jenkins
Mr. Hutchinson
Mr. Rogan
Ms. Jackson Lee
Mr. Rothman

9. An amendment offered by Ms. Jackson Lee to H.R. 1252 to limit the ability of parties to any civil action to negotiate a private settlement and the authority of any federal judge to seal sensitive information after final judgment pursuant to Federal Rule 26(c). The amendment was defeated by a rollcall vote of 6–16.

AYES

Mr. Conyers
Mr. Frank
Mr. Nadler
Mr. Scott
Ms. Jackson Lee
Mr. Meehan

NAYS

Mr. Gekas
Mr. Coble
Mr. Gallegly
Mr. Canady
Mr. Buyer
Mr. Bryant of Tennessee
Mr. Chabot
Mr. Barr
Mr. Jenkins
Mr. Hutchinson
Mr. Rogan
Mr. Graham
Mr. Watt
Mr. Delahunt
Mr. Rothman
Mr. Hyde

10. An amendment offered by Mr. Conyers to H.R. 1252 to enhance the ability of any federal court to acquire jurisdiction over a defendant located outside the United States in any civil action based on harm sustained in the United States. The amendment was defeated by a rollcall vote of 8–11.

AYES

Mr. Chabot
Mr. Conyers
Mr. Frank
Mr. Scott
Mr. Watt
Ms. Jackson Lee
Mr. Meehan
Mr. Delahunt

NAYS

Mr. Gekas
Mr. Gallegly
Mr. Canady
Mr. Buyer
Mr. Barr
Mr. Jenkins
Mr. Rogan
Mr. Rothman
Mr. Graham
Mr. Rothman
Mr. Hyde

11. Subcommittee amendment in the nature of a substitute to H.R. 1252 as amended by the Committee governing the "Judicial Reform Act of 1997." The amendment in the nature of a substitute was agreed to by a rollcall vote of 12-8.

AYES	NAYS
Mr. Gekas	Mr. Conyers
Mr. Gallegly	Mr. Frank
Mr. Canady	Mr. Scott
Mr. Buyer	Mr. Watt
Mr. Bryant of Tennessee	Ms. Jackson Lee
Mr. Chabot	Mr. Delahunt
Mr. Barr	Mr. Wexler
Mr. Jenkins	Mr. Rothman
Mr. Hutchinson	
Mr. Rogan	
Mr. Graham	
Mr. Hyde	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1252, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 1, 1998.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1252, the Judicial Reform Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JUNE E. O'NEILL, *Director*.

Enclosure.

H.R. 1252—Judicial Reform Act of 1997

Summary: H.R. 1252 would make numerous procedural and administrative changes to the federal court system. In addition, the bill would change the procedure for granting cost-of-living adjustments (COLAs) in pay for certain judges. Currently, such increases require Congressional action. Under H.R. 1252, the COLA's for Article III justices and judges would not require legislative approval.

CBO estimates that enacting H.R. 1252 would increase mandatory spending by \$121 million over the 1999–2003 period. Because H.R. 1252 would effect direct spending, pay-as-you-go procedures would apply. CBO estimates that implementing H.R. 1252 could affect discretionary spending, but we cannot predict such effects because they would depend on future Congressional action with regard to pay raises.

H.R. 1252 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would have no significant impact on the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: As shown in the following table, CBO estimates that implementing H.R. 1252 would increase direct spending by \$7 million in 1999 and \$121 million over the 1999–2003 period to cover annual COLA's for Article III justices and judges. The costs of this legislation fall within budget function 750 (administration of justice).

[By fiscal year, in millions of dollars]

	1998	1999	2000	2001	2002	2003
CHANGES IN DIRECT SPENDING						
Cost of living adjustments for judges:						
Estimated budget authority	0	7	15	25	33	41
Estimated outlays	0	7	15	25	33	41

Basis of estimate

For purposes of this estimate, CBO assumes that H.R. 1252 would be enacted by October 1, 1998.

Direct spending

Section 9 would repeal a provision that bars annual COLAs for Article III justices and judges except as specifically authorized by the Congress. As a result, these judges would receive automatic annual cost-of-living adjustments. CBO estimates that the cost of these adjustments would be \$7 million in 1999 and \$121 million over the next five years. These payments would be made from the mandatory spending accounts that fund salaries for these judges. The estimate assumes pay raises of between 3 percent and 4 percent per year applied to salaries totaling about \$231 million in 1998.

Various other provisions of H.R. 2294 could affect direct spending by increasing the workload for judges, but CBO expects that any such effects would not be significant.

Spending subject to appropriation

Section 9 also would enable agencies to provide Administration Law Judges (ALJs) with annual COLAs by linking their COLAs to the General Schedule instead of to the Executive Schedule. Currently, ALJs only receive COLAs from appropriated funds when the Congress approves such increases for the Executive Schedule. In fiscal year 1998, the Congress approved COLAs for the Executive Schedule (and a total of about \$3 million was appropriated for COLAs for ALJs). For the previous four years, however, ALJs did not receive COLAs.

CBO estimates that enacting H.R. 1252 could increase discretionary spending, but the amount of such increase would depend on future actions of the Congress regarding COLAs for the Executive Schedule. If, for one year or several years in the future, COLAs are not granted for Executive Schedule positions, but are provided for those on the General Schedule, H.R. 1252 would result in higher salary costs for ALJs. For each year in which there is a raise for one schedule and not for the other, we estimate a difference of \$3 million to \$5 million in spending for that year and subsequent years, assuming appropriation of the necessary amounts.

Other sections of H.R. 1252 could affect spending subject to appropriation, but CBO expects that their budgetary effects would not be significant.

Pay-as-you-go-considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays and governmental receipts that are subject to pay-as-you-go procedures are shown in the following table. The bill would affect direct spending by requiring COLAs for certain judges. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

[By fiscal year, in millions of dollars]

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Changes in outlays	0	7	15	25	33	41	50	59	68	77	87
Changes in receipts	Not applicable										

Intergovernmental and private sector impact: H.R. 1252 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would have no significant impact on the budgets of state, local, or tribal governments.

Estimate prepared by: Susanne S. Mehlman.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article III, section 1, of the Constitution.

SECTION-BY-SECTION ANALYSIS

SECTION ONE: SHORT TITLE

Section One sets forth the short title of the bill, the “Judicial Reform Act of 1997.”

SECTION TWO: THREE-JUDGE COURT FOR ANTICIPATORY RELIEF

Section Two requires that a three-judge panel at the U.S. District court level shall hear any constitutional challenge to the validity of a state law adopted by referendum. Procedurally, the judge receiving a request for such a panel contacts the chief judge of the relevant circuit, who then assigns two other judges (one of whom must be a circuit judge) to hear the challenge. 28 U.S.C. § 2284(b)(1). The bill explicitly requires that decisions be rendered expeditiously, and any appeal of a ruling by the panel is made directly to the U.S. Supreme Court.

The late Representative Bono first introduced the provisions contained in Section Two as H.R. 1170 in the 104th Congress. The Subcommittee and Committee favorably reported the bill, which the House passed on September 28, 1995. Representative Bono was responding to the actions of a single District court judge who issued injunctions against the enforcement of California state laws enacted pursuant to two referenda (Propositions 187 and 209) approved by statewide votes.

Congress initially established three-judge panels following the decision of *Ex Parte Young*, 209 U.S. 123 (1908), in which the Supreme Court first ruled that federal courts could enjoin state officials from enforcing unconstitutional state statutes. During the mid-1970’s, however, Congress began to limit their statutory application when the federal judiciary complained of excessive use in many state and administrative cases. Nonetheless, Congress has historically and consistently approved the use of three-judge panels for those disputes pertaining to voting rights and procedures. Like H.R. 1170 before it, H.R. 1252 is specifically limited to state laws enacted pursuant to a statewide vote, which appropriately dovetails with those cases involving apportionment and the Voting Rights Act to which three-judge panels currently apply.

At a time when many states are using referenda as a means to provide for the expression of collective legislative will, proponents of the late Representative Bono’s approach note that it is fundamentally unfair and does not accord due process to allow one judge to thwart that collective will.

SECTION THREE: INTERLOCUTORY APPEALS OF COURT ORDERS
RELATING TO CLASS ACTIONS

Section Three permits an immediate interlocutory (interim) appeal of a class-action certification. In other words, a party to an action in which a U.S. District judge certifies the composition of a

class of litigants to that same action (pursuant to criteria established in Rule 23 of the Federal Rules of Civil Procedure) may appeal the judge's decision within 10 days to the applicable court of appeals. Proceedings at the District level are not otherwise halted unless the District judge or the court of appeals so orders.

Representative Canady introduced the provisions contained in this section in an effort to dissuade attorneys from bringing unwarranted class-action suits. It provides protection to defendants who may be forced to expend unnecessary resources at trial, only to discover that a class action was improperly certified at the outset of litigation.

In addition, the language set forth in Section Three has been approved by the Civil Rules Subcommittee of the Rules of Practice and Procedure Committee of the Judicial Conference.

SECTION FOUR: PROCEEDINGS ON COMPLAINTS AGAINST JUDICIAL MISCONDUCT

Section Four as originally drafted mandates that any complaint against judicial misconduct be referred to a judicial circuit other than the circuit in which the judge who is the subject of the complaint sits, pursuant to rules developed by the Judicial Conference. Representative Bryant of Tennessee developed this proposal to assure objectivity in Judicial Discipline Proceedings.

Under the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," 28 U.S.C. § 372(c), a citizen may bring a formal complaint against a sitting judge by providing the clerk of the relevant circuit court of appeals with a written summary of the facts concerning that judge's alleged misconduct. The clerk then transmits the complaint to the chief judge of the circuit (or the next most senior circuit judge if the chief judge is the subject of the complaint). The chief judge reviews the complaint, and may dismiss it if he or she finds it to be incomplete, frivolous, or directly related to the merits of a decision or procedural ruling.

On the other hand, if the chief judge determines that the complaint is meritorious, he or she then appoints (and joins) an equal number of circuit and district judges of the circuit to investigate the complaint further. This group then issues a report to the judicial council of the circuit, which may conduct additional investigations and " * * * take such action as is appropriate to assure the effective and expeditious administration of the business of the courts. * * *" 28 U.S.C. § 372(c)(6)(B). Such "action" runs the spectrum of severity from reprimand to impeachment (if recommended by the Judicial Conference based on the judicial council's report).

During the Subcommittee markup, Representative Pease offered an amendment to Section Four of the Coble substitute which passed by voice vote. Developed in concert with Representative Bryant, the Pease amendment would limit out-of-circuit referrals to those cases in which a complaint is not dismissed as being incomplete, frivolous, or directly related to the merits of a decision or procedural ruling. The amendment represents an effort to respond to those critics of Section Four who assert that it will generate unnecessary and trivial administrative expenses for out-of-circuit judges. In other words, only "substantive" complaints will be referred out of circuit.

The purpose of Section Four is to maximize the level of objectivity that a chief circuit judge and other judges must bring to bear when investigating a fellow jurist for misconduct.

SECTION FIVE: LIMITATION ON COURT-IMPOSED TAXES

Section Five as introduced inhibits the ability of federal courts to impose tax settlements on states or municipalities which are parties to litigation. More specifically, Section Five forbids any U.S. District court from entering an order or approving a settlement that requires a state or one of its subdivisions to impose, increase, levy or assess any tax for the purpose of enforcing any federal or state common law, statutory, or constitutional right or law.

As amended by the Committee, Section Five contains a narrow, multi-part exception to this general prohibition of judicially-imposed taxation. Specifically, a court may not order a state or political subdivision to impose a tax unless the court first determines by clear and convincing evidence that: (1) there are no other means available to remedy the relevant deprivation of rights or laws, and the tax is both narrowly tailored and directly related to the specific constitutional deprivation or harm necessitating redress; (2) the tax will not exacerbate the deprivation intended to be remedied; (3) the tax will not result in a revenue loss for the affected subdivision; (4) the tax will not result in a depreciation of property values for the affected taxpayers; (5) plans submitted by state or local authorities will not effectively redress the relevant deprivation; and (6) the interests of state and local authorities in managing their own affairs is not usurped by the proposed tax, consistent with the Constitution.

The Coble substitute as adopted by the Subcommittee, however, struck another criterion from this multi-part exception; namely, that the tax will not conflict with the applicable laws governing maximum tax rates as determined by the appropriate state or political subdivision. During the May 14 Subcommittee hearing, it was noted that the Supreme Court has ruled that a federal court possesses the authority to order a local government to levy taxes in excess of the limit established by state statute where there is reason set forth in the Constitution for not observing the statutory limitation. *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990). The substitute incorporated this criticism by striking Subsection (a)(1)(E) and by appropriately amending Subsection (a)(1)(A)(i). The Committee did not amend this change.

In addition, Representative Delahunt offered an amendment to Section Five of the substitute adopted by the Subcommittee. The Delahunt amendment struck the third and fourth criteria of the multi-part exception, *supra*, while also revising the nature of the judicial action proscribed. Pursuant to the bill as drafted and the Coble Subcommittee substitute unamended, no district court may enter an order or approve a settlement that “requires” a state or political subdivision to impose taxes. The Delahunt language substitutes “expressly directs” for “requires.” The Committee believes that the term “expressly directs” could allow a judge to circumvent the limitations of Section Five by simply ordering a state or municipality to engage in specific construction projects, for example, without expressly directing how they should be financed. The prac-

tical effect would be to require the state or municipality to still impose a tax.

Consequently, the en bloc amendments adopted by the Committee contain a provision which substitutes the word “requires” for the term “expressly directs.” The issue is clarified further, as “requires” is defined as “any order or settlement which *expressly directs* any [s]tate * * * or political subdivision to impose * * * a tax”; and any order or settlement which will “*necessarily require*” a tax. (Italics added.)

At the same time, under Section 5(a)(2) of the bill, any finding by a court that this exception applies in a given case is subject to immediate interlocutory (interim) de novo review by the appropriate court of appeals. The purpose of this provision is that any decision which is adverse to the interests of taxpayers may be quickly reversed. Subsection (a)(3)(A) also permits any aggrieved corporation, unincorporated association, political entity, or person residing in the affected subdivision to intervene in any of the applicable legal proceedings by presenting evidence (written or oral) before the District court, and by appealing any finding that will impose a tax.

The en bloc amendments adopted by the Committee also contain a change to this portion of Section Five in response to comments made by the Department of Justice. Since the purpose of the review provision is to enable taxpayers to appeal an unfavorable ruling on the issue, the amendment makes clear that only a finding that the conditions giving rise to a court-imposed tax have been satisfied is subject to interlocutory de novo review.

In addition, Subsection (b) mandates that any District court decision to impose a tax automatically expires one year after the date of imposition, or earlier, if the court determines that the deprivation addressed “* * * has been cured to the extent practicable.” Further, and for the most part, state or local tax revenues may not be used to pay for the costs of administering a District court order to levy a tax. Section 5(d)(1).

The standing provision of Section Five was criticized during the Subcommittee hearing and subsequent markup. As originally drafted, the bill permitted certain classes of persons and entities to “intervene” in any proceeding concerning the imposition of a tax. The language as introduced and as contained in the Subcommittee substitute was too expansive since it applied to “any aggrieved” corporation, unincorporated association, or person residing or “present” within the affected state or political subdivision. In another sense, the language was also narrow, as there is no mention of aggrieved parties who reside outside a state or political subdivision but who own taxable property within the affected area.

