U.S. Department of Justice

Office of Policy Development

Assistant Attorney General

Washington, D.C. 20530

The Honorable Otto R. Skopil, Jr., Chairman
Committee on Long Range Planning of the
Judicial Conference of the United States
and
Members of the Committee

January 14, 1995

Dear Judge Skopil and Members of the Committee:

Delivered herewith please find Comments of the Department of Justice on the Proposed Long Range Plan for the Federal Courts.

I look forward to being with you to discuss the Plan on Tuesday, January 17, 1995 in Dallas, Texas. Accompanying me will be Harry P. Litman, Deputy Assistant Attorney General, and Mark Greenberg, Senior Counsel, both in the Office of Policy and Development which coordinated the Department's "commenting" process.

Sincerely,

Eleanor D. Acheson
Assistant Attorney General

COMMENTS OF THE DEPARTMENT OF JUSTICE ON THE PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS

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I. Introduction

The Department commends the Judicial Conference Committee on Long Range Planning for undertaking a Long Range Plan for the Federal Courts and on the scope and ambition of the Proposed Plan (hereafter the Plan). As the largest single user of the federal courts, the Department has views on many aspects of the Plan and welcomes the opportunity to provide its comments. Although the Department has some substantive disagreements with the Plan, the Department strongly supports the efforts of the judiciary to exercise leadership in the process of planning for the federal courts. Resolution of many of the issues addressed by the Plan will require input from a wide range of sources and, ultimately, decisions by the policy-making branches of government. The views of the judiciary are invaluable to any attempt to make these decisions.

The Plan's recommendations are guided by an underlying vision of the federal courts as courts of limited jurisdiction whose function is to adjudicate disputes involving a special federal subject matter. The Plan therefore attempts to define an area of uniquely federal jurisdiction and opposes the creation of areas of overlapping federal and state jurisdiction. Accordingly, many of the Plan's recommendations propose the shifting of parts of the caseload of the federal courts to other forums, including administrative agencies, Article I courts, and state courts or agencies. Congress is urged not to expand federal court jurisdiction into areas that have traditionally been part of the jurisdiction of state courts. A closely related theme of the Plan is the need to maintain the small size of the federal judiciary.

While the Department agrees that not all matters amenable to resolution by courts belong in the federal courts, the Department takes the position that the federal courts have been,

and should continue to be, available to satisfy needs of the nation that cannot be fulfilled in the state courts. The independence of the federal courts from the political arena and their distance from local affairs have indeed made them, as they were constitutionally designed to be, a uniquely valuable resource in vindicating a range of national interests. Their jurisdiction should be defined by the changing needs of an evolving nation.

At the same time, it is important that the docket of the federal courts not be indiscriminately overloaded with matters that could as well be adjudicated in other forums. The federal judiciary is a limited resource; the vast majority of justice system resources will necessarily continue to be found within state justice systems. The federal courts must therefore be used selectively. In determining whether federal involvement in an area is appropriate, the Department focuses on the following kinds of considerations: whether federalization would serve to vindicate basic individual liberties; whether the federal government would have superior investigative, prosecutorial, and statutory resources to bring to bear on problems of national concern; whether solving the problem would require action at the interstate or international level. Moreover, the federalization of an area does not imply that all litigation in that area should be adjudicated in federal courts. For example, when concurrent federal and state jurisdiction exists in criminal cases, the Administration has actively encouraged the use of federal-state cooperative programs to determine how federal prosecutions can be targeted to make the most efficient use of federal resources.

This vision of the role of federal courts underpins the Department's more specific comments on the Plan. The Plan's recommendations fall into two general categories. First, the Plan contains a variety of specific proposals for restricting the jurisdiction of the federal courts. Although the Department often agrees that the Plan has identified general areas in which alternatives to federal court jurisdiction could usefully be developed, the Department disagrees with much of the detail of the proposed restrictions on federal court jurisdiction. Second, the Plan includes a range of recommendations dealing with access to the federal courts. While these proposals recognize the importance of making the federal courts more accessible, they contain little in the way of concrete suggestions. The Department strongly supports the spirit of these recommendations, but hopes that the Plan will devote more attention to these issues and propose detailed and concrete mechanisms for achieving the goals that the recommendations reflect.

II. The Business of the Federal Courts

A. Criminal jurisdiction

Restrictions on criminal jurisdiction

Recommendation: The Plan recommends prosecuting criminal conduct in the federal courts "only in those instances in which state court prosecution is not appropriate," and restricting federal criminal jurisdiction to five narrowly defined categories. Recs. 1-2, Plan at 20-22.

Comment: While the Department generally agrees that the criminal docket of the federal courts should not be overwhelmed with cases that are primarily local in nature, the Department believes that it is not practical or desirable to restrict criminal prosecution in federal court to cases in which state court prosecution is "not appropriate." The Department also believes that a restriction of the federal courts' criminal jurisdiction to the specified five categories would be unworkable and would not give Congress sufficient flexibility to legislate in areas where the national interest is affected. The recommendation is premised on the idea found throughout the plan that the federal courts are special purpose courts whose jurisdiction should be limited to some peculiarly federal subject matter. The Department does not accept this premise. The determination of the business of the federal courts is left by the Constitution to Congress. The Constitution permits Congress to give the courts jurisdiction over constitutionally valid federal statutes. In the Department's view, it is appropriate, consistent with the history of federalism, and constitutionally permissible for Congress, within its broad constitutional law-making powers, to enact statutes to address problems that it determines require a national solution and to decide that the federal courts should be available to adjudicate matters arising under those statutes. Many cases that are "appropriate" for prosecution in state court involve national interests that Congress may determine are best advanced by federal prosecution.

Recommendation 1 states that "Congress should allocate criminal jurisdiction to the federal courts" only for five specified categories of offenses. This recommendation could be understood to support a general statutory restriction on the subject matter of the federal courts. For several reasons, such a restriction would be a bad idea. First, any such restriction would open a new field for litigation, thus adding to the workload of the federal courts and the complexity of federal law. Defendants would be able to raise the restriction on subject matter as a procedural defense. The potential for litigation is especially great because, as the Plan's five categories illustrate, any such restriction would have to use vague terms like "substantial multistate or international aspects." Rec. 1

(b). Moreover, restricting the criminal jurisdiction of the federal courts by statute would remove flexibility that federal prosecutors need to ensure uniform enforcement of federal laws, to pursue cooperative efforts with state and local law enforcement officials, and to take into account varying local conditions. Finally, in light of the present level of public concern about crime, it is wholly unrealistic to expect Congress to restrict the criminal jurisdiction of the federal courts. For these reasons, the Department recommends that Recommendation 1 be clarified to make clear that the nature of the criminal cases brought in federal court should not be controlled by a statutory restriction of federal court jurisdiction.

In accordance with the Plan's vision of the federal courts as special purpose courts, the five categories seem designed to identify a uniquely federal domain. Category (a), the only category covering general national interests, includes only offenses "against the federal government itself or against its agents, or against interests unquestionably associated with a national government." The other four recommended categories of federal criminal jurisdiction cover crimes that, because of their nature, can best be dealt with within the federal criminal justice system. The four categories are: crimes involving substantial multistate or international aspects; highly sophisticated crimes most effectively prosecuted with federal resources or expertise, serious, high-level, or widespread state or local government corruption; activities that raise issues that are highly sensitive in the local community.

These categories are too narrowly drawn. Most importantly, no provision is made for jurisdiction over federal criminal statutes that do not preempt an entire regulatory field. The commentary suggests a narrow interpretation of the cases falling under category (a)'s provision for offenses against interests unquestionably associated with a national government: "offenses in which Congress, in the interests of uniform national regulation, has taken over or preempted an entire regulatory field." Plan at 21.

The Recommendation, on this interpretation, may exclude a number of categories of cases that the Department believes should remain within the jurisdiction of the federal courts. First, specific provision should be made for jurisdiction over offenses that implicate the federal interest in protecting civil rights, including rights arising under the Constitution. Examples of such offenses include the use of excessive force by police officers and criminal interference with the exercise of constitutional rights, as under the Freedom of Access to Clinic Entrances Act and the Violence Against Women Act.

Second, the selective use of federal criminal justice resources in cooperation with state and local law enforcement

efforts has proved to be an effective strategy for attacking certain law enforcement problems, such as gangs, drugs, weapons, and repeat violent offenders. This Administration has stressed the need for such cooperative law enforcement strategies. Limiting federal criminal jurisdiction to areas over which the federal criminal justice system has exclusive jurisdiction would remove the flexibility needed for cooperative efforts. In particular, current cooperative programs, including Weed and Seed, the Organized Crime Drug Enforcement Task Force, and the Attorney General's Violent Crime Initiative, involve selective federal prosecutions that may not always fall within Recommendation 1's five categories.

Third, although the Department agrees that primarily local cases should normally be prosecuted in state court, in order to maintain a coherent and consistent national policy, federal prosecutors need the authority to challenge any violation of federal criminal law in federal court. For example, though the Department would rarely prosecute an antitrust violation with predominantly local impact, the Department cannot ensure a uniform national antitrust policy unless it has the ability to bring a federal prosecution against any violation of federal antitrust laws.

More generally, Congress may reasonably decide that federal resources or expertise may be a valuable complement to the state criminal justice systems in dealing with a national problem; it may therefore be appropriate for Congress to create federal criminal jurisdiction over conduct concurrently regulated by state criminal law. For example, Congress has recently attempted to address the national problem of violence by federalizing certain juvenile handgun offenses under the Youth Handgun Safety Act, though without removing such offenses from state criminal jurisdiction. When Congress determines that an important national interest requires a federal criminal statute, the federal courts should be available to adjudicate cases arising under the statute, whether or not Congress preempts all state regulation in the area, and whether or not the reason for Congress's action is a need for uniformity.

Finally, the Plan's attempt to define a uniquely federal subject matter results in an overly restrictive specification of the categories of cases most effectively prosecuted federally. Although the Department uses criteria like the extent of interstate or international activity, the sophistication of the enterprise, and the local sensitivity of the issue in determining whether to prosecute federally, the Department believes that it is not helpful to formulate these criteria as restrictive conditions on federal criminal jurisdiction. Rather, the principle should be that federal criminal jurisdiction should be available when necessary to vindicate federal interests. For example, in the case of state or local corruption, federal

prosecutors need flexibility to prosecute not only when the problem is serious, high-level, or widespread, but simply when state or local prosecutors fail to act.

In order to deal with these issues, the recommended categories of federal criminal jurisdiction should be expanded to include offenses that present a national problem requiring a federal solution and cases that must be brought in federal court in order to vindicate a national interest.

The Plan also recommends a review and recodification of federal criminal statutes with the purposes of eliminating obsolete provisions, rationalizing the federal criminal law, and cutting criminal jurisdiction back to the five proposed categories. The Department agrees that a thorough review and rationalization of federal criminal statutes would be worthwhile. Enactment of the federal criminal code is long overdue; more than thirty-five states have recodified their laws in the aftermath of the American Law Institute's issuance of the Model Penal Code in 1962. The federal system is far behind. A comprehensive criminal code would have numerous benefits, including improved clarity and simplicity, elimination of overlapping provisions, and possible adoption of Model Penal Code reforms. In addition, a rationalization of federal criminal statutes would make the collection of data easier by making types of conduct correspond to statutory sections in a more systematic fashion.

However, as is clear from the Department's objection to the proposed restrictions on federal criminal jurisdiction, the Department does not believe that such a review should be used to implement those restrictions. Moreover, it is not now realistic to expect Congress to review the criminal law with the goal of eliminating large areas of federal criminal jurisdiction. As a result, though a review might eliminate a few obscure provisions like those mentioned in the Plan, which are not enforced anyway, a review would not significantly affect the criminal docket of the federal courts.

Federal-state cooperation on prosecutorial policy

Recommendation: The Plan also recommends implementing its vision of limited federal criminal jurisdiction through development of a federal-state cooperative policy. Recs. 3-4, Plan at 22-23. Specifically, the Plan suggests increasing the allocation of federal resources to state criminal justice systems, relying more often on the practice of cross-designating federal and state prosecutors, and authorizing the state courts to adjudicate certain federal crimes such as local drug offenses and certain violent crimes.

Comment: As noted, the Department encourages cooperative ventures between federal and state or local prosecutors, and has

successfully implemented numerous cooperative programs. The Department strongly supports continued development of state-federal cooperation with respect to concurrent criminal jurisdiction. In general, the tendency of the Department's cooperative strategies is to reduce the number of prosecutions brought ~~in federal~~ court by, for example, making federal resources and expertise available to state and local prosecutors. In the Department's view, however, the primary purpose of such programs is to achieve the most effective use of law enforcement resources, not to restrict the criminal docket of the federal courts.

The Department agrees with the Plan's recommendation to increase the resources made available to state criminal justice systems, though any impact on the allocation of resources to United States Attorney's Offices should be considered. Realistically, however, greatly restricting federal criminal jurisdiction would leave states with law enforcement problems that they lack sufficient resources to handle. One reason for maintaining concurrent jurisdiction of certain criminal activity is that it allows the federal government to step in when state resources and expertise are inadequate to the problem. The Department also already makes use of cross-designation of federal and state prosecutors and will continue to do so as part of its efforts to maximize the effectiveness of law enforcement efforts through federal-state cooperation.

The Department opposes the proposal to expand the authority of state courts to adjudicate federal offenses. The proposal would place, likely without adequate finding, a new burden on state courts, engender massive procedural and operational complexities, and hamper attempts to maintain uniformity in federal law. First, authorizing the prosecution of federal drug-related and violent crimes in state courts would make it deceptively easy for Congress to respond to public concern about crime by enacting federal criminal legislation without providing sufficient resources. Second, the proposal would raise a host of procedural issues, concerning, for example, collateral estoppel and double jeopardy, that would increase the complexity of federal law and encourage litigation. Moreover, prosecution of federal crimes by federal prosecutors in state courts would saddle federal prosecutors with the task of operating within the varying procedural rules of the fifty states. Finally, uniformity of federal law would not be promoted by a massive increase of adjudication of federal law issues in fifty state jurisdictions.

Executive-judicial cooperation in developing prosecutorial standards

Recommendation: The Plan recommends that the Executive and Judicial Branches cooperate in developing standards to guide the

determination of which cases to prosecute federally, and urges adoption of the principle that "the potential for harsher federal sentencing policies and greater capacity in the federal prisons should be insufficient grounds, by themselves, to warrant prosecution under a federal, rather than a state, criminal statute." Rec. 4, Plan at 23.

Comment: The Department is concerned to preserve flexibility for U.S. Attorneys' Offices in setting prosecutorial guidelines and to avoid judicial involvement in prosecution policy decisions. The Department relies on prosecutorial principles, including those found in the Principles of Federal Prosecution, memoranda of the Attorney General, and national initiatives such as the Violent Crime Initiative. In fact, the United States Attorneys' Offices already take many of the Plan's proposed standards into account in their charging decisions. The Department intends to continue developing its prosecutorial principles, and, in this process, dialogue with the Judicial Branch is extremely valuable. The present Administration has been innovative in initiating such dialogue. Last March, the Attorney General convened the Three-Branch Roundtable on State and Federal Jurisdiction, which gathered representatives of all three branches from federal, state, and local levels of government; topics of discussion included the federalization of criminal law and principles governing the exercise of prosecutorial discretion in cases of concurrent jurisdiction. Although the judiciary's perspective is extremely useful to the Department, because of both constitutional separation of powers reasons and institutional limitations, the judiciary cannot directly participate in the policy decisions involved in establishing prosecutorial standards. The recommendation should be altered to clarify that the judicial role must be limited to providing the Executive Branch policy-makers with the first-hand perspective of judges.

The content of prosecutorial guidelines should be limited to overarching general principles in order to leave federal prosecutors the flexibility necessary to deal with local problems and concerns. Regarding the recommended principle concerning longer federal sentences, the Department agrees that the potential availability of such sentences within the federal system is by itself not normally sufficient to warrant federal prosecution. In certain circumstances, however, the availability of a longer sentence may be an important consideration. For example, under the auspices of a federal-state cooperative initiative, an overall prosecutorial strategy for countering a local crime problem may rely on stiff federal sentences to remove the most serious repeat offenders from the community. As a practical matter, resort to the federal system may be the only way to accomplish this goal because some states have been forced by the combination of financial constraints and constitutional standards for housing prisoners to shorten prison terms.

B. Civil Jurisdiction

Federal question jurisdiction

Recommendation: The Plan recommends that Congress "should not create new rights of action concerning matters traditionally cognizable by state courts, and that federal civil jurisdiction should be restricted to cases that: arise under the United States Constitution; involve the foreign relations of the United States; involve the federal government, federal officials, or agencies as plaintiffs or defendants; involve disputes between or among the states; affect substantial interstate or international disputes; or involve a clear need for national uniformity that cannot be achieved at the state level. Rec. 5, Plan at 23-24.

Comment: In keeping with the Department's view of the federal courts as courts of general jurisdiction available to serve national interests that cannot be adequately served in the state courts, the Department believes that whether a matter was "traditionally cognizable by state courts" is not the appropriate criterion for whether Congress should create a new right of action concerning the matter. As the country changes, different problems take on national dimensions. In the past, Congress has reacted to new national problems by enacting federal statutes, and it is appropriate for it to continue to do so. The purpose of the federal courts should be defined, not in terms of a special, historical subject matter, but in terms of their function as a limited and valuable resource for vindicating interests of the nation that cannot adequately be protected in state courts.

The six enumerated categories do not include a general category of jurisdiction for cases arising under federal statutes. Some such cases would be included under the sixth category, cases that "involve a clear need for national uniformity on an issue that, in light of experience, cannot be dealt with satisfactorily at the state level." Plan at 24. The commentary on this category indicates that it is to be narrowly interpreted to include only matters for which "uniform resolution is required on an issue that has not been, and clearly cannot be, resolved satisfactorily at the state level. The burden to satisfy this showing should be a high one if the federal courts are to be preserved for their historical purpose." Plan at 24.

The categories of federal question jurisdiction should include a general category of jurisdiction over cases arising under federal statutes. In a wide range of areas, Congress has determined that a national solution would be useful or necessary, and has responded with a federal statute. The reason is not always a need for *uniformity*. Problems may require the federal government's resources, national vision, large scale,

disinterestedness in local affairs, or other advantages. For example, civil rights, privacy protection, and environmental statutes address problems that have required national solutions at least in part for reasons other than "a clear need for national uniformity." The Plan lists several such statutes, including ~~the~~ Privacy Act of 1974, the Age Discrimination in Employment Act of 1975, the Civil Rights Attorney's Fee Awards Act of 1974, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Civil Rights of Institutionalized Persons Act, and the Americans with Disabilities Act of 1990, as examples of statutes that have "contributed to an enormous expansion of private rights of action." Plan at 30. The reference to these examples should be changed so as to make clear both that the Plan does not disapprove of federal statutes merely because they entitle people to seek redress in federal court and that important national issues like civil rights, privacy, and the environment are worthy matters for federal legislation. Not all cases involving such matters need or should be brought in a federal court, but the federal courts should always be open to cases arising under federal statutes in order to ensure the availability of an independent, federal forum for issues that Congress has determined are of national importance.

Cases arising under federal common law also are not expressly included within the six categories of federal question jurisdiction. Such cases involve matters of significant federal interest, such as disputes concerning navigable waters of the United States and Native American relations, for which a consistent body of law is important. Moreover, such cases do not significantly add to the caseload of the federal courts. The Department recommends expressly including the category of cases arising under federal common law.

Diversity jurisdiction

Recommendation: The Plan recommends eliminating diversity jurisdiction except for certain narrow categories. With respect to "mass tort" litigation, the Plan recommends retaining diversity jurisdiction and relaxing the "complete diversity" requirement in order to promote consolidation. The Plan also proposes several less sweeping ways to restrict diversity jurisdiction: eliminating diversity jurisdiction for cases filed by home-state plaintiffs, studying state appellate review of diversity cases, and making the amount-in-controversy requirement more difficult to satisfy. Rec. 6, Plan at 25-26.

Comment: The Department offers no views on diversity jurisdiction at this time.

Certification procedures

Recommendation: The Plan recommends that states "should be encouraged to adopt certification procedures, where they do not currently ~~exist~~, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts. Rec. 7, Plan at 27.

Comment: The Department supports this Recommendation, which achieves the advantages of state court resolution of state law issues without the problems of state appellate review of federal court decisions. State courts are the appropriate decision-makers for novel or difficult questions of state law on federalism grounds, and certification can preserve federal court resources.

C. Decision-making by administrative agencies and Article I judges

Recommendation: The Plan generally recommends broadening and strengthening administrative decision-making. More specifically, the Plan proposes: improving the adjudication of Social Security disability claims "by establishing a new mechanism for administrative review of ALJ decisions and limiting the scope of appellate review in the Article III courts;" giving agencies "the requisite authority and resources to review and, where possible, achieve final resolution of disputes within their jurisdiction;" and, where constitutionally permissible, assigning to "administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding." Recs. 8-9, Plan at 27-28.

Comment: The Department supports the general idea of improving the quality, speed, and finality of agency decisions. It is crucial, however, that the implementation of this idea not simply add layers of administrative procedure and not result in parties losing constitutional safeguards and meaningful access to federal court for the adjudication of federal rights. Agencies should be given resources and incentives to resolve cases before they reach federal court, but further obstacles should not be placed in the way of the access to federal court of those with legitimate federal claims. Evaluation of this recommendation therefore must concentrate on the details of specific proposals.

The Department agrees that, if agencies or Article I judges are provided with sufficient resources, they can provide more expeditious resolution, in the first instance, of federal benefit or regulatory cases involving intensive fact-finding. In theory, claimants can be benefited and federal court resources preserved. Like other proposals to shift decision-making to non-Article III bodies, the proposal depends on adequate funding.

The commentary suggests mandating more careful EEOC scrutiny of employment discrimination claims in order to reduce the number of such cases in the federal courts. The Department supports strengthening the EEOC, but that agency cannot take on a heavier load without increased resources. Until Congress provides those resources, the access of individuals to court to redress employment discrimination should not be curtailed.

The maxim that "justice delayed is justice denied" is as applicable in agency adjudication as in court litigation. The solution both to decreasing the number of appeals in federal court and to achieving fairer, more expeditious administrative decisions is to strengthen the existing first-level decision-making process by providing the agency with greater resources, decision-making authority, and adjudicatory stature.

D. Non-acquiescence of agencies in federal court of appeals decisions

Recommendation: Congress should enact legislation to prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular federal circuit. Rec. 10a, Plan at 28.

Comment: The Department opposes the recommendation that Congress should address the complex issues raised by agency non-acquiescence by passing the proposed legislation. At the same time, the Department recognizes that agency non-acquiescence can, in some circumstances, frustrate access to justice by delaying the vindication of claimants' rights under established law. Because of the importance of non-acquiescence to the carrying out of Executive Branch functions, however, any problems raised by non-acquiescence require a more discriminating solution than a blanket prohibition. Dialogue between the Judicial and Executive Branches could lead to an Executive Branch policy that would alleviate the problems.

In certain circumstances, it is important for federal agencies to be able to refuse to acquiesce to precedent established within a given circuit. A federal agency may find itself unable to seek review of a particular decision establishing an unfavorable precedent, for example because the case becomes moot on appeal and vacatur is not granted, or because the decision otherwise reaches a favorable outcome for the agency. In such circumstances, non-acquiescence allows the agency to challenge the unfavorable decision in a later case, through en banc or Supreme Court review. Non-acquiescence can also be an important tool for efforts to administer laws in a uniform manner among the circuits.

Moreover, as to some agencies, a petition for judicial review may be filed in more than one circuit. (In fact, an

agency can be faced with a situation in which, regardless of how the agency decides an issue, the loser will be able to file in a circuit with precedent unfavorable to the agency decision.) An agency should not be compelled to assume that review will be sought in the circuit with unfavorable precedent. It should be noted that other litigants, including those seeking benefits in agency proceedings, fall under no such restrictions.

Contrary to the commentary's suggestion that non-acquiescence "undermines the fundamental principle that an appellate court's decision on a particular point of law is controlling precedent for other cases raising the same issue," non-acquiescence is consistent with current legal principles. Plan at 28. Non-acquiescence does not affect the precedential force of appellate court decisions, for the federal government must overcome the adverse precedent if it attempts to relitigate an issue. The issue is not the precedential force of an appellate court decision for future courts, but whether the decision is binding on the federal government in litigation involving different parties. Absent certification of a class action, the general rule is that a court's decision binds the parties as to the matter before it, and cannot affect persons not parties to the suit. Since the federal government is not bound by principles of nonmutual collateral estoppel, United States v. Mendoza, 464 U.S. 154 (1984), the federal government is free to relitigate an issue in a different case though, of course, it faces the difficulty of overcoming the adverse precedent. Enacting new legislation to change these legal principles would inappropriately restrict the flexibility of the Executive Branch in establishing, interpreting, and implementing policy.

Recommendation: Congress should enact legislation to require agencies to demonstrate an extraordinary reason for relitigating an issue in an additional circuit when a uniform precedent has been established already in more than one court of appeals. Rec. 10b, Plan at 28.

Comment: The Department also opposes this Recommendation. The Supreme Court has noted the dangers of "thwart[ing] the development of important questions of law by freezing the first final decision rendered on a particular issue," and has emphasized the benefit the Court receives "from permitting several courts of appeals to explore a difficult question" before certiorari is granted. United States v. Mendoza, 464 U.S. at 160. The Plan rightly opposes creation of a "super-circuit" court to resolve disputes among the circuits, leaving the Supreme Court as "the sole arbiter of conflicting precedents among the courts of appeals." Recs. 15, 18, Plan at 34, 37. (The commentary states that "intercircuit inconsistency is not a problem that now calls for change." Plan at 37.) The proposed legislation would, however, effectively give individual circuits or groups of circuits power to set binding principles for the

entire nation. Moreover, such legislation could set off a "race to the courthouse" by litigants seeking a ruling from a circuit or circuits viewed as favorable to their position.

Of course, the fact that the first two or three courts of appeals agree on an issue does not demonstrate that the government's position has no merit. In fact, the Supreme Court has been known to resolve a question on the merits by rejecting the view of the decided majority of the courts of appeals. See, e.g., Central Bank of Denver v. First Interstate Bank of Denver, 114 S.Ct. 1439 (1994) (rejecting view of eleven courts of appeals); U.S. Department of Justice v. Landano, 113 S.Ct. 2014 (1993) (rejecting view of six appeals courts).

A co-equal branch of government should not be more restricted by a decision of a circuit court of appeals than are other circuit courts of appeals, so the Executive Branch should not be prevented from taking a position in one circuit that different circuit courts of appeals have rejected. The ability of agencies to relitigate issues in different courts of appeals is both an important policy-making tool of the Executive Branch and valuable to the development of the law.

E. Confronting the impact of legislation

Recommendation: The Plan recommends that Congress should consider the impact of proposed legislation on both the federal judiciary and the states, and should provide federal financial or other assistance to the states to enable them to cope with the increased workload resulting from the reduction of federal court or agency jurisdiction. Recs. 12, 13, Plan at 30-31.

Comment: The Department notes that the 1994 Crime Act contains a provision requiring prison impact assessments. The requirement may also include the assessment of the impact on other aspects of the criminal justice system. While the Department generally endorses consideration of the impact of proposed legislation on the federal courts and, indeed, on all parts of the criminal justice system, the Department has concerns about the great cost of preparing impact assessments.

F. The growth of the federal judiciary

Recommendation: The Plan recommends that the growth of the federal judiciary be carefully controlled. Rec. 14, Plan at 31.

Comment: The Department agrees that judgeship needs should be carefully evaluated so that the federal judiciary will not grow beyond what is needed. Since the Department does not believe that the federal courts' jurisdiction should be as limited as the Plan proposes, however, the Department's view is that the federal

judiciary will have to continue to grow to meet the changing needs of our dynamic society.

G. Native American tribal courts

The Plan does not address the United States' unique relationship to Indian tribes, and its corresponding obligations. In some states, the United States has jurisdiction over, and thus responsibility for, prosecution of major crimes in Indian country. In other states, criminal law enforcement is primarily the responsibility of state and local officials. The Plan should make clear that federal courts have a special responsibility in adjudicating crimes committed in Indian country. At the same time, federal courts should respect the autonomy of tribal court systems, and encourage state courts to do the same.

III. The Structure of the Federal Courts

A. Appellate Structure

Recommendation: The Plan recommends maintaining the present structure of regional, generalist courts of appeals, a Federal Circuit Court of Appeals with nationwide jurisdiction in certain specialized areas of law, and the Supreme Court of the United States as the only arbiter of intercircuit conflicts. The Plan also recommends equalizing the workload of court of appeals judges to the extent practicable and keeping the courts of appeals at a size small enough to allow them to maintain coherent, consistent bodies of circuit law, if necessary by redrawing circuit boundaries. Recs. 15-18. Plan at 34-37.

Comment: The Department supports these recommendations. The present system's disadvantages of imperfect uniformity and potential for forum-shopping are outweighed by the opportunity for the regional courts of appeals to gain special familiarity with the concerns of their regions and by the benefits of the percolation of issues in the courts of appeals. A system of generalist federal appellate judges also has significant benefits. Knowledge of the law's development in a number of areas helps a judge come to just resolutions of particular cases, and the responsibility to address a broad range of issues ensures that the quality of candidates for federal appellate judgeships remains high.

Although the Department has taken varying positions over the years on proposals to create a national court of appeals to resolve intercircuit conflicts, the need for an additional layer of federal appellate review appears effectively to have disappeared, judging by the Supreme Court's significant reductions in recent years in the number of cases that it considers for full briefing and argument.

The Department also supports attempts to equalize the workload of the federal courts. Widely varying workloads are unfair not only to judges, but to litigants, since they result in significant variation from circuit to circuit in the time between commencement and disposition of an appeal.

Finally, the Department agrees that the need for coherent bodies of doctrine requires that the size of each court of appeals must be kept small enough that its members can effectively confer and consult with each other and can ensure that the court speaks with a consistent voice. It is, at a minimum, important that a court have the ability to convene en banc to reconcile its own circuit precedents.

