Restoring Structural Checks on Judicial Power in the Era of Managerial Judging

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INTRODUCTION

My first memory of the legal system in action was a visit to the chambers of my grandfather, a federal district judge. My grandfather showed me a three-foot-long gavel displayed on his desk and described how he would wave it at lawyers when he encouraged them to settle cases. Although I deeply admired my grandfather, I can clearly recall feeling that I would not like to be a lawyer in his court, where the gavel, and its accompanying tongue-lashing, might induce me to settle a case that I thought should go to trial.

I recalled this incident years later while doing research for the National Commission on Judicial Discipline and Removal.[1] When I asked lawyers, including a number in the Department of Justice, about the extent of corruption among federal judges, they universally expressed the view that such corruption is extremely rare.[2] I did, however, hear many unsolicited complaints about abuse of authority by federal district judges. The complaints ranged from sexism and racism in the treatment of lawyers, to arbitrary and unfair actions in the management, control, and settlement of litigation.

The lawyers' stories echoed the kinds of stories in the legal literature on feminist jurisprudence or critical race theory.[3] The stories communicate how minorities and women feel marginalised when they appear before certain district judges. Interestingly, white male partners in large law firms also told stories of arbitrary and unfair treatment. Federal judges, it appears, have the power to make even the most favored in society feel as marginalised and powerless as women and minorities have often felt. This is not to suggest that all, or even most, federal judges behave in a discriminatory or arbitrary fashion, but it seemed to be a sufficiently recurrent theme to warrant further inquiry.

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[1] *See* Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges, in* 1 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 243 (1993).

[2] *Id.* at 277.

[3] *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (using victims' stories to support criminal sanction for racist speech).

The complaints about arbitrary decision-making focused principally on judges' control of the civil pretrial process, especially discovery, and on judicial involvement in settling civil cases. Civil procedure literature has documented the growth of judicial power in these areas as district judges have abandoned their passive roles in favor of more active, managerial judging.[4] District judges, aided by changes in the Federal Rules of Civil Procedure and encouraged by judicial administrators, have involved themselves in the management and settlement of cases to an unprecedented degree.[5] Commentators have both criticized and applauded the movement toward what Professor Judith Resnik has called "managerial judging."[6] These commentators have focused primarily on the perceived procedural benefits or liabilities of managerial judging and on whether managerial judging will really achieve its stated objective of alleviating court congestion. Although some observers have noted that managerial judging increases the potential for the arbitrary exercise of power,[7] not one has examined these developments from a separation of powers perspective. Viewed from this perspective, the trend toward managerial judging is potentially quite troublesome.

The Constitution divided power among the three branches of government on the fundamental assumption that no official could be trusted with unchecked power. The Constitution limit-

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[4] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (concluding that judges' increased role in influencing litigation is unnecessary). *But see* Paul R. J. Connolly, *Why We Do Need Managerial Judges*, JUDGES' J., Fall 1984, at 34 (arguing against Resnik's conclusion that judicial case management is unnecessary); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981) (arguing that judges' new role as pretrial managers is necessary). *See generally* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that emphasis on settlement is problematic); Leroy Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743 (1989) (examining pros and cons of judicial involvement in settlement conferences).

[5] *See* FED. R. CIV. P. 16; FEDERAL JUDICIAL CENTER, ADMINISTERING THE FEDERAL JUDICIAL CIRCUITS: A SURVEY OF CHIEF JUDGES' APPROACHES AND PROCEDURES (1982).

[6] *Compare* Judith Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, JUDGES' J., Winter 1984, at 8 (arguing little empirical evidence exists to support claim that judicial management improves use of judicial resources) *with* Connolly, *supra* note 4 (explaining existing evidence that judicial management improves litigation's efficiency).

[7] *See* Resnik, *supra* note 4, at 402-03 n.115 (arguing pretrial conferences often are not on record, and judges therefore have latitude in following procedural rules).

ed the power of the three branches in two ways. First, it separated governmental authority so that no official possessed significant combinations of executive, legislative, and judicial authority. Second, it granted overlapping authority so that one branch might act as a check on another.

The Constitution subjects the judiciary to the fewest number of external checks. Indeed, the framers intentionally granted the judicial branch a generous measure of independence from the other branches of government and from the electorate. The framers did not guarantee judicial independence because they believed that judges were immune from the ambitions that lead to abuse of power in other branches. Instead, the framers believed that independence was necessary to protect adjudication from the effects of political faction and because they believed that individual judges would not have much power to abuse. This latter belief flowed not only from the framers' view of judicial power as a whole ("neither the power of the sword nor the power of the purse"),[8] but also from the framers' expectation that there would be substantial separation of powers *within* the judicial branch itself. District judges would share trial authority with juries, would be bound by precedent, and would be subject to appellate review. Thus, checks built into the judicial branch itself would prevent judges from abusing their power.

The powers assumed by managerial judges, however, evade the important checks that the framers assumed would prevent judicial arbitrariness. These newly assumed powers arise at the pretrial stage when judges' authority is unchecked by juries. Judges exercise managerial authority on an ad hoc basis; no significant precedent guides or constrains their control over discovery or their behavior in settlement conferences. Moreover, these newly assumed powers are generally not subject to judicial review. Nothing stands in the way of a district judge's arbitrary exercise of managerial authority.

If the framers had anticipated that judges would assume such unchecked power, they surely would have predicted litigators' recent complaints. They would have realized that because judges are only human, they, like any official with un-

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[8] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

checked power, will tend to exercise power arbitrarily. Accordingly, the framers would have searched for ways to limit that power or check the arbitrary use of it. This Article suggests that we must limit judges' unchecked powers or restrain their use of this power. If the complexity of modern litigation requires some form of increased judicial management, we must allocate managerial power in a way that recognizes the basic principles of divided and checked power that are built into the structure of the Constitution.

This Article examines the issues described above in three sections. Part I looks at the history of Article III to determine how the framers expected federal judicial power would be exercised. This inquiry focuses on the purpose for which the framers granted the judiciary substantial independence from the political branches of government. It then examines the intrabranch checks and balances that the framers expected would compensate for the absence of interbranch checks and balances. Part II examines the way in which the growth of managerial judging has circumvented the expected intrabranch checks and balances. Part III assesses the effectiveness of existing extra-litigation restraints on arbitrary action at the district court level. Finally, Part IV recommends possible solutions to the separation of powers problems presented by managerial judging. In particular, Part IV argues that it would be helpful to take the following steps: (1) separate the functions of pretrial management and substantive decision-making by assigning all nondispositive pretrial functions to magistrate judges; (2) create, through published rules and caselaw, specific standards governing pretrial management; (3) provide district court review of magistrate judges' pretrial management decisions; (4) institute a system of judicial performance evaluation, directed by the circuit judicial councils, which would include attorney evaluation of the performance of all federal district judges and magistrate judges.

I. THE FRAMERS' VISION OF THE POWER OF FEDERAL TRIAL COURTS

It is well known that the framers intended to establish a federal judiciary that was largely independent of the political branches of government and the passions of the electorate. It is

less well-known that many in the founding generation were greatly concerned about the absence of checks and balances on the power of the federal judiciary. Thus, although judicial independence from political passions was a critical element of the Constitutional structure, it was equally important that judges would not be able to exercise arbitrary, unchecked power. The framers knew that concentrated power, without check, would be exercised arbitrarily to the detriment of the citizenry. In the case of the judiciary, these necessary checks were principally internal rather than external. The framers relied on precedent, appellate review, and the institution of the jury trial to provide substantial checks upon the arbitrary exercise of power by federal trial court judges. The twin themes of independence and accountability are explored below.

A. The Importance of Judicial Independence

The framers' belief in judicial independence was not new; it was substantially inherited from their British predecessors. The principal language guaranteeing judicial independence in the Constitution (that federal judges "shall hold their Offices during good behavior")[9] was derived from the British Act of Settlement of 1701, which provided that "judges' commissions shall be made *quamdiu se bene geserint* [as long as he shall behave himself well]."[10] One of the major grievances leading to the War for Independence was the Crown's refusal to provide colonial judges with the tenure protections of the Act of Settlement.[11] Indeed, one of the principal grievances listed in the Declaration of Independence was that the king had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

Thus, it is not surprising that, when drafting Article III, the framers included clauses that guaranteed tenure during good behavior and prohibited reduction in judicial salaries. Indeed, the framers went one step further than their British forebearers.

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[9] U.S. CONST. art. III, § 1.

[10] Act of Settlement, 12 & 13 Will. 2, ch. 2, § 3 (1700) (Eng.). *See also* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 151 (1973).

[11] *See* WINTON U. SOLBERG, THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION 35 (2d ed. 1990).

The Act of Settlement had permitted removal "upon the address of both Houses of Parliament . . . ."[12] The framers, however, expressly rejected a proposal by John Dickinson of Pennsylvania for removal by joint address of Congress.[13] As James Wilson, one of the principal architects of Article III, noted:

> Such a provision in the British government less dangerous than here, the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had *successively* offended by his independent conduct both Houses of Parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our government.[14]

To avoid the debilitating impact of faction on the federal judiciary, the framers refused to give Congress easily exercised power to remove federal judges.[15] As a result, the framers created "a truly independent judiciary limited only by the cumbersome process of impeachment."[16] Although Hamilton acknowledged

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[12] Act of Settlement, ch. 2, § 3.

[13] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428 (1911).

[14] SOLBERG, *supra* note 11, at 336-37 (quoting Madison's Constitutional Convention notes).

[15] Madison defined "faction" in *The Federalist* as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10 (James Madison).

[16] Martha A. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135 (explaining framers' reasons for creating independent judiciary). Some scholars have argued that federal judges may be removed by some mechanism other than impeachment. *See* BERGER, *supra* note 10, at 147 (arguing canon of construction requires conclusion that framers implied alternative options for judicial removal besides impeachment); Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475 (1970) (arguing same); Burke Shartel, *Federal Judges — Appointment, Supervision, and Removal: Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 723, 870 (1930) (arguing that preservation of federal bench's strength — tenure during good behavior — can be accomplished by organizational improvements within constitutional guidelines). However, most scholars have concluded that impeachment by the House and conviction by the Senate as provided in Article I of the U.S. Constitution is the sole mechanism for removing a federal judge from office. *See* Todd Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 841-42 (1993) (explaining that constitutional history supports removal of federal judges from office only by impeachment); *see also* Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108 (1970) (arguing that founding fathers deliberately created judiciary subject to Constitution alone); Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U.

in *The Federalist* that "[t]he want of a provision for removing judges on account of inability has been a subject of complaint," he argued that "all considerate men will be sensible that such a provision would either not be practiced upon, or would be more liable to abuse, than calculated to answer any good purpose."[17]

B. The Importance of Accountability and the Need for Checks on Judicial Power

The remarkable independence guaranteed to the federal judiciary was not uncontroversial.[18] The framers were deeply ambivalent about the independence of the judiciary.[19] The reasons for this ambivalence were rooted in the principles of separation of powers and checks and balances that provided the foundation of the structural Constitution. The key to the new structure of government was a system under which no individual exercised unchecked arbitrary power. As Madison stated in *The Federalist*:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control of the government; but experience has taught mankind the necessity of auxiliary precautions.[20]

The Anti-Federalists fixed upon the absence of these controls over federal judges and argued that the independence of the

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L. REV. 719 (1970) (concluding that no clear rules govern impeachable conduct, but such conduct must be "serious" in nature); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979) (arguing that impeachment was method chosen by framers for judicial removal and it therefore must not be undermined); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969) (arguing that legislation which establishes alternative means of impeachment is unconstitutional).

[17] THE FEDERALIST NO. 79 (Alexander Hamilton).

[18] *See* Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence, in* ORIGINS OF THE FEDERAL JUDICIARY 284-85 (Maeva Marcus ed., 1992) (stating that 10 states retained some measure of political control over sitting judges and only 3 states maintained unqualified good behavior standard). By comparison with state protections, Article III's protections are extreme. *Id.* No state provided guarantees against reductions in salary, and 10 of the original 13 states had some provision for removal of judges by the political branches in addition to impeachment. *Id.*

[19] *Id.* at 284.

[20] THE FEDERALIST NO. 51, at 322 (James Madison) (J. Cooke ed., 1961).

judiciary would lead to arbitrary and oppressive behavior. For example, "Brutus," writing in a New York critique of Article III, stated:

> [T]hey have made the judges independent in the full sense of the word. There is no power above them, to controul [sic] any of their decisions. There is no authority that can remove them, and they cannot be controuled [sic] by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[21]

The Anti-Federalists were concerned about both the potential power of the federal judiciary and the inadequacy of impeachment as a method of controlling that power. For example, the "Federalist Farmer" wrote:

> It is an observation of an approved writer, that judicial power is of such a nature, that when we have ascertained and fixed its limits, with all the caution and precision we can, it will yet be formidable, somewhat arbitrary and despotic — that is, after all our cares, we must leave a vast deal to the discretion and interpretation — to the wisdom, integrity, and politics of the judges - These men, such is the state even of the best laws, may do wrong, perhaps, in a thousand cases, sometimes with, and sometimes without design, yet it may be impracticable to convict them of misconduct.[22]

Moreover, the Anti-Federalists worried that, because of the concerns over legislative excesses during the Articles of Confederation, the framers were attentive to the need to control legislative overreaching, but insufficiently recognized the potential for judicial tyranny. As one opponent noted:

> In the unsettled state of things in this country, for several years past, it has been thought, that our popular legislatures have, sometimes, departed from the line of strict justice, while the law courts have shewn a disposition more punctually to keep to it. We are not sufficiently attentive to the circumstances, that the measures of popular legislatures naturally settle down in time, and gradually approach a mild and just medium; while the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tem-

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[21] 2 THE COMPLETE ANTI-FEDERALIST 438 (Herbert J. Storing ed., 1978).

[22] 2 *id.* at 315.

> pered and guarded by the constitution, and by laws, from time to time.[23]

As a result, "we may fairly conclude, we are more in danger of sowing the seeds of arbitrary government in this department [the judiciary] than in any other."[24]

Others who feared the unchecked power of the courts expressed their concerns in more florid literary prose:

> To conclude — as the Fox in the Fable, wanting to rob a hen-roost, or do some such prank, humbly besought admittance and house room only for his head, — his whole body presently followed—. So courts more crafty as well as more craving than that designing animal, have scarce ever gained an inch of power, but they have stretched it to an ell; and when they have got in but a finger their whole train has soon followed.[25]

Finally, the Anti-Federalists were most insistent about the need to guarantee the right to a jury trial as a way to control and check the arbitrary discretion of the federal courts. As Gerhard Casper has noted, "the Anti-Federalists were the true disciples of Montesquieu in their emphasis on juries as crucial for the separation of powers."[26] In particular, the Anti-Federalists focused on the absence of a right to a jury trial in the body of the Constitution itself, the explicit grant to the Supreme Court of appellate jurisdiction over both questions of law and fact, and the express grant of equity power to the federal courts.[27] The latter two grants of authority threatened to remove power from juries, even if the federal court system recognized the right to a jury trial at common law, either through the reversal of jury findings of fact on appellate review or the preemption of a right to jury trial through the expansion of the courts' equity powers, where no right to a jury existed. Thus, as Luther Martin of Maryland wrote in 1788:

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[23] 2 *id.* at 316.

[24] 2 *id.*

[25] 4 *id.* at 210.

[26] Casper, *supra* note 18, at 290.

[27] *Id.* at 288 (commenting on independence of new federal judiciary).

> *Jury trials* which have so long been considered the *surest barrier* against *arbitrary power*, and the *palladium* of *liberty*, — with the *loss* of *which* the *loss* of our *freedom* may be dated, are *taken away* by the proposed form of government, not *only* in a *great variety* of questions between *individual* and *individual*, but in *every case* whether *civil* or *criminal* arising *under the laws* of the United States, or the *execution* of those laws.[28]

A multitude of critics echoed these concerns about the potential loss of the jury as a check on arbitrary judicial power.[29]

Thus, for many Americans, the independence of the federal judiciary was a serious problem and not a great boon to democracy: "[The courts] will be independent of the people, and consequently suitable tools for the purposes of tyranny and oppression . . . ."[30] As Frank Easterbrook has pointed out, "judges have tenure *in spite of*, not because of, its liberating effect."[31]

C. The Framers' Checks on the Power of Federal Trial Court Judges

The framers responded to concerns about the power of federal judges in several ways. First, they argued that the nature of the judicial process would restrain judicial power. Second, they established internal checks within the judicial branch. Finally, they enacted constitutional and statutory provisions to guarantee that substantial decision-making power would remain with common-law juries, thereby providing an additional check on the power of federal trial judges.[32] Each of these limitations on federal judicial power is discussed below.