Accordingly, the en bloc amendment adopted by the Committee applies the intervention right to “any person or entity whose tax liability would be directly affected by the imposition of a tax.” The term “directly” is used to make clear that there would be no right to intervene simply because someone can identify a possible chain of events that might ultimately affect his or her tax liability.

This revision also specifies, however, that the court may deny intervention if it finds that the interest of a person or entity is adequately represented by existing parties to the dispute.

Two other changes to Section Five were adopted by the Committee. First, the en bloc amendments specify that Section Five does not validate, legalize, or approve any judicial tax. The purpose of this provision is to ensure that the bill does not create a new statutory right of judicial taxation beyond or in addition to what is allowed under the U.S. Constitution. The second change, set forth in an amendment offered by Mr. Bryant of Tennessee, applies Section Five to any action pending on, or commenced on or after, the date of enactment. The one-year expiration limit, *supra*, specifically applies to any court order or settlement in effect on the date of enactment.

Representative Manzullo and Senator Grassley introduced measures in previous Congresses to address the problem of court-imposed taxes; each has been a long-time critic of those federal judges who enforce their own decisions by appropriating the authority of legislators when they impose taxes on local communities. Perhaps the most conspicuous example of this practice involves the Kansas City public school system. Since 1985, a U.S. District judge for the Eastern District of Missouri has supervised the spending of more than one-billion dollars in excess of the normal school budget for that municipality because, based on his findings, certain minority schools in the area were insufficiently funded during the past. As a consequence, this judge has not only ordered the capital refurbishment of these schools, including such construction projects as an Olympic-size swimming pool and a model of the UN General Assembly Hall, he has also mandated that local property taxes be raised to pay for the additions. Roughly 1,200 other school districts are federally-supervised nationwide, an indication that this practice is widespread.

Proponents of the changes set forth in Section Five of the bill concede that courts are empowered to address due process concerns. But these same proponents argue that courts are neither equipped nor empowered to devise such remedies as have been invoked in the Kansas City example. The messy but democratic decisions governing municipal, state, and federal budgets as well as taxation must continue under our Constitution to be made by legislators who are answerable to the people whose interests they represent.

SECTION SIX: REASSIGNMENT OF CASE AS OF RIGHT

Section Six mirrors the civil procedure of many states by enabling all parties on one side of a civil action to request reassignment of the case (one time) as a matter of right. Pursuant to Subsection (b), a motion to reassign must be made not later than 20 days after the notice of original assignment of the case is given. The motion must be granted under Subparagraphs (A) and (B) if: it is made prior to trial or hearing and before the judicial officer to whom it is presented has ruled on a substantial issue in the case; and it is presented by consent of the parties on all sides.

Subsection (b)(2) addresses those instances in which a motion may be made at later points during litigation. First, any party joined in a civil action after the initial filing may request reassignment within 20 days of service of the complaint if the other parties on the same side agree. Similarly, any party served with a supple-

mental or amended or third-party complaint may offer a motion of reassignment under the same conditions. Finally, a judge who rules on a substantial issue before a party who has not been found in default enters an appearance in the case may not deny that party the right to otherwise request a reassignment.

Subparagraph (3) further specifies that no party or parties on a side may bring a motion to reassign if another party or parties on that same side have previously requested reassignment. The last relevant provision of the bill also requires the side offering the motion to pay for the reasonable costs incurred by all sides in traveling to the new location for all matters associated with the case.

The Coble substitute as adopted by the Subcommittee limits the application of this change to pilot or demonstration programs that will sunset after five years from the date of enactment. The projects will be based in the 21 largest federal judicial districts. This revision was included in the substitute to respond to the criticism that Section Six may encourage forum-shopping and attendant delay; if so, the pilot projects will sunset after five years allowing evaluation of its effects.

Finally, a minor provision set forth in the en bloc amendments adopted by the Committee states that Section Six has no application to proceedings before three-judge panels. Concern over this matter was expressed at both the Subcommittee hearing and markup, as the bill as introduced and the Subcommittee substitute as reported would seem to defeat the purpose of Section Two of H.R. 1252.

Representative Canady is the lead advocate of this provision of H.R. 1252. Section Six is intended to allow litigants on either side of a case to avoid forum-shopping by one side, or to avoid a judge who is known to engage in improper courtroom behavior or who regularly exceeds judicial authority.

This provision is not meant to replace appellate review of district court decisions; rather, it is designed to complement such review by encouraging judges to administer their oaths to uphold the Constitution. Many judges face constant reversals on appeal, yet they may still force a litigant to bear both extraordinary costs and the burden of overcoming standards of review on appeal.

Section Six of H.R. 1252 simply provides a litigant some freedom in ensuring that due process will apply to his or her case before that litigant must also bear the costs associated at trial. It will also increase efficiency and apply some internal pressure on the bench and bar to adjudicate more fairly and without further legislative intervention.

SECTION SEVEN: RANDOM ASSIGNMENT OF HABEAS CORPUS CASES

Section Seven was part of the Coble Subcommittee substitute. This change was developed in response to the May 14 testimony of Charlotte Stout, who participated in the related oversight hearing on judicial misconduct, and comments made by Representative Delahunt. Ms. Stout's daughter was raped and murdered by a man who has sat on death row for 18 years as a result of filing numerous habeas petitions, all of which have been handled by the same judge. The change set forth in the substitute would prevent the chief judge of a circuit from handling all habeas cases by himself

or herself, or from delegating the responsibility on an exclusive basis to another judge.

SECTION EIGHT: CAMERAS IN THE COURTROOM

Section Eight was also added by the Coble Subcommittee substitute. It would allow a presiding judge, in his or her discretion, to permit the use of cameras during federal appellate proceedings. Representative Chabot has introduced a bill, H.R. 1280, that would grant this authority to a judge in any federal proceeding. This change mirrors state efforts to provide greater public access to the workings of the judiciary.

The Committee also adopted an amendment offered by Mr. Chabot which creates a three-year pilot program allowing televised proceedings in any U.S. District court proceeding, subject to the discretion of the presiding judge.

SECTION NINE: ADJUSTMENT OF SALARIES OF FEDERAL JUDGES

The substitute included parts of H.R. 875, Representative Hyde's bill that would grant federal judges an increase in base pay and automatic annual COLAs (cost-of-living adjustments) without requiring floor votes on these or other future changes affecting their compensation. Section Nine of the substitute incorporates all of H.R. 875 with the exception of a retroactive 9.6% pay adjustment.

The Committee also adopted an amendment offered by Representative Gekas to apply the compensation provisions of Section Nine to administrative law judges (ALJs).

SECTION 10: MULTIPARTY, MULTIFORUM JURISDICTION OF FEDERAL COURTS

Section 10 of the substitute added legislation which the House passed in the 101st and 102nd Congresses, and which the full Committee on the Judiciary passed in the 103rd Congress. This language is intended to improve the ability of federal courts to handle complex multidistrict litigation arising from a single accident, such as a plane crash.

Briefly, this reform would bestow original jurisdiction on federal district courts in civil actions involving minimal diversity jurisdiction among adverse parties based on a single accident where at least 25 persons have either died or sustained injuries exceeding \$50,000 per person. The district court in which such cases are consolidated would retain those cases for determination of liability and punitive damages, and would also determine the substantive law that would apply for findings of liability and damage.

These changes should reduce litigation costs as well as the likelihood of forum-shopping in airline accident cases. An effective one-time determination of punitive damages would eliminate multiple or inconsistent awards arising from multiforum litigation. The Judicial Conference and the Department of Justice have supported this legislation in the past.

SECTION 11: APPEALS OF MERIT SYSTEMS PROTECTION BOARD

Under present law, the Office of Personnel Management (OPM) may appeal final decisions of the Merit Systems Protection Board

(MSPB) and final arbitral awards dealing with certain adverse personnel actions; however, any petition for judicial review must be filed with the U.S. Court of Appeals for the Federal Circuit within 30 days from the time the petitioner receives notice of the final order of the MSPB.

The Office of Personnel Management argues that the 30-day limit is half the time allotted to other federal agencies and employees which appeal decisions of other administrative bodies. Section 11 of the substitute therefore changes the 30-day constraint imposed on OPM to 60 days.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, March 10, 1998.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice regarding the substitute to H.R. 1252, the "Judicial Reform Act of 1997," and other amendments to that bill. In our letter of June 10, 1997, to the Chairman of the Subcommittee on Courts and Intellectual Property (copy enclosed), we discussed the Department's position on the five major components of the earlier version of H.R. 1252, and recommended that the bill not be passed.

We note that the bill upon which we commented has been replaced and amended, and that it contains five new provisions upon which we did not comment. These new provisions include: section 7—random assignment of habeas corpus cases; section 8—authority of a presiding judge to allow media coverage of appellate court proceedings; section 9—adjustments of salaries of Federal judges; section 10—multiparty, multiforum jurisdiction of district courts for certain mass tort litigation; and section 11—appeals of the Merit Systems Protection Board decisions.

We address below both the amendments and the new provisions. Notwithstanding our agreement with some of the new sections, the amendment adopted during the Subcommittee markup of this legislation have not alleviated our original concerns. Therefore, for the reasons stated below and in our June 10, 1997 letter, we strongly oppose the enactment of H.R. 1252. To the extent that any of the new provisions contain provisions we support, we urge that they be addressed in separate legislation. We would be happy to work with the Congress on these provisions.

Section 2. Three-Judge Court for Certain Injunctions

This section would require review of certain cases by a three judge panel. It provides for a process that is cumbersome, confusing, and inefficient, which in all likelihood will result in fewer judges—not more—having the opportunity to rule on the constitutionality of voter initiatives and referenda. As amended, the section would expand the scope of application even more broadly to anticipatory relief, including declaratory judgment, and would apply to

challenges based upon “repugnance” to the Constitution, treaties, or laws of the United States. In addition, a three-judge panel would be required to grant anticipatory relief from State referenda where Federal statutes were intended to preempt the field and where a State has passed a referendum that is contrary to Federal law. Such a procedure may affect several preemptive Federal statutes, including environmental statutes designed to protect public health and welfare. For the reasons set out here and in our letters of June 10, 1997 and May 16, 1995, we continue to oppose this section.

Section 3. Interlocutory Appeals of Court Orders Relating to Class Actions

Last year, the Judicial Conference transmitted to the Supreme Court a proposal, largely identical to section 3, to add Rule 23(f), allowing discretionary interlocutory appeals within 10 days of a class certification order. The Supreme Court is due to act on it within a few weeks. Historically, the Department has supported the use of the judicial rulemaking process rather than legislation to alter the Federal Rules of Civil Procedure. We believe that the Rules Enabling Act process is working effectively to achieve the aim of this section. Therefore, the Department recommends that section 3 of this bill be deleted.

Section 4. Proceedings on Complaints Against Judicial Conduct

This section would require that complaints against judicial conduct be transferred to another circuit for action. While the amendments to this section appear to be a slight improvement in that they give to the original circuit the opportunity to handle frivolous complaints internally, we continue to believe that the section is unnecessary and reiterate our concurrence in the testimony offered by representatives of the Judicial Conference in opposition to this section of the bill.

Section 5. Limitation on Court-Imposed Taxes

Even as amended, this section continues to raise constitutional concerns because, inter alia, it purports to restrict the remedial powers of Article III Federal courts to enforce Federal constitutional rights. The provision broadening the section to apply to any tax, rather than any tax for the purpose of enforcing any “federal or state common law, statutory, or constitutional right or law,” does not eliminate the constitutional concerns previously expressed in our June 10, 1997 letter. Additionally, this section provides the right to intervene in any proceeding concerning the imposition of a tax to aggrieved corporations, unincorporated associations, or persons residing in the political subdivision in which the tax is imposed. Besides being cumbersome to the courts, such a procedure may cause substantial delay, and prejudice the ability of the original litigants to adjudicate their cases.

Section 6. Reassignment of Cases as of Right

This section would give parties in civil cases the right to seek reassignment of their cases to a different judge. By effectively enabling parties to exercise peremptory challenges against Article III judges, this section raises grave concerns. It threatens to under-

mine the independence of the Federal judiciary that Article III of the Constitution is intended to secure, as well as the public perception of Federal judges as impartial adjudicators. Although the amended version would apply only to the 21 largest districts and contains a sunset provision, this section is no more appealing than its predecessor. In fact, two-thirds of the 21 largest districts have smaller divisions, which may have only a few judges; thus, there still exists a real potential for judge shopping and significant forum shopping, as well as increased costs and delay due to relocation.

The Honorable J. Harvie Wilkinson, Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, opposed enactment of this provision in a June 13, 1997 editorial in *The Washington Post*. He wrote, "[T]he customary recourse for litigants dissatisfied with a trial court's decision has been to pursue an appeal. This legislation replaces the traditional process with a dangerous alternative." Judge Wilkinson explained one of the dangers of the section as the possible influence of judges through considerations extrinsic to the merits of the case. For example, judges may make unsound decisions based on a fear of being removed. Further, Judge Wilkinson pointed out that jurists might be removed for racial reasons, creating a system worse than the systemic racially motivated juror peremptory strikes dismantled by *Batson v. Kentucky*. He concluded that peremptory strikes of judges will add further delay to the civil litigation system and erode the rule of law. Judge Wilkinson's concerns echo those which we express about this provision.

As amendment to this section appears to impose on the United States an obligation to pay certain costs for parties with an inability to obtain adequate representation. The purpose and intent of this amendment are unclear. While it apparently is meant to apply to circumstances arising from a transfer to a new location, it is not clearly limited to such circumstances. Also, as drafted, the Government might be required to pay costs for parties who are financially unable to obtain representation as a result of a transfer to another location, even when the Government is not a party, or when such transfer and judge shopping may have been caused by other parties. Lastly, the provision for splitting costs if both sides agree is inadvisable: if both sides agree, each party should pay its own costs. For all of these reasons, we oppose this section.

Section 7. Random Assignment of Habeas Corpus Cases

Section 7 of the bill would require the random assignment to judges of all writs of habeas corpus received in or transferred to a district court. Habeas corpus petitions normally are assigned on a random basis. However, following an initial assignment, it is the general rule that the subsequent petitions from the same prison inmate are assigned to the same judge. While each case must be appropriately considered, a system by which one judge processes all of the filings on one individual expedites and facilitates judicial administration. Randomly assigning these cases so that no single judge will understand previous activity by any petitioner could be an unintended burden on the court and actually lead to greater delay in the disposition of habeas proceedings.

Although it is uncommon, certain districts do assign all death penalty habeas corpus petitions to a single judge. There has been

only one complaint about this practice to our knowledge and the district in which the complaint arose abandoned the practice. So this proposal would have no effect on that district. Therefore, this amendment would force those districts that have this assignment arrangement to abandon it for no demonstrable reason.

Section 9. Adjustments of Salaries of Federal Judges

This section would extend to Federal judges and Justices of the Supreme Court the same annual cost of living salary increases generally available to Federal employees. It would also repeal section 140 of Pub. L. No. 97-92, a statute requiring specific congressional authorization for salary increases for judges and Justices, which was enacted in response to the decision of the Supreme Court in *United States v. Will*, 449 U.S. 200 (1980) (an attempt by Congress to rescind a judicial pay raise after it took effect held unconstitutional).