B. Review of administrative proceedings and magistrate judge decisions

Administrative proceedings

Recommendation: The Plan recommends that decisions of administrative agencies and Article I courts should be reviewable in the first instance in the regional courts of appeals. In the case of proceedings in which the predominant issue is evidentiary support for agency factual findings, the Plan endorses review in the district court with further review in the court of appeals only on a discretionary basis. Rec. 19, Plan at 37.

Comment: The Department agrees with the principle of providing only one level of Article III review as of right in cases in which a first level of appellate review has already been provided in an administrative or Article I forum. The Department questions, however, whether the court of appeals, as opposed to the district court, is the appropriate forum for the initial Article III review. The current rule is that review of agency action is in the district courts in the first instance, unless otherwise provided by statute. The goal of eliminating an unnecessary layer of Article III review as of right could be achieved simply by giving the courts of appeals discretion not to hear district court decisions reviewing agency action.

Magistrate judge decisions

Recommendation: The Plan recommends changing current law for cases in which the parties have consented to decision by a magistrate judge in order to allow review only in the court of appeals. Rec. 22, Plan at 38-39.

Comment: The Department again agrees with the principle of eliminating an unnecessary layer of Article III review. As the Plan recognizes, however, under current law, if the parties choose review in the district court, review in the court of appeals is only discretionary. Thus, without the compensating

benefit of eliminating an as-of-right level of review, the proposal would place all review in the court of appeals, though some cases decided by magistrates do not warrant it.

IV. Adjudication

A. Rules of practice and procedure

Recommendation: Although the official Recommendation is vague, the general theme of the Plan's recommendation, implementation strategies, and commentary is that rules should be adopted in accordance with the Rules Enabling Act process, and that the proliferation of varying local rules under the Civil Justice Reform Act of 1990 (CJRA) should be brought to an end in favor of predominantly uniform national rules of practice and procedure. Rec. 28, Plan at 44-45.

Comment: The Department endorses this theme. The Department supports the CJRA's purpose of encouraging the federal courts to experiment with ways of reducing cost and play. The purposes of the CJRA are best fulfilled, however, by bringing the experiment to a close as soon as it is feasible to do so, completing the studies of the local plans established under the CJRA, and adopting the most beneficial rules on a national basis. The Department therefore suggests that the Plan's recommendation be less vaguely worded to emphasize the importance of uniform national rules.

A specific suggestion for a procedural rule is that courts should be authorized to impose sanctions in criminal cases as they are in civil cases pursuant to Fed.R.Civ.P. 11. Sanctions should include reimbursement of the United States for attorneys' fees expended on defending frivolous motions and appeals.

B. Sentencing

Recommendation: The Plan recommends reversing the Sentencing Guidelines' reduction of flexibility in sentencing. It opposes mandatory minimum sentences, and supports enabling judges to impose more alternatives to imprisonment, encouraging departures from guideline levels, and widening the range of offender characteristics that judges may consider. Recs. 29, 30, Plan at 45-46.

Comment: The Department opposes this recommendation. The Plan's support for increased flexibility in sentencing renews a debate that has been resolved by Congress and the Supreme Court. Congress has developed, through the Sentencing Commission, a system for ensuring reasonable uniformity in sentencing. The Sentencing Guidelines were developed through a public process with input from judges, prosecutors, the bar, academia, the business community, and Congress. Although some aspects of the

Guidelines undoubtedly need refinement, the Department supports the basic approach of the Guidelines over flexible sentences determined by individual judges. Since the point of the Guidelines is to eliminate disparity in sentencing, Guideline sentences differ from pre-Guidelines sentences imposed by many judges. Inevitably, judges whose pre-Guidelines sentences were different from Guidelines sentences will disagree with the Guidelines, but that is an unavoidable cost of uniformity.

Furthermore, the Department believes that mandatory minimum sentences are appropriate where an especially high level of deterrence is appropriate; they also send an important public message regarding the certainty of punishment. In the antitrust area, for example, the Sentencing Guidelines have been a great boon to the Department's longstanding efforts to deter antitrust violations by imposing short but certain prison sentences on the people who commit these crimes. The Sentencing Commission concluded that antitrust criminals were receiving insufficient sentences to provide general deterrence and adopted an antitrust sentencing guideline that requires actual prison time for many antitrust offenders. Finally, the Department is concerned that the proposed easing of departure standards to allow for alternative sentencing, "especially for non-violent first-offenders," could create unwarranted disparity between sentences in drug and violent gang cases and sentences in white-collar cases.

As an alternative to the Plan's general opposition to the Sentencing Guidelines approach, the Plan could, instead, clarify the specific facts or factors that the judiciary believes should be included as reasonable bases for sentencing departures.

D. Costs of Litigation

Recommendation: The Plan recommends that the federal court system study possible shifting of attorneys' fees and imposition of user fees in particular categories of cases. Rec. 33, Plan at 49-50.

Comment: The Department does not object to the proposal to undertake a study of fee shifting and user fees. In supporting a study, the Department takes no position on the desirability of fee shifting or user fees.

E. Case management and resources

Appellate case management

Recommendation: The Plan recommends a number of reforms for conserving appellate resources and maintaining the consistency of circuit law. Rec. 34-36, Plan at 50-52.

Comment: The Department generally supports the theme of this recommendation but has specific concerns about some of the implementation strategies. First, the Department supports the use of alternative dispute resolution mechanisms in the courts of appeals, ~~such~~ as the Civil Appeals Management Plan. The recommendation's mention of "adjudicative programs" could be understood, however, to approve the use of appellate magistrates or commissioners whose decisions could become final if not appealed. The Department has previously expressed its concerns with the use of non-Article III personnel to make final judgments on appeal, and continues to oppose this practice.

Second, the Department supports the continued screening of appeals to weed out cases for which oral argument is not warranted. No screening process is infallible, however, so the Department suggests that before denying oral argument, courts permit counsel a brief opportunity to show the need for argument. See, e.g., 9th Cir. R. 34-4.

Third, the Department supports the increased use of non-judicial staff and use of adjunct judicial officers to handle routine matters. As the commentary makes clear, however, it would not be appropriate to delegate "essential appellate decision making functions" to such adjunct officers. Their function should be limited to such matters as conducting settlement programs and making findings and recommendations on matters that require appellate fact finding.

Fourth, the Department has concerns about the position that publication of opinions should be restricted to those of precedential import, because unpublished opinions are available to different litigants to varying degrees. The goal of the recommendation might be accomplished without restricting publication simply by not permitting citation of the relevant opinions. Also, the Department notes the importance of publishing and permitting citation of decisions that do -- or should -- have precedential import. A potential problem, particularly if proposals to prohibit so-called non-acquiescence proceed (see Recommendation 10), comes about when a court of appeals initially issues a non-precedential opinion and later decides to publish it. If that practice is to continue, the courts should allow the parties additional time to consider whether to seek *certiorari*.

The Department also believes that rehearing en banc is an important tool for resolving intra- and inter-circuit conflicts. As other reforms described in the Plan become effective, we are hopeful that the courts of appeals will become less reluctant to use this important tool for achieving consistency. Moreover, when disputes can be resolved at the court of appeals level without creating an intercircuit conflict, the burden on the

Supreme Court and the need to consider alternative judicial structures below the Supreme Court level (see Recommendation 18) are each reduced.

Alternative dispute resolution techniques

Recommendation: The Plan recommends that district courts be authorized to make available a variety of alternative dispute resolution (ADR) techniques. Rec. 38, Plan at 53.

Comment: The Department supports the development and use of alternative dispute resolution techniques. Greater reliance on alternatives to litigation may not only reduce the high costs and the congestion affecting the legal system, but also may offer the flexibility to produce individualized solutions that encompass a greater variety of concerns than traditional remedies. The Plan would be improved by the addition of specific recommendations of particular alternative dispute resolution techniques and mechanisms for encouraging their use.

Administration of federal court facilities

Recommendation: The Plan recommends that administration of federal court facilities, including court and judicial security programs and bankruptcy estate administration, should be conducted solely within the Judicial Branch. Rec. 50, Plan at 66-67.

Comment: The Attorney General has commissioned the National Academy of Public Administration to conduct a study and make recommendations on how to operate an effective Bankruptcy Trustee program. The National Academy of Public Administration has created a "blue ribbon" panel to conduct the study. It is the Department's view that any recommendation about the operation of the U. S. Bankruptcy Trustee program is premature given that the issue is currently under study. Any determination on the future operation of the bankruptcy estate administration program should await the results of the study. As noted in the comment on Recommendation 60 on security for judicial personnel, the United States Marshals Service provides security for court facilities and court and judicial personnel and is committed to continuing to work with the Judicial Conference to develop adequate security programs for courts and court personnel throughout the country. The Department would be opposed to any change in Department of Justice supervision of the Marshals Service: the Marshals Service has performed its function with distinction since 1789.

Judicial resources

Recommendation: The Plan recommends that adequate security protection be provided for judges and court personnel when they are away from the courthouse, including the provision of home

security systems and portable emergency communication devices and security briefings for judges and their families. In addition, the Plan calls for notification of judges and probation officers whenever prisoners are released. Recs. 60a, 60b, and 60d, Plan at 74-75.

Comment: The Department takes very seriously its current responsibility to provide security services for courthouses and court personnel through the United States Marshals Service. The Department agrees that judicial personnel should receive adequate security protection and is committed to continuing to work with the judicial conference to develop adequate security programs for courts and court personnel throughout the country. With regard to Recommendation 60d, relating to notification of judges and probation officers whenever prisoners are released, the Department agrees that such notification would be appropriate when a threat has been made against a specific judge or other officer. General notice of the release of all prisoners that have appeared before a judge would appear to be excessive.

Recommendation: The Plan recommends that the standards and procedures for reassigning circuit, district, and magistrate judges to perform duties in other districts or circuits allow sufficient flexibility that workload demands may be met wherever they occur. Rec. 61, Plan at 75-76. The Plan also recommends that courts use senior and recalled judges to alleviate workload problems and to achieve the goal of carefully controlled growth. Rec. 62, Plan at 76-77. Recommendation 63 calls for improved policies and procedures to encourage judges to assume senior judge status. Plan at 77.

Comment: The Department agrees that the flexibility in assignments the proposal contemplates would promote efficient allocation of judicial resources to accommodate workloads. In addition, the Department agrees that senior and recalled judges are a resource that should be used to respond to short-term workload issues. Specific standards and procedures for determining the circumstances under which such reassignments should occur and senior and recalled judges should be employed are matters for the judicial conference to determine. The policies and procedures relating to the status of senior judges should be considered by the judicial conference in the first instance. See also Comment on Recommendation 72.

Recommendation: The Plan recommends that magistrate judges should perform judicial duties to the extent constitutionally permissible to accommodate caseload needs. Rec. 64, Plan at 77-78. In addition, the Plan recommends that magistrate judges should exercise authority commensurate with their duties, including a limited contempt power. Rec. 65, Plan at 78.

Comment: The Department supports these recommendations to the extent implementation would promote more efficient and effective allocation of judicial resources, promote high standards of conduct from all officers of the court and otherwise improve the administration of justice.

Recommendation: The Plan makes several recommendations relating to the process for filling judicial vacancies. Recommendations include encouraging judges to give substantial advance notice of intentions to take senior status or to retire, and encouraging the President and senators to use special commissions or staffs to identify and screen judicial candidates, and urging the allocation of adequate resources for investigating the backgrounds of potential nominees. Recs. 66, 67, Plan at 78-79. The Plan also calls for establishing statutory benchmarks for the nomination and confirmation of judges and encourages the President to exercise recess appointment authority. Recs. 68, 69, Plan at 79-80.

Comment: Whether judges intending to retire or take senior status should be encouraged to give substantial advance notice of that intent is a matter entirely within the discretion of the federal judiciary. That principle notwithstanding, the Department recognizes the benefits advance notice would confer because such notice would allow the incumbent Administration to start the political process for filling the anticipated vacancy. Potentially, advance notice could make it possible to have new judges already designated and ready to proceed through the confirmation process when vacancies occur, thus enabling vacancies to be filled shortly after they occur.

The Department concurs with the views underlying the proposals contained in Recommendation 67 that the process that results in the most efficient selection of new judges should be used, consistent with allowing careful review of qualifications. The Department believes that the approach now used results in the selection of well qualified judges, but that the current process could be improved with respect to timing. Regarding Recommendation 67a, the President has assigned substantial priority to filling judicial vacancies and has been successful in filling a record number. The Federal Bureau of Investigation is a component of the Department of Justice and has devoted adequate resources to conducting the required background investigations of candidates for federal judgeships. In addition, this Administration has fostered a productive working relationship with the American Bar Association which has substantially supplemented its resources for its evaluation process. Regarding recommendation 67b, which encourages the President and Senators to rely on special commissions and staff to select judges, this President does rely on a staff devoted to the judicial selection process. Staff in the Office of the Counsel to the President and

in the Department of Justice are exclusively dedicated to this process.

The Department agrees with the sentiment behind Recommendation 68, which calls for statutory benchmarks to encourage the President to nominate new judges and the Senate to act on such nominations in a timely fashion, but cannot support the recommendation that statutory benchmarks for Presidential and Senate action should be established. While the Department agrees that the judicial selection process should be as efficient as possible, the lifetime appointment of any judge is too important for the process of evaluation and consideration to be constrained by inflexible deadlines.

With regard to Recommendation 69, which encourages the President to exercise recess appointment authority, the Department takes no position. While the Department is aware of the background that led to this recommendation, the President has the authority to make recess appointments. This authority may be exercised in appropriate circumstances at the discretion of the President, and Recommendation 69 adds nothing to this already existing authority.

Use of visiting or senior judges during a judicial emergency

Recommendation: The Plan recommends that rules governing the number of visiting or senior judges that may serve on panels in the courts of appeals should be held in abeyance during the existence of vacancies constituting a judicial emergency. Rec. 72, Plan at 81.

Comment: Existing law requires that a majority of the judges on any panel of the court of appeals be judges "of that court," unless the chief judge of the court declares an emergency, which includes, but is not limited to, "the unavailability of a judge of the court because of illness." 28 U.S.C. 46(b). Thus, each court of appeals currently has the authority -- so long as an emergency is declared -- to decide cases using panels that are not comprised of at least two judges from that court. In our view, however, the authority to declare such an emergency should be rarely exercised, because of the obvious adverse effects use of such panels would have on doctrinal coherence.

While senior judges of a particular circuit may properly be viewed as judges "of that court" for purposes of the provision, see Cone Corp. v. Hillsborough County, 995 F.2d 185, 186 (11th Cir. 1993) (en banc), district judges or circuit judges from other circuits may not have the familiarity with circuit precedent required to maintain consistency of decisions. Panels composed of a majority of judges from outside the particular court of appeals must therefore be viewed as an option generally to be employed only as a last resort.

Technology

Recommendation: The Plan recommends expanding the use of technology in the federal courts and continuing to study how it can be employed to improve the administration of justice. Rec. 74-75, Plan at 82-83.

Comment: The Department supports these recommendations. In recent years, many improvements in court-related technology have made litigation easier and more efficient for litigants. For example, many courts of appeals now announce decisions by means of electronic bulletin boards, which allow parties to obtain opinions virtually without delay. Similarly, by permitting litigants to check the status of cases electronically, such bulletin boards can significantly relieve the burden on judicial support staff. The use of facsimile machines makes it easier for litigants to file documents in emergency situations. Several circuits have adopted rules governing facsimile filing. See, e.g., 4th Cir. IOP 25.2.

Major technological innovations to the court system need to be studied and implemented carefully, however. Some technological advances, such as video-conferencing, can reduce the sense of fairness that is a crucial part of the judicial process if they are implemented before the bar and the public are prepared for them. Also, the cost of using some technological innovations could become a barrier to access to the courts for some litigants.

Data collection

Recommendation: The Plan recommends that the federal courts evaluate their data collection needs and improve their ability to gather information needed for planning and policy. Specifically, the Plan proposes establishment of a steering group with representation from data sources, users in the Judicial Branch, and outside researchers. Rec. 78, Plan at 83-84.

Comment: The Department supports efforts by the federal courts to undertake a broad evaluation of data needs and information gathering procedures related to the activities of the courts. All federal justice-related agencies would benefit greatly from steering group efforts to improve the consistency of definitions of data categories and to reduce duplication in data collection. Department components would be willing to participate in the proposed steering group. Also, the Department suggests that the U.S. Sentencing Commission may be in a unique position to provide input to this effort. Finally, Judicial Conference plans to collect data should not ignore the already existing federal data collection organizations.

Legislative "checklist"

Recommendation: The Plan recommends encouraging Congress to require legislative staff to satisfy a legislative "checklist." Rec. 96b, Plan at 99.

Comment: The Department supports this recommendation. Poor legislative drafting is a significant cause of the burden on the judicial system. Much litigation is engendered over gaps and ambiguities in enacted legislation in areas that are encountered time and again, such as standing, private rights of action, and retroactivity. During the legislative clearance process, many of the comments by Department components raise concerns that ambiguities in proposed legislation will spawn litigation. The Department has previously supported efforts to ensure that legislative staff employ a checklist commonly encountered problems with legislative drafting.

IV. Access to the courts and equal justice

A. Pro se litigation

Recommendation: In order to confront the growing demands that pro se litigation places on the federal courts, the Plan recommends a broad-based study of the impact of pro se litigation, encouragement of state development of procedures for reviewing prisoner complaints as an alternative to federal court pro se filings, and development of more effective systems and special mechanisms for adjudicating pro se cases in the federal courts. The Plan also encourages innovative ways of making counsel available to litigants who would otherwise have to represent themselves and the continued screening of pro se cases by centralized staff operating under court supervision. Recs. 32, 90, Plan at 47-49, 95-96.

Comment: The Plan's approach to pro se litigation treats it primarily as a problem for the federal courts' ability to limit their jurisdiction. The Department believes that the emphasis should be shifted to include the need to improve access to the justice system by providing fairer and more efficient adjudication of the claims of indigent and prisoner litigants. The Plan is also too vague in its proposals. Finally, the Plan's recommendations regarding pro se litigation are found in two different chapters of the Plan, without cross-referencing. The Plan should attempt to explain how these recommendations are to be integrated.

The Plan's first specific proposal is for a broad-based study of the impact of pro se litigation. First, the study should cover not only the impact of pro se litigation on the courts, but also ways of improving access to the courts for litigants who currently proceed pro se. Recommendation 82

advocates a "customer service model" of courthouse operations as a way to improve interaction between courthouse personnel and the general public. The Department suggests that the pro se litigation study should explore an application of this model to pro se cases. Issues for consideration include how to educate judges in dealing with pro se litigants; how to train court personnel to serve as facilitators and service providers for pro se parties; whether present prohibitions against provision of advice to pro se litigants should be modified; and how to simplify materials outlining court procedures and standard deadlines.

Second, the study should be truly broad-based, including participants from all segments of the bar. The recommendation suggests that a permanent National Commission on the Federal Courts would be an appropriate body to study and make recommendations on this issue, as well as others. Practitioners are conspicuously absent from the recommended members of the National Commission. Attorneys and other advocates representing prisoners' interests should be included, for they are in the best position to provide advice from the litigants' perspective.

Third, the subjects of the study should be discussed with greater specificity, and the proposal for a study should be better integrated into the Plan's other recommendations. Specifically, the Plan should make clear that the study would include prisoner pro se litigation (or else should propose a separate study of such litigation). The Plan should make clear that "standards for addressing the substantive and procedural problems presented by pro se prisoner litigation," Plan at 49, and the "special mechanisms" for more efficient handling of pro se cases, Plan at 95, are appropriate subjects for the study. Similarly, the tracking of the frequency of pro se filings recommended in Recommendation 90d and a review of the centralized screening of pro se cases recommended in 90e should be incorporated into the study. One goal of the study should be to produce recommendations that would streamline the discovery process pending some determination of the validity of the claim. Possibilities include either a separate and simplified discovery process for pro se cases, or a stay of discovery during the initial phase of the case if dispositive motions are filed. (Of course, discovery could not be stayed on the limited issues raised in the dispositive motions.) Finally, the study should explore ways to use technological advances, such as interactive videos explaining court procedures, to help pro se litigants navigate the court system. See Rec. 74 on technological innovations.

The Department supports the Plan's encouragement of the creation of state means for reviewing prisoner complaints of constitutional violations. If states provided adequate means of review, prisoners could obtain more speedy and simple redress,

while the burden on the federal courts could be lightened. It is crucial, however, that such new state procedures not merely add futile administrative procedures that prisoners must exhaust, further impairing their access to effective review.

The Department agrees with Recommendation 90's support for innovative ways of providing counsel for litigants who would otherwise have to represent themselves. This recommendation should at least be cross-referenced to the primary recommendation concerning pro se litigation, Recommendation 32.

B. Representation of those who cannot afford counsel

Recommendation: The Plan recommends a variety of ways to increase the availability and quality of representation for those who cannot afford counsel in both criminal and civil cases. Rec. 88-90, Plan at 93-96.

Comment: The Department supports making high quality representation more widely available to those who cannot afford counsel. In the case of representation of criminal defendants, the Department supports the recommendation to establish federal defender organizations in all judicial districts, or combinations of districts. Any attempt to implement this recommendation must, however, recognize the limitations imposed by conflict of interest rules and must ensure that a given public defender represents only one defendant in a case. Further, concerning criminal defendants in capital cases, counsel in the initial defense, any appeal and any habeas corpus proceeding must be adequately qualified for such cases. The Department expects soon to approve a policy of encouraging pro bono representation by Department attorneys, though, for conflict of interest reasons, such representation cannot include representation of criminal defendants. The Legal Services Corporation (LSC) has been an important way of providing high quality legal assistance to those who would otherwise be unable to afford counsel. The Department supports continued funding for the LSC.

C. Access for people with disabilities and people who do not speak English

Recommendation: The Plan recommends making justice accessible to people with disabilities and people who do not speak English. Recs. 85-86.

Comment: The Department endorses the underlying philosophy of these recommendations. The recommendations would benefit from greater detail, however, and should incorporate specific actions taken by the Judicial Conference earlier this fall.

First, the recommendation to make justice accessible to people with disabilities should specifically address the needs of

people with visual and hearing impairments. Facilities need to be constructed or renovated not only to allow physical access but also to enable full participation by people with visual and hearing impairments. Also, the recommendation mentions the need to remove attitudinal barriers to providing equal justice to people with disabilities; the recommendation should suggest that training be required for this purpose.

Second, the recommendations should discuss the specific steps endorsed by the Judicial Conference in its September 20, 1994 press release. The September 20th press release announced Conference approval of a series of amendments to the U.S. Court Design Guide. The guide applies to new construction and alterations. Recommendation 85 makes a vague reference to the need for "universal design." At the very least, this recommendation should describe the following steps apparently already approved by the Conference:

> Architects involved with the planning and design of courthouse projects will be instructed to be 'handicapped aware.' Among the improvements in new courthouses will be the following: All witness and jury boxes will be handicap accessible; spectator areas of courtrooms will include wheelchair stations; and service counters in clerk's offices, probation offices, and other area where there are counters for the general public will have stations available for persons in wheelchairs. Systems to assist those who are hearing-impaired also will be available in all courts.

Judicial Conference Press Release, Sept. 20, 1994.

The Judicial Conference also endorsed the use of realtime reporting technologies that provide instantaneous translation of the court reporter's shorthand notes and allow realtime display of the text on a monitor. See Judicial Conference Press Release, Sept. 20, 1994. Recommendation 85 should note this innovative measure. Recommendation 86 should include the Conference's decision to seek amendment of the Federal Interpreters Act to allow reimbursement for sign language interpreters in proceedings not initiated by the government.

The Department also recommends adding several other specific proposals to the recommendations: 1) the adoption of other systems, such as assistive listening devices, to accommodate hearing impaired persons; 2) the evaluation of the accessibility to people with disabilities of *existing* federal courthouses and the performance of the necessary improvements in accordance with the recently adopted amendments to the U.S. Court Design Guide; 3) the designation for each federal courthouse of an "ADA

coordinator" or other individual responsible for accessibility matters, as is the practice in most state courts.

The recommendation's only specific comment on the topic of interpreters is that, though the federal courts supply interpreters in cases instituted by the United States government, the need for interpreter services is arising in other civil litigation and must be addressed. The Plan should include specific proposals for addressing the problem. The Plan should address the need for interpreters throughout the justice system, not just in civil litigation, and should emphasize the quality as well as the availability of interpreters. Moreover, as noted, the Plan should specifically address the needs of the hearing impaired; proposals for interpreter services should encompass them.

Numerous organizations and associations, including the Judicial Conference and the National Center for State Courts, have made recommendations concerning the accessibility of the justice system to those who do not speak English. Some specific recommendations follow. First, the federal courts should work with the state courts in developing testing and training procedures. Such collaboration would reduce costs and the duplication of efforts, making possible testing of a wider range of interpreter skills than would otherwise be feasible. The National Center for State Courts has proposed establishing a nationally accessible database of qualified interpreters, which would facilitate the location of qualified interpreters for a large number of different languages. Third, while it is not feasible to develop a specific test of interpreting skills for every language, interpreters could be tested on their knowledge of general principles of court interpretation and on their grasp of the English language.

D. Bias and cultural diversity

Recommendation: The Plan recommends that federal judges exert strong leadership to combat bias in the administration of justice in the federal courts. Recs. 81, 83-84, 95, Plan at 85, 85-89, 98.

Comment: The Department endorses the importance of eliminating bias in the courts, and agrees that federal judges are in an excellent position to monitor and encourage fairness in the federal justice system. The recommendations should, however, propose more specific mechanisms for combating bias.

Recommendation 83 urges education and study and recommends that each circuit maintain mechanisms through which court users can complain about bias. It does not, however, address the need to ensure that employees of the judiciary have meaningful

procedures through which to seek redress for discrimination, nor does it prescribe the substantive standards under which complaints of bias should be reviewed. The Plan needs to discuss remedies and sanctions for discrimination.

The Plan mentions the need for continuing education for judges in a variety of subjects, including "cultural diversity and understanding," Plan at 85, and the Plan urges federal judges to strive to understand the diverse experiences of parties, witnesses, and attorneys, Plan at 89. To add specificity to these recommendations, the Plan should elaborate on appropriate training for judges and other court personnel. Recommendation 83 should cross-reference Recommendations 81 and 84, where the need for training is acknowledged.

Moreover, as this Administration has recognized, the first step toward creating a bench that is sensitive to a wide range of societal concerns and perspectives is the appointment to the bench of people from diverse backgrounds. The Plan should specifically acknowledge the importance of a diverse bench. Similarly, the Plan should address the importance of equal employment opportunity for courthouse staff.

E. Child-care

The provision of child-care facilities is an aspect of access to the courts that the Plan does not consider. The Plan should recommend that an assessment be made of the need for court-based child-care facilities in the federal court system. Such a study should include an examination of child-care programs in state court systems.

Many people who must appear in federal court as litigants, witnesses, or jurors, are parents of young children. In instances where the person is the full-time care provider for a young child, the person must either arrange for alternative child-care services or bring the child with him or her to court. Because of the unpredictable timing of many court proceedings, difficulties often arise in making private child-care arrangements. More significantly, however, it is prohibitively expensive for many people to do so. Consequently, young children are brought to the courthouse and must spend many idle hours waiting in witness rooms, cafeterias and hallways. During proceedings, parents are not able to give their undivided attention to the important matters at stake in the courtroom, and proceedings may be disrupted by children in the courtroom. Also, parents of young children are not as readily available as witnesses and may be disproportionately excluded from jury service because of their responsibilities.

The court systems in several states have recognized this longstanding problem and have made remarkable progress in addressing it. For example, in New York, the Permanent Judicial Commission on Justice for Children has developed services for children ~~in the~~ courts, including child care. We understand that currently the New York court system provides nine courthouse child-care centers that serve more than 15,000 children annually. The centers are operated through contract with not-for-profit providers such as victim-service agencies and children and family agencies. These are inexpensive programs funded through a variety of sources. The Massachusetts Trial Court Child Care Project has published policy guidelines and an operating plan for child care in the courts. Many courts and government agencies have requested the plan. Child-care facilities are available in several other state courthouses, including in San Francisco, and Los Angeles, California, and in Washington, D.C. The Bureau of Justice Assistance in the United States Department of Justice's Office of Justice Programs has provided a grant to the Center for Study of Social Policy to evaluate such state court child-care programs and to develop a prototype that other state court systems can use.

The federal court system should examine how state court systems have assessed the need for child care in their courthouses and should conduct a similar assessment of the need in the federal court system. This need should be addressed through development of programs patterned after state programs that have already proven effective.

F. Victims

The Plan should discuss victims' rights and needs. For example, in Chapter 2, which deals with the core values of the federal judiciary, the crime victim is not mentioned. Although both equal justice and accountability are presented as core values, the draft says nothing about the interests of victims. In discussing the need for training for the judiciary on certain topics, the Plan should include topics concerning the experience and interests of victims. Finally, in Chapter 9, "The Federal Courts and Society," victims are overlooked. Judges are admonished "to understand the diverse experiences of the parties and witnesses and attorneys before them," but not of the victims. So too, the section on customer service orientation mentions many of the judiciary's constituent groups, but omits mention of victims. The 1982 Final Report of the President's Task Force on Victims of Crime provides recommendations for the judiciary that the Committee could consider integrating into the Plan.

In addition to giving greater consideration to victims of crime, the Plan should identify the responsibility of federal courts for criminal debt collection. Criminal fines, penalty assessments, and bond forfeitures are targeted for deposit in the

Crime Victim Fund, established by the Victims of Crime Act of 1984. While responsibility for collecting criminal debt is vested in both the Administrative Office of the U.S. Courts (AOUSC) and the U.S. Attorneys' Offices, AOUSC annually receives a portion ~~of~~ Crime Victim Fund deposits to improve debt collection through a National Fine Center. Since FY 1994, the Office for Victims of Crime has transferred $19 million to the Courts and will transfer an additional $6.2 million in FY 95. The Plan would be improved by specific proposals for fulfilling the intent of the Criminal Fines Improvements Act of 1987. Proposals could include dedicating increased resources to debt collection, establishing a payment tracking system, providing annual staff training, and enhancing coordination and information exchange between AOUSC and the Executive Office of U.S. Attorneys on debt collection procedures.