1. Controlling the Primary Discretion of Trial Judges

First, the system of stare decisis and controlling precedent limited what Professor Rosenberg has identified as the "primary discretion" of trial judges.[33] As Rosenberg notes, "[W]hen the

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[28] 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 21, at 70.

[29] *See* 3 *id.* at 58-63, 159-60; 5 *id.* at 36-40, 112-15, 129-36.

[30] 4 *id.* at 241.

[31] Frank Easterbrook, *What's So Special About Judges*, 61 U. COLO. L. REV. 773, 777 (1990).

[32] *See infra* notes 57-61 and accompanying text (describing role of juries).

[33] *See* Maurice Rosenberg, *Judicial Discretion of The Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (discussing differences between primary and secondary

law accords primary discretion in the highest degree in a particular area, it says in effect that the court is free to render the decision it chooses; the decision-constraining rules do not exist here; and that even looser principles or guidelines have not been formulated."[34] Senators and Representatives, for example, have unrestrained primary discretion. No rules or restraints bind legislators in their decisions about how to vote. With this freedom comes substantial power, the concomitant risk of abuse of power, and, in the framers' view, the need to create multiple checks on the use of this power.

The framers relied on the fact that judges do not possess the same kind of primary discretion as legislators. Because of the control of precedent, judges are not able to exercise unconstrained power. They are limited by prior case law and by congressional statutes. In defending the independent judiciary, Hamilton expressly relied on the power of precedent as a check on judicial power: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ."[35] The framers did not grant judges the right to exercise their own unlimited discretion or will instead of judgment.[36] As Chief Justice Marshall wrote while he was presiding in the trial of Aaron Burr, even in cases in which the trial judge is given discretion, the choices are not left to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[37] Justice Frankfurter later put this principle more bluntly: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[38]

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discretion).

[34] *Id.*

[35] THE FEDERALIST NO. 78, at 529 (Alexander Hamilton).

[36] *Id.* at 526 (stating that if courts exercise their "WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body").

[37] United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14, G92d).

[38] Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting). Justice Cardozo expressed the same view, but by using a different metaphor, when he noted: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. He is

Because the interbranch checks on judicial power were so weak, the framers hesitated to grant federal judges any power outside of the context of a case or controversy in which precedent would regulate judicial discretion. The framers ultimately rejected judicial participation in a council of revision in part because they feared that it would give judges too much unchecked power.[39] The power of the council to veto legislation would have involved virtually unlimited primary discretion, which, because of the independence of the judicial branch, would not have been subject to checks and balances. Thus, although the framers recognized that judges would inevitably exercise some primary discretion, they expected it to be relatively limited given the constraints of statute and precedent.

The framers principally constrained the discretion of the courts by limiting judicial power to cases or controversies in which precedent and internal checks on judicial power could operate. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[40] Almost immediately after the adoption of the Constitution, the Supreme Court acknowledged the need to confine the duties of the courts to cases or controversies in which precedent would control and guide the courts. In *Hayburn's Case*,[41] all of the members of the Court, sitting as various circuit judges, declined to exercise authority to review wartime pension claims because they were not "properly judicial, and to be performed in a judicial manner."[42] In *Marbury v. Madison*,[43] the Court emphasized:

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to draw his inspiration from consecrated principles." BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). *See also* Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 688-89 (1979) (quoting Benjamin Cardozo).

[39] *See* 2 FARRAND, *supra* note 13, at 75 (remarks of Elbridge Gerry), 79 (remarks of Nathanial Ghorum); *see also* James T. Barry, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 253-54 (1989) (stating that council of revision opponents argued such participation would lead to judicial dominance of executive branch).

[40] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976).

[41] 2 U.S. (2 Dall.) 408 (1792).

[42] *Id.* at 410.

[43] 5 U.S. (1 Cranch) 137 (1803).

> Whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.[44]

In other words, the courts may act only when there is law, based on precedent, to apply. Courts do not possess authority to assert their own will. In *Muskrat v. United States*,[45] the Court referred to *Marbury* and emphasized that the judicial power is limited to cases or controversies, which the court defined to be "the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."[46]

While recent justiciability cases emphasize more strongly the aspect of the case or controversy requirement that limits the "non-democratic" court's intrusion into the domain of the political branches,[47] the need to cage unaccountable judicial power within the bounds of precedent remains undiminished. Indeed, even the concerns that animate the modern justiciability cases are related to Hamilton's concern that precedent should bind the judiciary. When courts venture beyond the context of a precedent-limited case or controversy system, little controls judges' primary discretion. Judges exercise "will" without boundary or definition rather than "judgment" based on prior judicial decisions. The framers anticipated this concern and protected

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[44] *Id.* at 165.

[45] 219 U.S. 346 (1910).

[46] *Id.* at 356-57.

[47] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982). In *Allen*, the Supreme Court stated that "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen*, 468 U.S. at 750. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper — and properly limited — role of the courts in a democratic society." *Id.*

against it by limiting judicial power to a context in which there would be substantial control on primary discretion.

2. Limiting the Secondary Discretion of Federal Trial Court Judges

The framers also limited the "secondary discretion" of trial judges.[48] Secondary discretion exists "when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal."[49] Justice Jackson most memorably characterized this type of discretion when he commented on the unreviewable discretion of the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final."[50] In other words, even if strict rules of precedent bind trial judges, they might nevertheless retain substantial unchecked power if their decisions were not reviewable.

The framers provided this type of discretion-restraining review for both legislators and the executive in the form of interbranch checks. Congress has the power to adopt legislation, but the President has the power to veto the legislation. The President has the right to appoint officers of the United States and to conclude treaties with foreign governments, but the Constitution gives Congress the power of advice and consent on these matters.

The framers further restrained the power of federal trial court judges by an intrabranch mechanism — appeal. Although the Constitution does not guarantee the right to an appeal,[51] it is clear that the Constitution contemplates appeals. Since the Judiciary Act of 1789, federal statutes have provided at least one level of appellate review.[52] As one scholar has noted:

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[48] Rosenberg, *supra* note 33, at 637.

[49] *Id.*

[50] Brown v. Allen, 344 U.S. 443, 540 (1953).

[51] The Supreme Court has described the right of appeal as "not essential to due process, provided that due process has already been accorded in the tribunal of first instance." Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 80 (1930). *See also* McKane v. Durston, 153 U.S. 684, 687 (1894) (stating that appellate review of criminal convictions is not absolute right, is not necessary to due process of law, and is entirely within state's discretion).

[52] *See* Judiciary Act of 1789, ch. 20, §§ 11, 22, 1 Stat. 73 (conferring appellate jurisdic-

> Even if constitutional, unreviewable discretion offends a deep sense of fitness in our view of the administration of justice. We are committed to the practice of affording a two-tiered or three-tiered court system, so that a losing litigant may obtain at least one chance for review of each significant ruling made at the trial-court level.[53]

Not only does appellate review provide a litigant with an additional court to examine a district judge's ruling, the reviewing court is typically made up of more than one judge. Thus, "our fondness for appellate review may also reflect a feeling that there is safety in numbers."[54]

The creation of internal checks and balances within the judicial branch assuaged the framers' concerns about unchecked judicial power. The Judiciary Act of 1789 established the presumption that the decisions of trial court judges would be subject to review on appeal. Thus, other judges within the judicial branch would be able to check the exercise of arbitrary behavior by trial court judges.

The Supreme Court tacitly acknowledged the significance of appellate review in *Marbury*. By declaring that Congress could not statutorily grant original mandamus jurisdiction to the Supreme Court, the Court effectively interpreted the grants of original jurisdiction in Article III of the Constitution to be a ceiling, rather than a floor, for Supreme Court jurisdiction. The Court did not permit Congress to enlarge the scope of original Supreme Court jurisdiction from which there would be no appeal. Other Supreme Court decisions echoed this preference for multiple hearings. For example, in interpreting a statute granting a right of appeal to the Supreme Court, the Court rejected an interpretation that the appeal right applied only to cases heard by circuit courts on appeal rather than to cases within the original jurisdiction of the circuit courts.[55] The Court noted:

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tion on circuit courts from judgments of district courts and regulating appellate review of lower court rulings by higher courts).

[53] Rosenberg, *supra* note 33, at 641-42.

[54] *Id.* at 642.

[55] *See, e.g., Ex parte* McCardle, 73 U.S. 318, 326 (1867) (holding that only allowing right of appeal to attach to all judgments of circuit court would satisfy "spirit and purpose of the law" in question).

> If any class of cases was to be excluded from the right of appeal, the exclusion would naturally apply to cases brought into the Circuit Court by appeal rather than to cases originating there. In the former description of cases the petitioner for the writ, without appeal to this court, would have the advantage of at least two hearings, while in the latter, upon the hypothesis of no appeal, the petitioner could have but one.[56]

Thus, although the Constitution does not guarantee a right of appeal, the Court has acknowledged that the right to appeal serves as an important internal check on the discretion of federal judges.

3. The Diffusion of Trial Court Authority to Juries

Finally, the power of the Article III judiciary as a whole was restrained by the dispersal of substantial decision-making authority to the public sitting as juries to find facts in civil litigation. After all, the best way to avoid the concentration and abuse of power by government officials is not to give it to the government in the first place, but to reserve it to the people.

The framers quickly responded to the Anti-Federalists' concerns about the potential elimination or restriction of the right to a jury trial as an additional check on arbitrary judicial action. Hamilton sought to reassure opponents of the Constitution that the grant of appellate jurisdiction to the Supreme Court, both as to matters of fact and law, would not be used to overturn the findings of common law juries.[57] Hamilton argued that appellate jurisdiction over factual issues would extend only to civil law matters and other cases not tried to a jury. Hamilton argued that this interpretation:

> Puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the Supreme

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[56] *Id.*

[57] THE FEDERALIST NO. 81, at 549-51 (Alexander Hamilton) (J. Cooke ed., 1961) (contending that grant of appellate jurisdiction as to law and fact "do[es] not necessarily imply a re-examination in the [S]upreme [C]ourt of facts decided by juries in the inferior court").

> Court there should be no reexamination of facts where they had been tried in the original causes by juries.[58]

In any event, the Bill of Rights, which guaranteed the right to a jury trial, ultimately addressed the Anti-Federalists' concerns. In suits at common law where the amount in controversy exceeded $20, the Seventh Amendment required that "the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to rules of the common law."[59] Thus, the framers guaranteed that the jury would continue to serve as a significant public check on the fact-finding power of Article III judges.

Furthermore, the new Congress moved quickly to protect the jurisdiction of common law juries against the intrusions of equity courts. The Judiciary Act of 1789 expressly limited equity jurisdiction in a number of areas to preserve the common law right to a jury trial.[60] In addition, judicial fact-finding was specifically circumscribed by sections 19, 26 and 30 of the Act.[61] Thus by 1800, the Anti-Federalists' three principal concerns about preserving the right to jury trials were addressed: (1) the Constitution guaranteed the basic right to a jury trial; (2) the Constitution also restricted the courts ability to review a jury's findings of fact; and (3) statutes expressly restrained the courts' ability to avoid jury trials by expanding equity jurisdiction.

Thus, at the beginning of the 19th Century, the authority of federal trial court judges was subject to three significant checks. First, precedent and statute limited the primary discretion of judges. Unlike legislators, judges did not have unlimited discretion to exercise their authority as they saw fit. Second, in place of the interbranch checks that guarded against the abuse of executive and legislative power, the system of appellate review provided an intrabranch check on the power of federal trial court judges. Finally, the institution of the jury trial and the constitutional and statutory provisions created to preserve its

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[58] *Id.* at 552.

[59] U.S. CONST. amend. VII.

[60] Section 16 of the Act restated the general common law rule that suits in equity would not be permitted in any case in which a "plain, adequate and complete remedy may be had at law." Rosenberg, *supra* note 53, (discussing Hamilton's view of Judiciary Act).

[61] *Id.*; Casper, *supra* note 18, at 291.

continued viability checked judicial authority by allowing public participation in the fact-finding process of the federal courts.

II. THE INCREASING INADEQUACY OF THE FRAMERS' CHECKS ON THE POWER OF TRIAL COURT JUDGES

For almost one hundred and fifty years, the checks on the power of federal trial court judges continued to operate as effective restraints on the arbitrary exercise of power. Precedent, appellate review, and the jury trial effectively limited the scope of trial court discretion. Indeed, if one check waned, another compensated for it. For example, trial courts in the nineteenth century began to exercise an increasing amount of control over the jury through the development of strict rules of evidence and control over the sufficiency of evidence through directed verdicts and new trial orders.[62] At the same time that trial courts began to regulate trials more elaborately, "Appellate courts kept pace, creating new procedures and scrutinizing trial courts' use of them."[63] As trial courts regulated juries, appellate courts established precedent to govern the new trial court powers and regularly reviewed the exercise of trial court authority on appeal. By the 1930s, however, changes in the American civil litigation process began to limit substantially the effectiveness of all three traditional checks on trial court power.

A. The Shift from Trial to Pretrial

The traditional litigation process focused almost entirely on the trial. In 1949, one observer of the litigation process commented: "The heart of the judicial process is the trial in court. All that precedes the trial is the preparation. All that follows is but the correction of error, if error there be."[64]

These trials, in the common law tradition, were adversarial, rather than inquisitorial; primary authority rested with the attorneys. Even in cases in which the judge was the fact-finder in the

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[62] *See* Steven Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 641-42 (describing "flowering" of new procedural tools for trials during 19th century).

[63] *Id.* at 641.

[64] Sidney P. Simpson, *The Problem of Trial*, *in* DAVID D. FIELD, CENTENARY ESSAYS 141, 142 (1949).

case, by agreement of parties or the equitable nature of the action, the judge's role was essentially passive.[65] Moreover, because the civil litigation process focused so heavily on "the fish bowl of trial . . . , trial judgments created prompt opportunities for appellate review."[66] In the past fifty years, however, civil litigation in the federal courts has been transformed from a trial-oriented process to a predominantly pretrial process.

One of the factors leading to this shift has been the dramatic growth of the federal courts' civil litigation load. In 1940, the number of civil filings totalled 28,909.[67] By 1960, the number of civil filings totalled 51,063,[68] and by 1988, that number had increased to almost 240,000.[69] Even taking into account the increase in the number of federal district judgeships, the number of filings per judgeship has more than doubled from 1960 to 1988.[70]

As a result of this workload, the Federal Courts Study Committee concluded that "caseload pressures are forcing [judges] increasingly to rely on clerks and to give short-shrift to certain aspects of their work."[71] In addition, the committee found that "[j]udges must labor under conditions they find quite unsatisfactory."[72] One federal judge has written in a discouraged tone about the burden of a docket that may include 350 civil and 12 criminal cases at any one time and has commented that "Judges are becoming more and more like baseball fans. They are preoccupied by statistics: filings per judge; dispositions per judge; time of disposition; court of appeals filings; opinions; orders; unpublished orders; decisions without oral arguments; and the utilization of staff attorneys . . . "[73]

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[65] *See* Resnik, *supra* note 4, at 380-81 (describing passive reception of evidence by factfinder, whether jury or judge).

[66] Yeazell, *supra* note 62, at 644.

[67] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 95 (1941).

[68] 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 30 (1990).

[69] *Id.*

[70] There were 206 filings per judgeship in 1960 as compared with 416 filings per judgeship in 1988. *Id.* In contrast, the number of criminal filings per judgeship has declined from 113 in 1960 to 77 in 1988. *Id.*

[71] *Id.* at 42.

[72] *Id.*

[73] Prentice H. Marshall, *Some Reflections on the Quality of Life of a United States District*

Moreover, the increase in volume alone does not adequately reflect federal judges' increased workload. Cases have become increasingly complex and take a longer time to try when they do go to trial.[74] Dramatic increases in information technology have spurred this increase in complexity. Cases that once involved hundreds of documents may now involve hundreds of thousands of documents.