Federal judges have supported the enactment of a provision such as section 9 for many years. The Department understands the judges' concerns regarding judicial pay and we support appropriate pay for the Federal judiciary. However, as we noted at the outset of this letter, we believe that matters like judicial pay should not be addressed in this bill.

Section 10. Multiparty, Multiforum Jurisdiction of District Courts

Section 10 will expand Federal jurisdiction in a very narrowly defined category of cases—mass tort litigation arising from a “single event or occurrence.” Ordinarily, the Department of Justice disfavors the expansion of the jurisdiction of the already-overloaded district courts. We are continually concerned about the burdens that diversity cases impose on the Federal courts, diverting their attention from criminal cases and other Federal matters. Section 10, however, delineates a unique category of litigation where the exercise of Federal jurisdiction in the manner specified will markedly increase the fair, speedy and efficient resolution of mass tort cases and will avoid time consuming, expensive and repetitive liability proceedings before duplicative State and Federal courts. This section resolves the problems presented by suits arising from the same incident in more than one jurisdiction, indeed often in many jurisdictions, both State and Federal. Moreover, it assures litigants that liability will be determined once and for all in an expeditious manner before a court specifically designated to consider the litigation. Accordingly, we would consider supporting such a provision separate from this legislation.

Although we note that the proposed § 1660 (“choice of law in Multiparty, Multiforum actions”) includes a list of factors that the court “may consider” when it determines the applicable law for the proceedings, it is our understanding that these factors are not exhaustive and are included in the bill merely to provide a measure of guidance to the district courts in the exercise of their discretion (which is to be informed through consideration of all relevant legal principles and facts bearing on the choice of applicable law). We urge that this consideration be reflected in the committee report.

Section 11. Appeals of Merit Systems Protection Board and Arbitration Decisions

This section would increase the amount of time for filing petitions for review of decisions by the Merit Systems Protection Board ("MSPB") and certain arbitral decisions, from 30 days to 60 days. This change would give the Office of Personnel Management ("OPM") and the Department of Justice the necessary time to devote to case selection and to coordinate the drafting of the petition for review. It would also put appeals filed pursuant to 5 U.S.C. 7703 on par with every other appeal filed in the appellate courts by the Executive branch of the Government. In addition, this section would extend the time limit from 30 to 60 days for individual appellants to appeal an adverse decision. We support this section and, as we noted at the outset of this letter, we would work to have it passed separately from this bill.

In addition, we will strongly recommend the inclusion of an amendment to this stand alone legislation that will eliminate the Federal Circuit's discretionary review of the Government's petitions for review in these appeals. This threshold power to reject the Government's petitions, unique among the Federal courts of appeal, has generated considerable litigation over whether the Government's petition meets the "substantial impact" standard in the law. By changing the system to let stand the OPM Director's findings on substantial impact, the appeals process would be more efficient and economical for the court and the parties because a single judicial panel could decide the merits of important civil service issues in the Government's petition.

With over 18 years experience in this role, we think the time is right to revisit this issue. Congress passed this requirement as part of the Civil Service Reform Act of 1978. Since then, the Government has asked the court on only 58 occasions to review MSPB or arbitration decisions. During that same time period, over 22,000 appeals of all types have been filed in the Federal Circuit. Since 1993, we have asked the court to review only 24 cases out of approximately 8,000 total Federal Circuit filings. Yet, while the number of appeals is small, the percentage of the Government's petitions the court has rejected is quite large. For example, the court rejected about 25% of the Government's petitions pursuant to its discretionary review of these appeals in the last 18 years. During the last five years, the court's rejection rate was 22%.

Moreover, the statute currently requires that OPM's Director, who is the chief personnel official for the Executive branch, must make findings on the substantial impact of any final decision the Director decides to challenge. In addition, the Solicitor General of the United States, the Government's chief litigator, acts as the ultimate gatekeeper to the Federal Circuit because the Solicitor General must authorize these appeals in the same way as every other Government appeal. We believe that this makes the court's discretionary review of the Government's petitions unnecessary. The parties to these cases stand to benefit from the court's considered analysis of important issues in an expedited one-step review of the merits of the Government's petition for review. This would allow agencies, managers, employees and their representatives to know the

appropriate legal standards by which actions in the workpiece will be judged.

Thank you for the opportunity to present our views on this legislation. Please let me know if we may be of additional assistance in connection with this or any other matter. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

ANDREW FOIS,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, June 10, 1997.

Hon. HOWARD COBLE,
Chairman, Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, House of Representatives, Washington, DC

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice regarding H.R. 1252, the "Judicial Reform Act of 1997." We understand that this legislation is scheduled to be marked up by your Subcommittee on June 10, 1997.

The bill has five major components, each of which appears designed to place limits on the exercise of discretion by district court judges. For the reasons given below, we oppose enactment of H.R. 1252.

Section 2. Three-Judge Court for Certain Injunctions

This section would establish a requirement that only a three-judge court (under 28 U.S.C. § 2284) may entertain an application for an interlocutory or permanent injunction, based on grounds of unconstitutionality, that seeks to "restrain [] the enforcement, operation, or execution of a State law adopted by referendum * * *." "Any appeal from a determination on such application shall be to the Supreme Court." In the past we have recommended against the enactment of similar legislative provisions. For the reasons stated in our May 16, 1995, letter to the Chairman of the Subcommittee on Courts and Intellectual Property (copy enclosed), we continue to believe that "three-judge-court requirements [of the kind envisioned by H.R. 1252] are cumbersome, confusing, and inefficient." We also observe that, as drafted, this provision would allow for immediate direct appeals to the Supreme Court even where the three-judge court denies injunctive relief. Such direct and immediate access to the Supreme Court for denial of an interlocutory injunctive decree is highly unusual, if not unprecedented.

We also note that the proposal would have the opposite effect of what its supporters maintain they want (i.e., a smaller chance that the will of the majority will be overruled by the views of one or a small number of judges). Indeed, under this legislation, fewer, not more, federal judges would have a chance to rule on the constitutionality of voter initiatives and referenda. Whereas now a district court, an appeals panel, an *en banc* appeals panel, and the Su-

preme Court could all very likely pass on a challenge to an initiative, under H.R. 1252 a maximum of only 12 judges would be involved. If the objective of section 2 is to avoid perceived problems that result from the decisions of a single judge, the current system is better designed than the proposed one. Accordingly, we urge that section 2 of H.R. 1252 not be enacted.

Section 3. Interlocutory Appeals of Court Orders Relating to Class Actions

This provision authorizes the exercise of interlocutory appellate jurisdiction to review a district court's certification decision in a class action. We support that concept. Recently, the Advisory Committee on Civil Rules approved a proposed Rule 23(f) that would read:

(f) APPEALS.—A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district court judge or the court of appeals so orders.

This amendment to the Federal Rules through the Rules Enabling Act process is very similar to section 3 of H.R. 1252, and in fact embodies the same concept. As this provision has been approved by the Advisory Committee, the Judicial Conference will consider the matter shortly. Traditionally, we have supported the use of the judicial rulemaking process—rather than the introduction of legislation—to effectuate changes in Rules of Civil Procedure. In this instance that process is functioning effectively. Accordingly, while we support the aim of this provision, we do not believe it is necessary, because it appears likely the Federal Rules will be changed to accommodate the concept.

Section 4. Proceedings on Complaints Against Judicial Conduct

This provision includes a number of changes with respect to the filing and processing of complaints of judicial misconduct, including a requirement that a complaint filed in one judicial circuit be referred to another circuit for further proceedings. This is a matter that does not directly affect the Department in its capacity as litigator; however, we concur in the testimony offered by representatives of the Judicial Conference in opposition to this section of the bill. The administrative burden and confusion inherent in the proposed system are too great and are not warranted by any problems evident in the current system. We believe that federal judges can and must be trusted to police their colleagues with respect to allegations of misconduct, and that judges in one circuit are equally—if not better—able to discipline their colleagues on that circuit as they are to discipline judges in other circuits.

Section 5. Limitation on Court-Imposed Taxes

In addition to being somewhat ambiguous, this provision gives rise to constitutional concerns, because it purports to restrict the remedial power of Article III federal courts to enforce federal con-

stitutional rights. We recommend against the enactment of Section 5 of H.R. 1252.

Section 5(a)(1) of the proposed bill would amend chapter 85 of title 28, United States Code, by establishing a new Section 1369, entitled, “Limitation on Federal court remedies.” The new section would restrict the power of federal district courts to remedy certain legal violations. Specifically, proposed Section 1369(a)(1) would limit the power of federal district courts to enter orders or approve settlements for the purpose of enforcing “any Federal or State common law, statutory, or constitutional right or law” that require state and local governments to impose, increase, levy, or assess taxes. Under the new provision, federal district courts would have the power to provide such relief only upon finding by “clear and convincing evidence” that: (A)(i) no other enforcement mechanism would provide a remedy, (A)(ii), and the proposed tax was narrowly tailored to remedy the deprivation at issue; (B) the proposed tax would not exacerbate the deprivation at issue; (C) the proposed tax would not result in the loss of revenue of the political subdivision compelled to levy it; (D) the proposed tax would not depreciate property values for affected taxpayers; (E) the proposed tax would not conflict with applicable state laws fixing the maximum appropriate rate of taxation; (F) and alternative remedial plans submitted to the court by State and local governments would not provide effective redress.¹ Section 1369(b) would require that orders imposing taxes entered in conformity with Section 1369(a)(1) would automatically terminate after one year.

Under current law, federal district courts may compel state and local governments to levy taxes in excess of their state law taxing powers when such a remedy would be required to enforce a federal constitutional right. See *Missouri v. Jenkins*, 495 U.S. 33, 56–58 (1990). In addition, federal courts have long been held to possess the equitable authority to compel state and local governments to exercise their existing taxing authority even when the federal Constitution would not require the imposition of such a remedy. *Id.* at 55. “[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court.” *Id.* Thus, the proposed restrictions would necessarily curtail the equitable discretion of federal district courts, and deprive them of the power to remedy certain constitutional rights altogether.

Although Congress has broad power to define the jurisdiction of lower federal courts, the Constitution bars Congress from exercising that power to prohibit the federal judiciary from performing its constitutionally assigned functions. See *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). The debate over the nature of this limitation has centered principally on whether Congress may impose limitations on the authority of lower federal courts to enforce federal constitutional rights. Compare, e.g., Laurence H. Tribe, “Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts”, 16 Harv. C.R.–C.L.L. Rev. 129 (1981), with Henry

¹ Section 1369(a)(2) provides that “a finding” under Section 1369(a)(1) would be subject to immediate interlocutory de novo review. It is not entirely clear whether “a finding” is also meant to include a determination that the conditions set forth in Section 1369(a)(1) have not been satisfied.

M. Hart, Jr., “The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic”, 66 Harv. L. Rev. 1362 (1953); see also Gordon G. Young, “A Critical Reassessment of the Case Law Bearing on Congress’s Power to Restrict the Jurisdiction of the Lower Federal Courts”. 54 Md. L. Rev. 132 (1995) (surveying the caselaw). As a result, we believe that the proposed bill’s restrictions on the power of federal district courts to enforce federal constitutional rights would be subject to reasonable constitutional challenge.²

By contrast, we believe that it is reasonably clear that no similar limitation pertains to Congress’s power to limit the ability of federal district courts to remedy non-constitutional rights. The enforcement of state law rights cannot be said to be a constitutional duty of the lower federal courts. See e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (upholding statute precluding jurisdiction over certain diversity cases); Amar, *supra*, at 255, 260 (concluding that Article III courts need not be available to hear purely state law claims). Similarly, Congress is generally free to define the remedies that are available for the statutory rights that it creates. Accordingly, the proposed bill’s restrictions on remedies for violations of state law and federal statutory law would not appear to prevent federal district courts from performing their constitutionally assigned functions.³

Moreover, we note that proposed Section 1369(d) is very confusing as drafted. It appears that the provision requires federal courts to use federal funds in administering permissible orders imposing indirect taxes on state and local governments unless applicable state or local law makes state or local funds available for the administration of such orders. However, the reference to “subparagraph (B)” in Section 1369(d)(1) is ambiguous, as is the reference to the use of funds “for the purpose of funding the administration of an order.”

Section 6. Reassignment of Case as a Right

This section provides that, “[i]f all parties on one side of a civil case to be tried in * * * district court bring a motion to reassign the case, the case shall be reassigned to another appropriate judicial officer.” Each side would be permitted one reassignment, without cause, as a matter of right. We recommend against the enactment of this provision.

As a general matter, it constitutes an unseemly affront to the judiciary and to the very concept of evenhanded justice under neutral laws. As a matter of good government, it is inappropriate to treat judges like jurors and to allow the parties to strike them without cause. This provision could undermine public confidence in judges and threaten their independence. It could also be used to isolate a

²We note, however, that the force of any such challenge might be mitigated here because the terms of the proposed bill appear to permit the Supreme Court to provide equivalent relief in the course of reviewing a state court judgment. See generally Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205 (1985) (arguing that Article III requires only that jurisdiction over federal constitutional claims be vested in either the Supreme Court or the lower federal courts).

³In addition, we do not believe that the prohibition on the use of consent decrees raises independent constitutional concerns. By its own terms, that prohibition would not prevent federal district courts from imposing indirect taxes after a case had been litigated to judgment, or if the parties stipulated that a constitutional violation had occurred.

judge who is criticized for a controversial decision, again thereby undermining public confidence and judicial independence, and perhaps even impairing collegiality among members of the judiciary. These are serious constitutional policy concerns. By effectively enabling parties to exercise peremptory challenges against Article III judges, the provision invites judge-shopping and thereby threatens to undermine the integrity and independence of Article III judges.

The provision would also undermine judicial efficiency. For example, we litigate major land condemnation projects, such as the current Big Cypress National Park expansion, in the Middle District of Florida, and the Everglades National Park expansion in the Southern District of Florida, each involving hundreds of condemnation cases. A single judge is assigned all the cases in the particular project, and the judge appoints a three-member commission pursuant to F.R.C.P. 71A(h) to try the cases. (There are hundreds of cases in these two projects that will be filed over the next several years.) the obvious benefits of such an assignment to a single judge are the judge's familiarity with the issues and consistency in ruling on issues that tend to arise repeatedly throughout the years of litigating these cases. If landowners (after learning of rulings that would be unfavorable in their cases) obtain reassignment after cases affecting their property are filed, the benefits of having a single judge over these cases are lost. Also, the defendant landowners might persuade the new judge to have their cases tried by jury rather than by commission, losing the fairness and evenhandedness benefits of uniform treatment that comes from the use of a commission. (See Advisory Committee Notes on Rule 71A(h) as to the benefits of trial by commission.) These problems would be compounded if the reassignments are to numerous judges. In projects such as these, the provisions of this bill would likely lead to a chaotic process and materially delayed resolutions.

Finally, the provision is unnecessary. There are existing procedures for dealing with cases of judicial bias. The parties should not be allowed, without cause, to second-guess the independence and competence of life-tenured federal judges duly appointed under the Constitution.

* * * * *

Thank you for the opportunity to present our views on this legislation. If we may be of further assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

ANDREW FOIS,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 16, 1995.