U.S. Department of Justice

Office of Policy Development

Assistant Attorney General

Washington, D.C. 20530

EXPEDITE

April 6, 1995

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL
THE ASSOCIATE ATTORNEY GENERAL

FROM: ELEANOR D. ACHESON EDA
ASSISTANT ATTORNEY GENERAL

SUBJECT: DOJ Comments on Revised Version of Proposed Long Range Plan for the Federal Courts

PURPOSE: Attorney General sign-off on second round of comments on Proposed Long Range Plan for the Federal Courts

TIMETABLE: Urgent. The inflexible deadline for the Department's comments is April 10, 1995.

DISCUSSION:

In November 1994, the Committee on Long Range Planning of the Judicial Conference distributed the initial version of its Proposed Long Range Plan for the Federal Courts. The Office of Policy Development gathered the suggestions of DOJ components, produced comments, and circulated them within the Department. The Department provided its comments on the initial version of the Plan to the Committee on January 14, 1995, and Assistant Attorney General Eleanor D. Acheson, Deputy Assistant Attorney General Harry P. Litman, and Senior Counsel Mark D. Greenberg of the OPD discussed the Plan with the Committee on January 17, 1995.

The Committee has now produced a revised version of the Plan. On March 14, 1995, the Judicial Conference formally received the Plan, authorized its public distribution, and decided that all recommendations of the Plan not identified by a Judicial Conference member for further study and report on or before April 11, 1995 will be approved by the Conference as of April 12, 1995.

The Office of Policy Development has again coordinated the process of preparing departmental comments on the Plan. Components have been given the opportunity to express their views, and OPD has produced the attached comments. The deadline

for the Department's comments on the revised version of the Plan is April 10, 1995.

U.S. Department of Justice

Washington, D.C. 20530

COMMENTS OF THE DEPARTMENT OF JUSTICE ON THE REVISED PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS

I. Introduction

The U.S. Department of Justice much appreciates the continuing interest of the Judicial Conference's Committee on Long Range Planning in the Department's views on the Proposed Long Range Plan for the Federal Courts ("the Plan") and welcomes this opportunity to comment on the revised (March 1995) Plan. On January 14, 1995, the Department provided the Committee with extensive comments on the initial (November 1994) draft of the Plan. The Committee has made a number of significant, and, in the Department's view, positive changes. Indeed, some of these changes take into account the Department's previously expressed concerns. The Department commends the Committee for its interest in and responsiveness to the Department's and others' comments and emphasizes its continued support for the judiciary's leadership in planning for the federal courts.

Although the Plan has somewhat moderated the earlier proposed restrictions on federal jurisdiction, the Department continues to believe that the Plan's underlying vision of the federal courts -- as courts of limited jurisdiction whose function is to adjudicate disputes involving a special, distinctively federal subject matter -- is somewhat too narrow. The Department's views on the appropriate role of the federal courts are set forth in detail in its comments on the initial version of the Plan. In broad outline, the Department believes that, though not all matters amenable to resolution by courts belong in the federal courts, the federal courts should be available to satisfy needs of the nation that cannot be fulfilled in the state courts. The Department also reiterates its strong endorsement of the spirit of the recommendations concerning access to the federal courts and again encourages the Committee to propose more detailed and concrete mechanisms for achieving the goals of these recommendations.

These comments on the revised Plan focus on changes in the Plan with which the Department has concerns. In many cases, the Department has not reiterated its comments on recommendations that have remained essentially unchanged. The Department has, however, repeated the gist of some comments that were not taken

into account by the revisions. Fuller discussion of such points can be found in the Department's previous comments.

II. The Business of the Federal Courts

A. General

Recommendation: A very general recommendation has been added, stating that Congress should "commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction" and should give the federal courts jurisdiction "only to further clearly defined and justified national interests." Rec. 1, Plan at 23.

Comment: In its comments on the previous version of the Plan, the Department set out in detail its views about the appropriate role of the federal courts. Certainly, the Department concurs that the federal courts are a limited resource that should be conserved and used selectively to further national interests. The Department does not believe, however, that the jurisdiction of the federal courts should be limited to a distinctively federal subject matter. Rather, the federal courts have been, and should continue to be, available to satisfy needs of the nation that cannot be fulfilled in the state courts.

B. Criminal jurisdiction

Restrictions on criminal jurisdiction

Recommendation: The Plan now includes in the criminal conduct that should be prosecuted in the federal courts those cases "where federal interests are paramount" in addition to "those instances in which state court prosecution is not appropriate." Also, the five narrowly defined categories to which Congress should restrict federal criminal jurisdiction have been slightly broadened to include activities over which "Congress has evinced a clear preference for uniform federal control." Rec. 2, Plan at 23-25.

Comment: The Department agrees with the direction of both changes in this Recommendation. First, as the Department stated in its comments on the previous version of the Plan, it is not practical or desirable to restrict criminal prosecution in federal court to cases in which state court prosecution is "not appropriate." Many cases that are "appropriate" for prosecution in state court involve national interests that Congress may determine are best advanced by federal prosecution. The revised commentary on this Recommendation recognizes the appropriateness of federal criminal prosecution "in matters that, in one sense, are purely local, but, in another sense, have garnered the nation's interest." Plan at 24. Again, as the Department emphasized in its previous comments, the Department agrees that

federal involvement in criminal prosecutions normally handled in the state courts should be targeted to particular prosecutions, especially those "that are beyond the reach of effective action by the state courts." Id. The new language of the Recommendation -- "where federal interests are paramount" -- may not, however, be the best way to characterize the category of cases in which needs of the nation cannot be fulfilled in the state courts. The Recommendation should state that federal prosecution is appropriate when federal interests would not otherwise effectively be protected.

Second, the inclusion of federal criminal jurisdiction in areas where "Congress has evinced a clear preference for uniform federal control" helps to take into account areas, like antitrust, in which Congress has determined that federal involvement is needed but in which Congress has not preempted an entire regulatory field. The problem, however, is that Congress may determine that federal involvement is important for reasons other than a need for uniformity, for example, in order to provide national leadership with respect to a criminal justice problem that is a national priority. Thus, Congress may appropriately provide for federal criminal jurisdiction over conduct concurrently regulated by state criminal law without evincing a "preference for uniform federal control." As noted above, the commentary recognizes the legitimacy of federal criminal prosecution of "local matters" requiring a national solution, but it would be helpful to modify the language of the Recommendation expressly to include federal criminal jurisdiction over offenses that present a national problem requiring a federal solution, regardless of whether the reason a federal solution is required is a need for uniform federal control.

The Department also continues to believe that the Plan's specifications of the categories of federal criminal jurisdiction are too restrictive. For example, federal prosecutors need flexibility to prosecute not only when state or local corruption is "serious, high-level or widespread" or when proscribed activities raise "highly sensitive issues in the local community," but simply when state or local prosecutors fail to act. Plan at 25.

Federal-state cooperation on prosecutorial policy

Recommendation: The Plan also recommends implementing its vision of limited federal criminal jurisdiction through development of a federal-state cooperative policy. Rec. 4, Plan at 26. Specifically, the Plan suggests increasing the allocation of federal resources to state criminal justice systems, relying more often on the practice of cross-designating federal and state prosecutors, and authorizing the state courts to adjudicate certain federal crimes such as local drug offenses and certain violent crimes.

Comment: The Department agrees with much of the point of this Recommendation, as elaborated in the Department's previous comments. In particular, the Department emphasizes its strong support for continued development of state-federal cooperation with respect to concurrent criminal jurisdiction. The Department reiterates, however, its opposition to the proposal to expand the authority of state courts to adjudicate federal offenses: as detailed in the Department's previous comments, the proposal would place, likely without adequate funding, a new burden on state courts, engender massive procedural and operational complexities, and hamper attempts to maintain uniformity in federal law.

Executive-judicial cooperation in developing prosecutorial standards

Recommendation: The Plan no longer suggests that the judicial branch should have a role in developing standards for prosecutorial guidelines, recommending instead that the executive branch develop such standards itself. Rec. 5, Plan at 27.

Comment: The Department welcomes the clarification that the judicial branch should not participate in the policy decisions involved in establishing prosecutorial standards. As discussed in the Department's previous comments, United States Attorneys' Offices already take many of the Plan's proposed standards into account in their charging decisions. The Department understands the interests served by the development of prosecutorial standards and has developed and will continue to develop such standards, consistent with the need for flexibility for U.S. Attorneys' Offices in setting prosecutorial guidelines.

C. Civil Jurisdiction

Federal question jurisdiction

Recommendation: The Recommendation that Congress "should not create new rights of action concerning matters traditionally cognizable by state courts" has been removed, and the categories of federal civil jurisdiction have been expanded to include cases that "deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve . . . paramount federal interests." Rec. 6, Plan at 27-29.

Comment: The Department welcomes the removal of the "traditionally cognizable by state courts" test for whether Congress should create a new right of action concerning the matter. The Department believes that the federal courts should

be available to serve national interests that cannot be adequately served in the state courts.

The Department believes that the inclusion of cases involving "paramount federal interests" is a change in the right direction, but that the change does not go far enough. The federal courts should be available for adjudication of any matter of national importance that cannot adequately be handled in the state courts. The Plan includes a category, which the commentary indicates is to be narrowly interpreted, of cases that "involve a strong need for national uniformity," but Congress often determines that a national solution is useful or necessary for reasons other than a need for uniformity: problems may require the federal government's resources, national vision, large scale, disinterestedness in local affairs, or other advantages. The criterion of "paramount federal interests" seems too restrictive to encompass all cases in which a national solution may be appropriate. Rather, Congress may appropriately create federal civil jurisdiction whenever a national interest cannot adequately be served in state courts -- the interest need not be "paramount." Not all cases in which there is federal civil jurisdiction need or should be brought in a federal court, but the federal courts should be available to provide an independent, federal forum when Congress has determined that national interests so require.

Finally, the Department cannot agree with the statement in the commentary that Congress should never enact new legislation enforceable in the federal courts "without a concomitant reduction of federal jurisdiction in other areas." Plan at 28. Congress should enact legislation in response to the emergence of new and legitimately national needs that cannot adequately be addressed by state courts; new needs may not be accompanied by diminished needs in other areas.

D. Non-acquiescence of agencies in federal court of appeals decisions

Recommendation: Congress should enact legislation to prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular federal circuit. Rec. 11a, Plan at 34.

Comment: The Department continues to oppose the suggestion that Congress should address the complex issues raised by agency non-acquiescence by enacting the proposed legislation. As discussed in the Department's previous comments, non-acquiescence is an important tool for the Executive Branch in establishing, interpreting, and implementing policy and should not be removed from Executive Branch discretion by a legislative prohibition. Also, as the Department pointed out, non-acquiescence is consistent with current law and does not undermine the

precedential force of appellate court decisions; the federal government squarely faces the difficulty of overcoming the adverse precedent when it relitigates an issue. Moreover, the Executive Branch gives great weight to court of appeals decisions, is mindful of executive and judicial resources, and chooses to relitigate an issue only sparingly and after careful consideration.

Although the Plan has been revised to make an exception for circumstances in which a federal agency is unable to seek review of a particular decision, this exception does not take into account the more general flexibility needed by the Executive Branch, nor the other problems with a prohibition of non-acquiescence discussed in the Department's previous comments. Finally, it has not been shown that non-acquiescence creates a significant problem for the federal judicial system. Dialogue between the Judicial and Executive Branches could perhaps clarify current Executive Branch policy on non-acquiescence and offer improvements to it to address any problems that do exist.

Recommendation: Congress should enact legislation to require agencies to demonstrate an extraordinary reason for relitigating an issue in an additional circuit when a uniform precedent has been established already in more than one court of appeals. Rec. 11b, Plan at 34.

Comment: The Department also continues to oppose this Recommendation for reasons set out in detail in the Department's previous comments. The Supreme Court relies on exploration of difficult issues by multiple courts of appeals. See United States v. Mendoza, 464 U.S. 154 (1984). Indeed, the court now generally hears cases involving federal agency practice only when they present issues on which there is a conflict among the circuits. Thus, the new suggestion in the commentary that Congress could require an agency to petition the Supreme Court for certiorari before relitigating an issue on which a number of circuits have all agreed is not a realistic solution, if the intention is to permit further litigation only when the Court grants certiorari.

Moreover, the Recommendation is in tension with the Plan's support for leaving the Supreme Court as "the sole arbiter of conflicting precedents among the courts of appeals," and the Plan's view that intercircuit conflict is not now a problem requiring change. Recs. 17, 20, Plan at 41, 43-44. The proposed legislation would effectively give individual circuits or groups of circuits power to set binding principles for the entire nation.

A co-equal branch of government should not be more restricted by a decision of a circuit court of appeals than are other circuit courts of appeals, so the Executive Branch should

not be prevented from taking a position in one circuit that different circuit courts of appeals have rejected. The ability of agencies to relitigate issues in different courts of appeals is both an important policy-making tool of the Executive Branch and valuable to the development of the law.

Finally, the Recommendation's exception for "special circumstances" is problematic. The commentary suggests that an agency would be required "to make some additional showing -- for example, changes in societal or other relevant circumstances or empirical data." Plan at 34. It would be extremely difficult to specify in a statute the circumstances in which it would be appropriate for the Executive Branch in its policy-making role to relitigate an issue, and the application of such a statutory test would inappropriately involve the courts in policy decisions.

E. Discretionary Access to the Federal Courts

Recommendation: A new recommendation proposes that, rather than entirely eliminating some of the areas of jurisdiction as proposed in other recommendations, Congress could give the federal courts, either at the trial or appellate level, discretion to decide in a case-by-case fashion whether there is a strong enough federal interest and need for a federal forum to allow the case to be pursued in federal court. Rec. 15, Plan at 37.

Comment: The Department opposes this Recommendation. The Recommendation proposes a radical change in the role of the federal judiciary. At very least, the proposal should be taken no further without a great deal of study and discussion with interest groups, such as civil rights organizations, that would undoubtedly be alarmed by the proposal. In the Department's view, the proposal would, without adequate reason, radically change the function of the federal judiciary by giving the federal courts power to decide policy questions now decided by Congress and the Executive Branch. The question whether there is a national interest in having a federal forum for adjudication of a particular case or type of case is a quintessential policy issue, requiring the weighing of costs and benefits and the setting of priorities. It is not a decision about the legal rights of the parties to a controversy. The federal courts are neither institutionally qualified nor constitutionally permitted to decide which problems implicate national interests that are not adequately protected in the state courts and how to allocate scarce resources. The Recommendation and the accompanying commentary do not seem to recognize the radical nature of the proposal and do not attempt to provide a justification for adding a new function to the traditional role of the federal courts in deciding cases and controversies.

F. Native American tribal courts

The Plan has not been revised to take into account the United States' unique relationship to Indian tribes, and its corresponding obligations. As suggested in the Department's previous comments, the Plan should make clear that federal courts have a special responsibility in adjudicating crimes committed in Indian country and should encourage federal courts to respect the autonomy of tribal court systems. Specifically, the Plan could recommend four types of pilot projects: 1) establishing magistrate courts on reservations; 2) in those districts with reservations or significant Native American populations, training federal judges and magistrates and other court personnel about Native American cultures and communities; 3) opening federal training programs for judges and magistrates to tribal judges where appropriate; 4) encouraging dialogue on issues of common concern between federal judicial officers and tribal judges.

III. The Structure of the Federal Courts

A. Appellate structure

Recommendation: The Plan recommends that the current appellate structure of regional courts of appeal and the Federal Circuit be maintained, but, in a departure from the initial draft, suggests that tax cases might more appropriately be handled by the Federal Circuit than by the regional courts of appeals. Rec. 17, Plan at 41.

Comment: The Department continues to support the recommendations to maintain the current appellate structure and opposes the suggestion that tax cases be transferred to the Federal Circuit. The Department believes that tax disputes are appropriately resolved by generalist judges in the regional courts of appeal and not by judges centralized in one court. The idea of centralizing tax appeals in a single court of appeals has surfaced intermittently for more than 50 years, most recently in a recommendation of the Federal Court Study Committee. Virtually every segment of the organized tax bar vigorously opposed the recommendation of the Federal Court Study Committee to create a court of tax appeals and lobbied heavily against it. The IRS, the Treasury Department, and the Department of Justice likewise strongly opposed the proposal.

B. Review of administrative proceedings and magistrate judge decisions

Administrative proceedings

Recommendation: The Plan recommends that decisions of administrative agencies and Article I courts should in general be reviewable in the first instance in the regional courts of

appeals. When initial judicial review is in the district court, the Plan endorses further review in the court of appeals only on a discretionary basis, except with respect to constitutional matters and questions of statutory or regulatory interpretation. Rec. 21, Plan at 44.

Comment: The Department continues to support the principle of providing only one level of Article III review as of right in cases in which a first level of appellate review has already been provided in an administrative or Article I court. The Department therefore agrees with the proposal for permitting only discretionary review in the courts of appeals of agency cases already heard in a district court. Because cases involving review of administrative agency decisions often do not involve difficult or novel legal issues, the Department questions whether instituting a new general rule according to which agency action would be reviewable in the first instance in the courts of appeals would be a wise allocation of federal court resources.

Magistrate judge decisions

Recommendation: The Plan recommends changing current law for cases in which the parties have consented to decision by a magistrate judge in order to allow review only in the court of appeals. Rec. 24, Plan at 46-47.

Comment: The Department reiterates its view that this proposal is not justify by the principle, with which the Department agrees, of eliminating an unnecessary layer of Article III review. It would, without the compensating benefit of eliminating an as-of-right level of review, place all review in the court of appeals, though some cases decided by magistrates do not warrant it. It is true, as the commentary notes, that appeal to a district court without appeal as-of-right to the court of appeals does not eliminate district court involvement. But the alternative unnecessarily involves a court of appeals for cases that may involve no difficult or novel legal issues.

IV. Adjudication

A. Rules of practice and procedure

Recommendation: Although the official Recommendation is vague, the general theme of the Plan's recommendation, implementation strategies, and commentary is that rules should be adopted in accordance with the Rules Enabling Act process, and that the proliferation of varying local rules under the Civil Justice Reform Act of 1990 (CJRA) should be brought to an end in favor of predominantly uniform national rules of practice and procedure. Rec. 30, Plan at 54-55.

Comment: The Department again endorses this theme and continues to agree that the purposes of the CJRA are best fulfilled by bringing the experiment to a close as soon as feasible, completing the studies of the local plans, and adopting the most beneficial reforms on a national basis. For this reason, the Department again encourages the Committee to word the Recommendation less vaguely to emphasize the importance of uniform national rules.

B. Sentencing

Recommendation: The Plan recommends reversing the Sentencing Guidelines' reduction of flexibility in sentencing. It opposes mandatory minimum sentences, and supports enabling judges to impose more alternatives to imprisonment, encouraging departures from guideline levels, and widening the range of offender characteristics that judges may consider. Recs. 31, 32, Plan at 55-57.

Comment: The Department continues to oppose this recommendation for the reasons elaborated in the Department's previous comments. The Recommendation attempts to reopen a debate that has been resolved by Congress and the Supreme Court. Although some aspects of the Guidelines undoubtedly can be improved and the perspective of the judiciary is useful to Congress and the Sentencing Commission in making improvements, the Department supports the basic approach of the guidelines, which were developed through a public process with input from diverse sources, over flexible sentences determined by individual judges. In its previous comments, the Department explained its support for mandatory minimum sentences in certain cases and its concern about the proposed easing of departure standards to allow for alternative sentencing.

The commentary urges the Sentencing Commission to encourage departures from the Guidelines in appropriate cases and to adopt guidelines "that permit judges to take into account a greater number of defendant characteristics." The Department believes that a helpful alternative to opposing the Sentencing Guidelines approach generally would be for the Plan to specify in detail the facts or factors the judiciary believes should be included as reasonable bases for sentencing departures and the additional offender characteristics the judiciary believes should be taken into account.

C. Case management and resources

Appellate case management

Recommendation: The Plan recommends a number of reforms for conserving appellate resources and maintaining the consistency of circuit law. Rec. 37-39, Plan at 62-65.

Comment: The Department generally agrees with the Recommendation, but calls attention to the specific concerns pointed out in the Department's previous comments. The commentary's discussion of the proposal to restrict publication of opinions now recognizes the problem that unpublished opinions are available to different litigants in varying degrees and makes the helpful suggestion that the Judicial Conference should develop uniform procedures and mechanisms for access to circuit court opinions. The Department again notes that the goal of this proposal might be partially accomplished without restricting publication simply by not permitting citation of the relevant opinions.

Alternative dispute resolution techniques

Recommendation: The Plan recommends that district courts be authorized to make available a variety of alternative dispute resolution (ADR) techniques. Rec. 41, Plan at 65-66.

Comment: The Department reiterates its support for the development and use of alternative dispute resolution techniques and suggests that the Plan should be further developed by the addition of specific recommendations of particular techniques and mechanisms for encouraging their use. (As the Committee may know, the Attorney General announced the Department's new and comprehensive ADR initiative just last week.)

Administration of federal court facilities

Recommendation: The Plan recommends that administration of federal court facilities, including court and judicial security programs and bankruptcy estate administration, should be conducted solely within the judicial branch. Rec. 53, Plan at 79-81.

Comment: The Department maintains the view that any recommendation about the operation of the U.S. Bankruptcy Trustee program is premature because the issue is currently under study by a "blue ribbon" panel created by the National Academy of Public Administration. Moreover, the Department continues to oppose any change in Department of Justice supervision of the Marshals Service. The Department's position is explained at greater length in its previous comments.

Judicial resources

Recommendation: The Plan recommends that adequate security protection be provided for judges and court personnel at all court facilities and when they are away from the courthouse, including the provision of home security systems and portable emergency communication devices and security briefings for judges and their families. In addition, the Plan calls for notification

of judges and probation officers whenever prisoners are released. Rec. 63, Plan at 89-90.

Comment: The Department reiterates that it takes its current responsibility to provide security services for courthouses and court personnel very seriously. The Department has worked and will continue to work with the Judicial Conference to develop adequate security programs throughout the country. While the Department agrees that notification of judges and probation officers would be appropriate when a threat has been made generally or specifically against a judge or officer, the Department does not support providing notice of the release of all prisoners that have appeared before a judge.

Recommendation: The Plan makes several recommendations relating to the process for filling judicial vacancies. Recommendations include encouraging judges to give substantial advance notice of intentions to take senior status or to retire, and encouraging the President and senators to use special commissions or staffs to identify and screen judicial candidates, and urging the allocation of adequate resources for investigating the backgrounds of potential nominees. Recs. 69-70, Plan at 94-95. The Plan also calls for establishing statutory benchmarks for the nomination and confirmation of judges and encourages the President to exercise recess appointment authority. Recs. 71-72, Plan at 95-96.

Comment: The Department discussed these recommendations in detail in its previous comments. The President has assigned a primary priority to filling judicial vacancies, has made 156 nominations and has had 138 judges confirmed, and is committed to reducing the number of judicial vacancies as far as possible. The Federal Bureau of Investigation, a component of the Department of Justice, has devoted adequate resources to conducting the required background investigation of candidates for federal judgeships. Moreover, this President relies on a staff devoted to the judicial selection process, and staff members in the Office of the Counsel to the President and in the Department of Justice are exclusively dedicated to this process. Also, the Department reiterates its opposition to the proposal for statutory benchmarks for presidential and Senate action: the lifetime appointment of a judge is too important for the process to be constrained by inflexible deadlines.

Legislative "checklist"

Recommendation: The Plan recommends encouraging Congress to require legislative staff to satisfy a legislative "checklist." Rec. 99b, Plan at 116-118.

Comment: As explained in its previous comments, the Department supports this recommendation. Two items that could be included in the checklist in addition to the items listed in the Plan are whether the applicable burden of proof is clearly specified and whether the proposed legislation would apply to the federal government.

V. Access to the courts and equal justice

A. Pro se litigation

Recommendation: In order to confront the growing demands that pro se litigation places on the federal courts, the Plan recommends a broad-based study of the impact of pro se litigation, encouragement of state development of procedures for reviewing prisoner complaints as an alternative to federal court pro se filings, and development of more effective systems and special mechanisms for adjudicating pro se cases in the federal courts. The Plan also encourages innovative ways of making counsel available to litigants who would otherwise have to represent themselves and the continued screening of pro se cases by centralized staff operating under court supervision. Recs. 35, 93, Plan at 59-62, 112-114.

Comment: The Department's previous comments addressed these recommendations in detail, and the recommendations have not been significantly altered. The Department calls attention to its previous comments and emphasizes its major concern that the Plan's approach to pro se litigation treats it primarily as a problem for the federal courts' ability to limit their jurisdiction. The Plan should devote greater attention to the need to improve access to the justice system by providing fairer and more efficient adjudication of the claims of indigent and prisoner litigants.

B. Access for people with disabilities and people who do not speak English

Recommendation: The Plan recommends making justice accessible to people with disabilities and people who do not speak English. Recs. 88-89, Plan at 105-108.

Comment: The Department's previous comments endorsed the underlying theme of these recommendations but suggested that greater detail would be helpful and made a range of suggestions. Although the Plan has been revised to take into account some of

the Department's comments, the Department wishes to call attention again to the specific suggestions in its previous comments. Finally, contrary to the Plan's suggestion, federal courts are not covered by the Americans with Disabilities Act. See Plan at 108. The Plan should note that the federal courts are not covered and should recommend that they nevertheless comply with the Act's standards.

C. Bias and cultural diversity

Recommendation: The Plan recommends that federal judges exert strong leadership to combat bias in the administration of justice in the federal courts. Recs. 86-87, 98, Plan at 104-105, 116.

Comment: The Department again endorses the spirit of the Recommendation and encourages the Committee to be more specific in recommending mechanisms to eliminate bias. In particular, the Plan should contain specific recommendations for dealing with complaints of discrimination by employees of the federal courts, litigants, and members of the bar.

U.S. Department of Justice

Office of Policy Development

Assistant Attorney General

Washington, D.C. 20530

March 27, 1995

MEMORANDUM

TO: Distribution List

FROM: Eleanor D. Acheson

SUBJECT: Department Components on Revised Proposed Long Range Plan for the Federal Courts

The Committee on Long Range Planning of the Federal Judicial Conference, after considering the comments of the Department of Justice and others on the draft of the Proposed Long Range Plan for the Federal Courts (PLRP) circulated last year, made certain revisions and issued the accompanying reworked draft PLRP. We are again invited to comment.

The INFLEXIBLE deadline for the Department to provide any comments on the PLRP is **APRIL 10, 1995**. The Office of Policy Development (OPD) is currently reviewing the document to determine the extent to which the Department's comments on the earlier draft of the PLRP have been incorporated into the March document. If you wish OPD staff to consider any new comments on this draft, please have your comments to Renée Landers and Mark Greenberg by no later than Thursday, March 30 at 5:00 p.m. If you have any questions, please call Renée Landers at 514-4582, or Mark Greenberg at 514-2160. Because the DOJ letter submitted to the Committee on Long Range Planning in January attempted to reflect the comments received from all the components, it is not necessary to reiterate those comments at this time.

Thank you for your help with this matter.

The Attorney General

The Deputy Attorney General

The Associate Attorney General

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Assistant Attorney
Office of Legal Counsel

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Assistant Attorney General
Criminal Division

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Proposed Long Range Plan for the Federal Courts

For Judge Morris

ublic Comment

Committee on Long Range Planning
Judicial Conference of the United States

November 1994

Proposed Long Range Plan for the Federal Courts

Draft for Public Comment

Committee on Long Range Planning
Judicial Conference of the United States

November 1994

COMMITTEE ON LONG RANGE PLANNING
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

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LONG RANGE PLANNING OFFICE
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November 1, 1994

TO ALL INTERESTED PARTIES:

As the federal judiciary began its planning process, the Chief Justice of the United States asked the members of the Long Range Planning Committee to articulate the role of the federal courts and provide guidance for long term direction. In response, the Planning Committee submits this proposed plan to the bench and bar and to the public generally for comment.

Our aim is not to produce a final report on the future of the federal courts but rather to generate a better understanding of the strengths, needs, and opportunities of the judicial system, to identify areas where we might change to improve, and to propose steps to sustain our service to society. A continuing review process will keep the plan updated and allow it to remain current with ongoing initiatives within the judicial branch.

We provide copies of this proposed plan to all who are interested in the work of the federal courts and may wish to offer comment. In order that individuals and organizations wishing to comment orally on the proposed plan may do so, public hearings will be held in three locations as described in the attached announcement. Following consideration of the public response, a subsequent version of this plan will be submitted for consideration by the Judicial Conference in March 1995.

While we hope you will find this document of interest, it is only one step in our ongoing planning process. We look forward to your continuing interest as the process continues over the months and years ahead.

Otto R. Skopil, Jr.

JUDICIAL CONFERENCE OF THE UNITED STATES
Committee on Long Range Planning

Public Comment and Hearings on the Proposed Long Range Plan

The Committee on Long Range Planning has proposed a long range plan for the federal courts. Persons and organizations wishing to do so may respond to the proposed long range plan by testifying at one of three public hearings or by submitting written comments. The committee requests that all comments be submitted no later than December 16, 1994. An information sheet follows this page.

In order that persons and organizations wishing to do so may comment orally on the proposed long range plan, public hearings will be held by the Committee on Long Range Planning as follows:

- **December 7, 1994**, in Courtroom No. 2, United States Courthouse, 230 North First Avenue, Phoenix, Arizona
- **December 9, 1994**, in the Media Auditorium, Thurgood Marshall Federal Judiciary Building, Washington, D.C.
- **December 16, 1994**, in the Ceremonial Courtroom, United States Courthouse, 219 South Dearborn Street, Chicago, Illinois

Each hearing will start at 9:00 a.m. local time. Anyone interested in testifying at a particular hearing should contact Peter G. McCabe, Assistant Director, Judges Programs, Administrative Office of the United States Courts, Washington, D.C. 20544, for scheduling at least 10 days before the hearing date. Written testimony for each hearing should be received by the Long Range Planning Office no later than one week before the hearing date.

For additional information, contact the Long Range Planning Office of the Administrative Office of the United States Courts at (202) 273-1810 or FAX (202) 273-1826. To request a copy of the plan, send a self-addressed mailing label to the following address:

Long Range Planning Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Public Comments to the Long Range Planning Committee

General Information

Questions to Consider in Preparing Comments

- Does this proposed Long Range Plan for the Federal Courts address your current needs or your anticipated future needs? If no, in what area(s) is it lacking?
- Are there issues which the federal courts will be facing that you feel are omitted from the plan? If so, in which area(s) do these omissions occur?
- Are there long term goals that you feel the federal courts should not pursue, or is any direction this Long Range Plan suggests not advisable? If yes, please explain.
- Are there other comments you wish to make regarding this Long Range Plan?