One of the results of this dramatic increase in workload is significant additional pressure to dispose of a case prior to trial. As the Federal Courts Study Committee Subcommittee on the Federal Courts and Their Relation to the States noted, "District courts may and do respond to caseload pressures by making it more difficult for litigants to get a trial."[75] The pressure to dispose of cases is so significant that, in spite of the huge increases in cases filed, the number of civil trials per judge declined by 12% — from 25 trials per judge in 1960 to 22 per judge in 1988.[76]

The dramatic increase in caseload and the accompanying pressure to dispose of cases more quickly has helped to transform civil litigation from a trial system to a system focused substantially on pretrial. In 1938, the Attorney General reported approximately four times more civil case filings than trials.[77] These figures reflect a trial rate of approximately 20% of the cases filed.[78] By 1990, 4.3% of the filed civil cases resulted in trials.[79] This 75% reduction in the rate of trials is even more significant when one considers that in 1940 the number of reported federal cases dismissed on account of abandonment (default for defendants or want of prosecution by plaintiffs) was 53% of all terminated cases, while that number declined to 11% in 1990.[80] Thus, the percentage of non-abandoned cases that

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Judge, 27 ARIZ. L. REV. 593, 601 (1985).

[74] 1 FEDERAL COURTS STUDY COMM., *supra* note 68, at 34-35.

[75] 1 *id.* at 33.

[76] 1 *id.* The number of criminal trials declined from 14 per judge to 13 in 1988. 2 *Id.*

[77] 1938 ATT'Y GEN. ANN. REP. 210, 313.

[78] *Id.*

[79] *See* Yeazell, *supra* note 62, at 633 (citing ADMIN. OFF. OF THE U.S. CTS., ANN. REP. OF THE DIRECTOR (1990)).

[80] *Id.* at 638 (citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR (1938) and DIVISION OF ANALYSIS AND REPORTS ADMINISTRATIVE OFFICE OF THE U.S. COURTS, SUMMARY OF CIVIL CASES TERMINATED FROM JULY 1, 1989 TO JUNE 30,

went to trial in 1940 is over 40%, while the number for 1990 still hovers at around 5%. Viewed another way, in 1938 trials and directed verdicts accounted for 63% of adjudicated terminations of civil cases, while in 1990 trials accounted for only 11% of all adjudications.[81] Thus, as Professor Yeazell has noted, "When fewer than one in twenty filed cases reach trial, one can no longer accurately refer to the federal district courts as 'trial' courts or the judges as 'trial' judges . . . ."[82]

B. The Rise of Managerial Judging

As the number of trials has declined and the great majority of cases are resolved at pretrial, judges have developed pretrial management techniques that not only regulate the process, but profoundly influence the ultimate result in litigation. As Professor Yeazell has noted that "Courts now devote the bulk of their civil work to such pretrial tasks: ruling on discovery disputes, deciding joinder issues, conducting pretrial and settlement conferences, and, sadly, punishing lawyers for misbehavior during this phase of proceedings. This work is important, required, and often practically dispositive."[83]

As a result of the explosion in the number of civil cases, the shift from trial-oriented to pretrial-oriented litigation, and the dramatic growth of discovery, the courts have become increasingly involved in the management of individual cases. The old model of litigation, under which judges were essentially passive and let counsel manage the course of litigation, gave way to a new model under which judges manage the pace and content of pretrial litigation.[84] This section examines the development of managerial judging and assesses its impact on the internal checks on the arbitrary exercise of trial court power. In particular, this section focuses on two related developments in managerial judging: the power of the court to regulate and control the discovery process, and the increasing involvement of trial judges

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1990)).

[81] *Id.* at 636.

[82] *Id.* at 636-37.

[83] *Id.* at 639.

[84] *See* Resnik, *supra* note 4, at 384 (noting that judges did not intervene in most pretrial matters until recently).

in settlement and other methods of resolving litigation without trial. The section begins with a description of the systemic changes that permitted the growth and development of these powers.

1. Setting the Stage for Managerial Judging

The the implementation of the Federal Rules of Civil Procedure in 1938 laid the foundations for managerial judging. As noted above, the Rules helped to reorient the focus of litigation from pleading and trial to pretrial and discovery. The liberal discovery permitted by Rule 26 and the wide range of discovery devices made available to litigants dramatically increased the use and importance of pretrial discovery. At the same time, judges were given a number of tools with which to manage this expanded discovery regime. Rule 26 permitted judges to limit and control the scope of discovery as well as the use of the various discovery devices.[85] Rule 37 granted a district judge extensive authority to compel discovery and to sanction both discovery abuse and the failure to comply with judicial orders.[86] Finally, Rule 16 allowed the court to "direct the attorneys for the parties to appear before it for a conference" to consider a wide range of issues relating to case management.[87] These sweeping powers

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[85] FED. R. CIV. P. 26. These provisions were originally contained in Rule 26(b), which defined the permissible scope of discovery, and in Rule 30(b), which permitted judges to issue protective orders to regulate deposition examination and to "make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." FED. R. CIV. P. 26, 30. Rule 33 permitted judges to "on motion and notice for cause shown," to enlarge or shorten the time for answering interrogatories. FED. R. CIV. P. 33. Rule 34 permitted discovery and inspection of documents only by judicial order upon "motion of any party showing good cause therefor." FED. R. CIV. P. 34. Rule 35 required a similar motion for good cause in order to obtain a physical or mental examination of a person. FED. R. CIV. P. 35.

[86] FED. R. CIV. P. 37. In particular, Rule 37(b) permitted the court to hold a party or other witness in contempt for failing to answer a deposition question and conferred additional powers to enforce discovery orders. These powers included a general ability to make just orders regarding refusals and, specifically, the ability to order that the facts would be deemed established against the refusing party. The court could also prohibit a party from pursuing claims or introducing certain evidence. The court could strike all or part of the pleadings, stay further proceedings, dismiss the action or proceeding or any part thereof, or render a judgment by default. Lastly, the court could order the arrest of the disobedient party unless the order was for a physical or mental examination.

[87] FED. R. CIV. P. 16. The original text of Rule 16 read:

gave the district judge substantial authority to become involved in all aspects of the pretrial process.

Although it took the courts some time to utilize the Rules' new managerial tools and to create a more active style of case management, the Rules' potential was recognized early on. For example, a 1941 report by a committee of the Judicial Conference of the District of Columbia explained:

> Necessarily, pretrial procedure envisages the invocation of initiative on the part of the judge. It transforms him from his traditional role of moderator passing on questions presented by counsel, to that of an active director of litigation. One of its principal functions is to ascertain the real points in dispute, to strip the controversy of non-essentials, and to mold it into such form as will make it possible to dispose of the contest properly with the least possible waste of time and expense. By exercising his authority to the fullest extent in this direction, the pretrial judge not only advances the cause of administration of justice, but also enhances the respect for the courts on the part of the public.[88]

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
> (1) The simplification of the issues;
> (2) The necessity or desirability of amendments to the pleadings;
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
> (4) The limitation of the number of expert witnesses;
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
> (6) Such other matters as may aid in the disposition of the action.
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Id.

[88] *Pretrial Procedure* (abridged from MAY 24, 1941 REP. OF THE COMMITTEE ON PRETRIAL PROC. TO THE JUD. CONF. OF D.C.), 4 FED. R. SERV. L. REP. 47 (1941); *see* Buffington v. Wood, 351 F.2d 292, 298 (3d Cir. 1965) (holding that district court judges could compel full discovery despite availability of other avenues to parties).

The Supreme Court confirmed and enhanced the growing power of district judges to manage the pretrial process. In *Link v. Wabash Railroad Co.*,[89] the Court affirmed a district judge's dismissal of an action because of the failure of plaintiff's counsel to appear for a pretrial conference. The Court ruled:

> The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power;" governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of the cases.[90]

In addition, the Court limited appellate review of pretrial managerial decisions to a determination of "whether it was within the permissible range of the court's discretion."[91] Lower courts have often cited *Link* to support a wide range of discretionary trial court action to regulate and control the pretrial process.[92]

The Supreme Court reinforced the broad discretionary pretrial powers of district judges in *National Hockey League v. Metropolitan Hockey Club*.[93] In that case, the Court reversed a Third Circuit decision which had overturned a district court's Rule 37 dismissal of an antitrust action because of the plaintiff's failure to answer written interrogatories as ordered by the district court. The Court first noted the wide discretion given to district judges and emphasized that these managerial decisions would not be reversed absent an abuse of that discretion.[94] The Court also acknowledged the severity of the sanction in the case, but argued that serious sanctions must be available not only to penalize misconduct, but also to deter future violations of judicial authority.[95]

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[89] 370 U.S. 626 (1962).

[90] *Id.* at 630-31 (footnote omitted).

[91] *Id.* at 633.

[92] *See, e.g.*, Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam) (stating that district courts may exercise inherent power to impose sanctions of default or dismissal), *cert. denied*, 479 U.S. 829 (1986); *Buffington*, 351 F.2d at 298 (advocating courts' use, control, and enforcement of pretrial procedure to maintain orderly administration of justice with trial court); *see* Peckham, *supra* note 4, at 790 (discussing appellate courts' extremely deferential review of district courts' authority to use pretrial procedures).

[93] 427 U.S. 639 (1976).

[94] *Id.* at 642.

[95] *Id.* at 643. The Court concluded that under the circumstances of the case, "the dis-

The Supreme Court reaffirmed trial courts' Rule 37 authority to impose significant sanctions, including dismissal of a case, for violation of discovery orders in *Roadway Express, Inc. v. Piper*.[96] In *Piper*, the Court concluded that the failure to comply with a trial court order to answer interrogatories was a ground for immediate dismissal and might also warrant the imposition of costs and attorneys' fees.[97] In addition to reaffirming *Link*, the Court upheld the district court's inherent power, outside the Rule 37 context, to impose costs and attorneys' fees "against counsel who willfully abused judicial processes."[98]

2. Judicial Management of Discovery and the Pretrial Process

Building upon the foundation provided by the Rules and the Supreme Court's elaboration of both the Rules and the inherent power of trial court judges, federal district judges became increasingly active in managing discovery and the pretrial phase of litigation. The foundation of this approach to judging is the "assumption that all but the simplest cases will benefit from complete pretrial procedures . . . ."[99] Judicial management of the pretrial process entails early and multiple pretrial conferences "at which the court and the parties identify issues and schedule a discovery cut-off date, pretrial motions, and the trial date among other things."[100] Rule 16 now requires the district judge to enter a scheduling order within 120 days after service of the complaint of a defendant.[101] Active judicial management entails close control of discovery through the imposition of strict deadlines and explicit limits on the use of discovery devices. Active

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trict judge did not abuse his discretion in finding bad faith on the part of these respondents and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities." *Id.*

[96] 447 U.S. 752 (1980).

[97] *Id.* at 764.

[98] *Id.* at 766.

[99] Peckham, *supra* note 4, at 779.

[100] Robert Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 253-54 n.3 (1985).

[101] FED. R. CIV. P. 16.

involvement in discovery necessarily requires the judge to evaluate the merits of the plaintiff's claims and the possible defenses. The judge defines the contours of a case by orders that limit and direct discovery. A subcommittee of the Federal Courts Study Committee stated that such judicial orders "force attorneys to make early predictions about which theories they can profitably pursue, and, if badly done, may substantially prejudice one of the parties."[102] As one judicial advocate of case management describes the judge's role: "As case manager, then, the trial judge becomes an active facilitator of the lawsuit, shaping its structure and shepherding its expeditious completion."[103]

In addition to controlling the discovery process, managerial judges can employ a variety of additional techniques to simplify cases and hasten the resolution of disputes. These devices may include "setting early and firm trial dates which motivate the parties to establish proper priorities rather than pursue all potential arguments."[104] Judges can also act informally by using the substantial power of their position. As the Federal Courts Study Committee noted:

> Many judges are more direct — using pretrial conferences to "persuade" the parties to "dispose of the many immaterial or uncontested issues that arise at the outset of a typical lawsuit." Forcing the parties to narrow the issues for trial reduces trial time by eliminating peripheral issues and focusing the issues that remain. In addition, case management advocates say that the process of narrowing the issues leads to the disposition of more cases through pretrial motions for summary judgment or judgment on the pleadings.[105]

A number of institutional developments within the federal court system encouraged and facilitated active judicial regulation of the pretrial process. For example, in 1969, most metropolitan federal district courts switched from a master calendar system to an individual assignment system.[106] Under a master calendar system each judge is assigned particular functions, such as mo-

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[102] 1 FEDERAL COURTS STUDY COMMITTEE, *supra* note 68, at 54 (1990).

[103] Peckham, *supra* note 100, at 253.

[104] *Id.* at 257 n.13.

[105] 1 FEDERAL COURTS STUDY COMMITTEE, *supra* note 68, at 50.

[106] *See* 1 FEDERAL COURTS STUDY COMMITTEE, *supra* note 100, at 48; Peckham, *supra* note 100, at 257 (reflecting changes in operation which allow federal courts to resolve problems regarding delay and court congestion); .

tions, pretrial or settlement conferences and trials, for a specific amount of time. Thus, one case could come before a number of different judges. By contrast, under an individual calendaring system, the case is assigned to a particular judge at the time the complaint is filed. Individual calendaring gives a judge more control over a case and makes it possible to hold judges accountable for moving cases toward disposition.[107]

As courts became increasingly concerned about the increasing federal caseload, judges began to meet to discuss methods of allocating and expediting cases.[108] In 1967, Congress created the Federal Judicial Center, which began to train judges in methods of efficient case management.[109] Congress also authorized the courts of appeals to hire circuit executives to help control the ever-expanding dockets and assist in the creation of innovative case management programs.[110]

In addition, significant changes to the Federal Rules of Civil Procedure expanded the power of district judges to manage litigation. Rule 16 was substantially amended in 1983 for the first time since its original adoption in 1938. As the Advisory Committee notes to the 1983 amendments stated, "[P]articularly with regard to case management, the rule has not always been as helpful as it might have been. Thus there has been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation."[111] The most significant change was the imposition of a requirement that a district judge enter a scheduling order "that limits the time (1) to join other parties and to amend the pleadings; (2) to file motions; and (3) to complete discovery."[112] The

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[107] *See* Peckham, *supra* note 100, at 257 (asserting judges' feelings of greater individual responsibility to monitor and expedite cases so as to avoid increasing pending case load).

[108] *Proceedings of the Seminar on Practice and Procedure under the Federal Rules of Civil Procedure*, 28 F.R.D. 37 (1960). *See also* William H. Becker, *Efficient Uses of Judicial Resources*, 43 F.R.D. 421 (1967) (discussing problem of growing case load in district court for Western District of Missouri and explaining techniques developed to solve problem).

[109] Act of December 20th, 1967, Pub. L. No. 90-219, 81 Stat. 664 (codified at 28 U.S.C. §§ 620-629 (1988 & Supp. V 1993)). *See also* Tom C. Clark, *The Federal Judicial Center*, 53 JUDICATURE 99 (1969).

[110] *See* 28 U.S.C. § 332(e)-(f) (1988 & Supp. V 1993) (authorizing courts of appeal to hire circuit executives); JOHN T. MCDERMOTT & STEVEN FLANDERS, THE IMPACT OF THE CIRCUIT EXECUTIVE ACT (Federal Judicial Center 1979).

[111] FED. R. CIV. P. 16 advisory committee's note.

[112] FED. R. CIV. P. 16.

amendment also permitted scheduling orders to set forth restrictions and regulations concerning discovery, the dates for further pretrial conferences, and "any other matters appropriate in the circumstances of the case."[113] These changes were justified on the ground that:

> Empirical studies reveal that when a trial judge intervened personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.[114]

Although the amended rule did not require particular scheduling or pretrial conferences, it expanded the list of topics that could be discussed at such conferences in order "to encourage better planning and management of litigation."[115] For example, the amended Rule 16(c) gave a district judge the authority to take appropriate action with respect to "the formulation and simplification of the issues, including the elimination of frivolous claims or defenses."[116] Rule 16(a) was also amended specifically to permit the court to require pretrial conferences for the purposes of scheduling and case management.[117]

In 1993 the Court amended the Rules once again to provide increased judicial control over the pretrial process. Rule 16(c) was amended by adding "the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant

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[113] *Id.*

[114] *Id.* (citing STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS 17 (Federal Judicial Center 1977)).

[115] FED. R. CIV. P. 16(C) advisory committee's note.

[116] FED. R. CIV. P. 16(C).

[117] The text of Rule 16(a) as amended in 1983 reads:

> Pretrial conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
>
> (1) expediting the disposition of the action;
>
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
>
> (3) discouraging wasteful pretrial activities;
>
> (4) improving the quality of the trial through more and thorough preparation, and;
>
> (5) facilitating the settlement of the case.