Hon. CARLOS MOORHEAD,
*Chairman, Subcommittee on Courts and Intellectual Property, Com-
mittee on the Judiciary, House of Representatives, Washington,
DC.*

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice regarding H.R. 1170, a bill to provide that federal court cases challenging the constitutionality of measures passed by state referendum be heard by a three-judge district court, whose decision would be appealable directly to the Supreme Court. We understand that this bill will be marked up by your Subcommittee in early May.

Provisions similar to those found in H.R. 1170 once were commonly found in federal law, but Congress gradually has eliminated such provisions because of a consensus view that such three-judge-court requirements are cumbersome, confusing, and inefficient. Indeed, in 1976, Congress rescinded a provision of federal law that was almost identical to the requirement proposed in section 1(b) of H.R. 1170. Former 28 U.S.C. § 2281 provided, in pertinent part, that

[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute * * * shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The only material difference between this former statute and proposed section 1(b) of H.R. 1170 is that the latter is limited to "State law adopted by referendum."

Before its revocation in 1976, both the bar and the bench expressed sustained and virtually unanimous opposition to § 2281. Vocal proponents of rescinding that statute included the United States Judicial Conference, the Chief Justice of the Supreme Court, the Chief Judges of the Second, Third, Fourth and Fifth Circuit Courts of Appeals, the Department of Justice, the American Bar Association, and Professor Charles Alan Wright, the foremost expert in the area of federal civil procedure. See S. Rep. No. 204, 94th Cong., 1st Sess. 3 (1975) ["Senate Report"]; H.R. Rep. No. 1379, 94th Cong., 2d Sess. 4 (1976) ["House Report"]. Repeal of the three-judge-court requirement also was recommended by the Federal Judicial Center Study Group on the Caseload of the Supreme Court, popularly known as the Freund Committee. See Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 595-605 (1972) ["Freund Committee Report"]

The strong criticism of the three-judge procedure in former § 2281 was animated by the widely-held view that that procedure was "the single worst feature in the Federal judicial system as we have it today." Senate Report at 2. Accordingly, Congress repealed former § 2281 in 1976. Pub. L. No. 94-381, § 1, 90 Stat. 1119. The

specific reasons Congress invoked to explain the repeal were three-fold.

First, “the original reasons for the three-judge court ha[d] been largely dissipated by limiting statutes and decisions controlling the jurisdiction of the federal courts collaterally to review State laws.” Senate Report at 8. As then-Chief Justice Burger noted, “[t]he original reasons for establishing these special courts, whatever their validity at the time, no longer exist.” *Id.* at 3. Because later legal developments obviated the concerns that originally had given rise to the three-judge-court requirement, the House concluded that “states no longer require this kind of protection from the arbitrary actions of a single judge.” House Report at 4. See also Senate Report at 7 (original rationale for § 2281 “has long been obsolete”).

Second, the procedure “compounds and confuses rather than simplifies orderly constitutional decision.” Senate Report at 8–9. Whether and to what extent a three-judge court must be convened under particular circumstances, and at certain stages of litigation, were questions that engendered hopelessly complex and arcane litigation and decisional law under § 2281. See generally 12 Moore’s Federal Practice ¶421.03[2], at 5–63 to 5–96 (2d ed. 1995) (cavassing and discussing hundreds of pertinent decisions and distinctions). Examples of frequent areas of procedural litigation included whether a three-judge court was required when it was unclear that the court had jurisdiction (for example, because the plaintiff lacked standing or the suit was barred by the statute of limitations or *res judicata*), and whether a three-judge court was required when plaintiff’s claim was frivolous.

What is more, a second tier of complex litigation was generated by the “wasteful and confusing” channels for appealing jurisdictional issues relating to three-judge courts under § 2281. According to the Senate, the rules on appellate review of whether a three-judge court was needed were “so complex as to be virtually beyond belief.” Senate Report at 6. See also Freund Committee Report, 57 F.R.D. at 598 (“When, where, and how to obtain appellate review of an order by or relating to a three-judge court is a hopelessly complicated and confused subject that in itself has produced much unnecessary litigation,” and “review of these matters has become so mysterious that even specialists in this area may be led astray”). Examples of this kind of litigation included questions as to which court had appellate jurisdiction when a three-judge court decided a case that should have been decided by a single-judge district court, or when a three-judge district court decided the case, not on the issue for which a three-judge court was required, but on some other issue, e.g., lack of standing, lack of personal or subject-matter jurisdiction, a statute of limitations bar, *res judicata*, or lack of merit on an unconstitutional ground.

Third, in addition to the extra, complex litigation engendered by the three-judge-court requirement of § 2281, the three-judge procedure in and of itself was, in Justice Frankfurter’s words, a “serious drain upon the federal judicial system.” *Phillips v. United States*, 312 U.S. 246, 250 (1941). As the Senate concluded, “the burden placed on the panels of judges to handle these cases on an expedited basis is onerous in view of the mounting backlog of cases of no loesser priority.” Senate Report at 9. See also *id.* at 4–5; House

Report at 4 (“The scarce judicial manpower of the nation is inefficiently used by requiring three judges to convene for work that could be performed by one.”); Freund Committee Report, 57 F.R.D. at 598.

Three-judge district courts are administratively complicated to convene and conduct, especially when, as frequently occurs, the judges do not reside in the city where the proceedings take place. Such a court “is not well adapted for the trial of factual issues,” Freund Committee Report, 57 F.R.D. at 599, and accordingly, such courts often resort to procedural devices to induce stipulated facts or otherwise pretermitt development of the facts at an evidentiary hearing, *id.*

Moreover, eliminating court of appeals review and providing direct appeal to the Supreme Court unnecessarily burdens the Supreme Court by requiring the Court to resolve cases that could and should be resolved at the court of appeals level. On direct appeal from a three-judge court, the Supreme Court often must decide between reaching decision on an inadequate factual record or protracting the litigation by remanding for development of a more helpful record. *Id.* And, even where the record is adequate, direct appeal means that the Supreme Court “does not have the benefit of the preliminary screening and sharpening of issues that the courts of appeals ordinarily provide.” *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (separate opinion of Burton and Frankfurter, JJ.) (1952)).

In sum, the three-judge requirement of § 2281 “generate[d], rather than lessen[ed], litigation,” and Congress accordingly eliminated that requirement in order to “increase the efficiency of our judicial system to the benefit of litigants, lawyers, and judges alike.” Senate Report at 7. H.R. 1170 would simply reinstate the problems and stresses that were alleviated by repeal of § 2281. Admittedly, H.R. 1170 might not apply to as many lawsuits as did former § 2281, because it is limited to state laws “adopted by referendum.” Nonetheless, the problems associated with such cases will be just as pronounced as they were with respect to cases under § 2281.

Moreover, in one important respect, H.R. 1170 is broader in scope than was § 2281. Section 2281 required a three-judge court only for the issuance of an injunction restraining the enforcement of a state statute. Section 1(a) of H.R. 1170 would, by contrast, require a three-judge court without respect to whether injunctive relief is sought. Under that section, a three-judge court would be required to “hear [] and determine []” “[a]ny action” in federal court that “challenges the constitutionality of a State law adopted by referendum.” Thus, for example, a three-judge court arguably would have to be convened if the unconstitutionality of a State referendum-passed statute were simply interposed as a defense to a private civil action or to a criminal charge. Indeed, H.R. 1170 seems to contemplate that any action being heard by a single district judge would have to be transferred to a three-judge court whenever a question is raised in the litigation as to the constitutionality of an applicable State statute. Thus, the problems and complexities that led to the elimination of § 2281 might even be exacerbated under H.R. 1170

The standard judicial procedure provides for expedited appellate review in the courts of appeals in appropriate cases. A decision of a single-judge district court holding unconstitutional a state law adopted by referendum would be such a case. H.R. 1170 would provide that only the Supreme Court, not a court of appeals, could overturn such a decision. The result in most cases will be to delay, rather than to expedite, appellate review. For these reasons, H.R. 1170 is likely to have the opposite result than the one of its sponsors intend.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

KENT MARKUS,
Acting Assistant Attorney General.

JUDICIAL CONFERENCE OF THE UNITED STATES,
Washington, DC, March 3, 1998.

Hon. HOWARD COBLE,
Chairman, Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Judiciary Committee has scheduled the "Judicial Reform Act of 1997," H.R. 1252, for consideration. The Judicial Conference of the United States opposes the enactment of Sections 2, 3, 4, 5, 6, 7 and 8 of this bill. The Subcommittee on Courts and Intellectual Property has not requested nor received the views of the Judicial Conference on Section 7: Random Assignment of Habeas Corpus Cases; and Section 8: Authority of Presiding Judge to Allow Media Coverage of Appellate Court Proceedings. This letter provides those views. The subcommittee has rejected the recommendations of the Judicial Conference on the other enumerated sections. Since the proposals in Section 4: Proceedings on Complaints Against Judicial Conduct; and Section 6: Reassignment of Case as of Right, are particularly significant and highly objectionable, I would summarize the Conference positions on these two sections.

Section 4. Proceedings on Complaints Against Judicial Conduct

This proposal would amend the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) to require that all complaints of judicial misconduct that are not dismissed as (1) frivolous, (2) relating to the merits of a decision or procedural ruling or (3) not in conformity with the statute, be referred to another circuit for compliant proceedings. This would fundamentally revise the current system, under which complaints against judicial conduct are processed by the circuit in which the complained-against judge serves.

The Judicial Conduct and Disability Act (1980 Act) emerged in its current form from the House Judiciary Committee and was enacted with the support of the Judicial Conference. The 1980 Act has operated as the Committee intended since enactment and has been effective and beneficial to the judiciary.

In 1991, the Judiciary Committee was instrumental in establishing the National Commission on Judicial Discipline and Removal. Two former members of this committee served on the Commission, one as its chair. The 1980 Act was closely reviewed and evaluated by the Commission. In its 1993 final Report, the Commission concluded that the 1980 Act “has yielded substantial benefits” to the federal judiciary. No amendments to the 1980 Act were recommended.

The proposal in Section 4 apparently results from a single matter: the consideration by the chief judge and by the Judicial Council of the Sixth Circuit of 12 complaints arising out of the handling of eight death penalty habeas corpus petitions by a district judge from the circuit. The complaints alleged the judge has unreasonably delayed disposing of these cases. One complaint also alleged the judge had violated the code of Conduct for United States Judge by accepting a letter of commendation from a local religious organization which opposes the death penalty.

The chief judge of the circuit found that the district judge had unreasonably delayed processing two of the cases. Before that finding was made, the district judge had disposed of two of the other cases, and was actively processing all the others which were not awaiting action in state court. In light of that, the complaints were dismissed on the ground that “corrective action” had been taken as is provided in the 1980 Act, 28 U.S.C. § 372(c)(3)(B). The judicial council affirmed this decision.

Canon 2A of the Code of Conduct states, in part, that “[a] judge should * * * act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The chief judge found that the district judge had not violated that canon by accepting a letter of commendation from the Nashville Ministers Conference ten years earlier. The judicial council affirmed this decision.

The stated purpose of this amendment is to ensure objectivity in the operation of the 1980 Act. Nevertheless, the decisions made in the case in point reasonably appear to be objective. Since the delay had ceased, dismissing the complaints of delay on the statutory ground that “appropriate corrective action” had been taken seems reasonable. The conclusion that the ten-year-past act of accepting a letter of commendation from a local religious group did not erode “public confidence” in the judiciary also seems reasonable.

These two decisions were made by the chief judge of the circuit, who happens to reside in the same city as the complained-against district judge. This fact gives rise to the claim that the decisions were either not made objectively or had the appearance of a lack of objectivity. However, the complaints and the decisions dismissing them were reviewed and unanimously affirmed by 15 other judges who sit on the Judicial Council of the Sixth Circuit, seven from the Sixth Circuit Court of Appeals and eight chief district judges, who reside and sit in the states of Michigan, Ohio, Kentucky, and Tennessee.

Neither the decision to dismiss these two complaints, nor the make-up of the complement of 16 judges who took part in that decision provides any reasonable justification for making a fundamental change in the operation of the 1980 Act by transferring com-

plaints against judicial conduct to another circuit for consideration. Indeed it is likely that 16 judges from any region of the country would have decided the same as did the 16 judges from the Sixth Circuit.

Moreover, the proposal ignores the fact that a significant strength of the 1980 Act lies in promoting solutions to judicial misconduct or disability problems not only through formal statutory processes but also through informal activity which amounts to peer review. As the Commission final Report explains:

Although the 1980 Act [28 U.S.C. § 372(c)] established a formal mechanism for filing complaints, perhaps its major benefit has been the facilitation of informal adjustments of problems of judicial misconduct or disability. In some situations, that has occurred without the filing of a complaint; in others it has followed a chief judge's inquiry in response to a complaint. A chief judge's power under the 1980 Act to conclude a proceeding "if he finds that appropriate corrective action has been taken" is a boon to negotiated resolutions.

* * * * *

The 1980 Act * * * has yielded substantial benefits both in those few instances where it was necessary for the judicial councils to take action and, more importantly, in the many instances where the existence of its formal process enabled chief judges to resolve complaints through corrective action and, indeed, to resolve problems before a complaint was filed.

"Report of the National Commission on Judicial Discipline and Removal," at 104, 123 (August 1993).

Transferring complaints out of the circuit where the complained-against judge is stationed would seriously cripple this process, which cannot effectively function from a remote location. For this reason, this proposal would not toughen discipline of judges nor would it make judges more accountable. Rather it would seriously undermine the existing effective disciplinary process.

Section 6. Reassignment of Case as of Right

This section provides that if all parties on one side of a civil case bring a motion to reassign the case, the case shall be reassigned to another judicial officer. Each side would be permitted one reassignment as a matter of right. No cause for the reassignment is required.

Under current practice, civil cases, absent special circumstances, are randomly assigned to judges for resolution. This system ensures the fact and appearance that the assignment was impartially made. The assigned judge may then be challenged on grounds of bias or prejudice. 28 U.S.C. § 144. Also, the judge must disqualify himself or herself if impartiality regarding the case might be reasonably questioned. 28 U.S.C. § 455. This process is designed to ensure that legal principles are applied in a fair and evenhanded manner in federal courts.

The proposal in Section 6 is designed to disrupt the random case assignment process. It condones attempts to influence the outcome

of a federal civil case by considerations which are outside of the merits of the case. For that reason this proposal is repugnant to the proper administration of justice. The parties would be allowed, indeed required, to evaluate the personal characteristics of the assigned judge to conclude whether this judge may be favorably or not favorably disposed to their case. For the first time, the race, gender, age, religious beliefs or political background of a judge would become an important and integral part of the federal judicial system.

Approval of Section 6 threatens to undermine public confidence in the federal judicial system. Support of this proposal appears to be based on two assumptions: federal judges are untrustworthy and current laws and practices designed to ensure fairness and impartiality in civil litigation are failing to protect adequately the rights of civil litigants. There is no justification for either assumption.

This proposal clearly would also delay civil litigation and increase the costs to parties in routine civil cases. In complicated cases, such as class actions or mass tort cases that are consolidated for trial, allowing the removal of judges for tactical reasons would have a profoundly negative effect on the administration of justice.