Hearing Testimony

- Witnesses must submit written testimony no later than one week before the hearing.
- Oral testimony will be held to 10 minutes per witness plus a 10-minute question-and-answer session at the committee's discretion.

Written Comments

- Those submitting written comments, including testimony for a public hearing, may submit documents of any length but must include an executive summary.
- An executive summary should contain the following:

  Name, title, date
  Group represented
  Hearing date (if applicable)
  Chapter, section of long range plan being reviewed
  Recommendation
  Brief summary of argument or background statement in "bullet" format

Written comments should be sent no later than December 16, 1994 to:

Long Range Planning Office
Administrative Office of the United States Courts
Washington, D.C. 20544

The committee prefers that written text be submitted on floppy diskette in either Macintosh Word 5.1 or DOS-compatible WordPerfect 5.1 format.

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Chapter I
Introduction

THIS first plan for the future of the federal courts responds to a growing awareness within and without the courts that the accelerated pace of social change requires public institutions to anticipate and act with respect to likely future opportunities and challenges. The Constitution vests the federal courts with the judicial power of the United States, which the courts are bound to exercise justly, speedily and economically. To meet that responsibility, the courts must preserve the rule of law while responding to the changing needs of society, litigants, and the practicing bar. The federal courts intend that this first plan, along with the planning process that it has initiated, will foster that response.

Why Plan?

Many of our nation's state courts have already initiated planning processes through "futures commissions" and long range planning bodies. This federal court planning process responds to the same imperatives for planning in the public sector mentioned above. Indeed, there is a universality about doing justice that transcends court systems, and many of the issues important to state court systems—equal justice, public trust and understanding, effective use of technology, alternative disputes resolution, obtaining adequate resources, and governance—are equally important to the federal courts.

A difference exists, however, between the planning context of the state courts and that of the federal courts. State courts exist to serve all the justice needs of a geographic area. Determining their mission is far simpler than doing so for the federal courts, which our Constitution has left to Congress to employ as courts that coexist with, supplement and only rarely supplant the role that state courts must assume without question. As noted by Alexander Hamilton, "[T]he national and state systems are to be regarded as ONE WHOLE."[1]

Determining the appropriate role for the federal courts has provided the greatest challenge for this planning process. In the words of John Jay, the country's first Chief Justice, "To provide against discord between National and State jurisdiction, to render them auxiliary instead of hostile to each other, and so to connect both as to leave each sufficiently independent and yet sufficiently combined was and will be arduous."[2] Much of the plan that follows is driven by the need to carry out this "arduous" task.

Many other challenges also have affected this planning process. The judicial branch is largely reactive to external forces beyond its control. Congress controls the courts' budgets and the scope of federal jurisdiction; the executive branch sets the prosecutorial and civil litigation strategies that have substantial impact on the courts' workload. The judicial branch has only a limited ability to influence these

1 THE FEDERALIST No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

2 Charge to Grand Jury at the first session of the Circuit Court for the District of New York (Apr. 4, 1790). 1 CHARLES WARREN, THE SUPREME COURT IN U.S. HISTORY 61 (photo. reprint 1987) (1926) (quoting COLUMBIAN CENTINEL, May 29, 1790).

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actors. Moreover, the structure of the federal judiciary is, by its nature, non-hierarchical. Unlike business organizations that can enforce a strategic plan from the top down, the federal judiciary's work is carried out by judges whose independence, guaranteed by the U. S. Constitution, makes regimentation impossible as well as undesirable.

Social and cultural changes, generally unpredictable and certainly uncontrollable by court planning processes, have even greater effects on the courts' workload. The great increase in illegal drug importation and use that has transformed the work of federal district courts was little anticipated even ten years ago. Given all the uncertainty that courts face, and the meager tools they have to control their fates, why should courts invest at all in long range planning?

The answer is simple. Planning can provide the courts with an orientation to alternative likely futures and enable judges to think strategically about how to allocate financial and human resources most effectively under various possible alternatives. No organization completely controls the environment in which it operates, or can predict the future that it faces, and planning holds no such promise. Indeed, if planning's purpose were to predict the future in order to master it, planning would be a true fool's errand. In the final analysis, planning is about conservation as well as change—the preservation of cherished, historic, threatened values in a turbulent environment. It is not about conforming tomorrow's courts to all the shifting trends of an uncharted future. Planning helps any organization, including the courts, to identify the organization's mission and the values it seeks to preserve and promote, to embody those values in goals and objectives, and to organize for effective action.

History of Federal Courts Planning and the Genesis of the Current Plan

The current planning process does not represent the federal judiciary's first effort to plan for its future. Statutes establishing the Conference of Senior Circuit Judges (1922) (the forerunner of the Judicial Conference of the United States), the Administrative Office of the United States Courts (1939), and the Federal Judicial Center (1967), and the subsequent growth of those organizations, arose from an understanding by Congress and the judiciary that the federal courts should have a national capacity to identify and respond to opportunities and barriers to the effective administration of justice. At the regional level, the creation of circuit judicial councils in 1939 responded to a similar need. And at the local level, many individual courts have developed their own methods to assess and respond to the need for change.

In 1990, the Federal Courts Study Committee Report made a significant step toward a long range plan for the courts. One of the Committee's administrative recommendations was that the judiciary should establish a "permanent capacity to determine long-term goals and develop strategy plans by which they can reach them." Through the creation of the Judicial Conference Committee on Long Range Planning and enhanced long range planning support capabilities in the Administrative Office and the Federal Judicial Center, the judiciary responded to the Federal Courts Study Committee's recommendation.

Appendix B of the plan documents the history of the work of the Long Range Planning Committee from its inception in March, 1991, to the present day. Here it suffices to note that the Committee has identified the major planning areas confronting the judiciary; analyzed forecasts of trends; consulted widely with state and federal judges, lawyers from all segments of the nation's bar, officials of the executive and legislative branches, and experienced planners from the public and private sectors; and assessed a range of policy alternatives that the judiciary might pursue on its own or recommend to other bodies.

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Chapter 2
Conserving Core Values, Yet Preserving Flexibility

A shared vision evokes a sense of mission and a commitment to action. This initial long range plan for the federal courts proposes a vision for the future drawn from history and from the core values that traditionally have defined the federal courts, yet balanced by the realization that the federal courts must themselves evolve (as they have throughout the past 200 years) to meet the changing needs of the public they serve. In this sense, the administration of justice must change in response to forces that the law does not create but must recognize.

The Vision

The federal courts of the future will conserve their traditional core values even during periods likely to be characterized by rapid change and uncertainty. The federal courts of the future will provide a base of stability yet maintain flexibility to serve the nation's needs.

This is the vision this plan proposes for the federal courts in fulfilling the role the Constitution and Congress assign to them. That vision is threatened, however, by many of the trends and developments of the last two decades. The threat comes from several quarters, many of which are discussed in more detail throughout the body of this plan. A large measure of the threat, however, comes from competing views of the role of the federal courts vis-a-vis the state justice systems, which combine together with the federal system to make up an increasingly interdependent whole.

In the increasingly complex society of the 21st century and beyond, the federal courts' role in carrying out the administration of justice will require them to balance many worthy but competing goals. Serving both their localities and the nation as a whole, they will seek the best allocations of responsibility between themselves and the state court systems. Balancing service to individual litigants and the public interest, the federal courts will operate with economy and efficiency without sacrificing care for the individual case.

Recognizing the inherent dignity of every human being who participates in the justice process, the federal courts will strive to make the ideal of equal justice a reality. Functioning as interpreters of the law and resolvers of disputes, the federal courts will retain their independence, collegiality and preeminent legal competence and handle impartially the causes of all parties appropriately before them. Finally, while never sacrificing the core values that make them uniquely valuable to the nation, the federal courts will remain open to innovations that improve their services, make them more accessible, and allow them to operate more efficiently.

Mission

What role should the federal courts play within our nationwide system of justice, which is increasingly under stress throughout the nation? Answering this question is difficult, because no single "constitutionally correct" role exists for the federal courts. Perhaps because they could not agree on what role the federal courts should play, or perhaps because they saw that the changing needs of the country would require differing roles for the federal courts over time, the framers of the Constitution largely left such questions for Congress.

Currently, and for the near future, the debate over the appropriate role of the federal courts will pit those who favor increased "federalization" of the law against those who favor limiting federal court jurisdiction. Even federalization opponents, however, acknowledge that policy and efficiency reasons support some selective additions to federal jurisdiction.

At bottom, the debate over the role of the federal courts vis-a-vis the state courts revolves around the larger question of determining the relative spheres of operation of state and federal law. That question is a complex one that is determined by political, legal, economic, social and pragmatic factors. Often it is difficult to draw hard and fast lines between issues appropriately federal and issues for the states. As the authors of one of the papers supporting this planning process noted:

> [The federalization debate] takes place within a jurisdictional framework characterized by a large overlap of state and federal jurisdiction, the absence of a bright line dividing state court and federal court jurisdiction, and a political and historical context that reflects constant shifts of judicial power between the state systems and the federal system.[1]

Now, as they did two hundred years ago, questions of the relationship of state and federal law "cannot fail to originate questions of intricacy and nicety."[2] They include questions of competence, questions of policy, questions of resources, and questions about the impact of federalization choices on other values.

In determining the appropriate role for the federal courts, this plan proposes an emphasis on the wellsprings of what has made the federal courts a unique and valuable resource for the nation. The federal courts have served the nation well because they are special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests. Those disputes frequently call for deliberative consideration by life-tenured judges specially selected for the job of performing what are often difficult counter-majoritarian tasks.

Accordingly, the mission, or role, of the federal courts now and for the foreseeable future may be stated as:

The mission of the federal courts is to preserve and enhance the rule of law by providing to society a just, efficient, and inexpensive mechanism for resolving disputes that the Constitution and Congress have assigned to the federal courts. That unique mission requires a commitment to conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism, leaving to the state courts the responsibility for adjudicating matters that, in the light of history and a sound division of authority, rightfully belong there.

The mission also requires protection of judicial independence to ensure that the judicial branch can carry out its constitutional role in a governmental system of checks and balances, to preserve and protect the individual rights and liberties guaranteed by the Constitution, to interpret and enforce treaties, federal statutes and regulations, and to ensure that cases are decided fairly and impartially.

1 WILLIAM W SCHWARZER AND RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 40 (Federal Judicial Center 1994).

2 THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

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Recent history contains many examples of the federal courts acting in this quintessential role as "keepers of the covenant" and guardians of American constitutionalism. Following the Supreme Court's decision in *Brown v. Board of Education*, a small cadre of federal judges in the South, often at great personal sacrifice in the face of hostile disagreement by a majority of the local citizens, successfully enforced adherence to the law of the land. During the constitutional crisis known as "Watergate," courageous federal judges insisted that even a President elected with one of the largest mandates in history was subject to constitutional limitations. In many less momentous cases, federal judges protected unpopular movements and individuals, punished corruption that seemed immune from accountability under local laws, and told popularly elected officials that their actions had strayed beyond the Constitution's mandates.

While accomplishing these difficult and delicate tasks, the federal courts have been able to retain the confidence of the people and obtain ready acquiescence to their rulings. They have been able to do so in no small part because of the belief that federal judges are selected by an exacting process, that the courts' rulings are supported and constrained by well-articulated legal principles, and that those decisions are reviewable by an appellate system that will correct errors, reject arbitrary judicial conduct and be faithful itself to the constitutional limits imposed on the judiciary.

Core Values of the Federal Judiciary

- Equal Justice
- Judicial Independence
- National Courts of Limited Jurisdiction
- Excellence
- Accountability

Core Values

The mission statement and historical examples demonstrate in action the core values of the federal judiciary that this plan is dedicated to conserve and enhance.

Equal justice. Every federal judge takes an oath to "administer justice without respect to persons" and to "do equal right to the poor and to the rich," meaning that bias, partiality, and the parties' economic circumstances should play no role in the federal courts' administration of justice. Concern with fairness also permeates this core value. Courts should make decisions that comprehend the relevant individual circumstances of litigants, that empathize with their situation, that apply deliberative imagination, that give them ample opportunity to be heard, and that reach a just result. In recent years adherence to this core value has led judges to express concerns ranging from the state of the criminal sentencing system to the ability of judges to give individualized justice when faced with increasing caseload.

Judicial independence. Federal judges must be able to decide the cases before them in an atmosphere free from fear that an unpopular decision will threaten their livelihood or existence. For that reason the Constitution's Article III provides for life tenure and the protection against salary decreases. As Alexander Hamilton wrote in the Federalist Papers, these "are the best expedients which can be devised in any government to secure a steady, upright, and impartial administration of the laws." Although the autonomy to make impartial decisions is at the heart of this core value, judicial

independence extends further, as it has become apparent in the interdependent modern world that a judge's ability to function independently can be affected by more than a simple threat of job loss or salary reduction. The federal court system must continue to be in control of its own governance, but within the limitations set by the Constitution's system of checks and balances.

National courts of limited jurisdiction, operating within a system of federalism. Unlike the state courts, which are designed to handle all legal disputes within a geographic area, the federal courts were never intended to handle more than a small percentage of the nation's legal disputes. This notion is at the heart of judicial federalism, a concept expressed in more detail later in the plan. Our Constitution's structure explains the importance of this core value, but it has been reaffirmed in practice time and again. Chief Justice Rehnquist has frequently noted that although the Framers left to Congress the ultimate task of developing a role for the federal courts, they left two important guideposts. Federal courts were intended to complement state court systems, not supplant them. And federal courts were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not.

Excellence. Throughout history, the federal courts have had to decide many of society's most contentious and most important issues. These disputes often present a high level of factual, legal and administrative complexity. The federal courts have successfully resolved many of these issues because they are repositories of legal competence—a superlative court system with superior resources that attracts the most talented lawyers and support staff—"the tallest trees in the forest." Excellence has many more components, encompassing the quality of the nominations process, the training given to judges, resources provided for their support, a limited enough jurisdiction so they can become sufficiently expert with subject matter and procedure, the time available for contemplation and reasoned decision, and the prestige of the office. Public confidence in the federal courts is a vital ingredient of our constitutional system. That confidence in large part depends upon the courts maintaining their standards of excellence.

Accountability. Our system of government is, at bottom, a popular government. The first Chief Justice, John Jay, quoted a "celebrated writer" as saying "that next to doing right, the great object in the administration of justice should be to give public satisfaction."[3] Under our form of government the judiciary must ensure dispute resolution according to law rather than the majority's wishes. Preserving the power of the courts to do what is right while sustaining their legitimacy in the eyes of the public is one of the most delicate balancing acts of our constitutional system. If the courts alienate the public and lose their support and participation, they cannot carry out their appropriate role. Moreover, judges, like all public officials, are finally accountable.

The most powerful popular influence on the federal judiciary is the judicial appointment process, which responds generally over time to changes in electoral majorities. Other elements of accountability are imposed by Congress under Articles I and III of the Constitution. Some specific elements, such as resolving most cases of judicial discipline or disability, reside in internal judiciary mechanisms. Ultimately, however, the federal courts system must ensure its own accountability through the example of its leadership, self-imposed standards of conduct that are more stringent than those for other public officials, a demonstrated ability to make efficient use of the resources it has been given, and the commitment to treat all users of the courts with understanding, dignity and respect.

3 Draft letter from John Jay, enclosed in letter from John Jay to James Iredell (15 Sept. 1790), in 2 McCree, The Life and Correspondence of James Iredell 292, 294 (1857).

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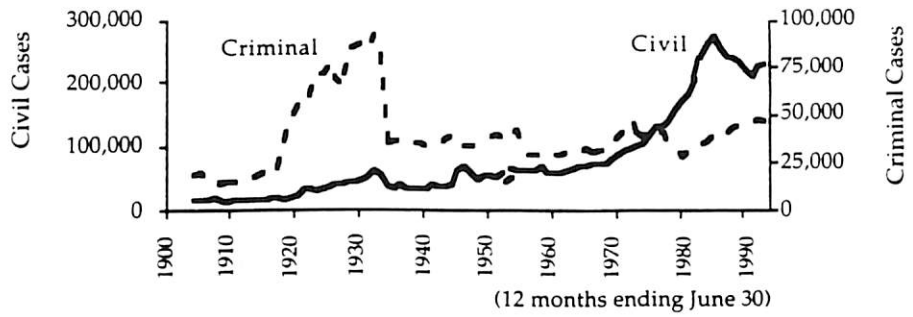
The Federal Courts Today

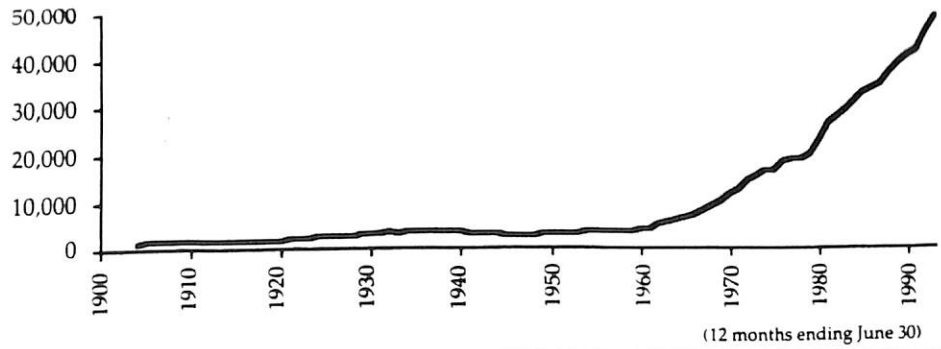
These core values are currently at risk for a variety of reasons, the vast majority of which are outside the courts' control. The increasing atomization of society, its stubborn litigiousness, the breakdown of other institutions, and, paradoxically, the very popularity and success of the federal courts, have combined to place the courts' mission under strain.

Figure 1
Civil and Criminal Cases Commenced in U.S. District Courts, 1904 - 1993



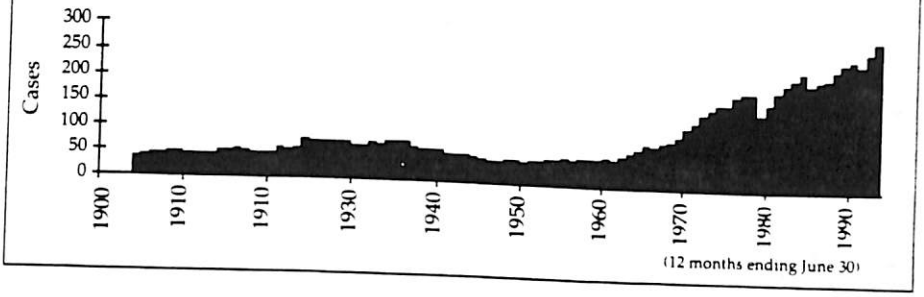
Huge burdens are now being placed on the federal courts. A historical overview of cases commenced in the federal district and appeals courts since 1904 reveals remarkable growth. While the U.S. population has increased slightly more than 200% since 1904, federal criminal cases commenced annually in the district courts have increased by only 157%. On the other hand, annual civil case filings have increased 1,424%, with most of that growth in the period since 1960. See Figure 1.

Figure 2
Federal Appeals Commenced, 1904 - 1993



Most remarkably, since 1904 annual cases commenced in the federal appeals courts have increased 3,868%. While it took 20 years for the level of appeals to double its 1904 level, and 38 years (1962) to double again, it took seven (1969), ten (1979) and eleven (1990) years for each of the next three doublings. See Figure 2.

Figure 3
Appeals per Judgeship



Although the number of courts of appeals judgeships has increased from 27 in 1904 to 167 in 1994 (excluding the Federal Circuit) the increase has not kept up with the expanding appellate docket, in large part because the judiciary has not sought the vast increases in judgeships that would be necessary. Figure 3 shows that while in 1970 there were about 130 appeals per judgeship, this had grown by 1993 to 298.

The number of district judges has also continued to increase over the years, but less so than the growth of the caseload. In 1904 there were 75 district judgeships. Their number grew to 649 by 1994. Between 1970 and 1993, district court filings per judgeship increased from 312 to 423. Although difficult to quantify, these filings have also increased in complexity.

The criminal caseload has fluctuated widely over the last 20 years. In raw numbers, it is currently lower than in 1972, but the nature and complexity of the caseload has changed dramatically. For this reason, a simple snapshot of case filings does not provide a realistic picture of the relative burdens of the criminal caseload in 1993 compared to 20 years ago. The numbers of cases and defendants have not changed drastically over the years, but other factors affect workload as well (see box below).

- In 1972, drug offenses accounted for only 18 percent of the criminal dockets, with selective service and auto theft accounting for an additional 13 percent. By 1992, both auto theft and selective service cases had all but disappeared while drug offenses accounted for 41 percent of the criminal filings.
- The number of multi-defendant cases has grown by 70 percent since 1980. The number of multi-defendant drug cases has increased by nearly 30 percent in just the last four years. The average judge time required per defendant in multi-defendant cases is 5.8 hours compared to 3.0 hours per defendant in single defendant cases.
- The number of jury trials with 4 or more defendants has increased more than 35 percent in just the last four years while criminal case filings have increased only 11 percent.
- The conviction rate in 1972 was approximately 75 percent. Since that time the rate has grown gradually to its present 85 percent. This translates into additional defendants requiring sentencing.
- In 1972 criminal case filings represented one-third of total filings in district courts and criminal trials accounted for 40 percent of all trials. In 1992 criminal filings were only 15 percent of all filings, but 47 percent of all trials.
- There were only 20 districts in 1972 where criminal cases represented more than 50 percent of the trial dockets; in 1992 38 districts devoted more than 50 percent of their trial dockets to criminal cases.
- Since 1970 the average length of a criminal jury trial has increased from 2.5 days to 4.4 days.
- Criminal jury trials in the 6-20 day range have increased 118 percent since 1973.
- The number of prosecutors has increased 125 percent since 1980 while the number of judges has increased only 17 percent.
- The number of prosecutors per judge has doubled in the last 10 years.

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Similarly, workload has increased for bankruptcy and magistrate judges in the past several decades. Tables 1 and 2 highlight the rapid rise of workload in these positions.

To meet the demand of increased judicial workload in the dozen years since 1982, the federal courts' full time permanent work force grew significantly from about 14,400 to about 24,000.

Reflecting primarily the growth of staff in the last decade, the judicial branch has seen a 170% increase in the size of its budget, about four times the growth of the total government budget, but comparable to the 171% increase in the budget of the Department of Justice.

The caseload increase has forced the courts to take many new measures to cope with the influx. In the district courts, the heavy burdens of criminal cases have produced significant delays for civil suits in some judicial districts, but the courts have responded through employment of case management techniques, alternative dispute resolution procedures, and the outstanding support of magistrate judges and of supporting staff. In the courts of appeals, where the increase in appeals since 1960 has amounted to twice the increase in district court caseload growth, various procedural innovations have been adopted, including the use of screening programs, summary dispositions, increased complement of staff attorneys, and the elimination of oral argument in many cases.

Table 1. Authorized Magistrate Judges and Civil and Criminal Workload 1975 - 1993 (12 months ending June 30)

	Full-time	Part-time	Combination	Civil and Criminal Matters Disposed Of
1975	143	322	17	255,061
1980	210	263	22	280,151
1985	277	179	11	426,440
1990	329	146	8	450,565
1993	385	93	4	510,057

Table 2. Authorized Bankruptcy Judges (or Referees) and Filings 1950 - 1993 (12 months ending June 30)

	Full-time Positions	Part-time Positions	Total Bankruptcies Filed
1950	54	110	33,392
1960	107	67	110,034
1970	184	34	194,399
1980	235		360,957
1990	291		725,484
1993	326		897,231

(Total bankruptcies in 1980 represent 67,517 cases filed in U.S. District Court plus 210,364 cases and 83,076 joint petitions filed after October 1, 1979 pursuant to the Bankruptcy Reform Act)

Conserving Core Values

The system has coped, but many judges believe that doing so has stretched the core values about as much as they can be stretched. As Chief Justice Rehnquist said in one of his recent annual reports, the federal courts are now at a crossroads. The next few years will require the nation to confront, and decide, critical questions about the federal courts and their role in our system of government. From the perspective of the federal courts, the choice is clear.

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The vision of the federal courts set out in this plan has been driven fundamentally by the need to conserve the core values. No change in the jurisdiction, structure, function, governance, or role of the courts should diminish the perception or reality of the federal courts as uniquely competent national courts of limited jurisdiction serving as the repository of these values.

While affirming the immutability of the core values, the plan also recognizes that specific elements of jurisdiction, structure, governance and function are not sacrosanct. The ability to adapt to changed conditions is the sign of a healthy institution and the key to its future. Accordingly, the plan makes many recommendations for change, most of which could be characterized as incremental. The plan also builds in many opportunities for experimentation and pilot programs, many of which will be critical for the more wholesale changes that will be called for if the alternative future discussed in Chapter 3 comes about.

Former Chief Justice Warren Burger once referred to the need for "systematic anticipation."[4] Although this plan presents what is to the federal courts an optimum vision of the future, it also recognizes that the most important aspect of planning is creating structures and methods for dealing with the unanticipated. Thus, while the mission statement for the federal courts is infused with the core values identified above, it has built in flexibility for encouraging the spirit of experimentation and innovation that has long existed in many federal courts.

Has the Crisis Arrived?

Some believe the mission of the federal courts has already been compromised and the system to which lawyers, litigants and the American people have become accustomed has gone by the boards. Others believe the courts have preserved their essential nature despite the changes, yet they worry about the future. Certainly many warning calls have been voiced throughout the years by well-respected leaders in the federal courts community. Sixty-seven years ago, during one other period when federal courts strained under an expanded criminal jurisdiction, then Professor Felix Frankfurter expressed dismay that '[s]igns are not wanting that an enlargement of the federal judiciary [which then numbered slightly more than 170] does not make for the maintenance of its great traditions."

Twenty-five years later, Justice Frankfurter restated his message in *Lumbermen's Mutual Casualty Co. v. Elbert*[5], that the federal courts' growing diversity docket was fundamentally altering the legitimate business of the federal courts, and that solving the jurisdictional problem by increasing the size of the judiciary was "bound to depreciate the quality of the federal judiciary and thereby adversely affect the whole system."

In the same year, Harvard professor and federal courts scholar Henry Hart declared, "The time has been long overdue for a full-dress reexamination by Congress of the use to which these [federal] courts are being put." More recently, Judge Henry Friendly (when the Article III bench numbered just under 500), Judge Richard Posner in 1985 (when it numbered a little more than 600), and the Federal Courts Study Committee in 1990 (when the Article III judiciary totaled about 750) have articulated a thesis of impending crisis. In 1992, the Chief Justice raised the following concerns:

4 Warren E. Burger, Agenda for 2000 A.D.—Need for Systematic Anticipation, Address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976) *in* DELIVERY OF JUSTICE 101, 102 (1990) (quoting PERLOFF, THE FUTURE OF THE UNITED STATES GOVERNMENT (1971).

5 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

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> Unless actions are taken to reverse current trends, or slow them considerably, the federal courts of the future will be dramatically changed. Few will welcome those changes. . . .
>
> Some will say that we merely need to create more federal judgeships, which in turn would require more courthouses and supporting staff. . . . [T]he long term implications of expanding the federal judiciary should give everyone pause.[6]

Similar concerns led the Judicial Conference of the United States in 1993 to endorse a policy of carefully controlled growth for the federal courts. At the same time, it reaffirmed an earlier position supporting a "relatively small" federal judiciary while rejecting the notion of an artificial upper limit on the number of federal judges.

Should the Congress and the nation not heed these concerns about the implications of uncontrolled growth, fears are increasing that one of two unfortunate consequences will inevitably follow: an enormous federal court system that has lost its special nature or, because of budgetary constraints, a larger system incapable, due to workload and shortage of resources, of dispensing justice swiftly, inexpensively and fairly. Contemplation of either consequence necessitates an alternative future of the federal courts, one that may be far different than the preferred vision set out in this chapter.

The projections in Tables 3 through 6 are based on historical data published by the Administrative Office of the United States Courts. (See Appendix A for additional projections and an explanation of the methodology.)

Table 3. Historical and Projected Cases Commenced in the U.S. District Courts, 1940-2020 (12 month periods ending June 30)

	Total Cases Commenced	Criminal Cases Commenced	Civil Cases Commenced	U.S. Civil Cases	Federal Question Cases	Diversity Cases	Admiralty and Local Jurisdiction
1940	68,135	33,401	34,734	13,644	6,177	7,254	7,659
1950	91,005	36,383	54,622	22,429	6,775	13,124	12,294
1960	87,421	28,137	59,284	20,840	9,207	17,024	12,213
1970	125,423	38,102	87,321	24,965	34,846	22,854	4,656
1980	196,757	27968	168,789	63,628	64,928	39,315	918
1990	264,409	46,530	217,879	56,300	103,938	57,183	458
1994	281,740	45,744	235,996	46,518	134,287	54,917	274
2000	369,875	51,665	318,210	47,104	209,479	61,627	
2010	608,291	68,906	539,385	57,127	370,041	112,217	
2020	1,060,110	98,669	961,441	69,762	678,401	213,279	

6 William H. Rehnquist, Remarks before the House of Delegates at the American Bar Association's Mid-Year Meeting 8-10 (Feb. 4, 1992).

Table 4. Historical and Projected Appeals Filed in U.S. Courts of Appeals, 1940 - 2020 (12 month periods ending June 30)

	Total Appeals	Criminal Appeals	Prisoner Petitions	Other Appeals
1940	3,505	260	65	3,180
1950	2,830	308	286	2,236
1960	3,899	623	290	2,986
1970	11,662	2,660	2,440	6,562
1980	23,200	4,405	3,675	15,120
1990	40,898	9,493	9,941	21,464
1994	48,815	11,052	12,772	24,991
2000	71,794	11,401	30,815	29,578
2010	139,896	16,427	71,659	51,810
2020	275,949	24,299	157,416	94,234

Table 5. Total Historical and Projected Appeals Filed by Circuit, 1940 - 2020 (12 month periods ending June 30)

Circuit	1940	1993	2020
D.C.	325	1,781	8,766
First	111	1,451	6,487
Second	572	4,250	22,116
Third	322	3,590	21,250
Fourth	159	4,177	29,176
Fifth†	398	6,689	33,248
Sixth	340	4,854	30,035
Seventh	377	3,235	21,808
Eighth	289	3,216	18,841
Ninth	335	8,380	37,928
Tenth	218	2,569	15,943
Eleventh		5,511	30,349

† The fifth circuit was split to form the eleventh circuit in 1982.