FED. R. CIV. P. 16(a).

to Rule 26 and Rules 29 through 37" as permissible subjects for consideration at pretrial conferences.[118]

These new powers and the dramatic growth of managerial judging have prompted a major debate in the civil procedure literature concerning the wisdom and efficacy of such extensive judicial involvement. A number of commentators, most notably Professor Judith Resnik, have argued that there is little empirical evidence to support the conclusion that active case management works to limit judicial workloads and that "[m]anagement advocates rely instead on anecdote and intuition to support their claims."[119] In particular, Resnik argues that the amount of judicial energy expended in pretrial supervision outweighs any reduction in other judicial effort.[120] By contrast, advocates of judicial management argue that Professor Resnik "ignores a substantial body of research into the consequences of various forms of judicial intervention."[121] Another judicial advocate of active litigation management argues that Professor Resnik overestimates the time a judge spends on judicial management and claims that "a judge could easily conduct all status conferences for a full caseload in one day per month and certainly in no more than two."[122]

The force and momentum of the judicial management movement, however, seems to have overtaken this debate as judges have been given increasingly broad powers and have begun to use them on a regular basis to control all aspects of pretrial. As Judge Posner, after noting the objections that have been raised to managerial judging, pointed out:

> Whatever the abstract merits of these objections, they are unlikely to persuade. The rise of the "pro-active" judge, the search for cheap and fast substitutes for the conventional Anglo-American trial, the convergence of the American and Continental systems — all these developments are well under way and are probably irreversible.[123]

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[118] FED. R. CIV. P. 16(C).

[119] Resnik, *supra* note 4, at 11 (noting lack of empirical data to support managerial judging).

[120] *Id.* at 54 (arguing that judicial management imposes costs of its own).

[121] Connolly, *supra* note 4, at 35.

[122] Peckham, *supra* note 100, at 267.

[123] Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1433 (7th Cir. 1986) (citation omitted).

If this conclusion was not clear prior to 1990, it was certainly confirmed by Congress's adoption of the Civil Justice Reform Act of 1990 (CJRA).[124] The CJRA is a controversial statute[125] which, in the words of its sponsor, "implements, for the first time, a national strategy to attack the problems of cost and delay in civil litigation."[126] The CJRA attacked these problems by requiring each district court to adopt a "civil justice expense and delay reduction plan."[127] The CJRA also required the chief judge of each district court to appoint a CJRA advisory group to recommend a plan developed in accordance with explicit statutory requirements.[128] These requirements state, *inter alia*, that the advisory group "shall consider and may include" a number of "principles and guidelines of litigation management and cost and delay reduction," including:

> Early and ongoing control of the pretrial process through involvement of a judicial officer in-
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> (A) assessing and planning the progress of a case;
> (B) setting early, firm trial dates . . . ;
> (C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and
> (D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition . . . .[129]

Ninety-one percent of the ninety-four federal judicial districts adopted this standard and provided for some form of judicial case management in their civil justice delay and expense reduc-

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[124] Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (Supp. V 1993)).

[125] *See, e.g.*, Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994) (arguing Congress has responsibility to help control federal case load). Critics of the CJRA argue that it "will overhaul unnecessarily the infrastructure of the civil litigation process," Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445, 490 (1992), and that it will balkanize the federal procedural rules by giving district courts too much authority to depart from the uniform standards of the Federal Rules of Civil Procedure, Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

[126] Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law*, 1 CORNELL J.L. & PUB. POL'Y 1, 4 (1992).

[127] 28 U.S.C. § 471 (Supp. V 1993).

[128] 28 U.S.C. § 478 (Supp. IV 1993).

[129] 28 U.S.C. § 473(a)(2) (Supp. V 1993).

tion plans.[130] The CJRA has thus effectively institutionalized judicial management of the pretrial process.

3. Judicial Involvement in the Settlement Process

As judges became increasingly active in managing the discovery process, they also became more actively involved in encouraging settlement. As one judge told a 1977 seminar for new federal judges, "I urge that you see your role not only as a home plate umpire in the courtroom, calling balls and strikes. Even more important are your functions as mediator and judicial administrators."[131] The same institutional changes that permitted expanded judicial management of discovery also provided encouragement and legal justification for expanded judicial involvement in the settlement process. The Federal Judicial Center conducted seminars to train judges in how to settle cases and published treatises on settlement strategies for federal judges.[132] The 1983 amendment to Rule 16 expressly added settlement to the list of permissible subjects for consideration at pretrial conferences. Ten years later, the Rule was again amended to authorize "the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."[133] In addition, the Rule now allows the court to require parties to be available to consider possible settlement.[134]

Judges have used a wide range of techniques to encourage settlement or early resolution of litigation.[135] Examples of these

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[130] JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY THE UNITED STATES DISTRICT COURTS 4 (1994) [hereinafter CIVIL JUSTICE REFORM ACT REPORT].

[131] Marc Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 3 (1985).

[132] D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (Federal Judicial Center 1986); HERBERT L. WILL ET AL., THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS (Federal Judicial Center 1977); .

[133] FED. R. CIV. P. 16.

[134] FED. R. CIV. P. 16(c). At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matter that the participants may reasonably anticipate may be discussed. *Id.* If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute. *Id.*

[135] Lawrence F. Schiller & James A. Wall, Jr., *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39 (1981) (describing different procedures employed by judges to encourage settle-

techniques include: (1) acting as a catalyst to stimulate settlement discussions; (2) acting as a check on unreasonable negotiating positions; (3) reminding the parties of the risks and costs of litigation; (4) reducing the uncertainty of litigation by suggesting or actually ruling on particular issues; (5) speaking to the parties separately and suggesting various options; (6) threatening sanctions; and (7) threatening adverse decisions on the merits.[136] Courts have also begun to use a wide range of alternative dispute resolution (ADR) techniques to move cases towards ultimate resolution. These techniques include mediation, arbitration, early mutual evaluation, court mini-trials and summary jury trials.[137] Although appellate courts universally allow the use of these innovative ADR techniques on a voluntary basis, courts are split on whether a district judge may unilaterally impose these techniques on the parties.[138] A number of district courts have encouraged early participation in settlement conferences by adopting local rules that provide for the imposition of costs as a sanction for last-minute settlements entered into after the taxpayers have incurred the expense of bringing in a jury.[139] Whatever the technique chosen, however, "most judges

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ment).

[136] *See* Leroy Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 751-52 (1989) (listing examples of pretrial settlement activities by judges).

[137] *See* THOMAS O. LAMBROS, THE SUMMARY JURY TRIAL AND OTHER ALTERNATIVE METHODS OF DISPUTE RESOLUTION: A REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON THE OPERATION OF THE JURY SYSTEM (1984). The summary jury trial was conceived by Judge Thomas O. Lambros of the Northern District of Ohio in a 1980 products liability case. The summary jury trial involves the use of a six-member jury which hears a description from the parties' attorneys of each party's view of the facts of the case. *Id.* at 7-10. Unlike a full trial, attorneys are not permitted to call witnesses. *Id.* at 14. However, they may recite to the jury expected witness testimony if it is based on a sworn statement or discovery response. *Id.* The verdict in a summary jury trial is advisory only; it is to be used as a basis for subsequent settlement negotiations. *Id.* at 10.

[138] *See In re* NLO, Inc., 5 F.3d 154 (6th Cir. 1993) (rejecting power to compel parties to participate in summary jury trial); Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987) (holding that federal district court may not require litigants to participate in non-binding summary jury trial). *But see* Arabian-American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988) (holding that district court has power to mandate participation in summary jury trials); Federal Reserve Bank v. Carey Canada, 123 F.R.D. 603 (D. Minn. 1988) (holding that district has power to mandate participation in summary jury trials without parties' consent).

[139] *See, e.g.*, White v. Raymarc Indus., Inc., 783 F.2d 1175 (4th Cir. 1986) (imposing costs on parties in civil actions settled in advance of trial unless clerk's office is given at least one

agree that doing this effectively requires the judge to obtain a detailed knowledge of the parties' contentions, the facts in dispute, and the legal theories involved."[140]

As with judicial management of pretrial, judicial activism in promoting settlement has been criticized on a number of grounds. First, many scholars question the practical usefulness of judicial involvement in the settlement process. For example, Professor Resnik has argued that "most researchers have concluded that intensive judicial settlement efforts do not lead to more dispositions than would otherwise have occurred."[141] However, most judges seem convinced that their settlement efforts are productive, perhaps because of the high rate of settlement since most cases would settle anyway.[142]

More fundamentally, several commentators have argued that settlement pressure may result in second-class justice for the poor or the powerless. As Professor Owen Fiss has argued:

> Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.[143]

Despite criticisms of both the efficacy and desirability of judicially encouraged settlement, there seems to be no move in the federal courts to reverse the trend toward increasing judicial involvement in the settlement process. Indeed, the CJRA expressly encourages judicial involvement in the settlement process,[144] and the great majority of civil justice delay and expense reduction plans provide for some form of judicial involvement in the settlement process.[145]

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business day's notice); Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985) (en banc) (holding district court has power to sanction attorney for abuse of judicial process).

[140] 1 FEDERAL COURTS STUDY COMMITTEE, *supra* note 68, at 51.

[141] Resnik, *supra* note 6, at 11; *see also* Galanter, *supra* note 131, at 8 (questioning effectiveness of judical promotion of settlement).

[142] *See* Galanter, *supra* note 131, at 9 (describing judge's experience that active judicial participation is effective in settling cases).

[143] *See* Fiss, *supra* note 4, at 1075.

[144] 28 U.S.C. § 473 (Supp. IV 1992).

[145] CIVIL JUSTICE REFORM ACT REPORT, *supra* note 130, at 6.

C. The Impact of Managerial Judging on Internal Checks and Balances Within the Judicial Branch

The development of managerial judging has dramatically increased the unreviewable discretionary power of federal district judges. Judicial regulation of pretrial and active judicial encouragement of settlement are effectively immune from the three checks that the framers expected would control the arbitrary exercise of power by federal trial court judges. As a result, it should not be surprising that the development of managerial judging has been accompanied by a rise in complaints about arbitrary judicial behavior. Unconstrained by precedent, unreviewed by appellate judges, and unchecked by the involvement of juries, district judges are free to manage cases as they wish. As the Federal Courts Study Committee noted:

> There are no standards for making these "managerial" decisions, the judge is not required to provide a "reasoned justification," and there is no appellate review. Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed. This, in turn, promotes arbitrariness.[146]

As detailed below, such unrestrained power is a fertile ground for arbitrary and discriminatory behavior.

1. The Loss of the Framers' Checks on Trial Court Power

Managerial judging effectively evades all three of the traditional checks on trial court power and creates new problems that the framers did not anticipate. First, district judges have virtually unlimited primary discretion because there is little precedent to control or guide a judge's actions in managing a case or encouraging settlement. The vast majority of all managerial decisions are unwritten and unreported. Thus, there is neither case law nor written rules to guide a judge or to provide parties with arguments to control a judge's discretion. Indeed, many of a district judge's actions in managing pretrial and encouraging settlement are private, informal, and off-the-record.[147] As a re-

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[146] 1 FEDERAL COURTS STUDY COMMITTEE, *supra* note 68, at 55.

[147] *See* Resnik, *supra* note 4, at 425-26 (suggesting that district judge's action in encouraging settlment was "off the record").

sult, judges are free to make up their own rules on an ad hoc basis. They decide what discovery is permissible, which issues may be pursued, and what is an appropriate framework for settlement in a case without the benefit of guidelines or control beyond their own judgment.

In addition, secondary discretion is virtually unlimited because there is essentially no appellate review of a judge's managerial actions controlling and regulating pretrial or encouraging settlement. First, the many decisions that are off-the-record are impossible to review because there is no official record for appeal. A staunch supporter of judicial management had to admit that "[t]he description of conferences as closed and unreviewable is largely accurate."[148] Even when decisions are on the record, they are essentially unreviewable because they are immune from interlocutory appeal and are subject to an abuse-of-discretion standard if appealed later in the case. As Wright and Miller note, "[a] discovery order can always be reviewed on appeal from a final judgment in the case, even though . . . the harmless error doctrine, together with the broad discretion the discovery rules vest in the trial court, will bar reversal save under very unusual circumstances."[149] The unreviewability of judicial management decisions distinguishes the American system from other systems, such as Germany's, which are admired by advocates of vigorous judicial management,[150] but which involve extensive appellate review of the entire conduct of the trial court's proceedings.[151]

Furthermore, the framers' diffusion of power to juries has no impact on managerial judging. The shift from trial to pretrial has rendered the jury process virtually irrelevant to modern litigation. The framers' fear that judges would evade the right to

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[148] Connolly, *supra* note 4, at 42.

[149] 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2006, at 90-91 (1970). As one group studying the operation of the district courts noted, "the experience of members of the Group and the Group's analysis of both our Court and other courts leads to the conclusion that discovery decisions are rarely appealed." FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 54 (1993).

[150] *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 855-57 (1985) (discussing advantages of system requiring written summary of findings and de novo standard of review).

[151] Yeazell, *supra* note 62, at 670-71.

a jury trial proved well-founded, not because judges expanded equity jurisdiction to avoid the right to a jury trial, but because the combination of new rules and the massive growth in federal caseload shifted the lawsuit's focus from trial to pretrial.[152] Consequently, the power of juries to act as a check on the abuse of federal trial court power has been substantially diminished.

The increased managerial authority of district judges has also created an additional separation of powers problem that the framers did not anticipate. The combination of managerial and substantive decision-making powers provides district judges with powerful leverage during the pretrial phase. Judges can use their power over substantive decision-making to coerce settlements and intimidate counsel into abandoning litigation theories or defenses.

Although the framers did not anticipate this particular problem, they certainly were familiar with this type of problem. The concentration of multiple kinds of power within one official who may use the combined authority to the detriment of individual rights is a classic example of a common separation of powers concern. The use of this power can dramatically limit party autonomy in litigation. The judicial system may sacrifice some party autonomy by conscious system-wide policy decisions to enhance efficiency if that increases the quality of justice to all participants, but it should not permit individual judges to curtail party autonomy by wielding the threat of decision-making power as a tool of judicial management.

Thus, with the increasing importance of pretrial and the development of managerial judging, all three of the framers' checks on the abuse of trial court power have been effectively eliminated and new separation of powers problems have emerged. District judges are essentially free to control the litigation process as they see fit. The results of this substantially unlimited discretion are evaluated below.

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[152] *See* Richard M. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989) (discussing judicial shift from common law trial to pretrial matters with features reminiscent of equity).

2. The Impact of Unrestrained Federal Trial Court Power

Given the framers' views on the nature of governmental power, they would likely have predicted that the loss of all internal checks on federal trial court power would lead to arbitrary action and abuse of authority. As noted earlier, the framers would undoubtedly have agreed with Lord Camden, who called discretion the law of tyrants and argued that "in the best it is oftentimes caprice and in the worst, every vice, folly and passion to which human nature can be liable."[153] Although some discretion is necessary to provide "the effective individualizing agency in the administration of justice,"[154] the framers would probably have agreed that "that system of law is best which confides as little possible to the discretion of the judge . . . ."[155] This is true not because of the venality of individual judges, but rather because, as an institutional matter, all government power ought to be subject to checks and balances.[156] As a result, the framers would undoubtedly have worried about the loss of checks on district court authority.

One might ask, however, whether the loss of checks on a district judge's power has a real, practical impact in the pretrial setting, and whether there is substantial abuse of pretrial management authority by district judges.[157] There are several possible responses to this question. First, for purposes of this Article, it is enough to know that the powers of managerial judging evade the only significant checks on trial court power. In short, the framers would probably have said that they knew enough

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[153] Rosenberg, *supra* note 33, at 642.

[154] Roscoe Pound, *Discretion, Dispensation, and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925 (1960).

[155] B. SHIENTAG, THE PERSONALITY OF A JUDGE 94 (1944).

[156] *See* Mistretta v. United States, 488 U.S. 361 (1989) (discussing background of Sentencing Reform Act and upholding constitutionality of Sentencing Commission). Indeed, dissatisfaction with the tremendous discretion accorded to district judges in the criminal sentencing process prompted Congress to adopt the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551 and 28 U.S.C. §§ 991-998, which authorized a new federal Sentencing Commission to create sentencing guidelines.