Section 7. Random Assignment of Habeas Corpus Cases

The dismissal of the complaints against the conduct of a district judge, which gave rise to Section 4 of the bill, also gave rise to this amendment. In the district in question at the time of the complaints, the complained-against judge was assigned all death penalty habeas corpus petitions. That assignment practice in that district has been discontinued.

The rationale for this proposal is that if a judge were predisposed to delay prosecution of death penalty habeas corpus petitions, this provision would ensure that fewer such petitions would be wrongly handled. For a reason that is not apparent, the amendment would apply to all habeas corpus petitions, not just those by death row inmates.

The amendment is objectionable for two reasons. Habeas corpus petitions are normally assigned on a random basis. However, following an initial assignment, it is the general rule that the subsequent petitions from the same prison inmate are assigned to the same judge. The great majority of these petitions, especially from "frequent filers," are without merit. While each case must be appropriately considered, a system by which one judge processes all of the filings of one individual expedites and facilitates judicial administration. Randomly assigning these cases so that no single judge will understand previous activity by any petitioner will be an unnecessary and, apparently an unintended burden on the court.

Although it is uncommon, certain districts do assign all death penalty habeas corpus petitions to a single judge. Outside of the matter which gave rise to this amendment, there has not been any complaint about this practice to our knowledge. Therefore, this amendment would force those districts that have this assignment arrangement to abandon it for no demonstrable reason. Conversely, the district that did have the practice, and that engendered this amendment, has abandoned it; so this proposal would have no effect on that district.

Section 8. Authority of Presiding Judge to Allow Media Coverage of Appellate Court Proceedings

This proposal would authorize a “presiding” circuit judge to permit photographing, electronic recording, broadcasting or televising any court proceeding over which he or she presides. The term “presiding” means the Chief Justice or Chief Judge if an entire court is sitting, or the senior active judge on a three-judge panel. The proposal also authorizes the Judicial Conference to promulgate advisory guidelines for this activity.

In March 1996, the Judicial Conference authorized each court of appeals to decide for itself whether to permit photographs and radio and television coverage of appellate arguments in civil cases.

On March 27, 1996, the Second Circuit Court of Appeals approved guidelines pursuant to which media coverage of appellate arguments in civil cases could occur. On May 24, 1996, the Ninth Circuit Court of Appeals voted to allow photographs and radio and television coverage of civil case appellate arguments, except for arguments in extradition proceedings. Guidelines for this practice were developed subsequently. Since March of 1996, approximately 30 arguments have been televised or recorded on videotape in the Second and Ninth Circuits.

All of the other appellate courts have voted not to allow this coverage in their appellate courts, with the exception of the Court of Appeals for the District of Columbia which has not decided on this matter.

The House Judiciary Courts and Intellectual Property Subcommittee did not hold a public hearing on the proposal in Section 8. This is a sensitive and controversial subject that presents a number of relevant issues that have not been considered. Since there is a very low level of demand from the private sector for televised appellate arguments, the question arises whether the considered judgment of the Judicial Conference and of the appellate courts should be overridden on this policy. Both the Second and Ninth Circuits prohibit photographs, televising, or radio coverage of appeals in criminal cases because such activities are currently unlawful. See Federal Rules of Criminal Procedure. Rule 53, 54(a). Would this section, if enacted, override the federal rules as to the United States courts of appeals?

Many other issues which surround this proposal have not been addressed. We respectfully recommend that this matter be postponed for further consideration, especially since a long-standing rule of criminal procedure may be amended by reference.

Thank you for your attention to our concerns with portions of this significant bill.

Sincerely,

LEONIDAS RALPH MECHAM,
Secretary.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * *

PART I—ORGANIZATION OF COURTS

* * * * *

CHAPTER 17—RESIGNATION AND RETIREMENT OF JUSTICES AND JUDGES

* * * * *

§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline

(a) * * *

* * * * *

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint. *In the case of a complaint so identified, the chief judge shall notify the clerk of the court of appeals of the complaint, together with a brief statement of the facts underlying the complaint.*

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term “chief judge”). The clerk shall simultaneously transmit a copy of the complaint *or statement of facts underlying the complaint (as the case may be)* to the judge or magistrate whose conduct is the subject of the complaint.

(3)(A) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, **may—**

[(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

[(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.]

may dismiss the complaint if the chief judge finds it to be—

- (i) *not in conformity with paragraph (1);*
- (ii) *directly related to the merits of a decision or procedural ruling; or*
- (iii) *frivolous.*

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(B) *If the chief judge does not enter an order under subparagraph (A), then the complaint or (in the case of a complaint identified under paragraph (1)) the statement of facts underlying the complaint shall be referred to the chief judge of another judicial circuit for proceedings under this subsection (hereafter in this subsection referred to as the “chief judge”), in accordance with a system established by rule by the Judicial Conference, which prescribes the circuits to which the complaints will be referred. The Judicial Conference shall establish and submit to the Congress the system described in the preceding sentence not later than 180 days after the date of the enactment of the Judicial Reform Act of 1998.*

(C) *After expeditiously reviewing the complaint, the chief judge may, by written order explaining the chief judge’s reasons, conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.*

(4) If the chief judge does not enter an order under paragraph (3)(C) of this subsection, such judge shall promptly—

(A) appoint himself and equal numbers of circuit and district judges of the circuit (*to which the complaint or statement of facts underlying the complaint is referred*) to a special committee to investigate the facts and allegations contained in the complaint;

* * * * *

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit *to which the complaint or statement of facts underlying the complaint is referred*. Such report shall present both the findings of the investigation and the committee’s recommendations for necessary and appropriate action by the judicial council of **the circuit** *that circuit*.

* * * * *

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that—

(A) * * *

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; **[or]**

(C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the

standing committee established under section 331 of this title[.]; or

(D) such disclosure is made to another agency or instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity authorized by law.

(15) Each written order to implement any action under paragraph (6) (B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit *in which the complaint was filed or identified under paragraph (1)*. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

* * * * *

[(18) The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.]

(18) The Judicial Conference shall prescribe rules, consistent with the preceding provisions of this subsection—

(A) establishing procedures for the filing of complaints with respect to the conduct of any judge of the United States Court of Federal Claims, the Court of International Trade, or the Court of Appeals for the Federal Circuit, and for the investigation and resolution of such complaints; and

(B) establishing a system for referring complaints filed with respect to the conduct of a judge of any such court to any of the first eleven judicial circuits or to another court for investigation and resolution.

The Judicial Conference shall establish and submit to the Congress the system described in subparagraph (B) not later than 180 days after the date of the enactment of the Judicial Reform Act of 1998.

* * * * *

CHAPTER 21—GENERAL PROVISIONS APPLICABLE TO COURTS AND JUDGES

Sec.

451. Definitions.

* * * * *

464. *Reassignment of cases upon motion by a party.*

* * * * *

§ 461. Adjustments in certain salaries

[(a)(1) Subject to paragraph (2), effective at the beginning of the first applicable pay period commencing on or after the first day of

the month in which an adjustment takes effect under section 5303 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of \$100 (or if midway between multiples of \$100, to the next higher multiple of \$100) equal to the percentage of such salary rate which corresponds to the most recent percentage change in the ECI (relative to the date described in the next sentence), as determined under section 704(a)(1) of the Ethics Reform Act of 1989. The appropriate date under this sentence is the first day of the fiscal year in which such adjustment in the rates of pay under the General Schedule takes effect.

[(2) In no event shall the percentage adjustment taking effect under paragraph (1) in any calendar year (before rounding), in any salary rate, exceed the percentage adjustment taking effect in such calendar year under section 5303 of title 5 in the rates of pay under the General Schedule.]

(a) Effective as of the first day of the applicable pay period beginning on or after the date on which an adjustment takes effect under section 5303 of title 5 in the rates of basic pay under the General Schedule (or under any other provision of law in lieu thereof), each salary rate which is subject to an adjustment under this section shall be adjusted by an amount equal to the percentage of the adjustment under such section 5303, rounded to the nearest multiple of \$100 (or if midway between multiples of \$100, to the next higher multiple of \$100).

* * * * *

§464. Reassignment of cases upon motion by a party

(a) UPON MOTION.—(1) If all parties on one side of a civil case to be tried in a United States district court described in subsection (e) bring a motion to reassign the case, the case shall be reassigned to another appropriate judicial officer. Each side shall be entitled to one reassignment without cause as a matter of right.

(2) If any question arises as to which parties should be grouped together as a side for purposes of this section, the chief judge of the court of appeals for the circuit in which the case is to be tried, or another judge of the court of appeals designated by the chief judge, shall determine that question.

(b) REQUIREMENTS FOR BRINGING MOTION.—(1) Subject to paragraph (2), a motion to reassign under this section shall not be entertained unless it is brought, not later than 20 days after notice of the original assignment of the case, to the judicial officer to whom the case is assigned for the purpose of hearing or deciding any matter. Such motion shall be granted if—

(A) it is presented before trial or hearing begins and before the judicial officer to whom it is presented has ruled on any substantial issue in the case, or

(B) it is presented by consent of the parties on all sides.

(2) Notwithstanding paragraph (1)—

(A) a party joined in a civil action after the initial filing may, with the concurrence of the other parties on the same side, bring

a motion under this section within 20 days after the service of the complaint on that party;

(B) a party served with a supplemental or amended complaint or a third-party complaint in a civil action may, with the concurrence of the other parties on the same side, bring a motion under this section within 20 days after service on that party of the supplemental, amended, or third-party complaint; and

(C) rulings in a case by the judicial officer on any substantial issue before a party who has not been found in default enters an appearance in the case shall not be grounds for denying an otherwise timely and appropriate motion brought by that party under this section.

(3) No motion under this section may be brought by the party or parties on a side in a case if any party or parties on that side have previously brought a motion to reassign under this section in that case.

(c) COSTS OF TRAVEL TO NEW LOCATION.—(1) If a motion to reassign brought under this section requires a change in location for purposes of appearing before a newly assigned judicial officer, the party or parties bringing the motion shall pay the reasonable costs incurred by the parties on different sides of the case in travelling to the new location for all matters associated with the case requiring an appearance at the new location. In a case in which both sides bring a motion to reassign under this section that requires a change in location, the party or parties bringing the motions on both sides shall split the travelling costs referred to in the preceding sentence.

(2) For parties financially unable to obtain adequate representation, the Government shall pay the reasonable costs under paragraph (1).

(d) DEFINITION.—As used in this section, the term “appropriate judicial officer” means—

(1) a United States magistrate judge in a case referred to such a magistrate judge; and

(2) a United States district court judge in any other case before a United States district court.

(e) DISTRICT COURTS THAT MAY AUTHORIZE REASSIGNMENT.—The district courts referred to in subsection (a) are the district courts for the 21 judicial districts for which the President is directed to appoint the largest numbers of permanent judges.

(f) 3-JUDGE COURT CASES EXCLUDED.—This section shall not apply to any civil action required to be heard and determined by a district court of 3 judges.

* * * * *

PART IV—JURISDICTION AND VENUE

* * * * *

CHAPTER 83—COURTS OF APPEALS

* * * * *

§ 1292. Interlocutory decisions

(a) * * *

(b)(1) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(2) *A party to an action in which the district court has made a determination of whether the action may be maintained as a class action may make application for appeal of that determination to the court of appeals which would have jurisdiction of an appeal of that action. The court of appeals may, in its discretion, permit the appeal to be taken from such determination if the application is made within 10 days after the entry of the court's determination relating to the class action. Application for an appeal under this paragraph shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.*

* * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.

1330. Actions against foreign states.

* * * * *

1369. *Limitation on Federal court remedies.*

1370. *Multiparty, multiforum jurisdiction.*

* * * * *

§ 1369. *Limitation on Federal court remedies*

(a) *LIMITATION ON COURT-IMPOSED TAXES.—(1) No district court may enter any order or approve any settlement that requires any State, or political subdivision of a State, to impose, increase, levy, or assess any tax, unless the court finds by clear and convincing evidence, that—*

(A) there are no other means available to remedy the deprivation of a right under the Constitution of the United States;

(B) the proposed imposition, increase, levying, or assessment is narrowly tailored to remedy the specific deprivation at issue so that the remedy imposed is directly related to the harm caused by the deprivation;

(C) the tax will not contribute to or exacerbate the deprivation intended to be remedied;

(D) plans submitted to the court by State and local authorities will not effectively redress the deprivations at issue;

(E) the interests of State and local authorities in managing their affairs are not usurped, in violation of the Constitution,

by the proposed imposition, increase, levying, or assessment; and

(F) the proposed tax will not result in the loss or depreciation of property values of the taxpayers who are affected.

(2) The limitation contained in paragraph (1) shall apply only to any order or settlement which—

(A) expressly directs any State, or political subdivision of a State, to impose, increase, levy, or assess any tax; or

(B) will necessarily require a State, or political subdivision of a State, to impose, increase, levy, or assess any tax.

(3) If the court finds that the conditions set forth in paragraph (1) have been satisfied, it shall enter an order incorporating that finding, and that order shall be subject to immediate interlocutory de novo review.

(4) A remedy permitted under paragraph (1) shall not extend beyond the case or controversy before the court.

(5)(A) Notwithstanding any law or rule of procedure, any person or entity whose tax liability would be directly affected by the imposition of a tax under paragraph (1) shall have the right to intervene in any proceeding concerning the imposition of the tax, except that the court may deny intervention if it finds that the interest of that person or entity is adequately represented by existing parties.

(B) A person or entity that intervenes pursuant to subparagraph (A) shall have the right to—

(i) present evidence and appear before the court to present oral and written testimony; and

(ii) appeal any finding required to be made by this section, or any other related action taken to impose, increase, levy, or assess the tax that is the subject of the intervention.

(b) **TERMINATION OF ORDERS.**—Notwithstanding any law or rule of procedure, any order of, or settlement approved by, a district court requiring the imposition, increase, levy, or assessment of a tax pursuant to subsection (a)(1) shall automatically terminate or expire on the date that is—

(1) 1 year after the date of the imposition of the tax; or

(2) an earlier date, if the court determines that the deprivation of rights that is addressed by the order or settlement has been cured to the extent practicable.

Any new such order or settlement relating to the same issue is subject to all the requirements of this section.

(c) **PREEMPTION.**—This section shall not be construed to preempt any law of a State or political subdivision thereof that imposes limitations on, or otherwise restricts the imposition of, a tax, levy, or assessment that is imposed in response to a court order or settlement referred to in subsection (b).

(d) **ADDITIONAL RESTRICTIONS ON COURT ACTION.**—(1) Except as provided in paragraph (2), nothing in this section may be construed to allow a Federal court to, for the purpose of funding the administration of an order or settlement referred to in subsection (b), use funds acquired by a State or political subdivision thereof from a tax imposed by the State or political subdivision thereof.

(2) Paragraph (1) does not apply to any tax, levy, or assessment that may, in accordance with applicable State or local law, be used to fund the actions of a State or political subdivision thereof in

meeting the requirements of an order or settlement referred to in subsection (b).

(e) *NOTICE TO STATES.*—The court shall provide written notice to a State or political subdivision thereof subject to an order or settlement referred to in subsection (b) with respect to any finding required to be made by the court under subsection (a). Such notice shall be provided before the beginning of the next fiscal year of that State or political subdivision occurring after the order or settlement is issued.

(f) *SPECIAL RULES.*—For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1370. Multiparty, multiform jurisdiction

(a) *IN GENERAL.*—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed \$50,000 per person, exclusive of interest and costs, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.