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Table 6 Historical and Projected Judgeships, 1940-2020

	Appellate Judgeships	District Judgeships
1940	57	191
1950	65	224
1960	68	245
1970	97	401
1980	132	516
1990	156	575
1993	167	649
2000	356	956
2010	657	1,581
2020	1,247	2,766

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Chapter 3
An Alternative Future of the Federal Courts

IF the federal courts are in crisis or approaching crisis now, how will they operate 25 years in the future, when, assuming there is no reduction in the trend toward increasing the work of the federal courts, some projections suggest that their current workload will increase four, five or six-fold?

Trend projections (as described in the previous chapter and Appendix A) reflect the likely course of case filings by assuming that the factors influencing the rate in the past will continue to do so in the future. Recent legislative developments tend to confirm the view of those who believe that the federal caseload will continue to expand greatly.

To be sure, predictions about what the world, or a small part of it, will look like in 10 or 20 or 50 years are more properly the realm of futurists and science fiction writers than judges who operate in the here and now. As the Federal Courts Study Committee noted, the problems in predicting future demands for federal judicial resources come about from the dual difficulties associated with predicting "any but the grossest social, economic, political, and demographic trends more than a few years in advance - if that far," and with ascertaining the relationship between those trends and the future business of the federal courts.[1]

Neither planners nor sociologists, for example, can know with certainty whether the drug problems that currently plague this country—and which are the cause of many other related criminal and soci-

Tiers of Justice

The year is 2020. Congress has continued the federalization trends of the eighties and nineties, and federal court caseloads have grown at a rapid rate. In the United States Court of Appeals for the 21st Circuit, Lower Tier, a recently appointed federal judge arrives at her chambers, planning to consult the latest electronic advance sheets in Fed7th in order to determine the applicable law of her Circuit and the upper tier court of appeals for her region. With nearly a thousand court of appeals judges writing opinions, federal law in 2020 has become vaster and more incoherent than ever.

This is only the judge's fourth month on the job, even though she was nominated by the President three years earlier; the appointment and confirmation process has bogged down even more than in 1995 because of the numbers of judicial candidates that the Senate Judiciary Committee must consider every year. Her predecessor was only on the bench for a year and a half before resigning in protest because he felt that he was only a small cog in what had become a vast wheel of justice.

1 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 8-9 (1990).

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etal ills—will continue, moderate, or decline. Even assuming that the drug crisis persists in all its tragic manifestations, it is difficult, if not impossible, to predict how the nation's leaders will respond to these problems: whether, for example, as some have urged, the nation will refocus some of its prosecutorial resources on education and rehabilitation; or, even more radically, whether there will be decriminalization of some of the substances that are currently proscribed.

The district courts and courts of appeals currently devote substantial judicial resources to resolving criminal drug cases. The extent of future court involvement in the adjudication of criminal drug offenses—whether state or federal court involvement—is a political question that cannot be answered definitively. This issue is only one of the variables that federal court planners have had to confront. The planners' task is to look at demographic and caseload trends and try to determine how the trends will influence the future.

A Possible Scenario for the Future

The forecasts—under one possible scenario—are bleak indeed. If the courts' civil and criminal jurisdiction continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish. Twenty-five years from now, the number of civil cases commenced annually could exceed 960,000 (in 1993 the civil filings in the district courts numbered about 230,000), while the number of criminal cases commenced could reach nearly 100,000 (in 1993 they numbered about 47,000). At the same time, appeals cases commenced could approach 275,000 (in 1993 they numbered 50,000). This situation is starkly shown in Table 7.

Based on current formulas for determining judgeship needs, these levels of case filings might require a district court bench of nearly 2,800 judges, while the appeals bench would be nearly 1,250 judges. Under current formulas for determining the need for additional judges, more than 4,000 federal judges might be necessary to handle the federal courts' docket in 2020.

Numbers alone do not adequately capture this frightening picture. A federal judiciary of 4,000 judges would necessarily have a different structure. It is highly unlikely that the current structure of twelve regional courts of appeals, (excluding the Court of Appeals for the Federal Circuit) could be maintained in 2020, given that, on average, each of these existing courts of appeals would have to have almost 104 judges. It is equally unlikely that with that many appellate judges and many more circuits, the present three-tier structure, with the Supreme Court solely responsible for resolving intercircuit conflicts, could remain. Another tier, at least, would likely be added,

Table 7. Case Filings and Judgeships

	1993	2020
District Courts		
Civil Filings	229,850	960,000
Criminal Filings	46,786	99,000
Total	276,636	1,059,000
Courts of Appeals		
Criminal Appeals	11,862	24,000
Prisoner Petitions	12,795	157,000
Other Appeals	25,567	94,000
Total	50,224	275,000
Judgeships		
District (by formula)	649	2,766
Circuit (by formula) (excludes Federal Circuit)	167	1,247

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and the Supreme Court's role as the ultimate arbiter of federal law would be diminished significantly, as it would only be able to review the merits of a tiny fraction of the entire federal caseload.

Present-day governance mechanisms could not continue without change. As the courts grow in size, the current governance structure balancing national, regional and local authority would have to be adjusted. The larger the system, the more attention that would have to be paid to matters of administration and accountability, and there would be pressure for a strong central executive body for the court system.

Perhaps the greatest loss, however, would be in the notion of courts as collegial bodies. The current Chief Judge for the Second Circuit Court of Appeals expressed this fear, when he said, "When I contemplate our court in the middle of the next century ... I despair. It will not be a court; it will be a stable of judges, each one called upon to plough through the unrelenting volume, harnessed on any given day with two other judges who barely know each other."[2]

Finally, no matter what the structure and governance system of the federal judiciary would be, the vision of coherence and consistency in decisional law likely would be a chimera. Federal law would be babel, with thousands of decisions issuing weekly and no one judge capable of comprehending the entire corpus of federal law, or even the law of his or her own circuit. This vision is one that planners have to confront if today's trends continue.

Another Possible Scenario for the Future

The possibility of more than 4,000 federal judges and more than 1,000,000 new cases per year is actually less troubling than a second scenario, premised on the likelihood that the nation in 2020 could not afford a federal judiciary that grew at the rate it did from 1940 until 1992. Consider, for example the cost of creating and maintaining judgeships. Including salary, administrative expenses, court security and space and facilities, the initial cost of establishing a court of appeals judgeship is over $980,000 (in 1992 dollars). Annual recurring costs would amount to about $814,000. For district court judgeships, these initial and recurring costs are about $871,000 and $695,000, respectively. The costs are similar but slightly less for bankruptcy and magistrate judgeships.

Because of budgetary constraints that will severely reduce discretionary federal spending, future Congresses will not likely permit the judicial budget to grow to fund the projected judgeship needs of the next several decades. If the economic realities of the next 25 years make it impossible to provide the resources necessary to create and maintain a federal judicial system that includes thousands of Article III judges, then we must contemplate a different picture that more severely undermines the 200-year old mission of the federal courts.

With scarce resources and many more case filings per judge than currently exist, delay, congestion, cost, and inefficiency would increase. The paperwork burden will affect both the litigants, who would face higher legal fees, and the judges, who would have limited staff assistance. Those civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers. Already in 1994 district judges are able to spend fewer of their working hours in civil trials than ever before, and the future may make the civil jury trial—and perhaps the civil bench trial as well—a creature of the past. The federal district courts, rather than being forums where the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice.

At the court of appeals level, it might become impossible to preserve the hallmarks of a sound appellate review system:

> [T]he judges do much of their own work, grant oral argument in cases that need it, decide cases with sufficient thought, and produce opinions in cases of precedential importance with the care they deserve, including indepen-

2 Jon O. Newman, *1,000 Judges — the Limit for an Effective Federal Judiciary*, 76 JUDICATURE 188 (1993).

dent, constructive insight and criticism from judges on the court and the panel other than the judge writing the opinion. These conditions are essential to a carefully crafted case law.[3]

In 2020 we may find a system of discretionary appellate review, of oral argument in only the exceptional case, and of staff personnel playing a dominant role in deciding the majority of the cases or at least identifying the cases that get the full attention of the judges.

In all respects the plan rejects these two apocalyptic alternatives. They are neither desirable nor acceptable. Nor are they inevitable. In contrast, the plan that follows contemplates conserving the federal courts as a distinctive forum of limited jurisdiction. The plan's proposals for jurisdiction, structure, governance, function, and role are all premised on this intent. Nonetheless, recognizing that long range planning also mandates consideration of alternatives to the plan's preferred vision for the future, Chapter 10 addresses alternative planning approaches should the plan's vision not be achieved.

Nightmare Justice

It is 2020. Federal caseloads have quadrupled, but the number of federal judges has leveled off at 1000. Because of severe budget crises born of entitlements spending and the reluctance to increase tax burdens any further, Congress is no longer willing to fund the increasing costs of courthouses, support staff and judicial salaries to address the rising tide of cases.

The federal courts have been forced to adopt extreme austerity measures. The queue for civil cases lengthens, to the point where federal judges rarely conduct civil trials. User fees proliferate, but have the unintended consequence of driving many litigants to private justice systems. Overworked and underpaid administrators defer maintenance on courthouses and no longer update library collections. More and more vacancies on the federal bench go unfilled for long periods of time because capable lawyers once attracted to a judicial career are no longer willing to serve. The federal courts are well on their way to becoming primarily criminal courts and courts for those who cannot afford private justice.

3 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990).

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Chapter 4
Judicial Federalism

JUDICIAL federalism is based on the principle that the state and federal courts together comprise an integrated system for the delivery of justice in the United States. Historically, the two court systems have played different, but equally significant, roles in our federal system. The state courts have been the primary forums for resolving civil disputes and the chief tribunals for enforcing the criminal law. The federal courts, in contrast, have had a much more limited jurisdiction. The source and nature of federal jurisdiction derive from a number of constitutional powers vested in Congress; and the notion of a limited federal court jurisdiction is premised on the more fundamental constitutional principle that the national government is a government of delegated powers in which the residual power remains in the states.

It follows from this fundamental view of the nature of our federal system of government that the jurisdiction of the federal courts should complement, not supplant, that of the state courts. Although Article III, Section 2 of the Constitution extends federal judicial power potentially to a wide range of "cases and controversies," the Framers wisely left the actual scope of lower federal court jurisdiction to the discretion of Congress. Traditionally, Congress has refrained from disturbing the jurisdiction of state courts, allocating a narrower jurisdiction to the lower federal courts than the Constitution permits[1] and allowing state courts to retain concurrent jurisdiction in numerous civil contexts. Indeed, for nearly the first century of the Republic, the federal courts did not have general original jurisdiction in matters arising under the Constitution, laws and treaties of the United States,[2] and a minimum amount in controversy was required for some "federal question" cases until fairly recently.[3] For that reason, it is possible to distinguish between federalism in the legislative context—the breadth of Congress's power to legislate under Article I, Section 8—and in the judicial context—the appropriate allocation of jurisdiction to the federal courts under Article III.

Beyond historical practice, the allocation of limited jurisdiction to the federal courts is justified both in theory and as a practical necessity. Unless a distinctive role for the federal court system is preserved, there is no sound justification for having two systems. If federal courts were to begin exercising, in the normal course, the broad range of subject-matter jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and, due to burgeoning dockets, their ability to resolve fairly and efficiently those cases of clear national import and interest that properly fall within the scope of federal concern. Under that unfortunate scenario, all courts—federal and state—might as well be consolidated into a single system to handle all judicial business. To follow this course—toward either a single national court system or two systems engaged in essentially identical business—would be disastrous.

1 For example, the diversity jurisdiction conferred by statute, 28 U.S.C. § 1332 (1988) (see *infra* Recommendation 6), is narrower than that authorized by Article III, Section 2 of the Constitution. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-531 (1967).

2 *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (now codified at 28 U.S.C. § 1331(a) (1988)).

3 The general amount-in-controversy requirement for "federal question" cases was eliminated in 1976 for "action[s] brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, and in all cases four years later. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369.

The federal courts, however, are well on their way down that path. As Congress continues to "federalize" crimes previously prosecuted in the state courts, and to create civil causes of action over matters previously resolved in the state courts, the continued viability of judicial federalism is unquestionably at risk.

The following recommendations attempt to articulate and preserve a sound judicial federalism, an end that can be attained in large part—

- first, through sensible limitations on federal criminal and civil jurisdiction;
- second, by means of a cooperative federalism in which the federal government and the states work together to promote effective civil and criminal justice systems; and
- third, through the carefully-controlled growth of the federal judiciary.

Indeed, achieving these three goals will produce a dual benefit: federal courts carrying on their historic mission and state courts remaining vital and efficient forums to adjudicate matters that belong there in the light of history and a sound division of authority.

The first goal—of limiting the federal court's jurisdiction—should be consistent with, and flow from, an understanding of the benefits of having dual systems of government. In general, the federal government can grapple with problems extending beyond the borders of individual states, problems that require uniform treatment, and problems that are too sensitive or volatile within a local community for effective local regulation or enforcement. State governments, in contrast, are better able to respond to matters of local concern—focusing on the impact that a problem may have in a discrete region, as well as any local interests, needs, or standards that may be implicated. The same principles can apply specifically in the judicial context—but with emphasis on reserving federal court jurisdiction for matters requiring adjudication in that forum.

Meeting the second goal of a cooperative federalism is essential because the missions of the federal and state justice systems, while undoubtedly distinct, nevertheless overlap. Each system can succeed only by communicating and cooperating with the other. Recommendations 3 and 13 strive to promote a healthy federalism in which both judicial systems are made better off through their collective efforts.

Finally, the third goal—of controlling the growth of the federal judiciary—follows from limitations on growth of the federal courts' jurisdiction. The appropriate size of the federal judiciary is necessarily a function of its jurisdiction. If in the coming years, Congress and the American people remain committed to the principle of judicial federalism, they will remain vigilant in limiting the jurisdiction—and, consequently, the size—of the federal courts.

The starting point in articulating a sound judicial system is identifying the essentials of federal court jurisdiction. In the following sections, the core of the federal courts' criminal and civil jurisdiction is described.

Defining and Maintaining a Limited Federal Jurisdiction

Criminal Proceedings

■ RECOMMENDATION 1: In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate. Congress should allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses:

(a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government.

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No one seriously disputes that conduct directly injurious to or affecting the federal government or its agents should be subject to the exclusive jurisdiction of the federal investigative, prosecutorial, and judicial branches. Treason and counterfeiting are examples of crimes with direct impact on the federal government. By the same token, federal criminal jurisdiction should also reach offenses in which Congress, in the interests of uniform national regulation, has taken over or preempted an entire regulatory field. Interstate environmental concerns, nuclear regulation, and wildlife preservation (migratory birds, etc.) are examples of the latter.

Appropriate subjects of federal criminal jurisdiction:

- offenses against the federal government or its inherent interests
- criminal activity with substantial multistate or international aspects
- sophisticated criminal enterprises requiring federal resources or expertise to prosecute
- serious, high-level or widespread state or local government corruption
- criminal cases raising highly sensitive local issues

(b) The proscribed activity involves substantial multistate or international aspects.

Simply because criminal activity involves some incidental interstate movement does not mean that state prosecution would in any sense be inappropriate or ineffective. Activity having some minor connection with and effect on interstate commerce might perhaps be constitutionally sufficient to permit federal intervention, but it should not be enough to involve a federal court's attention. In contrast, significant interstate activity by actors engaged in a massive enterprise, such as a multistate drug operation or a multistate fraud scheme, should normally call for the resources and reach of the federal government.

(c) The proscribed activity, even if focused within a single state, involves a sophisticated enterprise most effectively prosecuted by use of federal resources or expertise.

In addition to multistate operations, there are criminal enterprises that, although localized geographically, are so sophisticated as to require the resources and attention of the national government. Much white-collar crime involving an interplay of business, financial, and government institutions—such as the recent savings and loan investigations—falls into this category.

(d) The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter.

Historically, federal prosecutorial and judicial resources have been utilized frequently in state and local public corruption cases. The rationale for federal involvement has been, not so much that state resolution of these matters would be ineffectual, but that federal prosecution and adjudication promote a higher level of public confidence in the country's system of justice.

(e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.

During the height of the civil rights era, there was a manifest need in some parts of the country for the federal government to prosecute acts of violence against civil rights workers when local law enforcement had moved reluctantly against the violators. Even today, some civil rights actions, because of their potential for explosiveness in the community, may be more effectively handled by the national government.

■ RECOMMENDATION 2: Congress should review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose. More broadly, a thorough revision of the federal criminal code should be undertaken so that it conforms to the principles set forth in Recommendation I above.

There are good reasons for a comprehensive recodification of the federal criminal law wholly apart from any considerations of appropriate federal jurisdiction. As the Federal Courts Study Committee, for example, noted:

> [F]ederal criminal law is hard to find, hard to understand, redundant, and conflicting. ... Important offenses such as murder and kidnapping are commingled with trivial offenses like reproducing the image of "Smokey the Bear" without permission (18 U.S.C. § 711) and taking false teeth into a state without the approval of a local dentist (18 U.S.C. § 1821). ... Lack of a rational criminal code has also hampered the development of a rational sentencing system.[4]

Additionally, by involving itself in a comprehensive redrafting of the criminal code, Congress might become more sensitive to the wise use of executive and judicial branch resources. If encouraged to pinpoint only those offenses worthy of prosecution in federal court, Congress might be persuaded to "weed out" current offenses not appropriate for prosecution in that forum. Additionally, this process might provide legislators with a broader viewpoint on criminal justice in a federal system that will deter Congress from creating similar offenses in the future.

■ RECOMMENDATION 3: Congress and the executive branch should undertake cooperative efforts with the states to develop a policy to determine whether offenses should be prosecuted in the federal or state systems.

Implementation Strategies:

3a There should be an increase in federal resources allocated to state criminal justice systems for prosecution of matters now handled by federal prosecutors because of lack of state resources.

3b The practice of cross-designating both federal and state prosecutors to gain efficiencies of prosecution should be increased.

3c State courts should be authorized to adjudicate certain federal crimes for which there currently is no statutory grant of concurrent jurisdiction.

The growing federalization of state crimes appears to flow from the sense of Congress that state resources— prosecutorial, judicial, and penal—are overtaxed or inadequate. It would be more effective for Congress to increase federal resources to the state criminal justice systems and encourage cooperative efforts among federal and state prosecutorial offices. Presently, cross-designation of state and federal prosecutors and other coordinated ventures have enhanced effective law enforcement.

By authorizing concurrent jurisdiction over certain federal crimes between the federal and state courts, Congress could further this cooperation by encourag-

4 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 106 (1990).

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ing prosecution of federal crimes in state courts. For example, federal prosecutions of local drug activity and some violent crime could take place in state court, either by the U.S. Attorney's Office (through cross-designation) or the state's attorney. Adopting this recommendation would require Congress to repeal 18 U.S.C. § 3231, which makes federal criminal jurisdiction an exclusively federal matter, and replace it with a statute granting the state courts concurrent jurisdiction over some federal crimes. Incarceration for violation of a federal criminal statute might still result in imprisonment in a federal prison.

■ RECOMMENDATION 4: The judicial and executive branches should cooperate in developing standards on which the Justice Department will base the promulgation of prosecutorial guidelines. Specifically—

(a) the standards should be consistent with sound jurisdictional boundaries for federal criminal prosecution as described in Recommendation I; and

(b) the potential for harsher federal sentencing policies and greater capacity in the federal prisons should be insufficient grounds, by themselves, to warrant prosecution under a federal, rather than a state, criminal statute.

The decisions of federal prosecutors on what offenses to prosecute in federal court rather than state court are as crucial to the success of judicial federalism as any congressional action. In recent years, executive branch policies have occasionally allowed prosecutors to bring federal criminal cases based on factors unrelated to the appropriateness of a federal forum. An established, effective set of guidelines informed by federalism principles could focus limited federal resources solely on matters that deserve federal court attention, and avoid using the federal system merely as a substitute for state proceedings. Among the guidelines might be the following criteria for federal prosecution:

(1) offenses commonly prosecuted in state court (*e.g.*, firearm or drug offenses) should not be federally prosecuted absent a demonstrated federal interest beyond the mere violation of a federal statute;

(2) priorities should be set in recognition of limited federal courts resources and how they can be used most effectively; and

(3) targets for federal investigation should be selected in accordance with prosecutorial policies (*i.e.*, investigate only those activities that might properly be the subject of federal prosecution).

Civil Proceedings

■ RECOMMENDATION 5: Congress should assign civil jurisdiction to the federal courts only to further clearly defined and justified federal interests, and it should not create new rights of action concerning matters traditionally cognizable by state courts. Federal civil jurisdiction should extend only to matters that—

(a) arise under the United States Constitution;

There is no serious debate that the federal courts should be charged with the core duty of enforcing and interpreting the federal constitution. One of the federal courts' principal roles is to articulate the courts' fundamental structure of government and its underlying values, including the preservation of individual rights and liberties found in the Bill of Rights.

(b) involve the foreign relations of the United States;

Foreign policy is the prerogative of the federal government, and the federal courts should be the exclusive tribunal for resolving disputes that touch upon relations of the United States with other countries.

(c) involve the federal government, federal officials, or agencies as plaintiffs or defendants;

A sovereign may always sue in its own courts. Providing a forum for resolving all disputes involving the federal government is consistent with the policy of protecting the interests of the federal government as a sovereign. Federal courts also have always had jurisdiction over actions brought by or against agencies and federal officers arising out of their official duties. Exercise of that jurisdiction over such actions ensures that those arms of the federal government can be confident of a forum for the uniform interpretation and application of federal law.

(d) involve disputes between or among the states;

Absent a neutral forum for resolving disputes between or among the states, state governments occasionally might be tempted to retaliate against each other when a decision in one state's court system had a significant negative impact on another state. In order to promote the solidarity of our union, a federal forum is necessary to resolve controversies between and among the states.

(e) affect substantial interstate or international disputes; or

Just as the federal government and its court system should be involved in the criminal prosecution of significant multistate or international activities, it is appropriate for the federal courts to resolve and adjudicate civil matters significantly affecting interstate and international commerce. Inasmuch as one of the purposes of the federal government is to foster and regulate interstate activity, the federal court system is an appropriate forum for resolving civil disputes over those kinds of activities.

Appropriate subjects of federal civil jurisdiction:

- cases arising under the U.S. Constitution
- matters involving foreign relations of the United States
- actions involving the federal government, its agencies or officials
- disputes between or among states
- substantial interstate or international disputes
- matters requiring a nationally uniform rule

(f) involve a clear need for national uniformity on an issue that, in light of experience, cannot be dealt with satisfactorily at the state level.

A significant percentage of the federal courts' docket involves claims arising under federal statutes. This part of the docket has grown steadily over the years, due in large part to the tendency of Congress to create additional federal causes of action. The "clear need for uniformity" standard encourages Congress to be cautious in "federalizing" every matter that captures the nation's attention. It calls for Congress to do so only when uniform resolution is required on an issue that has not been, and clearly cannot be, resolved satisfactorily at the state level. The burden to satisfy this showing should be a high one if the federal courts are to be preserved for their historical purpose.

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Between 1950 and 1993, diversity cases annually comprised between 21 percent and 38 percent of all civil cases filed in the federal district courts.

Approximately 50 percent of all civil trials in the federal courts involve diversity actions.

■ RECOMMENDATION 6: Congress should diminish the impact of diversity jurisdiction on the federal courts' dockets by eliminating diversity jurisdiction, except in actions involving aliens, interpleader actions, and cases in which the petitioner can clearly demonstrate local prejudice in the relevant state court. Diversity jurisdiction should also be retained for consolidated "mass tort" litigation, which will require a relaxation of the traditional "complete diversity" requirement, in order to promote effective consolidation of related cases.

Alternatively or additionally, Congress should seek to reduce the number of federal court proceedings in which jurisdiction is based on diversity of citizenship through the following measures:

(a) eliminating diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located;

(b) undertaking a full-scale study, including pilot projects as appropriate, to determine the desirability and impact of shifting to state courts appellate review of diversity cases in which review primarily involves the interpretation of state law (which may require encouraging states to revise their constitutions to permit such review); and

(c) otherwise limiting diversity jurisdiction by—

(1) requiring litigants to undertake a more rigorous showing that the jurisdictional amount-in-controversy requirement has been satisfied;

(2) raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation; and/or

(3) excluding punitive damages from the calculation of the amount-in-controversy requirement.

Changes in the amount-in-controversy requirement for diversity actions:

- 1789: established at $ 500
- 1887: increased to $2,000
- 1911: increased to $3,000
- 1958: increased to $10,000
- 1989: increased to $50,000

Under Article III of the Constitution and 28 U.S.C. § 1332, the district courts are vested with original jurisdiction over controversies between—

(1) citizens of different states;

(2) citizens of a state and citizens or subjects of a foreign state;

(3) citizens of different states in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state as plaintiff and citizens of a state or of different states.

In such actions, the exercise of federal judicial power is based solely on the identity of the parties, not on any substantive rights, privileges or immunities conferred by federal law. Under the doctrine established in *Erie Railroad Co.* v. *Tompkins*,[5] the substantive law to be applied by the federal courts in such cases is the statutory or common law of the state in question.

Diversity jurisdiction currently accounts for almost one of every four civil cases filed in the federal district courts, about one of every two civil trials, about one of every ten appeals, and more than one of every ten dollars in the federal judicial budget. The federal courts' diversity docket constitutes a massive diversion of federal judge power away from their principal function—adjudicating criminal cases and civil cases based on federal law.

> In the 12-month period ending 6/30/93, 15,864 diversity cases—
>
> 31 percent of the total number of diversity filings in that period
>
> —were filed as original actions by in-state plaintiffs.

This recommendation falls short of recommending total elimination of the diversity docket for a couple of reasons. First, most commentators believe that the federal courts should retain diversity jurisdiction in actions involving aliens or interpleader,[6] and that Congress should consider extending diversity jurisdiction in ways that could facilitate the efficient consolidation and resolution of mass tort litigation. Second, there are many who believe that the historical purpose of diversity jurisdiction—to protect against local prejudice in state courts—still has limited viability.

The recommendation seeks to accommodate the historical purpose of maintaining diversity jurisdiction in those cases in which the petitioner can clearly demonstrate local prejudice in the relevant state court.[7] The burden of demonstrating local prejudice would normally be high, with the effect being that the district court would have discretion to refuse to exercise juris-

5 304 U.S. 64 (1938).

6 28 U.S.C. § 1335 (1988).

7 This proposal should be contrasted with the 19th and early 20th century legislation that authorized removal of cases involving diversity of citizenship to a federal court upon a defendant's showing that justice could not be had in state court due to prejudice or local influence. See, *e.g.*, Act of Mar. 2, 1867, ch. 196, 14 Stat. 558; Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1087, 1094-95 (codified at 28 U.S.C. § 71 (1946)). When the judicial code (title 28, United States Code) was recodified in 1948, removal jurisdiction based on a showing local prejudice was eliminated because "[those] provisions, born of the bitter sectional feeling engendered by the Civil War and the Reconstruction Period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." 28 U.S.C. § 1441 Revision Notes (1988).

As contrasted with its earlier use—which *expanded* federal court jurisdiction because the ability of state courts to provide justice to non-residents was questioned—a new "local prejudice" standard for diversity cases would *limit* opportunities to litigate in federal court based on the opposite belief that state courts can and should provide just and efficient resolution of all cases arising under state law. Its adoption would restrict federal diversity litigation to the kinds of cases envisioned by the Framers when diversity jurisdiction was established in the Constitution.

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Diversity jurisdiction in the federal courts should be limited to actions involving aliens or interpleader, and those in which local prejudice in the state court is clearly demonstrated.

Pending complete elimination of general diversity jurisdiction, it should be limited by:

- eliminating in-state plaintiff jurisdiction
- exploring the possible elimination of federal appellate review in certain cases
- imposing higher or stricter amount-in-controversy requirements.

diction over many cases that satisfy the jurisdictional prerequisites of citizenship and amount in controversy.

These alternatives track the recommendations contained in the 1990 Report of the Federal Courts Study Committee.[8] They follow from the pragmatic instinct that eliminating most of the diversity docket may have to take place gradually over time.

■ RECOMMENDATION 7: The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts.

State court certification procedures benefit the federal courts by occasionally relieving them of the time-consuming task of deciding questions of law more wisely left—on federalism principles—to the states. In 26 states, the court of last resort has either mandatory or discretionary jurisdiction to consider state-law issues upon certification from a federal court. Although some of these states permit consideration of questions certified by either the federal court of appeals or the federal district court, others limit their courts' jurisdiction to questions certified by a district court. All 50 states should authorize the federal courts, both trial and appellate, to employ these procedures for obtaining authoritative interpretations of state law.

■ RECOMMENDATION 8: Congress and the agencies concerned should take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction, and to facilitate mediation and resolution of disputes at the agency level.

Implementation Strategies:

8a The adjudicative process for Social Security disability claims should be improved by establishing a new mechanism for administrative review of ALJ decisions and limiting the scope of appellate review in the Article III courts.

8b Agencies should be given the requisite authority and resources to review and, where possible, achieve final resolution of disputes within their jurisdiction.

The limited resources of the federal courts can be conserved, in part, by reducing the court time devoted to fact finding and review of administrative determinations that often turn primarily on factual issues. If administrative agencies are to screen and, where possible, resolve disputes before they ever reach a federal court, it may be necessary, in some instances, to expand and improve the agency process in terms of speed, accuracy, and completeness.

8 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-42 (1990).

Congress, for example, should enact legislation to improve resolution of disability claims under the Social Security Act, as proposed by Judge Joseph F. Weis, Jr. and two other dissenting members of the Federal Courts Study Committee.[9] That proposal contemplates a thorough administrative review of ALJ decisions by a "Benefits Review Board" similar to that used in black lung benefit cases, with full review of the Board's decision by the district court and discretionary review of questions of law by the courts of appeals and the Supreme Court.