[157] As a practical matter, there is no way short of a major empirical survey of litigators to assess the actual scope of this problem; even then, one would be surveying only lawyers' perceptions of the problem. To my knowledge, no one has ever attempted such a survey, at least with respect to the general issue of judicial management of pretrial. For a discussion of empirical data on attorneys views of the settlement process, see *infra* notes 161-63.

about human nature to conclude that the kind of unchecked power exercised by managerial judges is inevitably subject to abuse.

In addition, published literature about the courts and current caselaw indicate three significant areas in which the reduced effectiveness of the checks on trial court power have a real impact on parties and lawyers in federal court. First, a district judge's unrestrained discretionary control of the pretrial process makes it easy for a judge to permit bias, including racial, ethnic or gender bias, to influence the management of a case. As recent studies have shown, federal judges are not immune from such bias.[158] The impact of bias at pretrial, however, may include ideological bias, favoritism to particular parties, or simply a fondness for, or antipathy to, counsel. Without the need to reach a decision based on clear rules or guidelines or to explain and justify a decision to a reviewing court, a district judge might, even unwittingly, be more likely to let such biases affect her decisions during pretrial.

Second, even without such biases, the unguided and unreviewable pretrial process can result in arbitrary case management decisions. A conference on managerial judging dramatically demonstrated the potential for arbitrariness inherent in managerial judging in a unique controlled experiment:

> The participating judges were divided into separate workshop sessions, each of which was asked to propose approaches for managing the same hypothetical case. The reports from the workshops disclosed dramatic differences in the ways that individual judges would have handled the case. Based on her intuition that the case had little merit, one trial judge would have required thousands of plaintiffs to file individual, verified complaints — a move that would have made it all but impossible for the plaintiffs' lawyer to pursue the cases. On the other hand, another trial judge confronting exactly the same hypothetical case would have ordered the defendants to create a multi-million dollar settlement fund.[159]

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[158] *See, e.g.*, DISTRICT OF COLUMBIA CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS, FINAL REPORT OF THE SPECIAL COMMITTEE ON RACE AND ETHNICITY (1995) (discussing how race and ethnicity affect work of federal courts in District of Columbia); DISTRICT OF COLUMBIA CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS, FINAL REPORT OF THE SPECIAL COMMITTEE ON GENDER (1995) (discussing how gender affects work of federal courts in District of Columbia); FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993) (discussing issues relating to gender bias in courts of Ninth Circuit).

[159] E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV.

Cases are made and broken by judges at the pretrial stage. A district judge can substantially determine the outcome of a case, including the amount and terms of the settlement, by defining the scope of a claim or permissible defenses, controlling and regulating discovery, and then encouraging and directing settlement negotiations. Without guidelines or appellate review to regulate the pretrial process, similar cases will have decidedly different outcomes.

Third, a district judge can use the substantial power of pretrial management, combined with implicit threats about how he might decide substantive issues, to coerce settlements and thus significantly limit party autonomy. As one study noted:

> Settlement activity by trial court judges is at least susceptible to judicial abuse. Overzealous judges may exercise undue influence on a final settlement, often without adequate knowledge or understanding of the facts of the case. Settlement judges often become familiar with the practices of individual attorneys, their reluctance to take a case to trial, the degree of their over-commitment and resulting need for postponements. Such judges have tools to influence, even coerce, a settlement agreement that may violate both procedural and substantive standards of fairness.[160]

Litigators also recognize the potential for judicial abuse of the settlement process. A well-known empirical study of litigators' views of judicial involvement in the settlement process showed that, while lawyers generally believe that judicial involvement will "improve significantly the prospects for achieving settlement,"[161] "[l]itigators are substantially more comfortable with judicial involvement in the settlement process when the judge who participates is not the judge to whom the case has been assigned for trial."[162] The study found that the number of attorneys who thought it was improper for a trial judge in a nonjury case to become involved in settlement was more than twice as large as the number who thought judicial involvement proper.[163]

306, 317 (1986).

[160] THOMAS CHURCH, JR., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 76-77 n.17 (1978).

[161] WAYNE D. BRAZIL, SETTLING CIVIL SUITS 39 (1985).

[162] *Id.* at 84.

[163] *Id.* at 85 (explaining that 58% declared it improper, 28% deemed it proper).

The effect of pretrial power in the settlement context was illustrated in *Lockhart v. Patel*.[164] In *Lockhart*, the defendant in a medical malpractice claim was represented by an attorney retained by his insurer. The trial judge reported using several devices to encourage settlement, including a summary jury trial. When that procedure did not result in a settlement and the parties were still $50,000 apart, the trial judge attempted other methods of persuasion:

> The court directed the defense attorney to attend the settlement conference . . . and to bring with him the representative of the insurance company . . . . The court specifically and formally admonished defense counsel: Tell them not to send some flunky who has no authority to negotiate. I want someone who can enter into a settlement in this range without having to call anyone else.[165]

When the insurer sent a representative with insufficient settlement authority, the judge found the insurer in contempt, struck the pleadings of the defendant, declared the defendant in default, and ordered a trial the next day limited to damages. In addition the judge ordered a further hearing on charges of criminal contempt. When confronted with these draconian, and virtually unappealable sanctions, the insurer decided to settle.[166]

Although this case was unusual because the details of the settlement process were published in a reported opinion, it seems unlikely that this kind of settlement pressure is atypical. Even though the Advisory Comments to the Rules[167] and a number of appellate decisions[168] state that judges may not coerce parties to settle, such rulings likely have little impact on

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[164] 115 F.R.D. 44 (E.D. Ky. 1987).

[165] *Id.* at 45.

[166] *Id.*

[167] *See* FED. R. CIV. P. 16 advisory committee's note (1983 version) (stating that "it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on the unwilling litigants").

[168] *See* Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) ("Although the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlements through coercion.") (citation omitted); Del Rio v. Northern Blower Co., 574 F.2d 23, 26 (1st Cir. 1978) ("There is no duty . . . to settle cases, or to reduce one's claims. Nor does the orderly administration of justice require a party to contribute to someone else's settlement.").

district judges faced with a crushing burden of civil cases. As the judge in *Lockhart* noted:

> The normal case load of a United States district judge is now [in 1987] considered to be 400 civil cases. At this time, every judge in this district has half again that many . . . . The drafters of amended Rule 16 knew of the docket pressures to which our courts are subject, and knew that to process 400 cases, you have to settle at least 350. That is why they encouraged "forceful judicial management," which is the only means of settling a high percentage of cases.[169]

Other examples of alleged judicial overreaching in the settlement context, such as the Agent Orange litigation, are more well known.[170] These publicized cases are likely the small tip of the iceberg. For every case in which a district judge is admonished for placing excessive settlement pressure on litigants, there are thousands in which the settlement procedures are never reviewed by an appellate court. Indeed, when the settlement efforts succeed, they guarantee that no appellate court will ever review the case.[171]

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[169] *Lockhart*, 115 F.R.D. at 47.

[170] In the Agent Orange litigation, several of the plaintiffs' lawyers complained that Judge Weinstein had improperly pressured them to settle. As Professor Peter Schuck noted in his analysis of the settlement, "The facts that a judge as conscientious and sophisticated as Judge Weinstein could be accused of overreaching (although the lawyer hesitated to call it 'duress') and that other judges have occasionally been found guilty of it suggest that the risk [of judicial impropriety] is not a trivial one." Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 360-61 (1986) (footnote omitted). In his book chronicling the Agent Orange case, Professor Schuck suggests that "although the line between forceful persuasion and illegitimate coercion is a narrow, ill-defined one, Weinstein does not appear to have actually crossed it." PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 163 (1987). However, he also notes:

> Weinstein exploited whatever leverage he could muster over the lawyers. While not actually threatening retribution if they refused to settle, he did use the ambiguity of his roles — as mediator and as ultimate decision maker — to play upon their fears, magnify the risks, and whittle down their resistance. In such a situation, the dangers of judicial overreaching and intimidation in quest of settlement are no less real for being subtle.

Id.

[171] *See* Yeazell, *supra* note 62, at 656.

3. What Should We Do About the Loss of Checks on District Judges?

In the absence of any significant institutional checks on the power of trial courts to regulate pretrial and encourage settlement, abuses are likely to occur. The dramatic decline in the effectiveness of the three traditional checks on trial court power has enabled district judges to exercise authority free from effective restraint. Without rules to guide their primary discretion, without appellate review to correct abuses, and without a jury to provide an independent check on trial judges' power, many of the checks designed to control the problems inherent in an independent federal judiciary have been eliminated.

If managerial judging evades the checks intended to control trial court discretion, what does this suggest about the new managerial techniques? First, it does not mean that the new managerial techniques are unconstitutional. Although the framers expected that limiting judicial power to cases or controversies would impose checks on trial court power, district judges' effective avoidance of those checks does not mean that pretrial power is exercised outside the context of a justiciable case or controversy. Although managerial judging may be consistent with the technical requirements of Article III, it is inconsistent with the spirit of the framers' vision of the entire government generally and with respect to the power of the federal judiciary in particular. Because the framers could not have anticipated the development of managerial judging, their structure for the federal courts did not provide for any checks on managerial power.

The growth of managerial judging does suggest, however, that if we wish to recapture the spirit of the framers' intent for the federal judiciary, we need to create new checks to supplement the ones that are ineffective in controlling judicial managerial power. We will either have to look outside of the litigation process or develop new institutional solutions within the litigation process to restore some measure of accountability. In the sections below, Part III discusses the possible use of extra-litigation checks as a method of controlling arbitrary judicial behavior, and Part IV proposes possible new solutions to the problem of managerial judging.

III. THE INEFFECTIVENESS OF EXTRA-LITIGATION CHECKS ON JUDICIAL MISBEHAVIOR

This search for new ways to control federal district judges' discretion will begin with an assessment of the possible use of checks outside of the litigation process to control the abuse of managerial judicial authority. These checks include both interbranch and intrabranch controls. As described below, interbranch checks are of extremely limited value, and existing intrabranch checks, while more promising, are unlikely to solve the problem.

A. Interbranch Checks on the Judiciary

Interbranch checks on the judiciary are unlikely to serve as an effective control on trial court discretion since they inherently pose the greatest risk to judicial independence. As a result, interbranch checks traditionally have been limited to only the most egregious misuse of judicial authority. Congress has the power to impeach federal judges, but may only exercise this authority to redress "high crimes and misdemeanors."[172] As many scholars have observed, impeachment is too large and powerful a weapon to be used effectively to remedy the arbitrariness and lesser misconduct discussed in this Article.[173] Congressional regulation is simply too blunt a weapon, capable of inflicting too much collateral damage, to be used effectively against the abuse of pretrial authority.

For similar reasons, executive branch control of the judiciary is neither possible nor desirable. Although the issue is not entirely free from dispute,[174] it seems fairly clear that the execu-

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[172] U.S. CONST. art. II, § 4.

[173] *See* Steven B. Burbank, *Alternate Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643 (1987) (proposing methods to punish judges for crimes without constitutional amendments); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1 (1989) (examining constitutionality of alternatives to impeachment); Warren S. Grimes, *100-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209 (1991) (suggesting alternatives and reforms to impeachment process).

[174] *See* Robert S. Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103 (1986) (contending imprisonment is not proper method for avoiding impeachment); Steven W. Gold, Note, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV. 699 (1987) (stating full criminal immunity should be given to

tive branch has the power to prosecute sitting federal judges for violations of the criminal law.[175] Additional executive branch action to regulate judicial misconduct that is not subject to prosecution would be suspect from both a constitutional and a policy perspective. Indeed, the prospect of executive branch involvement in controlling judicial discretion is sufficiently problematic that the Justice Department has been reluctant to initiate complaints for judicial resolution under the Judicial Conduct and Disability Act.[176] Thus, interbranch checks will not provide a solution to the problem of increasing district court discretion.

B. Existing Intrabranch Checks on Judicial Discretion

In addition to the largely ineffective mechanisms of appeal and mandamus,[177] other mechanisms within the judicial branch might be used to control the arbitrary exercise of judicial power during pretrial. First, the Judicial Conduct and Disability Act of 1980 (JCDA)[178] provides a formal mechanism for making a complaint to the chief judge of a circuit about the behavior of any judge in that circuit.[179] Second, the chief judges of both

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judge until impeachment proceedings conclude); William Hamilton, Note, *Indictment of Federal Judges: Chilling Judicial Independence*, 35 U. FLA. L. REV. 296 (1983) (advising separation of powers is reason enough not to indict federal judges); Melissa H. Maxman, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420 (1987) (stating proposed amendments to constitutional impeachment procedure would be harmful to judicial branch).

[175] *See* United States v. Claiborn, 765 F.2d 784, 789 (9th Cir. 1985) (holding Article III does not immunize federal judges from prosecution), *cert. denied*, 475 U.S. 1120 (1986); United States v. Claiborn, 727 F.2d 842, 846 (9th Cir. 1984) (finding prosecution of federal judge is acceptable even without prior impeachment by Congress), *cert. denied*, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 709 (11th Cir. 1982) (allowing prosecution of federal judge by executive for acts of conspiracy and obstruction of justice); United States v. Isaacs, 493 F.2d 1124, 1144 (7th Cir. 1974) (upholding conviction for criminal actions which took place before Kerner became judge, and recognizing executive's power to prosecute), *cert. denied*, 417 U.S. 976 (1974); *see also* Burbank, *supra* note 173, at 666 (recognizing executive authority to prosecute judges without amending Constition); Gerhardt, *supra* note 173, at 45 (finding executive authority to impeach judges in Constition); Peterson, *supra* note 16, at 830-56 (discussing Court's holding in favor of pre-impeachment prosecutions).

[176] *See* Peterson, *supra* note 16, at 892 (describing some attorneys' reluctance to use JCDA to file complaint).

[177] *See* Connolly, *supra* note 4, at 42 (quoting judge's opinion that statute is not being used to full effect).

[178] Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c) (1988 & Supp. IV 1992)).

[179] Professor Burbank explained the process as follows:

circuit and district courts have informal power to raise questions of abuse of power with judges in their courts. Each of these mechanisms are discussed below.

1. The Judicial Conduct and Disability Act

From the JCDA's inception through 1991, 2405 complaints were filed with chief judges.[180] The vast majority of complaints have been dismissed on the ground that they are frivolous.[181] Of the arguably meritorious complaints, one study found that by far the most common type of allegation was "abuse of judicial power," while other allegations concerned complaints of prejudice, bias, or undue delay.[182] Although some critics have complained that judges are unwilling to discipline their own colleagues under the JCDA,[183] recent studies conducted on behalf of the National Commission on Judicial Discipline and Removal (NCJDR) concluded that chief judges take the complaint process seriously and reach the appropriate result in the vast majority of cases.[184] Thus, within the limitations imposed by the substantive

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> The first step in that process is filing a complaint with the clerk of the court of appeals for the circuit. The chief judge of the circuit reviews the complaint, which he may dismiss if it does not meet statutory requirements, directly relates to the merits of a decision or procedural ruling, or is frivolous. The chief judge is also authorized "to conclude the proceeding if he finds that appropriate corrective action has been taken." Failing dismissal of the complaint or conclusion of the proceeding, the chief judge must appoint a special committee, consisting of the chief judge and equal numbers of circuit and district judges, to investigate the complaint and file with the council a report containing its findings and recommendations. The council, which is authorized to conduct any additional investigation it considers necessary, is directed to take such action "as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to," actions specifically enumerated in the [JCDA].

Stephen Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 285-86 (1982) (footnotes omitted). *See also* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 32-33 (1993) (elaborating on formalities required for filing complaints).

[180] Barr & Willging, *supra* note 179, at 42.

[181] *Id.* at 34, 55.

[182] *Id.* at 50.

[183] *See* Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45, 93-94 (1988) (discussing statistics that demonstrate JCDA has had little effect since its passage and might be counterproductive).

[184] Richard L. Marcus, *Who Should Regulate Federal Judges, and How?*, *in* 1 RESEARCH PA-

provisions of the JCDA, the judges responsible for enforcing the JCDA appear to be doing the job required of them.