(b) *SPECIAL RULES AND DEFINITIONS.*—For purposes of this section—

(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;

(3) the term “injury” means—

(A) physical harm to a natural person; and

(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

(4) the term “accident” means a sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons; and

(5) the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) *INTERVENING PARTIES.*—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

(d) *NOTIFICATION OF JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.*—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.

CHAPTER 87—DISTRICT COURTS; VENUE

* * * * *

§ 1391. Venue generally

(a) * * *

* * * * *

(g) A civil action in which jurisdiction of the district court is based upon section 1370 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

* * * * *

§ 1407. Multidistrict litigation

(a) * * *

* * * * *

(i)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1370 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

(3) *An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.*

(4) *Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.*

(5) *Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.*

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) * * *

* * * * *

(e)(1) *Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—*

(A) *the action could have been brought in a United States district court under section 1370 of this title, or*

(B) *the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1370 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.*

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1370 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) *Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(i) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.*

(3) *Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law*

determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1370 and an action in which jurisdiction is based on section 1368 of this title for purposes of this section and sections 1407, 1660, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

[(e) The court to which such civil action is removed] (f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

* * * * *

PART V—PROCEDURE

* * * * *

CHAPTER 111—GENERAL PROVISIONS

Sec.

1651. Writs.

* * * * *

1660. Choice of law in multiparty, multiform actions.

* * * * *

§ 1660. Choice of law in multiparty, multiform actions

(a) *FACTORS.*—In an action which is or could have been brought, in whole or in part, under section 1370 of this title, the district court in which the action is brought or to which it is removed shall determine the source of the applicable substantive law, except that if an action is transferred to another district court, the transferee court shall determine the source of the applicable substantive law. In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include—

- (1) the place of the injury;
- (2) the place of the conduct causing the injury;
- (3) the principal places of business or domiciles of the parties;
- (4) the danger of creating unnecessary incentives for forum shopping; and
- (5) whether the choice of law would be reasonably foreseeable to the parties.

The factors set forth in paragraphs (1) through (5) shall be evaluated according to their relative importance with respect to the particular action. If good cause is shown in exceptional cases, including constitutional reasons, the court may allow the law of more than one State to be applied with respect to a party, claim, or other element of an action.

(b) *ORDER DESIGNATING CHOICE OF LAW.*—The district court making the determination under subsection (a) shall enter an order designating the single jurisdiction whose substantive law is to be applied in all other actions under section 1370 arising from the same accident as that giving rise to the action in which the determination is made. The substantive law of the designated jurisdiction shall be applied to the parties and claims in all such actions before the court, and to all other elements of each action, except where Federal law applies or the order specifically provides for the application of the law of another jurisdiction with respect to a party, claim, or other element of an action.

(c) *CONTINUATION OF CHOICE OF LAW AFTER REMAND.*—In an action remanded to another district court or a State court under section 1407(i)(1) or 1441(e)(2) of this title, the district court's choice of law under subsection (b) shall continue to apply.

CHAPTER 113—PROCESS

Sec.

1691. Seal and teste of process.

* * * * *

1697. Service in multiparty, multiforum actions.

* * * * *

§1697. Service in multiparty, multiforum actions

When the jurisdiction of the district court is based in whole or in part upon section 1370 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.

* * * * *

CHAPTER 117—EVIDENCE; DEPOSITIONS

Sec.

1781. Transmittal of letter rogatory or request.

* * * * *

1785. Subpoenas in multiparty, multiforum actions.

* * * * *

§1785. Subpoenas in multiparty, multiforum actions

When the jurisdiction of the district court is based in whole or in part upon section 1370 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.

* * * * *

PART VI—PARTICULAR PROCEEDINGS

* * * * *

CHAPTER 153—HABEAS CORPUS

* * * * *

§ 2241. Power to grant writ

(a) * * *

* * * * *

(e) *Applications for writs of habeas corpus received in or transferred to a district court shall be randomly assigned to the judges of that court.*

* * * * *

SECTION 140 OF THE ACT OF DECEMBER 15, 1981

Joint Resolution Making further continuing appropriations for the fiscal year 1982, and for other purposes.

【SEC. 140. Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court.】

TITLE 5, UNITED STATES CODE

* * * * *

PART III—EMPLOYEES

* * * * *

Subpart D—Pay and Allowances

* * * * *

CHAPTER 53—PAY RATES AND SYSTEMS

* * * * *

SUBCHAPTER VII—MISCELLANEOUS PROVISIONS

* * * * *

§ 5372. Administrative law judges

【(a) For the purposes of this section, the term “administrative law judge” means an administrative law judge appointed under section 3105.】

(a) *For the purposes of this section—*

(1) *the term “administrative law judge” means an administrative law judge appointed under section 3105; and*

(2) the term “the rate of basic pay for level IV of the Executive Schedule” is used as described in subsection (c).

* * * * *

(c)(1) Any reference in this section to the rate of basic pay for level IV of the Executive Schedule shall be considered a reference to the greater of—

(A) the rate of basic pay then currently in effect under section 5315; or

(B) the rate of basic pay in effect under section 5315 on the effective date of this subsection, as adjusted under paragraph (2).

(2) Each time that rates of pay for the General Schedule are adjusted, whether under section 5303 or another provision of law in lieu thereof, the rate under paragraph (1)(B) (as last adjusted under this paragraph) shall be adjusted by the same percentage, and as of the same date, as are the rates of pay for the General Schedule.

[(c)] (d) The Office of Personnel Management shall prescribe regulations necessary to administer this section.

* * * * *

Subpart F—Labor-Management and Employee Relations

* * * * *

CHAPTER 77—APPEALS

* * * * *

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a) * * *

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within [30] 60 days after the date the petitioner received notice of the final order or decision of the Board.

* * * * *

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, *within 60 days after the date the Director received notice of the final order or decision of the Board*, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the pro-

ceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

* * * * *

DISSENTING VIEWS

We strongly oppose the so-called “Judicial Reform Act of 1997,” legislation put forth by the Republicans in an effort to stem a supposed tide of “judicial activism.” H.R. 1252 is a hodgepodge of ill-considered and largely unnecessary proposals that would degrade our judiciary and significantly increase unnecessary costs and delays in litigation.

H.R. 1252 is opposed by the Department of Justice, and an Administration veto is likely. In addition, H.R. 1252 is opposed by a wide and diverse coalition of groups that are concerned about the integrity of our civil and criminal justice systems. This includes: (1) legal and judicial groups, such as the American Bar Association, the Judicial Conference of the United States, and the Alliance for Justice; (2) civil rights groups such as the Leadership Conference on Civil Rights, the NAACP, and the Mexican American Legal Defense and Education Fund; (3) environmental groups, such as the Sierra Club and Earth Justice; (4) disabilities groups such as the Bazelon Center for Mental Health Law and the National Association of Protection and Advocacy Systems; (5) labor groups such as the Service Employees International Union and Coalition of Labor Union Women; and (6) women’s groups such as the National Women’s Law Center and National Partnership for Women and Families.

If there is any single idea in the Constitution that has separated our experiment in democracy from all other nations, it is the concept of an independent judiciary. It is the judiciary, more than any other branch of our government, that has served as the protector of our precious civil rights and civil liberties over the years. We agree with Alexander Hamilton that the “independent spirit in the judges” enables them to stand against the “ill humors of passing political majorities.”¹ And we support the timeless words of the Massachusetts Constitution that “[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.”²

Recent efforts by Republicans to discredit our judiciary by painting it with the broad brush of “judicial activism” are both disingenuous and demeaning. Once we parse through the thick rhetorical fog surrounding this issue, it becomes clear that Republicans real gripe is with the results, not the activist nature of judicial decisions. As Roger Pilon, a Cato Institute Director, acknowledged, “examples of ‘judicial activism’ that are cited, turn out, when examined more closely, not to be cases in which the judge failed to apply the law but applied the law differently, or applied different law, to

¹ “The Federalists Papers, No. 78” (1789).

² Mass. Const. art. 29, Declaration of Rights.

reach a result different than the result thought correct by the person charging activism.”³

Republican “conservatives” are prone to assert that Supreme Court decisions protecting a woman’s right to choose (*Roe v. Wade*⁴) and a child’s right to attend school without being subject to compulsory prayer (*Engel v. Vitale*⁵) constitute judicial activism. But decisions which limit Congress’ ability to provide affirmative action as a remedy to respond to racial discrimination (*Adarand v. Peña*⁶), Ban guns in schools (*U.S. v. Lopez*⁷), require background checks before felons can purchase handguns (*Printz v. U.S.*⁸), and limit campaign expenditures (*Buckley v. Valeo*⁹) are heralded as landmark examples of the Court restraining undue legislative power.

Similarly, when a Bush-appointed district judge enjoins an Oregon ballot initiative allowing for assisted suicide,¹⁰ or a Reagan-appointed district judge dismisses a contempt order for violating the Freedom of Access to Clinic Entrances Act because the defendants lack the requisite “willfulness” on account of their religious convictions,¹¹ we hear scant criticism from the right wing. But when federal courts in California have the temerity to suggest that referenda which deny alien children the right to an education¹² or prevent minorities subject to discrimination from benefitting from action,¹³ we hear storms of protest from the same conservatives.

The truth of the matter is that Republican-appointed judges are at least as likely as Democratic judges to find that particular state or federal actions violate the Constitution. This was confirmed by a recent study by the Institute for Justice which found that President Clinton’s Supreme Court Justices (Ginsburg and Breyer) are less likely to strike down laws on account of economic and civil libertarian concerns than any of their Republican-appointed colleagues.¹⁴ Indeed we find that only two Justices voted to invalidate all seven acts of Congress considered by the Supreme Court during the 1996–97 term—Justices Scalia and Thomas, widely considered to be the most conservative jurists on the Supreme Court.

The only thing more counterproductive than the phony debate over judicial activism are proposed “solutions” being floated by the Republican leadership. Efforts to impeach federal judges who issue

³ Hearing on H.R. 1252, The Judicial Reform Act of 1997 and Federal Judicial Term Limits Before the Subcomm. on Courts and Intellectual Property of the House Comm. On the Judiciary, 105th Cong. (1997) [hereinafter, 1997 Subcommittee Hearings] (written statement of Roger Pilon, Director, Center for Constitutional Studies, Cato Institute).

⁴ 410 U.S. 113 (1973).

⁵ 370 U.S. 421 (1962).

⁶ 515 U.S. 200 (1995).

⁷ 514 U.S. 549 (1995).

⁸ U.S. , 117 S.Ct. 2365 (1997).

⁹ 424 U.S. 1 (1976).

¹⁰ Lee v. Oregon, Civil No. 94–6467–HO, 2 (D.Or. 1994).

¹¹ U.S. v. Moscinski, 952 F.Supp. 167, 170 (S.D.N.Y. 1997).

¹² League of United Latin Americans Citizens v. Wilson, 908 F.Supp. 755 (C.D. CA, 1995), remanded 131 F.3d 1297 (1997), aff’d 1998 U.S. Dist. Lexis 3418, (March 13, 1998) (holding California Proposition 187 unconstitutional).

¹³ Coalition for Economic Equity v. Wilson, 946 F.Supp. 1480, rev’d 122 F.3d 718 (1997) (holding California Proposition 209).

¹⁴ Clint Block and Scott G. Bullock, “State of the Supreme Court,” Institute for Justice 1997.

unpopular decisions¹⁵ and limit lifetime judicial tenure¹⁶ would shred any semblance of separation of powers envisioned by the founding fathers. When Speaker Newt Gingrich (R-GA) states that judges who write opinions he does not agree with are “petty dictators” imposing “dangerous and wrong”¹⁷ decisions and requests that the Judiciary Committee conduct hearings on “judicial activism”¹⁸ in his opening speech of the 105th Congress, he initiated a dangerous new line of attack on federal judges. This was confirmed when Republican Majority Leader Tom Delay (R-TX) threatened articles of impeachment on several federal judges¹⁹ and declared “the Judges need to be intimidated” and “we’re going to go after [judges who don’t behave] in a big way.”²⁰ The irony of all of this judicial bashing is that Republicans are criticizing an institution—the judiciary—whose public confidence is nearly three times greater than Congress itself.²¹

The actual provisions of H.R. 1252—though scaled back from the dangerous rhetoric and proposals initially floated by the Republican leadership—will do far more to undermine the judiciary’s integrity and efficiency than enhance its accountability. While there are a few provisions in H.R. 1252 which some of us could support in other contexts—such as efforts to allow increased use of courtroom cameras where permitted by the court (§ 8) and provide federal judges with cost of living allowances which are not tied to Congressional pay raises (§ 9)—the potential merits of these provisions are far outweighed by the legislation’s other far more problematic sections. These include:

A. *Peremptory Judicial Challenges* (§ 6)—Granting the parties to federal civil actions the right to peremptorily challenge a judge’s authority and seek reassignment to another judge to a slap in the face of every federal judge in this country. In addition to creating new opportunities for judge shopping and gamesmanship, section 6 will impose appreciable new costs on the judiciary (particularly in mass tort cases). It will also permit prejudicial challenges based on a judge’s race, gender, or other immutable characteristic.

B. *Limiting Judicial Discretion Concerning Tax Revenues* (§ 5)—Limiting the ability of the federal courts to enter orders relative to taxes is a classic “solution in search of a problem.” While there was a single isolated case of a district court trying to increase taxes to remedy an illegal segregation case several years ago,²² the Supreme Court easily found the lower court had exceeded its authority.²³ In truth, it is Congress which has raised the specter of judicially imposed taxes, by pushing for a balanced budget amendment, thereby allowing for open-ended court authority to balance the

¹⁵ See Associated Press, “The Bar Urges Protection of Judges’ Decisions,” N.Y. Times, April 7, 1997, at A11.

¹⁶ See S.J. Res. 26, 105th Cong. (1997) (constitutional amendment limiting the tenure of all federal judges to ten years); H.J. Res. 63, 105th Cong. (1997) (constitutional amendment limiting the tenure of federal judges to twelve years); and H.J. Res. 74, 105th Cong. (1997) (constitutional amendment limiting the tenure of federal judges to twelve years).

¹⁷ 143 Cong. Rec. H1023, H1028 (March 17, 1997) (statement of Speaker Gingrich).

¹⁸ 143 Cong. Rec. H2 (January 7, 1997) (statement of Speaker Gingrich).

¹⁹ Supra note 15.

²⁰ Joan Biskupic, “Hill Republicans Target Judicial Activism; Conservatives Block Nominees, Threaten Impeachment and Term Limits,” W. Post, September 14, 1997, at A1.

²¹ The Harris Poll, No. 7, Louis Harris and Associates, Inc., February 10, 1997.

²² *Missouri v. Jenkins*, 672 F. Supp 400 (W.D. Mo. 1987), rev’d, 515 U.S. 70 (1995).

²³ *Missouri v. Jenkins*, 515 U.S. 70 (1995).

budget when the legislature is incapable of doing so. The real problem with section 5 is that by applying to court orders which may merely have the effect of impacting governmental revenues, rather than orders which expressly direct tax increases, the bill could undermine remedial powers relating to a broad range of laws, including statutes concerning civil rights, the environment and disabilities, and decimate court authority to properly interpret and apply the Constitution.