Improvement is needed in other program areas, as well. The EEOC, for example, accords claims of employment discrimination only cursory review before issuing "right-to-sue" letters. If more careful administrative scrutiny were mandated, the number of EEO cases requiring federal court action might be reduced. Indeed, all agencies with jurisdiction over various kinds of disputes should be empowered and required to conduct more thorough review and encouraged to resolve disputes before they may be brought to the federal courts.

■ RECOMMENDATION 9: Where constitutionally permissible, Congress should assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.

In addition to strengthening the existing adjudicative processes of federal agencies,[10] Congress should empower agencies or Article I courts to adjudicate, in the first instance, those types of regulatory or benefit cases in which federal law is enforced through a civil action in district court that routinely involves substantial factfinding but does not implicate the right to a jury trial under the Seventh Amendment. This approach conserves judicial resources by providing Article III reviewers with an established evidentiary record and limiting the scope of review. Also, with a more streamlined mechanism for initial dispute resolution, it should be possible for agencies to enforce important federal mandates more expeditiously.

■ RECOMMENDATION 10: Congress should enact legislation to—

(a) prohibit agencies from adopting a policy of [redacted] to the precedent established in a particular federal circuit; and

(b) require agencies to demonstrate an extraordinary reason for relitigating an issue in an additional circuit when a uniform precedent has been established already in more than one court of appeals.

A policy of non-acquiescence to precedent established in a circuit, which some agencies, such as the Department of Health and Human Services, the Department of the Treasury, and the National Labor Relations Board, have sometimes followed, undermines the fundamental principle that an appellate court's decision on a particular point of law is controlling precedent for other cases raising the same issue. Indeed, apart from its questionable propriety and inefficiency, non-acquiescence is unfair to litigants, many of whom are pro se, who frequently are unaware of precedent favorable to their cases.[11]

Congress is urged to go beyond simply repudiating the policy of non-acquiescence. It should establish a stricter standard of appellate review that requires some additional showing—for example, change in societal or other relevant circumstances—before relitigating in another circuit an issue that has received the careful scrutiny and uniform interpretation by multiple (perhaps three or more) appellate panels.

9 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 58-59 (1990).

10 See Recommendation 8 *supra*.

11 See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 59-60 (1990) (discussing the problem of non-acquiescence).

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■ RECOMMENDATION II: Except with respect to enforcement of substantive federal requirements, Congress should refrain from providing federal agency or court jurisdiction over disputes involving economic or personnel relations or personal liability arising in the workplace. Existing federal jurisdiction in these matters should be eliminated in favor of dispute-resolution or compensation mechanisms available under state law.

Implementation Strategies:

IIa Congress should eliminate federal civil jurisdiction over work-related personal injury actions, such as that provided by the Federal Employers' Liability Act and the Jones Act, where the states have proven effective in resolving worker compensation disputes in other industries and occupations.

IIb The concurrent jurisdiction of the federal courts to adjudicate routine claims for benefits under ERISA employee welfare benefit plans should be abolished.

IIc Any new cooperative federal-state program to establish national standards for employee benefits (e.g., health care) should designate state courts as the primary forum for review of benefit denial claims.

Over the years, Congress has provided for federal administrative and court resolution of a variety of work-related disputes that involve essentially state-law questions. Rather than ensuring an expert, uniform interpretation and application of federal law, the availability of a federal forum in these cases suggests—erroneously—that state courts and agencies are inadequate to the task of providing fair, adequate remedies.

Early examples can be found in the Federal Employers' Liability Act (FELA) and the Jones Act—legislation that opened the federal courts to worker injury claims in the railway and maritime industries, respectively. These statutes were enacted at a time when workers' compensation schemes did not exist or were regarded as inadequate. That perception is no longer valid, and these statutes should be repealed, allowing claims by railway employees and seamen to be subsumed under state law or, where applicable, federally administered workers' compensation systems.

A similar situation exists with respect to certain litigation arising under the Employee Retirement Income Security Act of 1974 (ERISA). In addition to providing exclusive federal court jurisdiction to enforce fiduciary obligations, plan funding and vesting requirements, and other congressional mandates—most of which apply exclusively to pension plans—ERISA allows participants and beneficiaries of employee welfare (*e.g.*, health insurance and severance pay) plans to bring actions in either federal or state court to recover benefits due under the terms of the plan and to enforce or clarify plan terms.[12] Resolution of those cases turn, not on the substantive provisions of ERISA or its underlying regulations, but on principles of contract and trust law developed from state legislation and common law. Under a system of judicial federalism, the federal courts should not be involved in the adjudication of

During the statistical year ending September 30, 1993, 10,536 ERISA actions, 2,149 FELA actions, and 2,601 maritime (including Jones Act) actions were filed in the district courts. In the same year, civil filings in those courts totalled 229,850.

12 *See* 28 U.S.C. § 1132(a), (d) (1988).

disputes that do not require their particular expertise in the interpretation and application of federal law.

The same holds true for any national health insurance or other employee benefit program that Congress may establish in the future. Apart from cases in which specific federal requirements (*e.g.*, any prohibition on discriminatory administration of plan benefits) are at issue, a state court should be the sole forum for litigation of routine claims relating to benefit entitlement.

Confronting the Effects of Allocating Jurisdiction

Impact of Legislation

■ RECOMMENDATION 12: When legislation is considered that may affect the federal courts directly or indirectly, Congress should take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for the federal courts.

New criminal legislation inevitably imposes financial and other burdens on the judicial branch associated with the investigation, prosecution, resolution, and punishment of those offenses. While judges feel these burdens directly, it is other parts of the judicial system—probation and pretrial services officers, public defenders and panel attorneys, and court reporters, interpreters, and clerks—who are most affected. Likewise, the enactment of new civil causes of action produces additional costs to the courts when litigation is brought to assert or defend newly created rights.

During the past quarter century, Congress—through new legislation—and the courts—through statutory interpretation—have both contributed to an enormous expansion of private rights of action. For example, federal court jurisdiction has been expanded through more than 200 pieces of legislation in 25 years.

Key examples include:

- Freedom of Information Act Amendments and Privacy Act of 1974
- Employee Retirement Income Security Act of 1974
- Age Discrimination in Employment Act of 1975
- Civil Rights Attorney's Fee Awards Act of 1974
- Comprehensive Environmental Response, Compensation and Liability Act of 1980
- Equal Access to Justice Act
- Civil Rights of Institutionalized Persons Act
- Comprehensive Crime Control Act of 1984 (including Sentencing Reform Act)
- Americans with Disabilities Act of 1990
- Family and Medical Leave Act of 1993
- Violent Crime Control and Law Enforcement Act of 1994

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Although some of the increases in workload are also attributable to interpretations of legislation by the courts themselves, the ultimate policymaking authority lies with Congress. If the same institution that provides a budget for the federal courts is required to take the costs associated with jurisdictional and procedural changes into account, workload may be allocated to the federal courts in a more reasoned, responsible manner.

Beyond jurisdictional expansions, Congress has imposed specific deadlines for judicial action and other procedural or reporting requirements—*e.g.*, the Speedy Trial Act of 1974 and the Civil Justice Reform Act of 1990—that require the courts to shift priorities, hold additional hearings or other proceedings, and alter methods of case management. Although these statutory mandates do not create new workload as such, they profoundly affect the allocation of judicial time and other resources.

Since 1991, the Administrative Office has supplied Congress with judicial impact statements on legislation potentially affecting federal court workload and budgets. This process should be continued in the hope that reminding legislators of the cost of their policy initiatives will result in fewer and more tailored expansions of federal jurisdiction, and a recognition that the courts cannot carry additional burdens without concomitant resources.

■ RECOMMENDATION 13: In considering measures that would shift jurisdiction away from the federal courts, Congress should also consider and address the impact of the proposed legislation on the states. Specifically—

(a) there should be consultation with state authorities in defining any new limits on federal jurisdiction; and

(b) federal financial and other assistance should be provided to state courts, prosecutors, and agencies to permit them to handle the increased workload that would result from the reduction or elimination of existing federal court or agency jurisdiction.

As explained above, cooperation between federal and state authorities (legislative, executive, and judicial) is essential to judicial federalism—to maintaining the "harmonious and consistent WHOLE" that Hamilton envisioned.[13] The purpose of limiting federal jurisdiction is to preserve *both* the distinctive role of the federal courts *and* the critical role of the state courts as general dispute-resolution forums. If both ends are to be achieved, no reduction in federal jurisdiction should be undertaken without also ensuring the states' capacity to handle the extra burden. This requires both effective federal-state communication[14] and a commitment by Congress to provide states with the necessary financial resources.

Growth of the Article III Judiciary

■ RECOMMENDATION 14: The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise the jurisdiction conferred on the federal courts.

Implementation Strategies:

14a The limited jurisdiction of the federal courts should be preserved as described in Recommendations 1 through 11.

14b The Judicial Conference should employ up-to-date, comprehensive methods to evaluate judgeship needs.

13 THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961); see Chapter 1 *supra*.

14 See Chapter 9, Recommendation 97 *infra*.

14c The need for additional judgeships should be reduced through operational improvements in the courts that increase efficiency without sacrificing either quality in the judicial work product or access to the remedies available only in a federal forum.

In 1950, there were 65 authorized judgeships in the geographic courts of appeals and 221 authorized district judgeships. By 1990, those figures had grown to 167 circuit judgeships (a 257 percent increase) and 649 district judgeships (a 297 percent increase).

During the same 40 years, annual district court filings increased by 128 percent on the criminal docket and nearly 400 percent on the civil docket. Annual court of appeals filings increased by 1,445 percent.

In response to an ever-increasing judicial workload, some (including legal scholars, representatives of the bar, and, at times, the federal judiciary itself) have seen additional judgeships as the key to ensuring continued access to federal justice. The potential risks of that approach, however, should not be ignored. While no available data indicate a precise point at which the federal judiciary would reach the "feasible limits on its growth," it is apparent that unlimited increases in Article III judgeships are far from being a complete (much less an appropriate) answer to workload pressures. To the contrary, a future of unrestrained growth would alter irrevocably the nature of the judicial institution and impose a substantial burden on the federal treasury in terms of additional costs for support personnel, logistical support, and space and facilities.

It has also been suggested that the most effective means of curbing growth in the federal judiciary would be an inflexible "cap" or "ceiling" on the number of Article III circuit and district judgeships. While that approach may be meritorious in theory, it would not allow the federal courts to maintain both the excellence for which they are known and appropriate access to federal remedies. Any specific limit would be artificial and of questionable utility in deterring the legislative and prosecutorial policies that increase the workload of the federal courts.

The best strategy for ensuring both access and excellence is to tread a middle path that rejects unlimited expansion yet avoids a policy of zero growth. Although this path may be followed in large part by controlling expansion of federal court jurisdiction, there must also be restraint in the creation of new judgeships. The court system must evaluate its judicial resource needs using formulas and standards that are current and take into account all relevant data and factors. Additional judgeships should be requested only after other appropriate alternatives have been exhausted, including improvements in case management and reallocation of existing resources.

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Chapter 5
Structure

THE federal courts function effectively under their present structures, but major problems loom on the horizon if judicial workloads continue to grow. Projections based on currently available data show that the volume of cases adjudicated in the district courts and courts of appeals will continue to rise in the foreseeable future. As discussed in Chapter 3, there is debate on how steep this rise will be and how quickly it will occur. The recommendations in this chapter are premised on an anticipated future of relatively limited growth in size and workload for the federal courts. In that scenario the courts' mission can be achieved without compromising the core values underlying the systems of trial and appellate justice.

There is, however, the possibility that the federal courts will not find it possible to avert a dramatic increase in caseload and a substantial need for additional judges, support staff, space and facilities. If that occurs, the quality of the courts' process and product will be put at risk. Measures must be taken, in that event, to preserve a viable system of justice, and the present structure and function of the federal courts may have to be reevaluated, as outlined in Chapter 10.

United States district courts, which include the United States bankruptcy courts, function to secure the just, speedy and inexpensive determination of every controversy brought before them. In the federal system, they are the fact-finders and first-line dispute resolvers.

United States courts of appeals perform two primary functions, often described in shorthand as "error correction" and "law declaration." Review for error typically focuses on whether the first-level decision-maker applied the correct law to the facts of the case and whether there were any procedural errors that fatally infected this process. Law declaration focuses on stating a rule of law for future cases and the goal of treating like cases alike.

Federal courts can best accomplish these functions when they are structured in a manner that facilitates access for citizens, affords procedural fairness, ensures the correctness of individual decisions, promotes the consistent, accurate application of federal law, and maintains the independence of judges to decide matters before them. Because it concludes that the federal courts are presently structured in a manner generally appropriate to carry out their functions,[1] the plan recommends no major structural changes for the near term.[2] Proposals made in this plan address certain problems that exist and problems anticipated if present trends continue. Because such problem areas lie principally in the appellate courts, this chapter addresses the organization of the appellate function first.

1 In reporting on the "problems and issues currently facing the courts of the United States," *see* Federal Courts Study Act, Pub. L. No. 100-702, § 102(b)(1), 102 Stat. 4642, 4644, the Federal Courts Study Committee (FCSC) neither identified the structure of the district courts as a problem area nor proposed any fundamental reorganization of the district courts. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

2 Although the FCSC recommended further study of structural alternatives for the courts of appeals, the ensuing Federal Judicial Center report concluded that the stresses imposed by "continuing expansion of federal jurisdiction without a concomitant increase in resources" were unlikely to "be significantly relieved by structural change to the appellate system at this time." JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 155 (Federal Judicial Center 1993).

Organization of the Appellate Function

Traditionally, appellate review in the federal court system has had four characteristics:

- access to at least one meaningful review for litigants aggrieved by a decision of a trial court, or federal agency
- review by a panel of three Article III judges
- consistent application of federal law
- appellate review performed by judges from the region in which the first-level tribunal sits.

At present, the greatest threat to the appellate system appears to be one of assuring the timely delivery of high-quality decisions in a growing number of appeals. The surging workload in the courts of appeals, increasing twice as fast as that of the district courts since 1960, has forced the courts of appeals to undertake procedural streamlining.

Table 8. Appeals Filed in the United States Courts of Appeals[3]

1960	3,899
1965	6,766
1970	11,662
1975	16,658
1980	23,200
1985	33,360
1990	40,898
1993	49,770

Among the measures adopted are various screening programs and other innovations that eliminate such traditional appellate processes as presentation of oral argument and preparation of an opinion that articulates fully the reasons for the court's decision. The courts of appeals have also greatly increased reliance on staff personnel.

These innovations have changed the face of federal appellate justice, some would say for the worse. Nonetheless, the plan assumes that the hallmarks of the federal appellate system remain:

- oral argument granted in appropriate matters
- cases decided with sufficient thought
- careful opinions produced in cases of precedential import after collegial deliberation.

The plan's recommendations are intended to ensure that these hallmarks are preserved. They have been developed after considering the views expressed and options discussed in the Federal Courts Study Committee report and the subsequent Federal Judicial Center report on structural alternatives for the courts of appeals.[4]

Courts of Appeals

■ RECOMMENDATION 15: The federal appellate function should be performed primarily in a generalist court of appeals established in each regional judicial circuit and in a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain specialized areas of law.

3 These figures exclude the Court of Appeals for the Federal Circuit and its predecessors, the Court of Customs and Patent Appeals and the Court of Claims.

4 McKenna, *supra* note 2.

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Federal judicial credibility and accountability are fostered when appellate judges are drawn primarily from the region they will serve. History suggests the value of maintaining regional connections between appellate judges and the trial judges whose decisions they review, and between appellate judges and the litigants whose cases are brought to the court. Regional courts of appeals should therefore continue as the bodies primarily responsible for reviewing the decisions of the district courts and other adjudicators whose decisions are now reviewable in the courts of appeals. Although the present geographical boundaries of twelve regional judicial circuits would not be what one might create if starting from scratch, the arrangement nevertheless has served the country well, and no problem has been identified that would be solved simply by wholesale redrawing of circuit boundaries. Indeed, that remedy would cause disruption to the bench and bar and create consequences that would outweigh any benefits gained.

The plan also rejects proposals to create new specialized subject-matter courts in the judicial branch. Admittedly, there are benefits to be gained by centralized review of certain case types, particularly those involving areas of law in which national uniformity is crucial and the courts of appeals have taken significantly different approaches, or where the subject matter is so technical that specialized expertise is necessary to render high quality decisions. The experience with patent cases that led to the creation of the Court of Appeals for the Federal Circuit is illustrative of this situation.[5] Nevertheless, the often-stated dangers of judicial specialization in most instances outweigh those benefits, and the Federal Circuit is sufficient to serve the purposes of centralized review in the unusual circumstances in which centralization may be preferred. The principles underlying opposition to specialization are served, to some extent, by expanding Federal Circuit jurisdiction to include additional subject areas rather than creating a new specialized Article III appellate court.

Finally, except in the limited circumstances discussed under Recommendation 19 *infra*, this vision of the future rejects the notion of discretionary appellate review. To ensure the continued fairness and quality of federal justice, the principle of allowing litigants at least one appeal as of right should be upheld.

Circuit Size and Workload

■ RECOMMENDATION 16: Each court of appeals should be comprised of a number of judges sufficient to maintain access to and excellence of federal appellate justice. If a court becomes so large that its members cannot effectively preserve collegiality or master its precedents, the judicial circuit should be divided or its boundaries otherwise realigned to produce courts of appeals in which coherent, consistent bodies of circuit law can be maintained.

As explained in Chapter 4, preservation of a distinct system of federal courts requires a policy of "carefully controlled growth" in the Article III judiciary and limitations on federal jurisdiction that would permit such controlled growth. These general principles apply with special force to the courts of appeals.

Growth affects the courts of appeals differently from the district courts. The effectiveness, credibility, and efficiency of a court of appeals depend in part on its ability to function as a unified court. That, in turn, depends on norms of collegiality and the practical ability to observe those norms. Collegiality in the courts of appeals is critical to the quality of an appellate court's product as well as to the satisfaction of its judges. The ability of an appellate court to shape and maintain a coherent body of law depends in part on the sense of circuit judges that they speak for a unified court, not just for themselves. This sort of collegiality provides a stabilizing influence that may make radical shifts in the law of the circuit less likely. Collegiality may thus moderate the effects of growth to some extent.

5 Some matters now committed to the jurisdiction of the Court of Appeals for the Federal Circuit (*e.g.*, matters arising from the Court of Veterans Appeals) do not fall into the category of cases to which this rationale applies. This plan takes no position on whether those matters should be redistributed among the regional courts of appeals.

Unfortunately, growth may also diminish collegiality. The larger a court grows, the more difficult it is for its judges to become familiar with their colleagues' views. This may be a particular problem when new judges are added to courts in large groups. On the other hand, having too few judges on a court also endangers collegiality and quality, for the greater the workload pressures on the judges, the more difficult it is for judges to maintain essential professional and social contact with other members of the court.

In principle, each court of appeals should consist of a sufficient number of judges to maintain traditional access to, and excellence of, federal appellate justice, to preserve judicial collegiality and the consistency, coherence, and quality of circuit precedent, and to facilitate effective court administration and governance. An appellate "court," in this special sense, is not a mere administrative unit. Nor should it consist of a large pool of strangers—like a jury venire—who are essentially unknown to one another. Rather, a "court" is a cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading and being persuaded. An appellate tribunal in this sense becomes an institution—an incorporeal body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring its predictability), and adjudicating cases in a manner reflecting all of these values.

If a court gets so large that it cannot meet this standard, it needs to be divided or realigned. However, circuit restructuring should continue to be, as it has been, a rare event undertaken only when necessary to permit the courts of appeals to fulfill their mission of providing litigants access to coherent, consistent decisions on issues of federal law.[6] Changes proposed to rectify the problems must be considered in the light of the disruption of precedent and judicial administration that such changes generally entail.

■ RECOMMENDATION 17: To the extent practicable, workload should be equalized among judges of the courts of appeals nationally.

Given the present national commitment to the right to one appeal, the caseloads of the courts of appeals are effectively beyond the control of the federal judicial system, and caseload fluctuations among circuits cannot be predicted with confidence. Accordingly, it is pointless to attempt realignment of the courts of appeals to achieve equal workloads with equal numbers of judgeships, either by circuit restructuring or by attrition.

Instead, equalization of appellate workload can be fostered by applying improved workload measures or some other appropriate formula to determine future judgeship needs. Where necessary, short-term equalization of workload can be achieved through flexible arrangements for temporarily assigning circuit judges to assist courts of appeals in other circuits.

6 Apart from the division of the Eighth Circuit (creating the Tenth Circuit) in 1929, and the division of the Fifth Circuit (creating the Eleventh Circuit) in 1981, the present arrangement of judicial circuits has endured since 1866. Nevertheless, realigning the states and territories in different combinations is not a novel idea: early in the nation's history, the New England states and New York comprised a single circuit and, since 1789, Congress has made 11 major changes to circuit boundaries (*i.e.*, in addition to adding new states to existing circuits.)

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Resolution of Intercircuit Conflicts

■ RECOMMENDATION 18: The United States Supreme Court should continue to be the sole arbiter of conflicting precedents among the courts of appeals.

The current empirical work on the number, frequency, tolerability, and persistence of unresolved intercircuit conflicts (*i.e.*, those not heard by the Supreme Court) demonstrates that intercircuit inconsistency is not a problem that now calls for change.[7] At the present time, the Supreme Court appears to be capable of resolving significant splits in the judicial circuits with reasonable promptness. Until such time as this situation seriously worsens, it appears that expanding the system's capacity for conflict resolution would entail more costs than benefits to the system. For that reason, the plan rejects proposals to reduce intercircuit conflicts by consolidating the present circuits into a few "jumbo" circuits, by creating new structures such as an intercircuit tribunal or a new tier of federal courts, or by allowing the Supreme Court to refer cases presenting conflicts to a court of appeals not involved in the conflict.[8]

Review of Administrative Proceedings

■ RECOMMENDATION 19: Ordinarily, the decisions of administrative agencies and Article I courts should be reviewable directly in the regional courts of appeals. In certain proceedings where evidentiary support for agency factual findings typically is the predominant issue (e.g., Social Security disability claims), the district court is an appropriate forum if further review by the court of appeals is permitted on a discretionary basis.

As explained in Chapter 4 (see Recommendation 9 *supra*), limited court resources can be conserved by relying on administrative agencies and Article I courts to adjudicate, in the first instance, claims for benefits and other fact-intensive issues arising under federal law. In such cases, both the trial function and the first level of appellate review should be conducted in an administrative or Article I judicial forum.

Except for the rare circumstances in which a specialized forum for review is appropriate (see Recommendation 15 *supra*), decisions of administrative agencies and Article I courts should be reviewable primarily in the regional courts of appeals. Where review of agency factual findings typically is the predominant issue (*e.g.*, Social Security disability claims), the district court can be the appropriate forum (see Chapter 4, Recommendation 8 *supra*). No new specialized Article III court should be created for review of agency action or Article I court decisions.

Only one level of Article III review should be available in these cases as a matter of right. Therefore, further review by a court of appeals should be available only on a discretionary basis if the case has already been considered by a district court.

7 *See* Arthur D. Hellman, Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem (Draft Final Report to the Federal Judicial Center, Sept. 1994).

8 But see Chapter 4, Recommendation 10 *supra* (proposing that federal agencies be limited statutorily from seeking intercircuit conflicts through relitigation in multiple courts of appeals).

Appeals in Bankruptcy Cases

■ RECOMMENDATION 20: Final orders of bankruptcy judges should continue to be reviewable by Article III judges in the district court, with further review available only at the discretion of the court of appeals for significant questions of law or public importance.

There are two methods of appeal from final orders of bankruptcy judges.[9] The first is by appeal to the district court. The second is by appeal to a bankruptcy appellate panel ("BAP"), if one has been established by the circuit council. Appeals as of right from either of those forums are to the courts of appeals, with discretionary review thereafter possible by the Supreme Court.[10]

Some have argued that this two-tier system of appellate review promotes unnecessary delay without any meaningful corresponding benefit and have suggested moving to a single system of review by courts of appeals.[11] Empirical evidence, however, suggests that a two-tier appeals process may not be a problem in most cases. A recent review of the process by the Federal Judicial Center indicates that 73% of bankruptcy appeals in the district courts were disposed of with little or no judicial involvement. Moreover, appeals were handled more expeditiously in the district courts than in the courts of appeals: an average of 145 days in the district court versus 245 days in courts of appeals.[12] Finally, preserving an initial review at the district court (except when a BAP exists and the parties agree to that forum) is consistent with the bankruptcy court's configuration as a unit of the district court, and with the consequent authority of district judges to review bankruptcy judge decisions.

■ RECOMMENDATION 21: Where the parties stipulate or other circumstances make it expedient, final orders of the bankruptcy court should be reviewable directly in the court of appeals if the district court certifies the issue(s) to be reviewed and the court of appeals grants leave to appeal.

There are bankruptcy cases in which direct review by the court of appeals is appropriate. One example is when there is a conflict of law within a district. Another is when the stakes are sufficiently high that the parties will exhaust the entire panoply of their appellate options and yet an expeditious determination is essential to the success of the overall bankruptcy case. As noted, the average appeal resolution times for both the district courts and courts of appeals are long. Providing some mechanism to short-cut the process in appropriate cases is essential. Finally, direct appellate review can also be appropriate when the parties agree to bypass an appeal in the district court, subject to certification and leave to appeal as described above.

Appeals of Magistrate Judge Decisions

■ RECOMMENDATION 22: Judgments entered in civil cases where the parties have consented to the case-dispositive authority of a magistrate judge should be reviewable only in the courts of appeals, and not by a district judge.

9 28 U.S.C. § 157(b)(1), (c) (1988).

10 *See* 28 U.S.C. § 158 (1988 & Supp. V 1993).

11 *See* Final Report and Recommendations of the Long-Range Planning Subcommittee of the Judicial Conference Committee on the Administration of the Bankruptcy System 16-17 (June 1, 1993).

12 Memorandum from Fletcher Mangum, Federal Judicial Center, to the Judicial Conference Committee on Long Range Planning (Dec. 23, 1993).

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In civil cases decided by magistrate judges with the consent of the parties, current law permits an appeal of the judgment either directly to the court of appeals or, if the parties agree, to a district judge followed by discretionary review in the court of appeals.[13] Although the latter route was intended as a less-expensive means of obtaining appellate review, its existence tends to undermine the perception of magistrate judges as fully capable judicial officers to whom the district court entrusts important adjudicative functions.

To encourage full utilization of magistrate judges to relieve workload burdens in the district courts, review by a district judge should be eliminated as an alternative route of appeal in civil consent cases. The practical impact of this change on litigants should be modest: from 1992 through 1993, only 33 districts reported appeals to district judges in civil consent cases, with 25 of those districts having three or fewer such appeals and 18 having only one.

Organization of the Trial Function

The federal courts are committed to affording litigants access to just, speedy, and economical resolution of civil and criminal disputes. Adjudication in national, specialized tribunals is appropriate at the trial (*i.e.*, initial dispute resolution) level in limited subject areas, such as certain tax litigation, contract claims against the federal government, and matters involving international trade. Bankruptcy proceedings are properly conducted in the first instance by judges who specialize in that field. With those exceptions, however, the traditional allocation of original jurisdiction to generalist trial courts organized on a geographic basis should be preserved. Public confidence in and respect for the federal judiciary is best fostered when justice is dispensed and administered by judges, jurors, and other court officials drawn from the geographical region served by the court. Moreover, to ensure continued access and quality in federal justice, it is important that court organization and procedures be made more efficient and flexible as workload demands increase.

District Courts

■ RECOMMENDATION 23: Except in certain limited contexts (i.e., bankruptcy proceedings, international trade matters, and claims against the federal government), the primary trial forum for disputes committed to federal jurisdiction should be a generalist district court whose judges are drawn from and reside in the general geographic region served by the court and whose facilities are reasonably accessible to litigants, jurors, witnesses and other participants in the judicial process.

The present system of generalist trial courts in the federal system has worked very well in practice and should be retained. Changes in the existing geographic arrangement of judicial districts should be focused on dealing with inefficient and inflexible allocation of judicial resources.

There are various approaches to improving resource allocation, including partial restructuring (as by consolidating existing districts within state borders or by redrawing district lines across borders where major metropolitan areas might be better served) and total restructuring (*e.g.*, all district, magistrate, and bankruptcy judges would be available at any time for service anywhere in the nation). Because of the key historical connection between state affiliation and district judge appointments and its proven fairness and effectiveness, a more extensive restructuring of the system is not appropriate at this time.

Consistent with our federal system and for reasons of credibility and accountability (*i.e.*, familiarity with local law and legal traditions), judges in the district courts should be drawn from the states they are appointed to serve. Although some may regard judges selected in this manner more as regional or local officials than as jurists chosen to interpret and apply national law, it is important to maintain a state-defined organization so long as local affiliations remain integral to the judicial selection process.

13 See 28 U.S.C. § 636(c)(3)-(5) (1988). Under FED. R. CIV. P. 73(c), review directly in the court of appeals is the normal route for appeals in these cases.

This does not mean, however, that the system should be wholly inflexible. As discussed below, the existing district boundaries and methods of organizing support functions should be examined to assess the extent to which merger or sharing of judicial and administrative resources would enhance capacity to meet workload demands. Also, the standards and procedures for assigning judges between districts should remain sufficiently flexible that judge power can be allocated wherever needed.[14]

District Alignment

■ RECOMMENDATION 24: The judicial districts should continue to be allocated among and within the states so that each district comprises a single state or part of a state.

By adhering to state boundaries, the current alignment of judicial districts comports with traditional concepts of federalism and reflects long-standing political conventions with respect to selection of candidates for judicial appointment. In the past, states have been divided into two or more judicial districts for reasons not necessarily related to the needs of judicial administration, and the current array of 94 judicial districts may not be the optimal arrangement for allocating work and resources at the trial level. Although combining districts may not be an option in states where geographic distances and other factors would make a single district court impractical, administrative redundancies might be avoided and existing judge power utilized more effectively if certain of the existing districts were combined.[15]

Districts with multistate or regional scope may be desirable in theory, but at this time the plan does not propose to create larger judicial districts with boundaries coterminous with the judicial circuits. A more gradual approach is preferable absent convincing evidence that such realignment would increase efficiency. In certain areas, however, administrative convenience and flexible resource allocation ultimately may compel organization of districts that include more than one state or an entire region.[16]

As a first step, consideration should be given to merging districts within states or, at least, merging judicial support functions between and among those districts.[17] In time, further consolidation may be appropriate but the advantages of larger court organization should be demonstrated first through statewide entities or smaller-scale consolidations.