For a number of reasons, however, the JCDA does little to address the concerns about arbitrary judicial decision-making and abuse of pretrial authority. First, the substantive provisions of the JCDA itself exclude from review most complaints lawyers might have about arbitrary judicial behavior. Section 372(c)(3)(A)(ii) of the JCDA states that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."[185] As the text makes clear, the so-called "merits exclusion" applies not only to what would commonly be understood as decisions on the merits of a case, but also to decisions on procedural issues as well. The Ninth Circuit concluded that this provision indicates the JCDA was "not intended to provide a tactical option to counsel in litigation . . . ."[186] The Administrative Office of U.S. Courts reported that of the 195 proceedings terminated by chief judges in 1991, 162 (83%) were dismissed on the ground that they related directly to the merits of a decision or procedural ruling.[187] This provision precludes consideration of complaints about much of the arbitrary behavior discussed above. Although a lawyer may wish to complain about how a judge is managing discovery or other aspects of pretrial, or about the extent of a judge's involvement in settlement, the JCDA expressly precludes such review because the complaint concerns matters that are "directly related to the merits of a . . . procedural ruling."[188]

Moreover, to warrant disciplinary action under the Act, a chief judge must find that a judge's conduct is "prejudicial to the effective and expeditious administration of the business of the courts."[189] Under this provision, a chief judge may dismiss

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PERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 363, 371 (1993) (suggesting JCDA stimulates improved judicial behavior); Barr & Willging, *supra* note 179, at 51 (introducing analysis of § 372(c) complaints).

[185] 28 U.S.C. § 372(c)(3)(A)(ii) (1988). For further discussion about the application of this section, see Barr & Willging, *supra* note 179, at 63, and Marcus, *supra* note 184, at 417-21.

[186] *In re* Charge of Judicial Misconduct, 593 F.2d 879, 880-81 (9th Cir. 1979).

[187] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE U.S. COURTS 116-18 (1991).

[188] 28 U.S.C. § 372(c)(3)(A)(ii).

[189] 28 U.S.C. § 372(c)(1) (Supp. V 1993).

an otherwise valid complaint on the ground that it does not rise to a level of conduct prejudicial to judicial administration. Thus, one chief judge dismissed a complaint about a district judge's handling of a status conference because the conduct was not prejudicial to judicial administration.[190]

Even in areas within the JCDA's scope, the JCDA's usefulness is limited by lawyers' reluctance to invoke its provisions. Claims of bias or prejudice unrelated to the merits of any particular decision, for example, could permit a chief judge to initiate an investigation and impose sanctions under the JCDA. Yet lawyers, who are the persons in the best position to perceive and evaluate such bias, virtually never file such claims. Of the over 2400 complaints filed under the JCDA between 1980 and 1991, attorneys accounted for only 6% of individuals filing complaints.[191] A complaint under the JCDA is not viewed the same as an appeal — a routine request for review of a trial judge's decision. A complaint is a much more serious allegation of judicial misconduct, which lawyers are reluctant to make, particularly "against judges before whom they routinely appear."[192] Thus, as one chief judge told investigators for the NCJDR, "Lawyers are reluctant to file complaints and will do it only in a serious case."[193] In its final report, the NCJDR stated that "testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint. This type of risk aversion is common among those who appear frequently in federal court, notably government lawyers."[194] The JCDA is simply too dramatic a sanction to be comfortably used by lawyers in most cases.[195]

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[190] Marcus, *supra* note 184, at 386.

[191] Barr & Willging, *supra* note 179, at 45.

[192] Charles G. Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 257 (1993).

[193] *Id.* at 258.

[194] REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 100 (1993) [hereinafter NCJDR REPORT].

[195] A 1990 amendment to § 372(c), which allows chief judges to "identify a complaint" sua sponte arguably could relieve some of the pressure on lawyers because the JCDA no longer requires the filing of a complaint in order for the chief judge to initiate an investigation. Geyh, *supra* note 192, at 279. This amendment has not, however, apparently resulted in significantly more investigations under the JCDA.

2. Informal Discipline of District Judges

In addition to the formal disciplinary mechanism under the JCDA, chief judges have informal authority to address judicial misconduct. As one commentator has noted, there is a "general consensus among judges, legislators, and academics that informal action has been and remains the judiciary's most common response to episodes of judicial misconduct."[196] Indeed, as one chief judge pointed out to investigators for the NCJDR, "In my experience, the most serious complaints never hit the complaint process."[197] The reasons for this were explained by another chief judge, who stated that "[i]t's always better to [deal with a situation] informally. You get the right result without unnecessarily humiliating or degrading anyone."[198]

Although the informal process does offer many advantages, particularly for a chief judge who is considering possible disciplinary action, it involves the same types of limitations as the formal process under the JCDA. First, the informal process is generally not available for complaints about procedural decisions on their merits, which are precisely the types of decisions in which most of the problems discussed above arise. Moreover, lawyers remain reluctant to raise complaints even on an informal basis.[199] Finally, the informal process involves no record, and it may be unclear whether any action has been taken. Unfortunately, as two commentators for the NCJDR have noted, "Although the lack of accountability is a serious disadvantage, it seems inextricably linked to the advantages of the informal process."[200]

Thus, the existing mechanisms of judicial discipline within the judicial branch are ill-suited to remedy the problems highlighted in this Article. The disciplinary scheme is directed towards a set of problems different from the ones discussed herein. Moreover, attorneys are too reluctant to utilize this mechanism for it to be a useful remedy for abuse of pretrial management authority.

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[196] Geyh, *supra* note 192, at 280.

[197] Barr & Willging, *supra* note 179, at 131.

[198] *Id.* at 137.

[199] *See* Geyh, *supra* note 192, at 257 (discussing lawyers' reluctance to file complaints against judges).

[200] Barr & Willging, *supra* note 179, at 139.

To solve the problem of increasingly unchecked trial court power, it will be necessary to return in some form to the framers' model, which controls both the primary and secondary discretion of district judges. This objective requires: (1) restoring a precedent or rule-based structure to pretrial decision-making; (2) providing review of pretrial decisions; (3) dividing the authority exercised by district judges and distributing some of it to other officials to prevent abuses of authority; and (4) looking for ways to increase judicial accountability without excessively impinging on judicial independence. The next section explores possible mechanisms for accomplishing these goals.

IV. SOLUTIONS TO THE PROBLEM OF UNCHECKED TRIAL COURT POWER

The increasing unchecked power of federal judges suggests the need for new restraints on judicial authority that respect the continuing need for independence of Article III judges. An independent judiciary remains an essential part of the system of checks and balances that regulates the entire national government. Destroying the necessary independence of Article III judges to increase accountability would solve a problem within the judiciary only to create a larger problem within the national government structure by diminishing the judiciary's check on the political branches. New controls on the increasing discretion of federal district judges must be carefully crafted to respect the traditional role of the judiciary in providing an independent check on the other branches of government.

The tension between the principles of independence and accountability makes development of effective solutions difficult. The framers recognized that independence and accountability are, to some extent, mutually exclusive. The framers solved this dilemma by using three checks that preserved judicial independence from the political branches: (1) appellate review which operates within the judicial branch so as to avoid undue influence from the political branches or the public; (2) obedience to precedent which is essentially self-imposed; and (3) the petit jury which involves the diffusion of some judicial power to the public. The reinvigoration of old checks and the creation of new ones must attempt to match this combination of internal checks

and self-regulation, which encourages accountability while preserving the kind of independence most important to the framers.

A. Increasing the Use of Magistrate Judges to Supervise Pretrial

The current judicial structure, in which district judges handle most pretrial issues, cannot accommodate any significant solutions to the problem. First, maintaining the current structure would not solve the problems created by the concentration of managerial and substantive decision-making authority in a single person. Any effective solution should provide for the division of these two powers to prevent the use of substantive decision-making power as a coercive tool in pretrial management. Second, providing for greater access to the courts of appeals will not work because the courts of appeals are already overburdened with cases reviewing the final judgments of district courts.[201] From 1958 to 1988 the number of filings per circuit judge increased from 55 to 240.[202] In response to a Federal Courts Study Committee survey, 81% of circuit judges reported their workload to be "heavy" or "overwhelming."[203] Increasing the number of circuit judges would create many additional problems and probably would still not allow for adequate review of pretrial decisions.[204] Realistically, the courts of appeals cannot provide any meaningful review of pretrial actions.

Since review cannot come from above in the system, the only possible place to look for help is down to a different decision-maker. This decision-maker should be able to assume the district judge's pretrial managerial authority and leave the district judge with substantive decision-making authority and the power to review pretrial decisions on appeal. In the current federal system, the logical place to vest this initial responsibility for the supervision of pretrial is the magistrate judge.[205] Currently,

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[201] *See* Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (1993) (arguing that courts of appeals are desperately overburdened and that Congress should double number of circuit judges).

[202] 1 FEDERAL COURTS STUDY COMMITTEE, *supra* note 68, at 31.

[203] *Id.* at 88.

[204] *See id.* at 94-102 (analyzing consequences of increasing number of judges).

[205] Magistrate judges are non-Article III judicial officers who serve within the judicial branch. A magistrate judge is appointed by the judges of the district court in which the

many magistrate judges take an active part in managing pretrial.[206] Section 636(b)(1) of the Judicial Code provides:

> A judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.[207]

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magistrate judge will serve, for an eight year term, subject to reappointment. 28 U.S.C. § 631 (1988 & Supp. V 1993). A magistrate judge may be removed by the judges of the district court "only for incompetency, misconduct, neglect of duty or physical or mental disability." 28 U.S.C. § 631(i) (1988). Regulations of the Judicial Conference require a district court to appoint a "merit selection panel" to "recommend to the court for nomination individuals whose character, experience, ability, and commitment to equal justice under the law fully qualify them to serve as a United States magistrate judge." Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges, § 3.01 (1992), *reprinted in* MAGISTRATE JUDGES DIV., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE SELECTION AND APPOINTMENT OF UNITED STATES MAGISTRATE JUDGES app. at H-3 (1993).

[206] *See generally* CARROLL SERON, THE ROLES OF MAGISTRATES IN THE FEDERAL DISTRICT COURTS (Federal Judicial Center 1983) (setting forth results of survey of U.S. Magistrates concerning their authority and experiences in 82 federal district courts in light of 1976 and 1979 amendments to Federal Magistrates Act); CARROLL SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES (Federal Judicial Center 1985) [hereinafter NINE CASE STUDIES] (analyzing dynamic role of magistrate in nine different federal districts chosen as subject of in-depth case study); CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS (1990) (cataloging history, role, development, and consequences of U.S. Magistrates); Richard W. Peterson, *The Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62 (1970) (providing historical background of Federal Magistrates Act and consideration of magistrate system and importance to society); Linda J. Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070 (1975) (describing structure and operation of system of English Masters and drawing parallels and distinctions to U.S. Magistrate system); Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975) (providing detailed analysis of U.S. Magistrate system and suggestions for improvement); Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565 (1974) (discussing history of Federal Magistrates Act of 1968 and experiences since its implementation and concluding that magistrates have successfully aided in pre-trial and discovery proceedings); Jack B. Weinstein & Jonathan B. Wiener, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429 (1988) (providing overview of development of Federal Rules of Civil Procedure and of U.S. Magistrate system).

[207] 28 U.S.C. § 636(b)(1)(A) (1988). When this provision was added to the Magistrates

This provision permits magistrate judges to hear any nondispositive pretrial motions, but prohibits them from hearing dispositive motions on the merits.[208] Thus, under this provision, magistrate judges have been authorized to issue protective orders,[209] decide motions for leave to amend,[210] resolve a wide range of discovery issues,[211] impose fees and attorney sanctions for discovery misconduct,[212] and preside over settle-

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Act in 1976, both the House and Senate Committees indicated that the pretrial matters that may be referred to a magistrate "include[s] a great variety of preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case." H.R. REP. NO. 1609, 94th Cong., 2d Sess. 9 (1976); S. REP. NO. 625, 94th Cong., 2d Sess. 7 (1976).

[208] *See* JUDICIAL CONFERENCE COMM. ON THE ADMIN. OF THE MAGISTRATE JUDGES SYS., INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 32 (1991) [hereinafter JUDICIAL CONFERENCE INVENTORY]. One commentator has defined the difference between dispositive and nondispositive motions as follows:

> A dispositive motion refers to "a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action". A judge may designate a magistrate to conduct hearings and write a report and recommendation on a dispositive motion. Note that a dispositive motion will usually, though not always, dispose of a case (e.g., a motion to dismiss).
>
> A nondispositive motion includes all other motions (e.g., discovery); a judge may designate a magistrate to hear and determine a nondispositive motion, subject to reconsideration by a judge if it can be shown that the "magistrate's order is clearly erroneous or contrary to law."

NINE CASE STUDIES, *supra* note 206, at 7 (citations omitted).

[209] New York v. United States Metals Ref. Co., 771 F.2d 796 (3d Cir. 1985) (authorizing grant of protective order by magistrate over certain confidential materials); Bryant v. Hilst, 136 F.R.D. 487 (D. Kan. 1991) (authorizing magistrate to deny protective order preventing defense counsel from communicating with plaintiff's physicians without express authorization of plaintiff in medical malpractice suit).

[210] United States Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099 (9th Cir. 1985); Gray v. First Nat'l Bank of Louisville, No. 89-794, 1991 U.S. Dist. LEXIS 1121 (E.D. La. Jan. 30, 1991); Walker v. Union Carbide Corp., 630 F. Supp. 275 (D. Me. 1986).

[211] *See, e.g.*, Mathers v. Bricklayers & Allied Craftsmen, No. 5:89-CV-83, 1991 U.S. Dist. LEXIS 654 (W.D. Mich. Jan. 18, 1991) (authorizing magistrate judge to deny motion to compel discovery on ground that material protected by attorney-client privilege); Pauley v. United Operating Co., 606 F. Supp. 520 (E.D. Mich. 1985) (authorizing magistrate to order defendant to appear at pretrial discovery hearing); Fischer v. McGowan, 585 F. Supp. 978 (D.R.I. 1984) (authorizing magistrate to hear motion to compel non-party deponent to reveal confidential sources as nondispositive matter); FDIC v. United States, 527 F. Supp. 942 (S.D. W. Va. 1981) (authorizing magistrate judge to issue order denying discovery on basis of attorney-client privilege).

[212] Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522 (2d Cir. 1990) (imposing

ment conferences.[213] One study estimated that magistrate judges already play some role in up to fifty percent of district court cases.[214] The use of magistrate judges could be expanded to include management of pretrial, including discovery and settlement discussions, in all cases filed in district court.

A revised system making greater use of magistrate judges should include the following features. First, magistrate judges would handle all aspects of pretrial including management of discovery and supervision of settlement discussions, while district judges would retain the initial power to decide dispositive motions and preside at trial. This division of authority would diminish the problems that arise when a single person exercises both management and adjudicative functions. Magistrate judges would be unable to coerce the parties during discovery or settlement negotiations with implied threats of what the judge might do at trial. Even if the pressure to settle lawsuits before trial persists, a magistrate judge would not have the same power to limit party autonomy.

Second, magistrate judges' decisions on pretrial issues should remain appealable to district judges.[215] This procedure would provide some control of the secondary discretion of the official making the initial decisions concerning pretrial management. Although district judges would still have the final say on case management issues, they would not have the day-to-day managerial responsibility for litigation and would not be the parties' initial point of contact. This further division of power would help to curb the arbitrary exercise of case management authority. Magistrate judges would know that if they were to overstep the limits of fairness, they would be subject to review and possible reversal.

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monetary sanctions under Rule 37 usually considered nondispositive, although some Rule 37 evidentiary sanctions may be dispositive and therefore not authorized under U.S.C. § 636(b)(1)(A) (1988)), *cert. denied*, 498 U.S. 846 (1990).

[213] G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (authorizing magistrate judge to issue Rule 16 order requiring attendance at pretrial conference of parties with power to settle case).

[214] JUDICIAL CONFERENCE INVENTORY, *supra* note 208, at 8.

[215] The Magistrate's Act already permits a district judge to review a magistrate judge's decision on a nondispositive matter: "A judge of the court may reconsider any [nondispositive matter] . . . where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

To facilitate review by district judges on appeal, all communications between the magistrate judge and any party should be on the record. Currently, many district judges conduct various aspects of discovery management and settlement off the record. Accordingly, a judge may act without the restraint produced by the knowledge that his or her remarks will be recorded and subject to subsequent criticism. Such off-the-record communication also effectively precludes any form of appellate review. Requiring all discussions to be on the record would enable later review and would provide a check on arbitrary behavior. In addition, at least in cases appealed to the district judge, the magistrate judge should prepare an opinion to provide a record of her decision and serve as the foundation for an appeal.