C. *Three Judge Panels (§2)*—Requiring special three-judge panels to hear cases concerning the constitutionality of state referenda will diminish courts ability to make well reasoned judgment and threaten to tie the legal process up in knots. This is why Congress—on a bipartisan and consensus basis—repealed nearly all of the three judge panel provisions in 1976.²⁴

D. *Judicial Misconduct (§4)*—Proposals to remove the evaluation of judicial misconduct complaints fly in the face of years of study and validation of the current legal response to the sensitive and constitutionally difficult problem of judicial discipline. There has been no showing of need to justify this overhaul, which would be both cumbersome and expensive.

All of the above described proposals would significantly increase costs and delays in our judicial system—the precise opposite of the drafters’ intent. At the same time the Majority is so casually imposing these new burdens on our judiciary, they have cast a blind eye to the most serious resource issue facing the federal bench, the Senate Republicans’ failure to fill the record number of vacancies which exist in the judiciary.²⁵ For these and the other reasons set forth herein, we dissent from H.R. 1252.

I. PEREMPTORY CHALLENGES OF FEDERAL JUDGES WILL UNDERMINE CONFIDENCE IN THE JUDICIARY

Perhaps the most objectionable section included in H.R. 1252 is section 6’s peremptory challenge provision allowing parties on either side of a civil case to remove the assigned judge without stating any reason or cause. We oppose this section for a number of reasons including: (1) its negative impact on public confidence in the judiciary; (2) its adverse impact on litigation costs and delays and its corresponding bias in favor of wealthier parties; and (3) the likelihood it will result in increased judicial challenges based on racial, sexual, and other biases. Section 6 also is subject to a massive loophole allowing peremptory challenges to be made after a judge has issued major substantive and procedural orders.

Current law already provides a clear and coherent statutory regime for removing judges in appropriate circumstances: 28 U.S.C. § 144 allows for disqualification of a judge because of his or her own bias or prejudice; 28 U.S.C. § 372(c) establishes a complaint procedure for parties alleging judicial misconduct; and 28 U.S.C. § 455 requires judges to disqualify themselves in cases where their

²⁴ See *infra* note 54.

²⁵ Obstructionist tactics by Senate Republicans have created a nearly 10% vacancy rate and led even Chief Justice William Rehnquist to demand that the Senate provide for speedier up or down votes on judicial appointments. At the markup, Mr. Delahunt offered an amendment which would have required the GAO to study the impact of Senate delays in judicial confirmations on the federal judiciary which was rejected by an 11 to 13 vote. Markup of H.R. 1252 by the House Comm. on the Judiciary 58–62 (March 10, 1998).

impartiality might reasonably be questioned. However, proposed section 6 goes well beyond removing judges for cause, and allows parties to remove judges for no stated reason whatsoever. As such, it calls into question the integrity of every judge serving in the federal judiciary.

As the Judicial Conference testified, “[s]ection 6 would foster legal manipulation and maneuvering, which is contrary to the fair and impartial administration of justice. It would also have a negative impact on public confidence in the judicial system as a whole, by exacerbating the belief that judges are not to be trusted and that the system is irrational.”²⁶ These concerns were reiterated by Frederick B. Lacey, a respected former U.S. Attorney and Federal District judge who stated, “[e]very trial lawyer wants to judge shop. The [peremptory] strike promotes this practice, and I think it discredits the judicial system [and] poses a threat to proper and fair case management.”²⁷

Peremptory judicial challenges will lead to significant added costs and delays in our civil justice system. It is significant to note that a recent RAND Corporation study completed at Congress’ direction found that the most significant factor in reducing litigation costs stems from pre-trial delays and failure by judges to assert early control over a case.²⁸ These problems would be significantly aggravated under section 6. By establishing a right to replace a judge in the early stages of a case, the legislation discourages judges from devoting significant time and energy at the front end of a case. Moreover, ambiguities inherent in section 6—such as the determination of which “side” a party belongs to (a factual finding to be made by the chief judge of the circuit),²⁹ determining the meaning of “substantial issue”³⁰ and “notice of the original assignment of the case,”³¹ and the uncertainty of the provision’s impact on prisoner litigation and cases before federal magistrates³²—are likely to lead to increased litigation and costs.

The potential for delay and gaming of the system in mass tort cases involving complicated and lengthy pretrial proceedings is particularly acute. In such cases it is only after the pretrial period that the matter is formally transferred back to its original district for trial, typically to the judge who supervised the pre-trial work. Since section 6 only applies to “case[s] to be tried”³³ it would permit a reassignment motion to be filed with respect to a judge after he or she has become intimately familiar with the case. Judge Paul Niemeyer, writing on behalf of the Judicial Conference, has stated that under these circumstances “a preemptive challenge would be devastating. All the expertise that the judge acquired regarding the cases, developed over many months, would be lost. New judges would have to educate themselves regarding the cases, with attend-

²⁶ 1997 Subcommittee Hearings *supra* note 3 (written statement of Chief Circuit Judge Henry A. Politz, U.S. Court of Appeals for the Fifth Circuit, and Judge Ann Claire Williams, Northern District of Illinois, U.S. Judicial Conference 20).

²⁷ 1997 Subcommittee Hearings *supra* note 3 (written statement of Judge Frederick B. Lacey).

²⁸ 1997 Subcommittee Hearings, *supra* note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 22).

²⁹ § 6, Proposed 28 U.S.C. § 464(a)(2).

³⁰ § 6, Proposed 28 U.S.C. § 464(b)(2)(C).

³¹ § 6, Proposed 28 U.S.C. § 464(b)(1).

³² § 6, Proposed 28 U.S.C. § 464(d)(1).

³³ § 6, Proposed 28 U.S.C. § 464(a)(1).

ant delay and expense.”³⁴ The same problem presents itself with respect to class actions—a judge could be disqualified after going to all the time and effort to certify a class prior to the actual trial.

Moreover, in mass tort cases section 6 would work to the pronounced advantage of wealthy corporate defendants, since the right to seek reassignment only applies where all the parties on a side concur in the motion. Judge Niemeyer has written that “[s]ection 6 appears to unfairly favor the side of a case with fewest parties, because ‘all the parties on one side’ must bring the motion to reassign the case. In most mass tort cases, where there are numerous plaintiffs but only a single or small number of defendants, the defendants would have a distinct advantage in obtaining the consents necessary to transfer the case to a different judge.” The unfairness could be even worse with respect to class actions—if “parties” is deemed to include all class members (as opposed to just named class representatives), plaintiffs’ attorneys would face the impossible task of obtaining consents for thousands, if not millions, of class members.

Another category of concern that we have with section 6 stems from the opportunity for discriminatory use of peremptory challenges. Instead of limiting judicial challenges to cases of actual conflict or bias, section 6 does not require the exercising party to make any showing or even any allegation of bias. According to the Alliance for Justice, “the [strike] decision is more likely to be based on a judge’s race, gender or experience before taking the bench, instead of a demonstrated bias for or against a particular party.”³⁵ These concerns were echoed in a recent Washington Post Op-Ed,³⁶ when the Honorable J. Harvie Wilkerson, Chief Judge of the Fourth Circuit complained that under H.R. 1252 judges could easily be removed for racial reasons, creating a system worse than the systemic racially motivated juror peremptory strikes previously dismantled in *Batson v. Kentucky*.³⁷

Proponents’ assertions that peremptory challenges should be incorporated into the federal judicial system based on supposedly favorable results in the states do not survive scrutiny. While seventeen states have reassignment provisions, only ten states currently provide for the more radical form of absolute peremptory challenge included in H.R. 1252,³⁸ and almost all of these laws predate today’s concerns for judicial management and efficiency.³⁹ Moreover, the procedure in these states is not widely supported. For example, a former Wisconsin State Supreme Court Justice described his state peremptory challenge provision as “a dilatory tactic which causes a great deal of expense and inconvenience to litigants, to

³⁴ Letter from Judge Paul V. Niemeyer, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to Barney Frank, Ranking Member, Subcommittee on Courts and Intellectual Property, U.S. House of Representatives, February 27, 1998.

³⁵ Memorandum from the Alliance for Justice, the Alliance for Justice Opposes H.R. 1252, the “Judicial Reform Act” 5 (1998).

³⁶ Judge J. Harvie Wilkerson, “To Strike a Judge,” W. Post, June 13, 1997, at A29.

³⁷ 471 U.S. 1052 (1985).

³⁸ The other states allow for a “modified” peremptory challenge, by requiring an affidavit that the motion to reassign was made in good faith and/or an allegation that the movant believes it would be impossible to receive a fair trial before the assigned judge. See 1997 Subcommittee Hearings supra note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 26).

³⁹ 1997 Subcommittee Hearings, supra note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 26).

witnesses, and to the taxpayers who foot the bill for court administration.”⁴⁰

California’s modified peremptory challenge provision has also caused “serious case management problems” according to the Judicial Conference.⁴¹ During the Committee markup, Mr. Rogan (R-CA), a former prosecutor, described his adverse experiences under California’s peremptory challenge procedure. Mr. Rogan explained that California judges are afraid that a decision out of step with similar decisions of other judges might cause them to be permanently challenged by either the plaintiffs’ or defendants’ bars in civil cases, or by the prosecution or defense bars in criminal cases. Accordingly, the law has the effect of forcing state judges to meet to ensure that their sentences for particular offenses in criminal cases and their judgments in civil cases are in line with one another.⁴² (A bipartisan amendment offered by Mr. Rogan and Mr. Frank to strike the entire peremptory challenge provision was defeated by an 11–13 vote.)

The fact that section 6 is generally written to apply to motions brought within 20 days of the original assignment of the case does not provide a significant limitation on the opportunity for abuse and gamesmanship. This is because the 20-day limitation is subject to gaping loopholes that would allow challenges to be made at later stages of the proceeding. For example, under section 6 a new opportunity to reassign a case arises whenever: (1) a new party is added (by intervention, interpleader, etc.); (2) a supplemental, amended, or third party complaint is served; or (3) a party enters a belated appearance.⁴³ Such occurrences are fairly common, particularly in complex trials, and can easily be manipulated by a party desirous of acquiring a new judge after the party has lost important substantive rulings in a case.

The fact that the peremptory challenge provision was modified by amendment to only apply to the 21 largest judicial districts also does not mitigate section 6’s infirmities. The Department of Justice has noted that “two-thirds of the 21 largest districts have small divisions which may have only a few judges, thus there still exists a real potential for judge shopping and significant forum shopping, as well as increased costs and delay due to relocation.”⁴⁴ Paradoxically, the 21 district limitation could create greater forum shopping opportunities, because parties will have an incentive to file suits in these districts in order to take advantage of the peremptory challenge procedures. Again, such manipulative practices would be most affordable for wealthy litigants.⁴⁵

⁴⁰ 1997 Subcommittee Hearings, *supra* note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 26).

⁴¹ 1997 Subcommittee Hearings, *supra* note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 26).

⁴² Markup of H.R. 1252 by the House Comm. on the Judiciary 76, (March 10, 1998) (statement of Mr. James E. Rogan, R-CA).

⁴³ § 6, Proposed 28 U.S.C. § 464(b)(2).

⁴⁴ Letter from Andrews Fois, Assistant Attorney General, U.S. Department of Justice, to Henry Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives 3 (March 10, 1998).

⁴⁵ Arguing the principle that if the provision is the right thing to do, it should be available to litigants everywhere. Mr. Watt offered an amendment extending the project to all judicial districts. Mr. Watt pointed out that allowing a judicial peremptory challenge in only 21 districts might even be unconstitutional, creating an inequality among litigants nationwide. The amendment was defeated by a 6–12 vote. Markup H.R. 1252 by the House Comm. on the Judiciary 30–35 (March 24, 1998).

II. LIMITING JUDICIAL DISCRETION CONCERNING TAX REVENUES IS UNNECESSARY AND UNCONSTITUTIONAL

Section 5 prohibits district courts from entering any order or approving any settlement that “requires” any “state or political subdivision to impose, increase, levy or assess any tax” unless the court finds by clear and convincing evidence that six enumerated conditions exist.⁴⁶ Taxes that meet the six conditions automatically end within one year, and no tax can be imposed if it contravenes state or federal law.

This provision is highly problematic for a number of reasons. First it is unnecessary. There is simply no outbreak of judicial taxation cases in this country. Outside the context of a few nineteenth-century municipal bond cases, the federal courts have not directly imposed a tax except for a single school desegregation case—*Missouri v. Jenkins*.⁴⁷ And even this isolated case was overturned by the Supreme Court in 1995, when the Justices unanimously rejected the concept of direct federal court imposition of taxes.⁴⁸

Even more importantly, as section 5 is currently written, it could apply to virtually any order or settlement requiring governmental monetary expenditures to conform their institutions to constitutional or federal legal requirements, even if the order or settlement does not explicitly impose such a tax.⁴⁹ It is for this reason that the Judicial Conference has written that section 5 “may undermine the very foundation of judicial power.”⁵⁰ For example, under section 5 *Brown v. Board of Education*⁵¹ could have been vitiated because it necessitated expenditures by local governments to desegregate their local schools. The language could also apply to preempt suits under the Americans with Disabilities Act seeking access to government facilities which require funds for renovation, or an environmental action requiring clean-up of a toxic waste dump. More-

⁴⁶ When granting any relief against a government entity, a court would be required to find by clear and convincing evidence that; a) there are no other means available to remedy a violation of a Constitutional right; b) the proposed remedy is narrowly tailored to remedy a specific deprivation; c) the tax will not exacerbate the deprivation intended to be remedied; d) plans submitted by the state and local authorities are insufficient; e) the interests of State and local authorities in managing its own affairs is not usurped by the levy; and f) the levy will not result in the loss of depreciation of affected taxpayers. § 5(a), Proposed 28 U.S.C. § 1369(a)(1).

In the unlikely event that the six conditions can be met and the court order is permitted, the automatic annual termination of the court order would create an undue and costly burden for the parties and the court. This would require parties to appear repeatedly before the court to provide information on the court order, despite the fact that there may be no change in circumstances necessitating any new court review.

⁴⁷ 672 F. Supp. 400 (W.D. Mo. 1987) (ordering that Kansas City, Missouri school district increase property tax levies for one year in order to comply with court’s desegregation order.) See also Memorandum from the Alliance for Justice, supra note 35, 1 (March 26, 1998).

⁴⁸ *Missouri v. Jenkins*, 515 U.S. 70 (1995).

⁴⁹ At committee, Mr. Delahunt offered an amendment which would have narrowed the bill to court orders which “expressly direct” a tax increase, rather than orders which may indirectly necessitate a revenue increase (as the subcommittee-reported bill had provided). His amendment was rejected by a 10 to 12 vote. Markup H.R. 1252 by the House Comm. on the Judiciary 16–20 (March 10, 1998).

⁵⁰ 1997 Subcommittee Hearings, supra note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 19).

⁵¹ 347 U.S. 483 (1954). In the wake of *Brown*, a number of school districts refused to levy taxes to fund their school systems, and court intervention was necessary to uphold the Constitution. See *Griffin v. Prince Edward’s County School Bd.*, 377 U.S. 218 (1964). In the wake of *Brown*, 81 Members of the House signed a resolution condemning as part of a supposed “trend in the federal judiciary to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the people.” 1997 Subcommittee Hearings, supra note 3 (written statement of Wade Henderson, Executive Director, Leadership Conference on Civil Rights, 4).

over, since section 5 applies to pending cases, orders, and settlements, it could easily undermine numerous long standing desegregation and environmental orders. It is for this reason that a broad range of civil rights, environmental, and disabilities groups oppose section 5.