■ RECOMMENDATION 25: The impact of district alignment on access to the courts and efficient judicial administration should be studied periodically. Where merger would produce administrative and/or cost efficiencies, multiple districts within a single state should be combined, if feasible, to form a single district or lesser number of districts within the state. In these larger districts, smaller geographic units should be maintained or established to administer functions for which more localized operation is appropriate.

14 See Chapter 8, Recommendation 61 *infra*.

15 An example of this may be found in Oklahoma, which currently is divided into three judicial districts. 28 U.S.C. § 116 (1988).

16 At present, one judicial district (Wyoming) includes territory of adjoining states—those parts of Yellowstone National Park located within Idaho and Montana. 28 U.S.C. § 131 (1988). Similarly, the District of Hawaii includes certain Pacific island territories that are not part of the state. Id. § 91. For purposes of legal uniformity and administrative efficiency, an exception to the principle of state-based districts should be retained in these cases and similar ones that may arise in the future.

17 In considering the alignment of districts within states, attention should be given to federal enclaves currently located within more than one district.

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The time has come to begin a serious and recurring inquiry into the optimal manner of organizing districts. Periodic study of existing districts within states and divisions within districts would make it possible to evaluate whether the current manner of organization aids or inhibits access to the courts and efficient judicial administration. Assessment of the continued need for more than one district in a state or divisions in a district should include input from each of the affected districts and coordination with pertinent representatives of the executive and legislative branches. Even if political considerations dictate retention of most of the present district boundaries, serious consideration should be given to merging at least those smaller districts within states where adjudicative and administrative efficiencies can be realized.

This general emphasis on organizing the courts on a larger geographic basis does not mean that functions such as jury selection should not be administered more locally. Where local administration is appropriate, smaller administrative units could still be established for limited purposes within a statewide or larger court. For example, such units might be used to accommodate the special challenges and needs faced by courts in large metropolitan areas. Likewise, it may be desirable for districts to share administrative support functions (e.g., probation and pretrial services) without altering district boundaries.

Bankruptcy Courts

The 1978 Bankruptcy Reform Act[18] assumed that all bankruptcy matters should be handled expeditiously by a specialized bankruptcy court. Although the Supreme Court in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*[19] later held that the Act's jurisdictional scheme extended unconstitutionally the exercise of Article III power to non-Article III courts, the principle that the nature and complexity of bankruptcy require judges who have substantial expertise in the field has gone unchallenged. The Bankruptcy Amendments and Federal Judgeship Act of 1984,[20] for example, which attempted to address the constitutional infirmities of the 1978 Reform Act, nevertheless sought to do so in a way that would promote the efficient resolution of all bankruptcy matters by a corps of experts, the bankruptcy judiciary. The following recommendations attempt to further that basic premise.

■ RECOMMENDATION 26: Each district court should continue to include a bankruptcy court consisting of fixed-term judges with expertise in the field of bankruptcy law.

Implementation Strategies:

26a The bankruptcy court should exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible.

26b Congress should be encouraged to clarify the authority of bankruptcy judges to conduct appropriate proceedings (e.g., jury trials) in bankruptcy matters.

Serious constitutional and statutory questions remain regarding the bankruptcy courts' authority. At this juncture, however, most of those questions—particularly constitutional ones—are largely speculative. Despite these jurisdictional uncertainties, the bankruptcy system continues to work well. Therefore, no major changes are needed other than to urge Congress to clarify jurisdictional issues (such as the issue whether the bankruptcy courts have statutory authori-

18 Bankruptcy Reform Act of 1978, Pub L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1501 and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993)).

19 458 U.S. 50 (1982).

20 Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 11 U.S.C. §§ 101-1501 and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993).

ty to conduct jury trials). Jurisdictional lines in bankruptcy, as elsewhere, need to be made clear and bright, and the bankruptcy courts must continue to exercise pervasive jurisdiction over matters affecting the debtor's bankruptcy.

■ RECOMMENDATION 27: If jurisdictional difficulties of a constitutional nature make efficient resolution of bankruptcy matters impossible in the bankruptcy courts, then the question of whether some or all bankruptcy judgeships should have Article III status should be considered.

If serious jurisdictional difficulties arise in the future because bankruptcy judges do not enjoy "good behavior" tenure and guaranteed compensation under Article III of the Constitution, Congress should consider reestablishing some or all bankruptcy judgeships with Article III protections to make the bankruptcy court a viable, efficient forum for the resolution or restructuring of debtors' estates. This follows from the basic premise that for bankruptcy to be a fair and efficient system, there must be specialized courts with plenary authority over all bankruptcy matters.

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Chapter 6
Adjudication

ADJUDICATION is the raison d'être of the federal court structures discussed in Chapter 5. Adjudication encompasses a number of different functions, from managing the preliminary phases of cases and appeals to conducting proceedings, making decisions and overseeing their implementation. Federal courts will be challenged in the years ahead to manage their increased caseloads efficiently and effectively while satisfying the interests of justice. Tensions among several sets of competing values will confront the courts at every turn as they design and implement new case management methods. They will have to balance consistent results against individualized justice, national uniformity against local variation, law declaration against dispute resolution, the overall generalist's approach against more specific subject-matter expertise, and excellence against delay.

As the federal courts approach the 21st century, it is clear that growing court caseloads, limited resources, emerging technology, and a changing population will require changes in the way justice is delivered. The extent and degree of the necessary changes, though, are unclear at this point. Given this uncertainty, as well as the lack of relevant data to show the impact of many possible changes, the plan proposes that a spirit of careful experimentation and innovation be fostered in order to assist the judiciary and Congress in shaping the future of the justice system.

Innovations in appellate and district court case management and decision making normally should be tested by individual courts on a pilot basis before they are applied nationally. Where feasible, pilot projects should be coordinated and evaluated by the Judicial Conference. By pursuing this approach of careful innovation and evaluation, different courts may experiment with a variety of programs to cope with caseload problems and create better ways to deliver justice. The judiciary, moreover, will be able to measure what works and what does not, before it endorses national initiatives.

Wherever feasible, the courts should conduct pilot programs that do not require new statutory authority or congressional approval. In the event that the pilot programs instituted under the judiciary's own authority are not adequate to address a particular need, authority should be requested from Congress to institute more ambitious pilot programs. The range of experimentation in the judiciary should be broad, and the appropriate committees of the Judicial Conference of the United States, along with the judicial councils of the respective circuits, the Administrative Office, and the Federal Judicial Center, should assist in crafting the pilot programs so that a variety of techniques and procedures are tested and analyzed throughout the nation.

The topics discussed below are clearly not an exhaustive list of the possibilities for continued innovation. All the issues discussed—rules and procedure, criminal sentencing, juries, pro se litigation, costs of litigation, and case management techniques in appellate and district courts—emerged as the planning process evolved. Future editions of the long range plan should target additional areas and issues.

Rules of Practice and Procedure

■ RECOMMENDATION 28: National and local rules of practice, procedure, and evidence for the federal courts should be adopted and, as needed, revised to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation.

Implementation Strategies:

28a Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.

28b The national rules should strive for uniformity of practice and procedure, but individual courts should be permitted some flexibility to account for differing local circumstances and to experiment with innovative procedures.

28c In developing rules, the Judicial Conference and the courts should seek significant participation by representatives of the bar.

Under the Rules Enabling Act of 1934,[1] the Supreme Court prescribes nationally applicable rules of practice, procedure, and evidence for the federal courts based on recommendations from the Judicial Conference of the United States. The Conference is specifically charged by the Act with drafting and recommending rules that "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[2]

Rule making under the Act proceeds in an exacting and meticulous manner, assuring broad-based consideration of the rules and taking into account the needs of the justice system and the public as a whole. Proposed amendments to the rules receive fresh and thorough review at several levels—by the respective rules advisory committees, through public comments and hearings, by the Standing Committee on Rules of Practice and Procedure, by the Judicial Conference itself, and by the Supreme Court. The amendments are then submitted to the Congress, which has the opportunity to amend, reject, or defer any of the rules.

The rules procedure is perhaps the most thoroughly open, deliberative, and exacting process in the world for developing substantively neutral rules. "Neutral" describes rules that cause cases to be resolved impartially, *i.e.*, on findings of fact that are as close to the truth as it is reasonably possible to make them and that follow the law, as interpreted and applied with fidelity to the Constitution, statutes, and precedents.

It is troubling, therefore, that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act. The openness of the rule making process ensures that all interested persons have an opportunity to identify and comment on drafting ambiguities and potential problems. It is essential that the bench, the bar, and the Congress do their best, working together—as intended under the Rules Enabling Act—to keep procedural rules substantively neutral and fair.

The federal rules are designed to establish an essentially uniform, national practice in the federal courts. Nevertheless, they authorize individual courts to prescribe legitimate local variations in practice and procedure through local court rules that are "not inconsistent" with the national rules. Members of the bar have complained about the proliferation of local rules imposing procedural requirements. Moreover, the Civil Justice Reform Act of 1990 has encouraged each district court to engage in

1 28 U.S.C. §§ 2071-2077 (1988).

2 28 U.S.C. § 331 (1988).

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its own procedural experimentation and impose additional case management requirements. Accordingly, it is difficult for lawyers, particularly those with a national practice, to know all the current procedural requirements district by district.

Although some local procedural variations are clearly appropriate, the long-term emphasis of the courts—at the conclusion of the period of experimentation and evaluation prescribed by the Civil Justice Reform Act—should be on promoting nationally uniform rules of practice and procedure, wherever feasible.

The bar should be an active partner in the rule making process. Effective participation by the bar is essential, both through membership of practicing attorneys on the rules committees and the willingness of attorneys and bar associations to suggest and comment thoughtfully on proposed amendments to the rules.[3]

Sentencing in Criminal Cases

Sentencing of criminal defendants upon conviction is perhaps the single most important area in which the federal courts experience the tension between the competing goals of uniform practice and attention to individual circumstances. Congress created the United States Sentencing Commission in 1984 and charged it with formulating sentencing guidelines as a means of avoiding sentencing disparities among similarly-situated criminals convicted of the same crime. Some of the Commission's attempts to carry out its mandate—and the interest that Congress has shown in creating harsher criminal penalties that limit judges' sentencing discretion—have led many judges to question whether the current sentencing scheme adequately takes into account individual circumstances.

■ RECOMMENDATION 29: The Judicial Conference should continue and strengthen efforts to express judicial concerns about sentencing policy.

Sentencing policy has been and will inevitably continue to be a focus of federal crime legislation and policy making. Despite major changes in the criminal justice system at both federal and state levels, there is continuing public demand for harsher sentencing policies.

The continuing challenge for the federal courts is to ensure that legislation and sentencing guidelines reflect sound public policy while taking into consideration the impact on court resources. In the emotionally charged area of criminal justice, both the unique perspective and expertise of judges and the relevant data collected by the courts should be brought to bear in developing positions that will serve the public interest in criminal sentencing and judicial administration.

■ RECOMMENDATION 30: The legal standards for criminal sentencing should encourage both uniformity of practice and attention to individual circumstances.

Implementation Strategies:

30a Congress should be encouraged not to prescribe mandatory minimum sentences.

3 At the time this plan is being written, the Standing Committee is in the midst of a comprehensive study of the rule making process. As a result, several steps have been taken to enhance bar participation by increasing bar membership on the rules committees, expanding rules publications and education efforts, adding more attorneys and organizations to the mailing lists, increasing rules committee contacts with the bar, inviting state bar associations to appoint coordinators to the rules committees, and undertaking more empirical studies to measure the impact of the operation and effect of the federal rules on the bar and litigants. The Standing Committee should continue and expand these outreach efforts to the bar.

30b The United States Sentencing Commission should be encouraged to develop sentencing guidelines that—

(1) afford sentencing judges the ability to impose more alternatives to imprisonment;

(2) encourage departures from guideline levels where factual differences should appropriately be taken into account; and

(3) enable sentencing judges to consider within the guideline scheme a greater number of offender characteristics.

The sentencing regime of mandatory minimum penalties and sentencing guidelines has hampered the ability of federal judges to tailor appropriate sentences to the individual offender. Alternatives to imprisonment, community service or home confinement are underused, especially for non-violent first offenders. The average time served for all types of crimes has increased while the proportion of offenders sentenced to probation without confinement has fallen.

Although the guidelines were intended to eliminate the evil of disparate sentencing caused by inconsistency, they have only replaced it with a new disparity born of uniformity, where offenders who are different in relevant ways are often treated the same.[4]

Indeed, the Sentencing Reform Act recognized that flexibility in sentencing is needed. The Act authorizes judges to depart from the guidelines when factors are present of a type or to a degree that the Sentencing Commission did not anticipate.[5] Most importantly, Congress granted the sentencing judge the authority to determine whether or not the Commission had adequately taken into account relevant factors in determining a guideline sentence. To ensure that this authority did not confer unlimited discretion, Congress made sentencing decisions subject to appellate review.

Despite these safeguards, the impression remains among judges that departures from guidelines are suspect and should be made only in extreme cases. The Sentencing Commission has contributed to this impression through language in the guidelines manual that is interpreted to discourage departures, and by repeatedly amending the guidelines to eliminate from future consideration those factors on which departures from guideline levels have been based. The Commission should encourage, not discourage, departures in appropriate cases in the interests of justice. More broadly, it should adopt guidelines that permit judges to take into account a greater number of offender characteristics and impose more alternatives to incarceration.

The Jury System

■ RECOMMENDATION 31: All aspects of the administration and operation of the jury system—grand juries, criminal, petit, and civil—should continue to be studied and improved in the interests of promoting justice and fairness.

4 See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992); Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

5 *See* 18 U.S.C. § 3553 (1988).

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The continued vitality of the federal jury system into the 21st century will require great sensitivity by courts and legislatures to the changing characteristics, needs, and expectations of the American public. Enshrined as a fundamental right under the United States Constitution, the jury trial is a key element in the Anglo-American tradition of justice. Although juries have already received much attention in recent years,[6] every aspect of the operation of civil and criminal juries will require continued close analysis and repeated monitoring to ensure that the formation of jury wheels, selection of jury panels and individual juries, and the treatment and utilization of jurors during the period of their service, comport with high standards of fairness to the jurors and the parties who appear before them.

Much of the planning and administrative work that needs to be done will require close coordination of planners in the judiciary with experts in the fields of sociology, demography, and statistics. Special needs of jurors (*e.g.*, accommodation of hearing-impaired individuals) may need enhanced attention and respect. And all proposals for change must be thoroughly justified in terms of serving the needs of the public generally, so that there is neither the fact nor the appearance of responding to demands from special interests.

Improvements in administration and operation of the jury system should take into account four overlapping elements of the system and the environment in which it operates. First are the essential differences between criminal juries (grand and petit) and civil juries. The constitutional protections and functional roles of criminal and civil juries differ enough to warrant separate consideration in an assessment of the status and possible futures of lay fact-finding in federal litigation. Second, studies should review the major sub-systems of the jury system, including the mechanics of creating the master and qualified jury wheels,[7] summoning a jury panel for a case or a set of cases,[8] selecting the jury for a case,[9] and managing jury matters until the jury is discharged. Third, any innovations considered should comprehend that the role and significance of juries in federal court litigation in the future will change as the population of the nation becomes ever larger and more diverse while federal litigation becomes faster-paced and more complex. Finally, planning for changes in how and when juries are used must take into account the *appearance* of change as well as its substance, because the jury trial is a potent public symbol of the quality justice in America as well as a device for the disposition of court business.

Pro Se Litigation

■ RECOMMENDATION 32: Steps must be taken to confront the growing demands pro se litigation places on the federal courts.

Access to a court to present claims has been held to be a fundamental right. When the alleged deprivation of constitutional rights is attributed to actions by government agents, access to the courts to redress these violations is even more important. Congress enacted 42 U.S.C. § 1983 and related civil rights statutes to allow affected plaintiffs to bring their causes of action in federal court when they were deprived of rights under the Constitution or laws of the United States and there was no adequate remedy at state law. A significant number of these plaintiffs proceed pro se.

Implementation Strategies:

32a A broad-based study, with participation from within and outside the courts, should be conducted to evaluate the impact of pro se litigation and recommend changes.

6 In addition to efforts at the federal level, there have been state courts projects aimed at improving jury administration and operation. See, *e.g.*, JURORS: THE POWER OF 12—REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES (Sept. 1994) (containing recommendations on improving public awareness, juror summoning, jury selection, jury trial procedures, jury deliberations, and other juror-related policies).

7 See 28 U.S.C. §§ 1863-1866 (1988 & Supp. V 1993).

8 See 28 U.S.C. §§ 1866-1867 (1988).

9 See FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

Pro se litigation places great stress on the resources of the federal courts. A large proportion of recent caseload increases is due to pro se filings.[10] While these cases pose a numerical burden at the appellate level, the district courts face numerous practical difficulties in dealing with unrepresented litigants.

Most pro se cases are filed under 28 U.S.C. § 1915, which allows plaintiffs to avoid payment of filing fees and causes the court to direct service by the United States Marshals Service. The court must screen these cases to determine whether a plaintiff should be allowed to proceed "in forma pauperis" (IFP). Often, pro se IFP cases involve plaintiffs with claims of employment discrimination, denial of social security benefits, habeas corpus, or egregious conduct by governmental authorities other than prison officials. The great majority, however, are civil rights cases brought by prisoners alleging that conditions of their confinement constitute a deprivation of their civil rights. Filings of this type have continued to remain constant or increase, even in districts where the caseload has otherwise been reduced.

Additional statistical data on pro se litigation should be collected and studied to determine how much of the future caseload could be expected to result from pro se filings and to find better ways of addressing the disputes underlying these cases. Statutory changes may be necessary. In Chapter 9, this plan proposes creation of a permanent National Commission on the Federal Courts to study and make recommendations on a variety of issues affecting the judicial system.[11] That commission, which would include judges, representatives of the other two branches of government, and academic experts, would be an appropriate body to inquire into the growing problem of pro se litigation.

The importance of adjudicating meritorious cases suggests that significant jurisdictional changes and changes in case management techniques should be considered. A study of pro se litigation should also consider the issue of adequate funding for staff attorneys and law clerks, who are currently relied on to make initial determinations of which cases are meritorious compared to those that are frivolous.

32b Alternative avenues for pro se prisoner litigation should be explored.

Available data indicate that most of the prisoner pro se cases are brought by state prisoners. Federal prisoners have an extensive administrative procedure that often results in their obtaining some relief.

There are different categories of prisoner pro se plaintiffs. Many plaintiffs are illiterate, or at least unschooled, in legal practice. Some are in need of mental health counseling, while others have legitimate claims of assaults or medical needs that should be addressed immediately. Some are frequent filers, having upwards of 20 cases in court at one time. Occasionally, these plaintiffs are very sophisticated and adept at pleading practices, forcing the court to continue cases even on claims without any basis in fact or law. Although the obvious purpose of some filings is to harass prison or court authorities, other cases are brought merely to enable a plaintiff to confer with another inmate, or to travel outside the prison for a court hearing.

10 Statistics are limited with regard to pro se cases, although the Administrative Office continues to take steps to expand the range of data available. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 112 (1990) (recommending regular collection and reporting of pro se litigation data). In the district courts, prisoner petition filings increased in 66 of 94 districts between 1992 and 1993; approximately 53,500 prisoner petitions were filed in 1993, or 23% of all civil case filings.

In the courts of appeals approximately 17,700 pro se cases were filed in the year ended September 30, 1993, constituting over 35% of all filings in those courts. Prisoner petitions represented approximately 63% of these pro se filings. Although the Supreme Court does not separately track pro se or prisoner filings, 4,240 in forma pauperis (IFP) petitions were filed in 1992, accounting for 2/3 of all certiorari petitions.

11 See Chapter 9, Implementation Strategy 96d *infra*.

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Changes in state law or procedures may well exacerbate the litigation pressure. Many states are implementing procedures to lengthen the time spent in prison before an inmate is eligible for parole or to eliminate parole entirely for certain kinds of crimes or numbers of convictions. Increasingly violent prison populations in overcrowded conditions are likely to increase (1) the number of inmate-on-inmate assaults and resulting claims of deliberate indifference by prison authorities, (2) actions by guards alleged to violate the cruel and unusual punishment clause, and (3) claims for deprivations of due process following prison misconduct incidents. Currently these disputes are all resolved by filing a case in a federal court.

Maintaining the federal courts as a forum of limited jurisdiction requires that changes be made in the manner in which prisoner pro se claims are handled. States should be encouraged (financially, if feasible) to provide a means of reviewing claims of abuse of due process, deliberate indifference to medical needs, or other conduct in violation of constitutional prohibitions. It is anticipated that fewer pro se filings will occur where such changes are effectuated.[12] The privilege of filing in forma pauperis should be protected, but guarded from abuse. Consideration should also be given to furnishing legal services to aid in the screening and drafting of prisoners' complaints.

32c The courts should develop workable standards for addressing the substantive and procedural problems presented by pro se prisoner litigation.

Although all pro se claims are processed through the system in some manner, they receive at the same time too much attention—because staff attorneys, clerks, magistrate judges and district judges must review them—and too little attention—because sheer volume renders court personnel unable to afford them sufficient attention until significant time has passed (assuming that the claim is clearly drafted, which it often is not). Determining meritorious claims is sometimes a classic needle in the haystack search.

In the near term, the courts must continue to develop more effective and efficient case management systems for adjudicating pro se litigation. The creation of a workable system is affected by and includes several factors: the jurisprudential standards set by the court of appeals of the circuit for dismissal as frivolous under 28 U.S.C. § 1915(d), the number of prison inmates in the state or district court, whether the state has a death penalty, the statute of limitations for § 1983 claims (currently the state personal injury statute of limitations), whether the state has a statute which tolls any statute of limitations for a person who is incarcerated, and the jurisprudential standards applicable to frequent filers.

Costs of Litigation

■ RECOMMENDATION 33: The federal court system should study possible shifting of attorneys' fees and imposition of user fees in particular categories of cases.

In assessing how the federal courts may continue to provide access to all who seek their justice, the judicial system will benefit from further consideration of the subject of attorneys' fees, the shifting of other costs of litigation, and the imposition of court costs. Whether fees should be shifted, or costs imposed, based on the outcome of a case, has been an intensely controversial issue for many years. Appropriate data are needed to assess the potential impact of fee and cost shifting on users of the federal courts.[13] While the plan rejects the "loser-pays" rule for shifting attorneys'

12 42 U.S.C. § 1997e authorizes federal district courts to require exhaustion of prison administrative grievance procedures in state prisoner cases brought under 42 U.S.C. § 1983 if the U.S. Attorney General certifies, and the district court determines, that the procedures are in "substantial compliance" with certain minimum standards prescribed in the statute. Congress should amend Section 1997e to eliminate the minimum standards and direct the district court to require exhaustion of state administrative remedies if either the court or the Attorney General "is satisfied that the remedies are fair and effective." *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 48 (1990) (recommending this statutory change); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 60 (Sept. 1990) (endorsing the FCSC recommendation).

13 A related issue of interest to the courts is how attorneys fees are paid. *See, e.g.*, Sarah Evans Barker, *How the shift from hourly rates will affect the justice system*, 77 JUDICATURE 201 (1994).

fees for all federal claims, it endorses experimentation with its use in certain federal cases. Evaluation of fee shifting to deter abusive litigation conduct should continue, but that device should be used only after consideration of the impact such action might have on open access to the courts.

The Need for Case Management

The challenges of broadened jurisdiction, rising caseloads, increased access, and a rigid sentencing process have magnified federal court workload to such an extent that the system now operates under severe strain in many courts. While striving to manage the impact of major increases in the criminal docket, the courts still seek to accomplish a fair and efficient outcome in every civil action—a goal reinforced by the requirements of the Civil Justice Reform Act of 1990 (CJRA).[14]

Special attention to managing the process of litigation may once have been necessary only in certain specialized categories of cases, especially complex litigation and mass tort claims. Indeed, trial judge involvement in overseeing complex litigation is well accepted.[15] The confluence of pressures on the federal judicial system, however, has made reliance on effective case management vital to the effective disposition of all types of cases at all levels in the system. The early involvement and active role of federal district judges "in the management of litigation" was credited by the Federal Courts Study Committee with explaining "the federal district courts' ability to keep abreast of their increased workload."[16] And the availability of magistrate judge to conduct pretrial and settlement proceedings, as well as trials, has made the magistrate judge system an indispensable tool to the district courts.

Although the central role of the federal district judge in effecting the appropriate pace of civil litigation has been clear to judges for many years,[17] case management has proven equally useful to appellate courts faced with increased case filings. Recommendations for dramatic structural change in the appellate courts have not been supported by objective data, but there clearly is a need to continue procedural experiments and innovations in the way the courts of appeals cope with their burgeoning caseloads, while maintaining the quality of justice.

Case Management in the Courts of Appeals

Unfortunately, the processes by which appeals are actually decided in each circuit are generally not well known, and they have not been sufficiently studied. In the text that follows, programs are discussed that would help address the current caseload and allow for the testing of procedural variations short of court restructuring. Ideally, all the techniques suggested would be selected by one or more circuits, so that the entire universe of possibilities could be canvassed.

■ RECOMMENDATION 34: The courts of appeals should exchange information on appellate case management.

Federal appellate courts have developed a variety of different case management systems.[18] It is important that the appellate courts take advantage of the varied experiences of other circuits by exchanging information about the operation and results of the use of particular case management techniques and systems.

14 28 U.S.C. §§ 471-482 (Supp. V 1993).

15 *See, e.g.*, AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY § 3.06, at 106-09 (1994); MANUAL FOR COMPLEX LITIGATION, Second §§ 20.1, 20.13 (1985).

16 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 99 (1990). The FCSC predicted that "[g]reater use of active case management, and development—in cooperation with the bar—of local plans to control cost and delay in civil cases, will be necessary to keep courts abreast of rising workloads and secure 'the just, speedy, and inexpensive determination of every action' promised by Federal Rule of Civil Procedure 1." *Id.*

17 *See* STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (Federal Judicial Center 1977).

18 *See* ROBERT A. KATZMANN & MICHAEL TONRY, EDS., MANAGING APPEALS IN FEDERAL COURTS (Federal Judicial Center 1988).

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This exchange might well be stimulated by more frequent intercircuit assignment, as now occurs frequently for senior judges. On a voluntary basis, it would also be beneficial for active appellate judges to observe first-hand how other courts handle their work.[19] The Administrative Office and the Federal Judicial Center should promote the growth of institutionalized means of enabling the appellate courts to make full use of this information.

■ RECOMMENDATION 35: The federal court system should collect and analyze information on various courts of appeals case management practices.

Providing access to meaningful review in the courts of appeal by a panel of three Article III judges does not imply that all cases merit the same procedures or level of judicial attention. To the contrary, many appeals can be handled effectively and fairly with a minimum of judicial attention.[20] Appeals that are exclusively fact-driven differ greatly from those that raise novel legal issues. Most appeals are disposed of without a decision on the merits[21] and many of those that require the attention of a three-judge panel do not require the full panoply of traditional appellate procedure such as oral argument and full briefing. Accordingly, evaluation of what appellate procedures are best suited to different types of cases or issues on appeal would be helpful in guiding efficient resource allocation.

Many streamlining efforts are underway today in the courts of appeals. New strategies are being explored for appeal diversion, appeal management, expanded use of non-judicial staff, restricted publication of opinions, and maintaining consistency of circuit law. Information about how the courts handle their workloads will be collected as part of an appellate case management study initiated by the Judicial Conference's Committee on Court Administration and Case Management. This is a worthwhile effort, since it is important that all appellate courts receive the benefit of the varied experiences of other circuits and exchange information about the operation and results of their use of particular case management techniques and systems.

■ RECOMMENDATION 36: The courts of appeals should adopt internal procedures and organizational structures to promote the effective delivery of high-quality appellate justice and to maintain the consistency of circuit law.

Implementation Strategies:

36a There should be further development of appellate adjudicative programs, such as the Civil Appeals Management Plan.

Experience has shown that some courts have been able to settle significant numbers of civil appeals through dispute resolution programs. Under such procedures as CAMP, attorneys in selected civil appeals are required to confer with a judge, a court staff attorney, or a volunteer private lawyer in an effort designed to dispose of appeals through settlement, improve the quality of briefs and arguments in those appeals that do not settle, resolve procedural problems that might arise, and conform to scheduling orders with deadlines.

36b Innovative management of appeals and screening for oral argument should continue and be expanded as needed.

19 Consistent with a Federal Courts Study Committee recommendation, Congress amended 28 U.S.C. § 291(a) to authorize intercircuit assignments of court of appeals judges "in the public interest." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 104, 106 Stat. 4506, 4507. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 155 (1990).

20 More than 50% of all filed appeals are currently disposed of by means other than a decision on the merits of the case. Some of these non-merits terminations require judicial attention (*e.g.*, dismissals for want of jurisdiction), but many do not.

21 *See* JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (Federal Judicial Center 1993).

Not all appeals require oral argument. Some may not require full briefing and may be evaluated on short briefs limited to fifteen pages, without extensive records.[22] Courts may also wish to experiment with adjunct judicial officers, such as appellate commissioners, to act as evaluators and managers of appeals. Some courts may find it useful to have appeals screened first by nonjudicial court staff. Others may find it preferable to have one judge or a panel of judges determine the process due before the case is scheduled for a particular track. Still others may opt for no screening at all. In addition, a study and pilot project should be instituted on the desirability of shifting federal appellate review of diversity cases to state appellate courts.

36c There should be increased use of nonjudicial staff and use of adjunct judicial officers to handle certain routine matters.

Courts differ greatly in how they use their central staff counsel, particularly with respect to the level of their involvement in the nonargument decision making process.[23] These differing practices can reflect strong differences of opinion among judges regarding the proper role of staff—differences that are heightened in the face of current proposals to expand the use of adjunct judicial officers to the appellate context. It is clearly not appropriate to delegate essential appellate decision making functions, such as affirming or reversing a district court judgment, to "appellate commissioners" in the courts of appeals, though such officials might play a useful role in a variety of properly delegable functions, such as conducting settlement programs and making findings and recommendations to the court on matters (*e.g.*, counsel fee petitions and contempt petitions) that require fact finding by the appellate court.