One potential problem with this form of review is that parties might use the appeal process as a litigation tactic to prolong litigation and disrupt an opponent's discovery. However, empirical data on the current use of magistrates to handle pretrial matters suggests that excessive appeals would not be a problem. In one study of the use of magistrates in nine representative districts, data showed that litigants had challenged magistrates' rulings on nondispositive motions in only four percent of the sampled cases.[216] The study also concluded that a magistrate's pretrial decisions were more likely to be accepted if the magistrate was perceived as an integral part of the judicial team. Therefore, the study noted:

> An important ingredient for successful innovation is a willingness to develop ongoing channels of communication with the practicing bar: Contrary to some commonly held expectations, pretrial case management by magistrates may be an effective strategy if the practicing bar develops an understanding of the rationale for these steps. For example, in some districts, magistrates have become, for all practical purposes, the pretrial officer of the criminal or civil docket and have discretionary responsibility over the initial phase of case processing. Interviews with a broad cross section of attorneys demonstrate a willingness to accept the decisions of these officers . . . .[217]

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[216] NINE CASE STUDIES, *supra* note 206, at 102-03.

[217] *Id.* at 111.

If the burden and delay involved in multiple appeals of pretrial rulings proved problematic despite the empirical data, it would be possible to create disincentives for frivolous appeals. Such disincentives could include the automatic award of attorneys' fees if the party appealing the magistrate judge's ruling loses before the district court. Such a provision would discourage meritless appeals while leaving open an avenue for review of arbitrary decisions during the pretrial process.

Dividing authority and providing a method to appeal case management decisions, however, would not remedy every abuse of managerial power. To restore the framers' vision of regulated judicial authority, it would also be necessary to control the primary discretion of the managerial decision-maker. In other words, there must be standards that limit and regulate the exercise of managerial power. Accordingly, the courts should begin to create published standards to control pretrial case management.

These standards could be created in a number of ways. First, written rules could be adopted at either the national or district level to guide and control magistrate judges in the exercise of their management authority.[218] With respect to discovery control, for example, the courts could adopt a model of "differential (or differentiated) case management" (DCM), in which cases are assigned to a particular management track based on the size

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[218] The CJRA model suggests that such innovative sets of rules should be created first at the district level. Local codes would permit different districts to experiment with various methods of regulating the pretrial process by rule. One should note, however, that a number of scholars have pointedly criticized the CJRA for balkanizing federal procedure by allowing so much variance from the previous uniformity of the Federal Rules of Civil Procedure. *See, e.g.*, Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1443-45 (1994) (stating that CJRA has created chaos in discovery in federal cases); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1452 (1994) (discussing clash between Federal Rules of Civil Procedure and CJRA); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993) (analyzing procedural reform efforts). Given the importance of a uniform set of procedure rules, the ultimate goal should be a set of national standards.

and complexity of the litigation.[219] One recent report described DCM as follows:

> The DCM track approach involves formalization of a number of discrete and well-structured approaches to case scheduling and management, followed by early assignment of cases to them. It may be decided to assign cases at the outset according to objective criteria, or simply to allow attorneys to choose the track into which their case will fit. Within each track, judges will use different case-management techniques and schedules that are at least partially predetermined.[220]

"DCM is to be distinguished from other case management approaches that treat each case on an entirely individual basis, with no systematic recognition of differences in cases over broad categories."[221] Thus, under a DCM system, the management discretion of the pretrial judge is controlled by a formal system that specifies how particular types of cases will be managed. The CJRA expressly encouraged the adoption of DCM by directing each district's advisory group, in adopting a plan to reduce expense and delay, to consider:

> Systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and

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[219] One commentator described the principles of DCM as follows:

> First, not all classes of cases present the same degree of management complexity and therefore processing procedures and time frames should be tailored to the type of case. Second, the allocation of judicial system resources to cases should reflect the level of court intervention appropriate to individual case need. Third, the judicial system should have multiple pathways through which cases can exit, rather than the traditional first-in/first-out case disposition approach. Finally, DCM introduces the concept that certain classes of cases and litigants require early judicial intervention.

Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1569 n.71 (1994). *See also* Suzanne Alliegro et al., *Beyond Delay Reduction: Using Differentiated Case Management* (pts. 1-3), 8 CT. MGR., Winter 1993, at 24, Spring 1993, at 12, and Summer 1993, at 23 (presenting various DCM programs in respective courts).

[220] Terence Dunworth and James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1324 (1994) (discussing preliminary report of Rand Corporation's Institute for Civil Justice on CJRA pilot program).

[221] CIVIL JUSTICE REFORM ACT REPORT, *supra* note 130, at 8.

> other resources required and available for the preparation and disposition of the case . . . .[222]

Forty-three districts have already adopted civil justice delay and expense reduction plans that include DCM "with a detailed system incorporating formal systematized tracks."[223] Although both the CJRA and these plans advocate the use of DCM for efficiency reasons, the argument above suggests that adoption of such a system is equally important for the purpose of restoring checks on the discretionary power of pretrial management. All districts should adopt such a program in conjunction with the use of magistrate judges to handle pretrial management.

In addition, courts could adopt procedural rules to regulate the involvement of magistrate judges in settlement negotiations. Such rules should include a proscription against a judge's involvement with substantive decision-making authority to protect against the use of that power to coerce settlement. The rules should also include provisions to regulate a judge's contact with the parties, particularly ex parte contact, during the settlement process.

The precise substance of these rules would ultimately be less important than the existence of standards that could be applied uniformly to all litigants and provide a basis for review of any action that is inconsistent with the published guidelines. The increased use of magistrates should not provide a basis for even greater discretionary case management and thereby "relieve[] the pressure on the rulemakers to reassess the discovery rules more generally."[224] Increased use of adjuncts requires more, not less, attention to the rules.[225]

Furthermore, the district courts should be encouraged to publish their decisions on appeals from the managerial decisions of magistrate judges to provide further guidance for the exercise of pretrial authority. Such decisions would provide a body of precedent to guide magistrate judges in regulating pretrial and settlement. The burden on district judges of writing such deci-

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[222] 28 U.S.C. § 473(a)(1) (Supp. V 1993).

[223] CIVIL JUSTICE REFORM ACT REPORT, *supra* note 130, at 9.

[224] Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2141 (1989).

[225] *Id.* at 2175-78.

sions would be compensated for by the elimination of day-to-day management responsibilities for civil litigation. District judges would decide cases, write opinions, and preside over trials. Magistrate judges, in turn, should welcome the provision of precedent to guide their case management responsibilities.

These changes would help restore to the federal trial courts the checks and balances that the framers deemed essential for courts with the independence guaranteed by Article III. The division of case management and substantive decision-making authority between magistrate judges and district judges would limit the abuses caused by the concentration of both powers in one person. The opportunity to appeal a case management decision would restore the intrabranch check upon which the framers depended to protect against the arbitrary use of power. The creation of written standards, whether through prospective rules or case precedent, would guide and control the discretion of the case manager so as to encourage the exercise of "judgment" rather than "will." In this way, magistrate judges will not have the power and the immunity from review to create the problems involved in district-judge management of litigation, even if the incentive remains to move cases along aggressively.

This proposal would not only help control the arbitrary exercise of judicial power, it might also increase efficiency. By providing a district judge more time to devote to substantive decision-making, the proposal should speed up the decision-making process. A number of commentators and studies have advocated the use of magistrate judges for pretrial management to ease the burden on district judges. For example, Judge Jack Weinstein described the experience of the Eastern District of New York, which "institutionalized the use of magistrates in the discovery phase for nearly every civil case."[226] Weinstein noted, "Magistrates who are given full power to manage discovery can do so exceptionally well. . . . Magistrates become experts at arranging schedules, deciding discovery disputes and preventing them, identifying improper requests and improper refusals to produce, and generally smoothing out the discovery phase of the litigation."[227] The Eastern District of North Carolina has also uti-

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[226] Weinstein and Weiner, *supra* note 206, at 439.

[227] *Id.*

lized magistrate judges for pretrial management. In that district, judges "operate on the explicit assumption that magistrates are the pretrial officers and judges are the trial officers of the court; that is, a magistrate should do everything that is statutorily feasible to prepare a case for trial."[228] A study of the use of magistrates in the Eastern District and eight other districts concluded that there "is general agreement among judges and attorneys that discovery disputes are effectively resolved by magistrates, since a magistrate may rule with finality and challenges are rare."[229]

Many district court civil justice delay and expense reduction plans incorporate automatic referral of pretrial management to magistrate judges, and these plans note that increased reliance on magistrate judges will require the appointment of additional personnel.[230] The Civil Justice Reform Act Advisory Group for the United States District Court of the District of Columbia recommended that when a case is assigned to a district judge, "a magistrate judge should be assigned randomly at the same time to handle all discovery matters and other pretrial matters in the case that the district judge chooses to refer."[231] Although the Advisory Group had initially resisted this proposal in its draft report, it finally concluded that "if *all* discovery in a case is referred to a single magistrate judge, that magistrate judge may come to know the case as well as the assigned district judge will know it and, therefore, can efficiently resolve discovery disputes."[232]

Thus, the increased use of magistrate judges could have significant collateral benefits in addition to the restoration of practical checks on pretrial authority. By increasing the efficiency of case management, the greater use of magistrate judges would

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[228] NINE CASE STUDIES, *supra* note 206, at 78.

[229] *Id.* at 112.

[230] CIVIL JUSTICE REFORM ACT REPORT, *supra* note 130, at 13, 20, 22.

[231] FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 53 (1993).

[232] *Id.* at 54. District judges' resistance to the idea of being *forced* to give up control over pretrial is illustrated by the fact that the final plan adopted by the judges of the District of the District of Columbia allows each judge to decide whether to refer pretrial matters to a magistrate judge: "At the discretion of the district judge, discovery should be referred to magistrate judges." CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 11 (1993).

lessen the pressure to coerce parties into premature settlement. In addition, by decreasing the burden on district judges, the increased use of magistrate judges will also help to control the growth of the Article III judiciary, an explicit goal of the Federal Courts Study Committee.[233]

Critics of this scheme might raise both constitutional and policy concerns regarding the fact that magistrates are not Article III judges themselves.[234] First, from a constitutional perspective, magistrates clearly may not exercise the same power as a district judge. Decisions regarding substantive issues probably must be subject to de novo review by an Article III judge.[235] In *United States v. Raddatz*,[236] the Supreme Court upheld the constitutionality of a magistrate's decision on the admissibility of a confession on the ground that the decision was reviewable de

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[233] *See* 1 FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 68, at 7; *see also* GORDON BERMANT, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (Federal Judicial Center 1993); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1148 (1994) (citing deleterious effects of Article III judiciary growth).

[234] For a discussion of the constitutional issues relating to the authority of magistrate judges, see Magistrate Judges Division, Administrative Office of the United States Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993).

[235] It may, however, be constitutional for magistrate judges to preside over civil trials with the consent of the parties, as authorized by 28 U.S.C. § 636(c). This section provides that parties may appeal these decisions directly to the courts of appeals "in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. § 636(c)(3). Although the Supreme Court has never ruled on this issue, it has upheld the constitutionality of consensual referral of voir dire to a magistrate judge in a felony criminal case. Peretz v. United States, 501 U.S. 923 (1991). In addition, twelve circuits have ruled that consensual civil trials pursuant to this provision do not violate Article III. *See* Orsini v. Wallace, 913 F.2d 474 (8th Cir. 1990), *cert. denied*, 498 U.S. 1128 (1991); Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987); Bell and Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); Gairola v. Commissioner of Virginia Dep't of Gen. Servs., 753 F.2d 1281 (4th Cir. 1985); D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 825 (1985); Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890 (D.C. Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); Puryear v. Ede's Ltd., 731 F.2d 1153 (5th Cir. 1984); Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984), *cert. denied*, 469 U.S. 870 (1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984), *cert. denied*, 469 U.S. 852 (1984); Campbell v. Wainwright, 726 F.2d 702 (11th Cir. 1984); Pacemaker Diagnostics Clinic of Am. v. Intro-Medix, 725 F.2d 537 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

[236] 447 U.S. 667 (1980).

novo by a district judge.[237] Although the district judge did not conduct a new hearing, the Court approved the procedure because "the entire process takes place under the district court's total control and jurisdiction . . . and the ultimate decision is made by the district court."[238]

On nondispositive matters such as pretrial case management and supervision of settlement negotiations, however, a magistrate judge's authority under the Magistrate's Act is undoubtedly constitutional. Although the Supreme Court has never directly addressed this issue, none of the many lower court cases dealing with the power of magistrate judges over pretrial matters has questioned the constitutionality of the statutory authority granted in Section 636(b)(1).[239] In instances where the magistrate judge decides only nondispositive matters and the power to review these decisions remains in the hands of Article III judges, the magistrate judge seems clearly to fall within the constitutionally permissible category of "judicial adjunct."[240]

Even if the increased use of magistrate judges is constitutional, it might present policy concerns if the lesser independence of magistrate judges significantly affected the outcomes of cases. Although the basis for allowing magistrate judges plenary authority over pretrial matters has been the assumption that such matters are "nondispositive," one of the premises of this Article has been that pretrial management decisions are effectively dispositive in an era in which less than five percent of cases go to trial. Thus, one might worry about giving magistrate judges, who are not protected by Article III, the duty of managing the pretrial phase of every case.

As a practical matter, however, it is unlikely that the use of magistrate judges for all pretrial management would create sig-

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[237] The Court treated a motion to suppress evidence in a felony prosecution as a case-dispositive motion.

[238] *Raddatz*, 447 U.S. at 681, 683. *See also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion) (emphasizing that *Raddatz* had upheld magistrate's power because ultimate determination on merits was made by district judge); Mathews v. Weber, 423 U.S. 261 (1976) (upholding referral of social security benefit cases to magistrates for review of administrative record, oral argument, and preparation of recommended decision).

[239] *See supra* notes 205-09 (citing cases discussing power of magistrate judges).

[240] *See Raddatz*, 447 U.S. at 676 (holding that Article III was satisfied when district judge made ultimate adjudicatory determination based on magistrate's proposed findings of fact).

nificant problems. First, magistrate judges are protected from influence of the political branches in that they are appointed by, and report to, the Article III judiciary.[241] The Ninth Circuit has noted that by vesting appointment power in Article III judges, the Magistrates Act protected magistrate judges from being "directly dependent upon loyalty to officers in either of the political branches."[242] Although there is a possibility that "a particular decision, though legally correct, might lead Congress to lower the pay of all magistrates,"[243] that possibility seems too remote to have a real impact on the independence of magistrate judges. Finally, the relatively obscure and nonpublic context of pretrial management also makes it less likely that such decision-making authority would subject magistrate judges to significant political influence. It is more likely that, as is true with respect to district judges, the principal difficulty will be ensuring an appropriate level of accountability rather than the necessary degree of independence.

Moreover, it would not necessarily be a bad thing if magistrate judges were more accountable to the district court judges who can hire and fire them.[244] Some judicial abuse of pretrial authority is caused by the district judges' unaccountability and the extent to which the perquisites of high judicial office lead to impatient and intemperate judicial behavior. As the well-respected district judge Edward J. Devitt used to remind groups of new federal judges, "[D]aily association with these external trappings may mislead us to an inflated appraisal of our own importance, so a practical application of the virtue of humility counsels that we must be on our guard."[245] The lesser status and indepen-

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[241] *See* SMITH, *supra* note 206, at 29-32 (explaining selection procedures for magistrate judges); *see also supra* note 205 and accompanying text (explaining statutory provisions for appointment and removal of magistrate judges)

[242] Pacemaker Diagnostics Clinic of Am. v. Intro-Medix, 725 F.2d 537, 545 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984).

[243] *Id.* at 552 (Schroeder, J., dissenting).

[244] One could argue that magistrate judges might be subject to pressure, either actual or perceived, from district judges to move cases quickly and rapidly dispose of them by settlement, which could lead to some of the same problems as judicial case management. For a number of reasons, this seems unlikely. First, there is no evidence that magistrate judges are subjected to such pressure in the districts in which they already participate in pretrial management. Second, the requirement that reappointments be first evaluated by a merit panel limits undue judicial influence.

[245] EDWARD J. DEVITT, YOUR HONOR 4 (Federal Judicial Center 1986).

dence of magistrate judges may be a blessing rather than a problem.