Another serious flaw in section five is that it grants standing to challenge a court order to “aggrieved corporations” as well as individuals. This grant is written so broadly that foreign corporations who are not present in the jurisdiction, but whose tax liability would be “directly affected”⁵² by the imposition are given standing to sue. It is one thing to give standing to a company that has a real stake in the life of a community and must live with the social and political consequences if a court order is overturned, but it is quite another to confer standing on a foreign entity that happens to do business here and whose sole interest in American society is in maximizing its profits. Unfortunately, an amendment offered by Mr. Delahunt to exclude such foreign corporations from the scope of the section were rejected by the Committee by a 10 to 12 vote.

III. THREE-JUDGE PANELS WILL DIMINISH COURTS ABILITY TO MAKE WELL REASONED AND EFFICIENT LEGAL JUDGMENTS

Section 2 provides for a three-judge district court procedure in cases challenging the constitutionality of state laws, with a direct appeal to the Supreme Court. We oppose this section because of the new and unnecessary costs and delays it will impose on the federal judiciary. At every step of the process, the three-judge court requirement is burdensome on the federal judiciary, and the burden is substantial even if the number of cases falling within the ambit of the requirement is small. We do not have to surmise that this is so; when a substantially similar statute was repealed in 1976,⁵³ the repeal received universal support, and the three-judge panel provision was described as “the single worst feature in the Federal judicial system as we have it today.”⁵⁴

It is also spurious to point to district court decisions holding portions of California have to travel great distances to convene the three-judge panel, to the substantial detriment of their existing caseloads. This Committee knows all too well that the federal judiciary has limited resources and an overburdened docket; we should not blithely require the judiciary to triple the time it must devote to a single case without evidence that an improvement worthy of that added investment would be forthcoming.

Proponents of the three-judge panel provision argue that very few cases would be implicated by its provisions, and the burden would therefore be minimal. This argument is wrong for several reasons. First, no reliable evidence was introduced into the record to demonstrate that the number of cases would be small.⁵⁵ Even

⁵² § 5(a), Proposed 28 U.S.C. § 1369(a)(5)(A).

⁵³ Former 28 U.S.C. § 2281, repealed by Pub L. No. 94-381, § 1, 90 Stat. 1119. The primary difference between H.R. 1252 and § 2281 is that the former applies only to State law adopted by referendum.

⁵⁴ S. Rep. No. 204, 94th Cong., 1st Sess. 2.

⁵⁵ Proponents of the legislation argued that only ten cases in the last decade would have come within the ambit of the three-judge panel provision. The source of this information, apparently, was a quick keyword computer search performed by a Library of Congress employee and reported by telephone. No truly reliable research was conducted. Our own records easily contradict this conclusion as ten referenda from California alone have been challenged in federal courts

if the number is small, the burden is high. As Chief Judge Harry T. Edwards of the D.C. Circuit Court of Appeals testified in 1995, even “a relatively insignificant number [of three-judge panel cases constitutes] a terribly burdensome process when we’re asked to engage in it.”⁵⁶ Finally, because the referendum process does not exist in numerous states, and its use is more heavily concentrated in others (e.g., California), the burden imposed by H.R. 1252 would not be evenly distributed among the circuits.

Fact-finding is a trial court function particularly difficult for a three-judge panel, and it is clear that many proceedings under section 2 will involve substantial fact-finding. As Judge Edwards noted, “determining the likelihood of irreparable harm in the weighing of probable evidence in support of parties’ arguments on the merits are fact-finding matters ill-suited for initial decision by multi-judge panels.”⁵⁷ A burden is also imposed on the Supreme Court since it would be required to dispose of a case on the bare-bones record developed in an injunctive suit in the district court, without intermediate consideration by a court of appeals.⁵⁸

One of the principal arguments advanced by the proponents of section 2 is that it will prevent forum-shopping by plaintiffs who, it is said, may currently file their cases in the court most likely to favor their position. This argument ignores the fact that all federal districts have rules that require the random assignment of cases. Indeed, in the successful legal challenge to California proposition 187 that originally motivated this proposal, the case was filed in the Central District of California, where it was randomly assigned to one of 25 district court and 7 senior judges.⁵⁹ It is also spurious

since 1988. The referenda are Propositions 65 (consumer protection/warning labels), 73 (campaign finance reform), 103 (insurance reform), 115 (reciprocal discovery in criminal cases), 140 (term limits), 187 (curtailing benefits to immigrants), 198 (open primary), 208 (campaign finance reform), and 209 (banning affirmative action by state agencies).

⁵⁶ Hearing on H.R. 1170 Before the Subcomm. on Courts and Intellectual Property Comm. on Judiciary, 104th Cong. (April 6, 1995) (statement of Harry T. Edwards, Chief Circuit Judge, U.S. Court of Appeals for D.C.).

Judge J. Skelly Wright, testifying in 1975, emphasized “the problem of ruling on evidence as the swift-moving events of the trial take place. Three judges cannot act with the same incisiveness as the single judge in making trial rulings as necessary.” Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice 94th Cong. (June 20, and July 19, 1975) (statement of Judge J. Skelly Wright).

⁵⁷ Hearing on H.R. 1170, id. (statement of Harry T. Edwards, Chief Circuit Judge, U.S. Court of Appeals for D.C.).

⁵⁸ The Alliance for Justice explained, “[u]nder H.R. 1252, three-judge court cases would come to the Supreme Court without the filtering of facts and contentions normally applied by the courts of appeals. Those courts winnow the record, narrow the issues, and sharpen arguments: without the layer of review, the Supreme Court will be forced to decide cases on records that are diffuse and imprecise. Moreover, for laws passed by the legislature, a legislative record has been developed. This is not true for those laws adopted by referendum, thus there would be even less material for the Supreme Court to rely on these situations.” Alliance for Justice, *supra* note 35, 2. See also, Fois, *supra*, note 44, 2 (the three-judge panel would provide “for a process that is cumbersome, confusing, and inefficient. * * *”).

An additional complication under the legislation is that in cases where preliminary injunctive relief is denied, which include claims for a permanent injunction and damages, the latter two claims could be tried before a different set of judges with different procedures for appeal, since section 2 does not apply to temporary restraining orders. This is an inefficient and non-sensical result.

⁵⁹ If anything, H.R. 1252 itself provides an opportunity for forum shopping that does not now exist. If the legislation is enacted, plaintiffs seeking to challenge the constitutionality of a state law can elect to file a case seeking a declaratory judgment; if they like the judge randomly assigned to the case, they can seek the declaratory judgment alone, and when that judgment is final, it will be *res judicata* and an injunction will have to issue. An end run, in effect, can occur around the three-judge rule. If, on the other hand, the plaintiffs perceive the randomly assigned judge to be unfavorable, they can then file an application for an injunction, which will automatically give them two more judges, in the hope that the original judge will be out-voted by the

to point to district court decisions holding portions of California Proposition 187 and 209 as unconstitutional as justifying this intrusive and expensive proposal. The drafters of proposition 187 recognized that state efforts to deny alien children public education was constitutionally problematic, and drafted the initiative in a specific attempt to provoke a constitutional challenge and overturn *Plyler v. Doe*.⁶⁰ As for proposition 209, while this initiative banning state affirmative action was struck down by the district court, the decision was quickly overturned by the Ninth Circuit.⁶¹ A three-judge panel would have likely only delayed a decision on the merits.

Finally, we would note that Members of the Majority have repeatedly attempted to argue that section 2 is justified because of the continuing applicability of three judge panels to voting rights cases. We respectfully disagree for two reasons. First, the original rationale for retaining three-judge panels in voting rights cases stemmed from legislative concern regarding the problem of racist judges in the South.⁶² There has been no comparable suggestion of judicial bias with respect to state voter initiatives. Secondly, Mr. Watt stated he believes that the justification for three-judge panels in voting rights cases does not currently exist to the same extent it did historically, and that based on his experience with three-judge panels in his own redistricting dispute he believes three-judge panels are extremely inefficient.⁶³

IV. REMOVAL OF JUDICIAL CONDUCT COMPLAINTS WILL HARM A SYSTEM THAT IS WORKING WELL

Section 4 of H.R. 1252 alters the current procedure for handling complaints of misconduct against federal trial judges to provide for consideration of judicial complaints outside the relevant circuit.⁶⁴ The proposed changes are unnecessary and would ultimately be counter-productive. The current system, which allows for resolution of complaints in the first instance by the circuit in which the complained against judge resides, is set forth in the Judicial Conduct and Disability Act.⁶⁵ This law has stood the test of time and was the result of years of discussion and compromise concerning the

two additional judges. In short, plaintiffs would have two bites at the apple in terms of getting the best court possible.

⁶⁰ 457 U.S. 202 (1982) (holding a Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment). See also *League of United Latin Americans Citizens v. Wilson*, 908 F.Supp 755 (C.D. CA, 1995), remanded 131 F.3d 1297 (1997), aff'd 1998 U.S. Dist. Lexis 3418 (March 13, 1997).

⁶¹ *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D.Cal.), rev'd, 122 F.3d 692 (9th Cir. 1997).

⁶² See H.R. Rep. No. 94-1379, at 13 (1976) (noting that the civil rights community argued "three-judge courts were needed to protect racial minorities from the local bias and parochialism of some federal judges").

⁶³ Markup of H.R. 1252 by the House Comm. on the Judiciary, 105th Cong. 41-42 (March 10, 1998) (statement of Mr. Watt).

⁶⁴ Under the proposed system, a complaint is initially referred to the chief judge of the circuit where the court in sits. The chief judge may dismiss the case if she finds that the complaint a) relates to the merits of the case, b) the complaint was improperly filed, or c) the complaint is frivolous. If the chief judge finds that the complaint cannot be disposed of on any of these three grounds, then she shall forward the complaint to a chief judge of another circuit for his consideration. That chief judge may dispose of the complaint by written order if he finds that the problem has been remedied or is now moot, or conduct proceedings on the merits. § 4(a), Proposed 28 U.S.C. § 372(c).

⁶⁵ 28 U.S.C. § 1 note.

constitutionality and appropriateness of establishing a statutory disciplinary mechanism for the federal judiciary. The efficacy of the Judicial Conduct and Disability Act was reiterated as recently as 1993 by the congressionally created National Commission on Judicial Discipline, which concluded:

One of the most important findings of this Commission concerns the continuing importance of informal approaches to judicial misconduct and disability even after the 1980 Act * * * Informal approaches remain central to a system of self-regulation within the judiciary * * * [A] major benefit of the Act's formal process has been to enhance the attractiveness of informal resolution.⁶⁶

The Commission also recognized the cost effectiveness of peer review of judges, noting that the benefits of timely resolution of complaints, the proximity of the chief judge to insure implementation of discipline, the lack of travel cost, and retaining an administrative instead of adversarial discipline process would all be lost if internal circuit review was abandoned.⁶⁷ This view is shared by the American Bar Association,⁶⁸ and the Department of Justice,⁶⁹ the latter having written "federal judges must be trusted to police their colleagues with respect to allegations of misconduct, and that judges in one circuit are equally—if not better—able to discipline their colleagues on that circuit as they are to discipline judges in other circuits."⁷⁰

Notwithstanding the widespread and non-partisan support for the current legal regime, Republicans would have us completely overhaul the law as an apparent result of a single matter in which the Chief Judge and the Judicial Council of the Sixth Circuit considered and ultimately dismissed—12 complaints arising out of the handling of eight death penalty habeas corpus petitions by a district court judge from that circuit.⁷¹ After reviewing the details of this case, the Judicial Conference noted that "it is likely that 16 judges from any region of the country would have decided the same as did the 16 judges from the Sixth Circuit."⁷² Moreover, the core complaint in that dispute is already being dealt with by another provision in this bill—section 7 providing for the random reassignment of habeas corpus cases.

⁶⁶ 1997 Subcommittee Hearings, *supra* note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 10, citing Report of the National Commission on Judicial Discipline and Removal, at 113 (August 1993)).

⁶⁷ 1997 Subcommittee Hearings, *supra* note 3 (written statement of Chief Circuit Judge Politz and Judge Williams 12–13).

⁶⁸ 1997 Subcommittee Hearing, *supra* note 3 (statement of Mr. N. Lee Cooper, President, American Bar Association, 14). Citing the Report of the National Commission on Judicial Discipline and Removal, *supra* note 66, 89–90, the ABA wrote "[I]n assessing the impact of the 1980 Act, 'it would be a mistake to attend only to complaints that resulted in council action following the appointment and report of a special committee. * * * [T]he opportunity to resolve complaints and conclude a proceeding on the basis of corrective action is a central feature of the Act. Indeed 73 complaints * * * were resolved on that basis.'" *Id.*

⁶⁹ Letter from Andrew Fois, Assistant Attorney General, United States Department of Justice, Hon. Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, U.S. House of Representatives (June 10, 1997).

⁷⁰ *Id.*, 2.

⁷¹ Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference for the United States, to John Conyers, Jr., Ranking Member, Committee on the Judiciary, U.S. House of Representatives (March 3, 1998).

⁷² *Id.*, 3.

CONCLUSION

We would warn the Members of the many dangers that occurs when elected representatives seek to score easy political points by criticizing judges and circumscribing court powers and jurisdiction as H.R. 1252 does.⁷³ In his farewell address to the Nation, then President George Washington warned:

Let there be no change [in court powers] by usurpation; for it is through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.⁷⁴

Until Congress can devise a better system of checks and balances than James Madison and the founding fathers, we would advise the Majority to stop criticizing and micro managing our judiciary and return to the legislative work the voters sent us to Congress to accomplish.

JOHN CONYERS, Jr.
CHARLES E. SCHUMER.
RICK BOUCHER.
BOBBY SCOTT.
ZOE LOFGREN.
MAXINE WATERS.
WILLIAM D. DELAHUNT.
STEVEN R. ROTHMAN.
BARNEY FRANK.
HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTY MEEHAN.
ROBERT WEXLER.



⁷³H.R. 1252 is only the most recent effort in a long line of Republican legislative efforts to substitute their political judgment for the well-reasoned legal judgment of an independent judiciary. Among other things, since Republicans took control of Congress, they have: (1) passed laws which allowed for summary exclusion of aliens seeking asylum without legal due process and eliminated judicial review of other administrative decisions effecting aliens [[Illegal Immigration Reform and Immigrant Responsibility Act of 1995, Pub. L. No. 104–208 (1996)]; (2) directed a variety of intimidating questions and surveys towards the judiciary; and (3) initiated an unprecedented number of GAO reviews of the judiciary. At the same time, Republicans have also unsuccessfully sought legislation to establish a non-judicial authority to review the courts [S. 1446, 104th Cong. (1995)]; abrogate the Fourth Amendment exclusionary rule [H.R. 666, 104th Cong. (1995)]; and circumscribe federal court authority with regard to real property taking cases [H.R. 1534; H.R. 992, 105th Cong. (1997)].

⁷⁴1997 Subcommittee Hearings, *supra* note 3 (written statement of N. Lee Cooper 17).