Finally, some may complain that the routine use of magistrate judges for pretrial management would lead to the bureaucratization of the federal judiciary and the transformation of district judges into judicial supervisors.[246] The empirical data on the use of magistrate judges, however, appears to put these concerns to rest. The leading Federal Judicial Center study of the use of magistrate judges found:

> As districts take more steps to extend the scope of the judicial family . . . there is a strong collegial base for administering the court, which in turn helps to ensure a more congenial work setting for all participants. Those very steps that some claim will undermine the unique qualities of the judiciary — rules, standard operating procedures, committees, and demarcated lines of duty and responsibility — may not be the cause of a less satisfactory work setting.[247]

In sum, transfering pretrial management to magistrate judges, separating substantive and managerial decision-making, and creating clear guidelines for case management promise to restore many of the lost checks on judicial power. These changes pose few risks to the values of judicial independence at the heart of Article III, while reestablishing an important degree of accountability for judicial case management.

B. Increasing Accountability Through Judicial Performance Evaluations of Federal Judges and Magistrates

As the discussion above illustrates, any attempt to increase the accountability of the federal judiciary runs the risk of affecting the independence that is central to the framers' construction of Article III. The Judicial Conduct and Disability Act's limited effort at self-regulation prompted criticisms that the sanctions authorized by the Act were inconsistent with Article III.[248] Yet

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[246] *See* Owen Fiss, *The Bureaucratization of the Federal Judiciary*, 92 YALE L.J. 1442 (1983) (discussing problem of bureaucratizing federal judiciary); Patrick E. Higginbothem, *Bureaucracy: The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980) (theorizing that role of federal judiciary faces risks of being fundamentally altered by federal branches).

[247] NINE CASE STUDIES, *supra* note 206, at 23.

[248] *See* Paula Abrams, *Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers*, 41 DEPAUL L. REV. 59 (1991) (discussing constitutional legitimacy of

even the use of magistrate judges as principal case managers would not eliminate all complaints about arbitrary or unfair judicial behavior. The preservation of judicial independence necessarily means that there will always be limits on the ability of the system to regulate judicial behavior. As the framers themselves knew, accommodating both independence and accountability is a difficult task.

One way to accommodate both independence and accountability is to encourage individual self-regulation. Encouraging judges to examine and assess their decision-making process and the way they relate to the parties and lawyers who come before them may improve judicial behavior while also protecting a judge's independent judgment. As noted above, both formal and informal complaints to a chief judge can prompt judicial self-assessment and the correction of problem behavior. However, the reluctance of litigators to identify themselves in a complaint to the chief judge limits the usefulness of the complaint process. The independence and power of the federal judiciary create the fear of retaliation and the perception that lawyers will have no way to protect themselves from a judge's anger about a complaint to the chief judge. As one United States Attorney's office reported in response to a survey about the use of the complaint process under the Judicial Conduct and Disability Act:

> This matter was discussed at the . . . Circuit Judicial Conference a few years ago, and the uniform consensus among lawyers, both public and private, was that the worst thing you could do was to make a complaint. Regardless of the merits, when you are dealing with the "Judges' Club" the "circle the

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disciplining federal judges by judicial branch); Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985) (arguing unconstitutionality of Judicial Council's Reform and Judicial Conduct and Disability Act of 1980); Drew Edwards, Note, *Judicial Misconduct and Politicizing the Federal System: A Proposal for Revising the Judicial Council's Act*, 75 CAL. L. REV. 1071 (1987) (criticizing Judicial Council's Reform and Judicial Conduct and Disability Act of 1980).

Empirical data from the National Commission on Judicial Discipline and Removal strongly suggests that the Act has had little effect on the independence of federal judges. *See* Marcus, *supra* note 184, at 394-400. In a survey conducted by the Justice Research Institute, federal judges overwhelmingly (by a ratio of more than over 40 to 1) reported that judicial discipline proceedings had never interfered with their judicial independence. Even the few affirmative responses "do not indicate significant risk to judicial independence." *Id.* at 399-400 n.71.

> wagon" mentality virtually always prevails, with the end being worse than the beginning.[249]

One method of dealing with litigators' reluctance to complain publicly about judicial behavior and of encouraging judicial self-assessment would be for district courts to distribute anonymous questionnaires that ask litigators to assess the performance of district judges and magistrate judges.[250] As another United States Attorney's office stated in response to the survey noted above, "There might be less reluctance to express an opinion re: a judge's performance if attorneys were routinely and regularly requested to evaluate the judges before whom they have appeared — preferably on an anonymous basis."[251]

It would not be difficult for a district court to conduct an annual survey of a sampling of the litigators who have practiced in that court and to solicit comment on, and evaluation of, the judges and magistrate judges of the district. Questions could cover issues of judicial temperament and demeanor as well as judicial competence in managing cases. Recent investigations into issues of gender, race and ethnic bias in the federal courts have usefully employed similar surveys.[252] In addition, advisory

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[249] Peterson, *supra* note 16, at 894.

[250] *See* Richard L. Aynes, *Evaluation of Judicial Performance: A Tool for Self-Improvement*, 8 PEPP. L. REV. 255 (1981). The use of such anonymous surveys is commonplace in the academic world, in which there is a similar need to increase accountability without diminishing academic independence. Professors have long been accorded independence under the tenure system on the ground that such independence is necessary in order to encourage creative and uninhibited scholarship. At the same time, however, such independence has led to complaints that professors are not responsive to students' concerns and devote insufficient time to their teaching responsibilities. In order to respond to these concerns, many universities, including many law schools, have adopted a system of student evaluations in which students complete evaluations of a professor at the end of every course. Although the impact of such an evaluation process has never been empirically evaluated, it seems reasonable to draw a few conclusions about the process. First, the evaluations give feedback to those who might otherwise be unaware of the negative impact of their classroom behavior. Second, it seems likely (based on anecdotal reporting) that the awareness of the evaluation process acts to curb abusive behavior to some extent. By most accounts, student complaints about abusive faculty have declined significantly over the past 20 years, although it is by no means clear how much of this is attributable to the student evaluation process. Finally (again based principally on anecdotal accounts), it appears that the evaluation process has had little impact on the value of academic independence. Although no claims can be made as to the exact significance of the process, it generally appears to be a useful innovation. *Id.* at 262 n.36.

[251] Peterson, *supra* note 16, at 894.

[252] *See* THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE

groups created pursuant to the Civil Justice Reform Act have also employed such surveys.[253] Thus, many courts already have some experience with the survey process.

Consultants and hearing witnesses recommended to the NCJDR that courts utilize anonymous questionnaires or other forms of judicial evaluation "to provide feedback to judges concerning their performance, conduct, and demeanor"[254] and to deal with the reluctance of litigators to report complaints about judges under the Judicial Conduct and Disability Act.[255] Indeed, the Commission noted in its report that "in at least one circuit the chief judge uses judicial evaluation in the process of informal resolution of complaints."[256] The NCJDR itself recommended that "the Judicial Conference and the circuit councils consider programs of judicial evaluation for adoption in the federal courts."[257] As the Commission also noted, "There are numerous models available, and with the aid of the Federal Judicial Center (whose Director, as a federal judge, has found evaluation questionnaires useful), the Conference could recommend a few of them for experimental use on a regional basis."[258]

In 1985, the American Bar Association encouraged the development of such programs by adopting *Guidelines for the Evaluation of Judicial Performance.*[259] This comprehensive study sets forth criteria for judicial performance, recommendations for the methodology and administration of programs for judicial perfor-

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NINTH CIRCUIT GENDER BIAS TASK FORCE (1993) (detailing surveys used in investigation of gender bias); FINAL REPORTS OF THE SPECIAL COMMITTEE ON RACE AND ETHNICITY AND THE SPECIAL COMMITTEE ON GENDER OF THE DISTRICT OF COLUMBIA CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS (1995) (detailing surveys used in investigation of gender, race, and ethnic bias).

[253] *See, e.g.*, FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (1993).

[254] NCJDR REPORT, *supra* note 194, at 118.

[255] *See* Todd Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 243, 356-57 (1993) (explaining why litigants are reluctant to file complaints against judges).

[256] NCJDR REPORT, *supra* note 194, at 118.

[257] *Id.*

[258] *Id.*

[259] AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985) [hereinafter ABA GUIDELINES].

mance evaluation, and proposals for how evaluations should be used and disseminated.[260] The Guidelines suggest a variety of possible approaches to judicial evaluation, but recognize that polling of lawyers and others in the judicial system "will be the primary method for eliciting performance information."[261] The commentary to the Guidelines, however, criticizes the attorney surveys used by many bar associations as unscientific.[262] To improve judicial confidence in the surveys, the Guidelines recommend that the court, not the bar, organize performance evaluation programs, and that "experts be used in developing approaches, devices, and techniques to be used in any judicial evaluation program."[263] At the same time, the Guidelines emphasize that, while organized by the court system, an evaluation system should "operate through an agency or committee that is broadly based and composed of persons of independent quality drawn from the bench, the bar, and non-lawyers familiar with the judicial system."[264] The Guidelines also recommend that an evaluation program should preserve both the anonymity of the attorneys and others who provide information and the confidentiality of the responses.[265] Finally, the Guidelines include sample lawyer questionnaires from states that have adopted programs that are consistent with the approach recommended by the Guidelines.[266]

These state judicial systems provide useful models for how a federal judicial evaluation program might be developed.[267]

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[260] *Id.*

[261] *Id.* at 25.

[262] *Id. See also* Flanders, *Evaluating Judges: How Should the Bar Do It?*, 61 JUDICATURE 304, 305 (1978) (criticizing polls' methodology as falling far short of reasonable scientific standards).

[263] ABA GUIDELINES, *supra* note 259, at 24.

[264] *Id.* at 6.

[265] *Id.* at 29-33.

[266] *Id.* at 42-55.

[267] *See* Francis L. Bremson, *Evaluating Judicial Performance: Refining the Process*, 8 STATE CT. J., Summer 1984, at 43 (describing judicial evaluation formally conducted in Alaska for retention election purposes); Daina Farthing-Capowich, *Designing Programs to Evaluate Judicial Performance: Participation is Key to Success*, 9 STATE CT. J., Summer 1985, at 22 (recognizing importance of participation among bench, bar, and public in designing evaluation programs to measure judges' strengths and weaknesses); Daina Farthing-Capowich, *Evaluating Judicial Performance: Developing Court-Sponsored Programs*, 8 STATE CT. J., Summer 1984, at 27 [hereinafter *Evaluating Judicial Performance*] (describing judicial evaluation programs of

Since 1979, a number of states have adopted judicial performance evaluation systems, and others are in the process of developing them.[268] Although the details of these systems vary from state to state, the attorney questionaire is a feature common to all of them.[269] Studies have suggested that, to be effective, such programs should be administered by the courts rather than the bar,[270] should include court managers and representatives of the bar in the group that designs the program,[271] and should insure confidentiality of both the identity of the evaluating attorneys and the result with respect to specific judges.[272]

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several states, Ninth Circuit Court of Appeals, and American Bar Association); Daina Farthing-Capowich & Judith White McBride, *Obtaining Reliable Information: A Guide to Questionnaire Development for Judicial Performance Evaluation Programs*, 11 STATE CT. J., Winter 1987, at 5 (providing general framework for developing judicial performance evaluation questionnaire); Alan B. Handler, *Evaluating Judicial Performance: Testing the Theories*, 8 STATE CT. J., Summer 1984, at 38 (describing results of New Jersey Pilot Judicial Performance Program); Alan B. Handler, *A New Approach to Judicial Evaluation to Achieve Better Judicial Performance*, 3 STATE CT. J., Summer 1979, at 3 (condensing New Jersey's Supreme Court's Committee Report on Judicial evaluation and performance which detailed goals and methods of evaluation); Daniel B. Horwitch, *Judicial Performance Evaluation: Implementing the Process*, 10 STATE CT. J., Summer 1986, at 16 (describing Connecticut Judicial Department's judicial performance evaluation program); Susan Keilitz & Judith White McBride, *Judicial Performance Evaluation Comes of Age*, 16 STATE CT. J., Winter 1992, at 4 (describing characteristics of 15 judicial performance evaluation programs).

[268] Keilitz & McBride, *supra* note 267, at 6-9. As of 1992, six states and the Navajo Nation operated systems of judicial performance evaluation, and eight states were actively developing programs.

[269] *Id.* Most of the states go much further and include other methods of evaluation. For example, Minnesota's program includes unannounced courtroom visits by another judge and a person trained in evaluating communication skills. *Id.* at 12. New Jersey's program includes videotaping judges while they are presiding over hearings. These videotapes are reviewed by the judge and an "expert in communications," who "analyzes the judges' verbal and nonverbal behavior, including the judge's control in interactions with people in court and the judge's style in posing questions, gathering facts, and considering information." *Id.* One report suggests that the judges who have been videotaped "find the process a revealing and useful tool for self-improvement." *Id.*

[270] *See Evaluating Judicial Performance*, *supra* note 267, at 27 (comparing 15 programs and finding leadership of Chief Justice and Supreme Court serves essential role).

[271] Farthing-Capowich, *Designing Programs to Evaluate Judicial Performance*, *supra* note 267, at 23 (emphasizing importance of broad participation in designing judicial performance evaluation program).

[272] Farthing-Capowich & McBride, *supra* note 267, at 8 (stating that all respondents should be assured anonymity).

These programs seem to have been successful in encouraging the improvement of judicial performance. One recent assessment concluded:

> During 15 years of development, judicial performance evaluation programs have demonstrated usefulness as a means of examining the performance of individual judges and the judicial system. Before these programs began, the judiciary had no formal means of periodically assessing judicial performance. Programs provide meaningful feedback on fundamental aspects of judicial performance that can be used to identify ways of improving individual and institutional judicial performance.[273]

One might argue, however, that evaluations of state court judges might have more impact than evaluations of federal judges because most state judges are subject to possible restraints on continuing judicial service, either through election or reappointment. The experiences noted above, however, and those of individuals familiar with the responsiveness of judges to informal complaints,[274] suggest that an evaluation process would prove useful in federal court. Based on these assessments and the experience of the state court systems that have developed and refined the attorney evaluation process, the federal courts have ample basis to begin at least the experimental development of a program of anonymous attorney evaluation of judges and magistrate judges.

CONCLUSION

The framers' vision of the federal judiciary was complex and ambivalent. While the framers deemed the independence of the court important, they nevertheless feared the abuse of arbitrary and unchecked power. To balance judicial independence and accountability, the framers limited judicial power to a well-defined context in which precedent, appellate review, and the right of trial by jury would prevent district judges from abusing the independence guaranteed by Article III.

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[273] Keilitz & McBride, *supra* note 267, at 13.

[274] *See* Collins T. Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Informal Responses*, 71 JUDICATURE 282 (1988).

Although these checks worked well in the context of 18th and 19th century litigation, dramatic changes in the litigation process now limit their effectiveness. The explosive growth of civil litigation shifted the courts' focus from the trial to the pretrial stage of litigation. As judges worked with increasing vigor to dispose of cases prior to trial, they developed new techniques to manage litigation. Judges began to manage the pretrial discovery process and regulate the scope and pace of litigation to an unprecedented degree. Moreover, in an effort to lighten docket loads, judges also became active participants in the settlement process.

These new pretrial powers effectively evade the checks on judicial power that the framers created. Precedent, appellate review, and the jury cannot effectively regulate a district judge's authority during the pretrial phase. Consequently, district judges are free to control pretrial, and the fate of a case, without significant limitation. In this setting, the framers would have expected, and one indeed finds, the kinds of separation of powers problems that arise when power is concentrated and unchecked in one person.

The new style of judicial management challenges the judicial system to respond with procedures that restore some measure of accountability to trial court litigation. The tools necessary to meet this challenge already exist within the judicial system. Increased use of magistrate judges can restore the possibility of review while separating the functions of managing and substantive decision-making. Yet this alone will not solve the problem of managerial judging. Courts must also commit themselves to creating a more comprehensive set of rules to guide and regulate the exercise of managerial authority by magistrate judges.

The courts also have authority to implement systems of judicial evaluation. Judicial evaluation will help reveal the hidden process of managerial judging and increase the accountability of judges for their managerial decisions. Ultimately, of course, the power to modify judicial behavior on the basis of such evaluations rests solely with individual judges. To have it otherwise would threaten the independence that remains a principal tenet of the federal judiciary. Such evaluations would, however, provide a basis and an incentive for judicial self-regulation that would discourage the arbitrary exercise of managerial power.

The increased power inherent in managerial judging creates separation of powers problems that are neither new nor unexpected. The framers taught us that concentrated and unchecked power creates the potential for abuse and arbitrariness. The framers also taught us how to be creative in developing mechanisms to control such power. As judicial power grows to meet the challenges of expanding dockets and increasingly complex litigation, the system must respond with new ways to regulate and control that power.