36d Publication of opinions should be restricted to those of precedential import.

Not all appellate decisions warrant publication. Opinions prepared for publication tend to take considerably more judicial and law clerk time than opinions not prepared for publication. In addition, the proliferation of published opinions may increase the likelihood of conflicting interpretations of circuit law. Courts should periodically reassess whether their publication practices are in keeping with Judicial Conference standards for publication of opinions.

36e Internal efforts to maintain the consistency of circuit law should be continued and enhanced.

Courts should consider whether they might maintain the consistency and coherence of circuit law by methods short of gathering the full court for an en banc proceeding. These might include: (1) circulating a concise list each week of the significant issues in cases heard or submitted that week on which opinions will be written; and (2) monitoring by staff attorneys to ensure strict adherence to the policy that no panel may overrule or disregard the decision of a prior panel unless the court as a whole so agrees either informally (by prior circulation of the proposed opinion) or formally (by in banc rehearing).

Case Management in the District Courts

■ RECOMMENDATION 37: The district courts should enhance efforts to manage cases effectively.

This plan acknowledges the need for broader, more effective use of case management to meet increasing caseload burdens at the trial level. Because it is anticipated that there will be continuing growth at the trial level due to expanding civil and criminal federal jurisdiction, continued experimentation in the district courts with innovative case management techniques should be encouraged.

22 *See* Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning 8 (Feb. 16, 1993).

23 *See* JOE S. CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (Federal Judicial Center 1985).

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■ RECOMMENDATION 38: The district courts should be authorized to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation.

Bench and jury trials resolve only a very small proportion of the district court's civil docket. More than ninety percent of cases are resolved without trial by such means as summary judgment, default, voluntary or involuntary dismissal, and settlement. Most litigants' experience, therefore, is based upon a resolution in federal court without a trial. Judicial case management efforts would benefit from increased focus on this large proportion of the civil caseload that does not reach trial, taking into account the simplicity or complexity of various categories of civil cases, the costs of litigation, and the need to achieve timely and just dispositions for the litigants.

A conventional bench or jury trial is very expensive and not the best resolution for every dispute initiated in the district courts. Often, a fair settlement by the parties, with or without court involvement, is the preferable resolution for particular litigation. To this end, the federal trial courts should be empowered to offer a wide array of means and methods for resolving civil disputes—while preserving the traditional trial process—through settlement efforts by district judges and magistrate judges, by the effective use of supporting court personnel, and by a variety of alternative dispute resolution techniques that involve members of the bar and other court adjuncts.

Primary emphasis should be placed on fairness and justice. Simplicity, cost and timeliness must also be considered and obviously contribute to the perception of fairness and justice on the part of the litigants and the public. Even conventional jury and bench trials should continue to be evaluated against these benchmarks, and steps should be taken to enhance their performance on these standards as well.

A goal of our judicial system must be to resolve disputes expeditiously and inexpensively—with resolutions that are, and are perceived by litigants, attorneys, and other members of the public to be, both procedurally fair and substantively just. The effective operation of the federal civil justice system depends on average citizens being confident that there exists a public forum in which they can secure a fair and just resolution of their disputes without risking personal or professional bankruptcy.

Over the past decade the increase in civil causes of action in federal courts, continuing federalization of many criminal offenses, increases in prosecution resources, implementation of sentencing guidelines, and other factors have made it more difficult for civil litigants to receive early and firm trial dates. The availability of alternative dispute resolution procedures would often allow litigating parties to go to trial in a more efficient, expeditious and cost effective manner. Along with allowing litigants to choose the dispute resolution procedure most appropriate to their cases, the provision of alternative procedures would save litigants' money and conserve the judiciary's unique and precious resource—the trial, whether bench or jury—for those disputes in which it is most needed and desired. Further, the courts should be empowered to have parties pursue non-binding procedures in appropriate cases while always preserving the right to jury trial. The diversion of disputes not requiring a traditional trial to other resolution procedures will enable judges to concentrate on improving the management and conduct of trials.

This proposal will have a budgetary impact in that additional funds will be necessary to compensate neutrals who participate in alternative dispute resolution programs, and additional staff will be needed in some courts to administer the programs. The Federal Judicial Center should continue to sponsor the requisite training and education for judges and assist the courts in developing programs for arbitrators, mediators and other ADR neutrals to implement this recommendation.

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Chapter 7
Governance: Management and Accountability

JUDICIAL governance involves the development and implementation of administrative policies that support the federal courts' adjudicatory activities. Although the case-deciding function is performed separately in each court by one or more judges, the management of judicial resources and establishment of other administrative policies are performed more effectively and efficiently through broader decisional processes. These preserve the autonomy of the judicial institution while ensuring accountability to Congress and the taxpayers for efficiency in court administration and wise use of resources.

The nature and mission of the federal courts require an approach to internal governance that distinguishes them from executive branch agencies and other, more hierarchical institutions. Judicial governance is conceived and conducted in accordance with the following principles:

Separation of powers. Under Articles I and III of the Constitution, Congress is authorized to structure the federal courts, define their jurisdiction, and determine what resources will be allocated for their use. Although these prerogatives justify a certain amount of congressional policy making and oversight in judicial administration, the courts' status as a co-equal branch of government requires that Congress consult with them in exercising that authority and, to the extent practicable, allow those who exercise the judicial power under the Constitution to govern the courts autonomously.

Key functions of judicial branch governance include:

- budget formulation and execution
- assignment of caseloads
- resource allocation and administration
- personnel management
- procedural rulemaking
- financial and property controls
- enforcement of ethical and legal standards
- program management
- data collection and dissemination
- interbranch, intergovernmental and public relations
- strategic planning
- research and education

Judicial independence and accountability. The federal courts exist to administer justice under the law, free from political pressure by the other government branches or the influence of ephemeral popular emotions. This adjudicatory independence requires a substantial degree of administrative independence to perform the basic governance functions described above.

At the same time, the courts are accountable to the public for the efficient administration of federal justice. By providing internal coordination and review, judicial governance institutions promote responsible use of tax dollars and fair, appropriate treatment of litigants, witnesses, jurors, and the public.

Decentralized authority. Under Article III of the Constitution, judicial power is vested directly in the respective courts of appeals, district courts, and other courts whose judges serve during good behavior with undiminished compensation. Since governance is ancillary to the adjudicative function, the primary responsibility for establishing and executing administrative policy naturally resides with the courts individually.

Broad participation. The governance process of the federal courts is broadly participatory because autonomous judges are the ultimate source of judicial branch authority. Informed policy making, moreover, requires full consideration of relevant facts and options. The courts rely for national policy making on the 27-member Judicial Conference, which is advised by an extended structure of 25 committees consisting of nearly 300 members. More than one in six federal judges holds a position in the national governance hierarchy through membership on the Judicial Conference or one of its committees, the Board or an advisory committee of the Federal Judicial Center, or an ad hoc advisory group for the Administrative Office. Participation is also high on the regional and local levels through circuit councils and conferences, committees attached to both, and governance mechanisms in the circuit, district, and bankruptcy courts.

Functional, not proportional representation. Judicial governance bodies represent the interests of all judges. Membership in those bodies is based on the need to bring together institutional experience and opinion found at all levels of the judiciary. Although the members bring particular perspectives (trial judge, appellate judge, etc.) to the task, they are not intended to serve as agents of specific courts, circuits, or categories of judges. For that reason, judges from smaller circuits have the same votes in the Judicial Conference as judges from large circuits, and circuit judges serve on the Conference and councils without regard to their proportionate numbers in the larger judicial population.

Evolutionary development. Over time, federal court governance institutions have developed administrative authority necessary to ensure effective action and meet the evolving administrative needs of the courts in a nation and society that continues to change.[1] Although governance authority has tended to be concentrated in fewer hands over time, the degree of consolidation is appropriately modest and directed largely at rationalizing administration in an expanding judiciary and providing effective oversight against abuse and inefficiency. Strong, centralized authority and autocratic leadership are foreign to the courts, inconsistent with the deliberative, consensus-oriented decision making appropriate to a judicial institution, and contrary to current management trends generally.

The following recommendations provide the means by which the federal courts can retain their unique nature and mission—as the Constitution and sound policy require—while meeting their legal, ethical, and societal responsibilities.

1 The Judicial Conference, which began as a purely advisory body in 1922, acquired administrative authority in 1939 when the Administrative Office was created to act under its supervision. It has more recently delegated to its Executive Committee the authority to act for, and steer, the Conference on a day to day basis. Likewise, the circuit judicial councils, created in 1939 solely to supervise district docket management, have acquired greater responsibility to oversee judicial administration at the regional level

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Distribution of Authority

■ RECOMMENDATION 39: The present distribution of governance authority among the national, regional (circuit), and local court levels should be basically preserved. There should continue to be a careful balance of responsibility in the interests of individual judge autonomy, local court initiative and control, and coordination to achieve administrative efficiency, accountable resource utilization, and effective external relations.

Implementation Strategies:

39a The judicial branch should obtain funding for the operation of the courts solely through direct appropriations to the Administrative Office of the United States Courts for expenditure under the direction and supervision of the Judicial Conference of the United States. Court funding should not be obtained directly by a circuit council or any other regional or local body.

39b The agencies of judicial administration at the national level should continue to decentralize administrative responsibility wherever appropriate, while maintaining sufficient oversight to ensure that courts are accountable for the proper use of the authority vested in them.

For most of their history, the federal courts have been administratively autonomous—both within and without the judicial branch—subject only to the common administrative support provided, in turn, by the Treasury, Interior, and Justice Departments, as well as occasional management oversight by the Supreme Court justices assigned to the respective circuits. In 1922, however, Congress established the Conference of Senior Circuit Judges (the forerunner of the present Judicial Conference of the United States), primarily as an advisory and coordinating body. In 1939, Congress transferred national administrative responsibility for the courts from the executive branch to a newly created Administrative Office of the United States Courts, which functions under the Conference's supervision. At the same time, Congress created a Judicial Council in each circuit, initially to monitor the district courts' dockets.

These national and regional bodies, and others added since, have grown as elements of governance authority and support in accordance with changing needs. The circuit judicial councils—through their statutory power to oversee judicial administration regionally—and the Judicial Conference—through control of the judicial budget and supervision of the Administrative Office—exercise significant authority to formulate and execute policies applicable throughout the judicial branch. The individual courts, however, continue to exercise primary responsibility for their own administration and operate autonomously in many ways.[2]

This allocation of governance authority has served the federal courts well and should be retained in the future. Broad participation and consensus at each level, and deference by national and regional policy makers toward localized initiative and control, are essential in a judicial system populated by constitutionally independent individuals.

2 Indeed, even though circuit councils may issue "necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit," 28 U.S.C. § 332(d)(1) (1988), that power is used only sparingly to remedy exceptional problems arising at the district court level.

By the same token, national or regional coordination or direction is required to achieve and maintain appropriate efficiency and economy of scale, accountability in the discharge of the public trust, and effective relations with the other branches of government, the bar and other relevant organizations, and the general public. Budgetary policy is a key area in which national coordination is necessary to ensure that resources are adequately obtained and appropriately allocated: Court funding should not be obtained directly by a circuit council or any other regional or local judicial authority.

As a general rule, authority to make policy and spending choices should reside with those whose interests the decision most directly affects. This is consistent with the current management theory—embodied in the 1993 report of the National Performance Review—that "empowerment" of front-line managers and employees results in more efficient, less costly operations.[3] Decentralization will provide the tools needed for appellate, district, and bankruptcy courts to administer themselves.

With increased authority, however, goes increased accountability. The Judicial Conference and the national judicial support agencies, through their respective functions and activities, should encourage court personnel to manage decentralized resources wisely with a primary aim of customer service.

The Administrative Office should continue to delegate to individual courts an appropriate degree of programmatic responsibility in the areas of budget execution and personnel classification and management, consistent with the broader interests of the judicial branch and the responsibilities that Congress imposes on the Administrative Office by statute or through the appropriations process. Likewise, the Federal Judicial Center should continue to encourage and, through technical and financial support, assist individual courts to make local education programs a key element of their personnel management and organizational development.

Effective Organization and Operation

The existing governance institutions at the national, regional and local levels have been highly successful largely because Congress has mandated few details, allowing for evolution and adaptation of the organization and methods of administration to meet the changing needs of the federal courts. For that reason, the governance system should maintain its current flexible distribution of authority and responsibility, with only slight adjustments in the role and organization of various institutions to ensure adequate capacity for well-informed, coordinated and timely action.

■ RECOMMENDATION 40: The Chief Justice of the United States should remain the head of the federal judicial system, retaining the traditional authority and responsibility of that office in matters of judicial administration.

By statute and custom, the Chief Justice, in consultation with the Judicial Conference and others, determines the structure of federal judicial administration at the national level according to his or her management preferences. By allocating responsibility (other than statutorily prescribed functions) among the Director of the Administrative Office, the Director of the Federal Judicial Center, the Administrative Assistant to the Chief Justice, and the chair of the Judicial Conference Executive Committee, the Chief Justice can establish whatever working relationships he or she believes will be most effective.[4] This provides considerable flexibility to alter governance arrangements in light of changing developments while preserving the permanent role of the Chief Justice as overall head of the judicial branch.

Because of this adaptability, it is unnecessary, and indeed unwise, to establish an additional high-level management position—such as a "chancellor," "associate justice for administration" or "executive judge"—to oversee judicial administration. Since the existing insti-

3 *See* CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS—REPORT OF THE NATIONAL PERFORMANCE REVIEW 69-72 (1993).

4 *See* RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE 49 (Federal Judicial Center 1994).

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tutions can be structured, as needed, to ensure prompt, effective decision making, creation of a permanent statutory office with a specific mandate would only serve to reduce the flexibility of the system and pose a threat to regional and local administrative autonomy.

■ RECOMMENDATION 41: The Judicial Conference of the United States should continue to set broad-scale policies and make critical decisions.

Implementation Strategy:

41a The Conference should continue periodic evaluation of its procedures to ensure that its members have adequate time and information for decision making.

The Judicial Conference of the United States—consisting of the Chief Justice, the chief judge of each circuit, a district judge representative from each circuit, and the chief judge of the Court of International Trade—is a body whose function and structure accords with the nature of the judicial branch. The main purpose of judicial governance is to ensure that judges receive the support they need to perform their constitutional tasks. Thus, a large, broadly representative Conference, supported by an effective committee structure and administrative staff, is the best means of preserving broad-based judge control and involvement in those decisions that affect the judicial branch as a whole.

This does not mean that Conference procedures and internal organization should remain static. In 1986-87, the Chief Justice commissioned a Committee to Study the Judicial Conference that reviewed the decision making process and committee organization and recommended a series of significant modifications in how the Conference transacts its business. Among its recommendations adopted by the Conference was a policy requiring internal review of the Conference committee structure every five years. It is important that these periodic studies continue and include not only committee operations but also the manner in which the Conference itself makes decisions. Of particular importance in an age of increasingly complex and technical problems is the need to ensure that Conference members have sufficient, accurate information—from committee reports and other sources—with which to evaluate policy alternatives and determine the direction of judicial administration in the federal courts.

■ RECOMMENDATION 42: The leadership role of the Judicial Conference's Executive Committee should be enhanced.

Implementation Strategies:

42a The Executive Committee should be allowed a more active role in steering the Conference and acting on its behalf.

It is obvious that a body—the Judicial Conference—that meets only twice a year cannot provide administrative oversight and control on a day-to-day basis. In recent years, the Executive Committee of the Conference has developed into the arm of the Conference primarily responsible for making timely decisions and managing the judiciary's relations with the Congress and the executive branch in rapidly changing areas of policy development.

Given the increasing number and range of administrative issues to be addressed by the federal courts, it is appropriate for the Judicial Conference to focus on fundamental or long-term policies and matters on which a full airing of views is needed, leaving more routine matters to be handled by the Executive Committee. This reallocation of responsibility should be expanded so that the Conference can utilize its limited meeting time more effectively. For example, the Executive Committee could assume a more pro-active role in determining both the content of the Conference agenda and the manner and order in which it is considered. In addition, many of the ministerial and routine matters now placed on the "consent" calendar at Conference sessions could be formally delegated to the Executive Committee for final action. More broadly, the Conference might wish to consider greater system-wide leadership for this body—for

example, employing its members' powers of persuasion to encourage courts to use their substantial delegated budget and personnel management authority to improve and enhance services to court users and other aspects of judicial administration.

42b There should be an opportunity for at least partial reduction in the chair's judicial workload to offset the time required for performance of administrative duties.

Naturally, an expansion of Executive Committee responsibility will impose more substantial demands on the available time of its members, especially the chair. It is not clear, at present, whether the person chairing the Executive Committee needs a special measure of docket relief. Nevertheless, the time consumed with administrative work may ultimately grow to the point that the chair will need to be relieved of at least some judicial duties simply to serve in that position.[5]

42c While remaining relatively small in size, the Executive Committee should include, ex officio, the chair or chairs of the Conference committees with major resource allocation or policy making responsibilities (even if they are not Conference members).

With expanded authority, the ability of the Executive Committee to make prompt and appropriate decisions will become more critical and be dependent, in large part, on the expertise its members possess. Although Judicial Conference membership—from which the Executive Committee is ordinarily drawn—typically includes judges with wide ranging experience and expertise, there are policy areas in which knowledge of current issues and problems may be critical to informed decision making. In those circumstances, it would be helpful to include regularly in Executive Committee deliberations the chair of the Conference committee with responsibility for the particular program. At the present time, the budgetary and fiscal issues facing the judiciary and the federal government in general make it appropriate to include (as is currently done) the chair of the Conference's Budget Committee in the Executive Committee.

■ RECOMMENDATION 43: The Judicial Conference should continue to rely on a broad committee structure for development of policy, and should strengthen the committees' ability to provide sound advice and needed information.

Implementation Strategies:

43a The Conference should maintain the periodic infusion of new committee members with new and diverse perspectives while taking steps as appropriate to preserve the insight, experience, and legislative contacts that are likely to be acquired through committee service.

In setting policies on the tenure and composition of committee membership, the Conference should seek to balance the need for fresh perspectives against the value of continuity and experience. Before 1987, committee members served indefinite terms, severely reducing the number of judges who could become involved in national judicial administration. A key part of the reforms adopted that year was establishment of a fixed 3-year term for committee appointments and an overall 6-year limit on service by an individual judge on any committee. Although departures have been allowed on rare occasions, these norms have been credited with the much broader degree of judge participation in Conference work in recent years.

5 Docket relief can be provided in more than one way. For example, inter- and intra-circuit assignments could be used to bring visiting judges to the chair's home court so that the chair could devote a greater amount of time to Executive Committee work. Alternatively, Congress could authorize a temporary judgeship for the chair's home court, either in all cases or whenever the Chief Justice certifies the need to relieve the chair of some or all judicial duties. A similar approach is already taken whenever a full-time judge assumes an "office of federal judicial administration"—presently defined as the Director of the Administrative Office, the Director of the Federal Judicial Center, or the Administrative Assistant to the Chief Justice. *See* 28 U.S.C. § 133(b) (Supp. V 1993).

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The difficulty with any rule of this kind is that it deprives the organization of valuable service and expertise at the same time that it provides necessary infusion of new and different ideas. Whether a particular limit on committee service is too short or inflexible depends, in large part, on the context. If the work of a particular committee requires a member to undergo a substantial "learning curve" or involves lengthy projects (*e.g.*, the federal rules process), the appropriate balance between continuity and renewal may be found in longer terms for its members or chairs, or in occasional waiver of the overall committee service limit.

43b The Conference should afford the committee chairs an effective role in relevant Conference debates and an opportunity to meet together at least once a year.

Because of the familiarity and expertise they acquire with the subject areas of their committees, Conference committee chairs are a valuable resource that should be utilized more effectively. Although the chair of a committee whose report is on the Conference discussion agenda typically is invited to make an oral presentation at the Conference session, there are other situations, not involving a specific committee proposal, when it would be helpful for Conference members to hear the views of a committee chair on an issue falling within the committee's area of concern.

It is not uncommon for issues to arise that cut across the jurisdictions of more than one Conference committee. Proposals to authorize electronic or facsimile filing of court documents—involving the committees responsible for court administration, rules of practice and procedure, and automation, respectively—are only a recent example. Although staff-level coordination can help considerably in avoiding duplication of effort or misunderstanding among the committees, regular meetings of the committee chairs would be useful as a forum for sharing of information on common issues and alerting others to matters that are under consideration or may, in the future, be addressed in a particular committee.

■ RECOMMENDATION 44: The number of judges participating in the Judicial Conference and its committees should not increase in proportion to growth in the judiciary overall.

At present, approximately 17 to 18 percent of all life-tenured and fixed-term judges serve on the Judicial Conference and its committees. If the judiciary were to increase in size to 2,700 judges but keep its current proportion of judges holding governance appointments, the size of the Conference organization would increase from approximately 300 to around 475 judges. Although a governance process with that number of participants might still be manageable, at some point the problems of coordination and effective discussion will outweigh the benefits of broader participation.

■ RECOMMENDATION 45: The Administrative Office of the United States Courts and the Federal Judicial Center should retain their separate institutional status and respective missions.

Although close coordination of effort and a good, cooperative relationship are necessary, the functions of the Administrative Office and the Federal Judicial Center are sufficiently distinct to merit continuation of their separate organizations. Having distinct but mutually supportive agencies for administration and policy support and education and research, respectively, will be important as the federal courts deal with resource allocation demands in the years to come. When there are shortages in funding and other resources, it is important that research and education not be sacrificed for the sake of day-to-day operational needs.

As a practical matter, the judicial system benefits from having two distinct sources of advice on major policy matters. With their different perspectives, the Administrative Office and the Federal Judicial Center can individually supply information and analysis that provide judicial policy makers and administrators with a complete picture.

■ RECOMMENDATION 46: The basic organization and authority of governance institutions at the regional and local court levels should be retained.

Implementation Strategies:

46a Circuit judicial councils should continue to provide a means for administrative coordination and oversight of all courts within their respective circuits.

The judicial circuits are an essential element in the machinery of federal judicial administration. As the courts face a future of increasingly scarce resources, it will become more, not less, important to have a regional mechanism—the circuit judicial council—in which collective needs and interests of all courts (appellate and trial, large and small, urban and rural, overworked and underworked) can be weighed before resources are allocated. Although proposals have been made to sever this administrative connection between the courts of appeals and district courts, appellate judge participation in circuit administration affords the process a broader perspective and detachment that are essential to making difficult decisions.

46b The chief judges of the courts of appeals and district courts should continue to be selected on the basis of seniority subject to statutory limitations on age and tenure.

Currently, chief circuit and district judges rise to those positions based on seniority in their courts, subject to age and length of service limitations prescribed by statute. The value of this system lies in the certainty it provides, as well as ensuring equal opportunity and avoiding the divisiveness of an electoral process. Although there is, among judges, the widely held view that administrative ability should be a criterion for service as chief judge, there is also widespread hostility toward any system of chief judge selection different from the seniority method. Given that the current system has generally worked well, this plan does not propose that the judiciary seek an alternative selection method.

■ RECOMMENDATION 47: The judicial branch should continue to develop and enhance the capabilities of court administrators and managers to assist the governance process and enforce its decisions.

The key to successful administration of the federal courts lies in strong, effective court managers (circuit executives, clerks of court, etc.). As discussed in Chapter 8, an expanded, concerted effort by the federal courts to recruit, train, and retain the services of highly qualified, competent administrators will not only enhance the judges' ability to perform their constitutional functions but also foster the efficient, responsible use of judicial branch resources required in an era of tight budgets and close public scrutiny.

■ RECOMMENDATION 48: All judicial governance institutions should continue to develop and integrate long-range planning capabilities as part of their policy making processes.

In its 1990 report, the Federal Courts Study Committee recommended that the Judicial Conference and the circuit judicial councils undertake or enhance their respective capacities for long-range, as opposed to short-term operational, planning. In addition to this national plan, successful planning efforts have occurred, with training and technical assistance from the Administrative Office, in several individual courts and judicial branch programs. As described more fully in Chapter 11, a continuing planning process is essential—not only to establish formal goals or objectives, but also to ensure well-informed, coherent day-to-day decision making. Planning should continue and be expanded at all levels as an integral part of the governance process.

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Participation

Although governance participants are expected to serve as representatives of all judges, it is important that the different perspectives and experiences of trial and appellate judges, of life-tenured and fixed-term judges be reflected in the decision making process. Over the years, the membership of governance bodies has evolved steadily toward broader, more inclusive participation. Nevertheless, there is room for improvement.

■ RECOMMENDATION 49: There should be broad, meaningful participation of judges in governance activities at all levels.

Implementation Strategies:

49a District judges should be afforded the opportunity to participate effectively in national and regional governance. To that end—

(1) only district judges should participate in selecting district judge representatives to the Judicial Conference;

(2) district judge members of the Judicial Conference should be afforded a term of service comparable to the average tenure of chief circuit judges; and

(3) each circuit judicial council should have an equal number of district judge and circuit judge members, including the chief circuit judge.

District judges have participated in the Judicial Conference since 1957, and in circuit judicial councils since 1980. However, the rules governing their membership in these bodies continue to place district judges at a disadvantage vis-a-vis circuit judges. For example, circuit judges participate in selecting district judge representatives to the Judicial Conference even though the chief circuit judge also automatically sits on the Conference.

Another disparity between district and circuit judges can be found in the tenure of Conference members: while district judge members have a statutory term of three years, the circuit judges are represented on the Conference by their chief judges who may serve for up to seven years. Many district judges with experience in national leadership believe that the three-year terms put district judge members at a comparative disadvantage. Because in fact most chief circuit judges serve between four and five years, a five-year term for district judge members of the Conference would seem appropriate. This is so despite the fact that extending the term reduces the number of district judges who can serve on the Conference over time. A longer term should make the district judge member a more effective participant in the decision making process—thus better reflecting the district judge perspective and improving the overall quality of Conference deliberations.

Although the work of circuit judicial councils is, in practice, predominantly related to trial-level administration, circuit judges continue to form a majority of those bodies. In 1990, Congress amended the council statute to include "an equal number of circuit judges and district judges of the circuit," but allowed the chief circuit judge to remain as presiding officer.[6] Circuit judges should continue to participate equally with district judges in council business, but the chief circuit judge should be included *among* the "equal" number of circuit judge members on the council.

6 *See* Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 323, 104 Stat. 5104, 5120 (codified at 28 U.S.C. § 332(a)(1) (Supp. V,1993)).

49b Senior judges should be afforded a greater opportunity to participate in governance. To that end—

(1) senior judges should be expressly authorized to serve on the Judicial Conference;

(2) senior judges should be authorized to serve on the Board of the Federal Judicial Center;

(3) senior judges should be authorized to serve on circuit judicial councils; and

(4) individual courts should take appropriate steps to include senior judges in local governance mechanisms.

As discussed in Chapter 8, senior circuit and district judges provide an invaluable resource to the federal courts and should be treated with the respect and consideration befitting their experience and dedication to the law and public service. Although they serve on Judicial Conference committees and, occasionally, on local court committees, there are statutory requirements and prevailing practices that often exclude senior judges from governance activity.[7] This not only deprives senior judges of a voice in making policies that still apply to them but also deprives the governance process of views acquired through years of judicial service. To rectify this problem, the relevant statutes should be amended to guarantee a role in national and regional governance for senior judges who remain substantially active.[8]

Unlike most governance mechanisms discussed in this plan, many important mechanisms in individual courts (*e.g.*, boards and committees) are not founded by statute or national rule, and thus are not amenable to national prescription. Nevertheless, each court is encouraged to establish goals for broader senior judge participation that parallel those offered here for the national and regional bodies.

49c Non-Article III judges should be afforded the opportunity for meaningful participation in governance. Specifically—

(1) the Judicial Conference should include one bankruptcy judge and one magistrate judge designated by the Chief Justice, each of whom serves for a term equal to that specified for district judge members and possesses the right to vote on all matters before the Conference except judicial discipline of Article III judges;

(2) every circuit judicial council should include one bankruptcy judge selected by the bankruptcy judges of the circuit and one magistrate judge selected by the magistrate judges of the circuit, and each should have the right to vote on all matters before the council except judicial discipline of Article III judges and the designation or certification of senior judges for workload assignment or salary purposes;

7 Thus, the legislation excluding all but "circuit and district judges in regular active service" from membership on circuit judicial councils, 28 U.S.C. § 332(a)(3) (Supp. V 1993), and requiring active status for circuit and district judge members of the Federal Judicial Center's Board, 28 U.S.C. § 621(a)(2) (1988), should be amended to make senior judges eligible for membership in those bodies. Similarly, the statute that governs representation in the Judicial Conference, 28 U.S.C. § 331 (1988), should be amended to clarify that senior district judges certified under 28 U.S.C. § 371(f) (see note 8 *infra*) may serve as Conference members. (While senior judges are not expressly excluded from Conference membership, the statutory language is open to differing interpretations.)

8 Those senior judges who continue to carry 25 percent of an active judge's workload, and are accordingly certified to receive salary increases payable to judges in regular active service (28 U.S.C. § 371(b)(1), (f) (Supp. V 1993)), should be considered substantially active.

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(3) judges of the territorial district courts should be eligible to participate in the selection of, and to serve as, district judge members of the Judicial Conference and the respective circuit judicial councils; and

(4) individual district courts should take appropriate steps to include bankruptcy judges and magistrate judges in their local governance mechanisms.

Although governance of the judicial branch is principally the responsibility of judges who enjoy life tenure and undiminished compensation under Article III of the Constitution, there is an appropriate role in the governance process for fixed-term judges who serve as adjuncts to Article III courts or otherwise exercise the jurisdiction of an Article III court.[9] Bankruptcy judges, magistrate judges, and judges of the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands should have an opportunity to be represented directly in the Judicial Conference and circuit judicial councils. They perform many similar duties to the Article III judges and have differing, yet relevant perspectives that will inform and enrich the decision-making process.

Beyond its impact on the quality of decision making, representation of fixed-term judges on the Judicial Conference and circuit councils will enhance communication and mutual problem-solving by all judges. For magistrate judges, enhanced communication will foster an environment conducive to greater utilization of magistrate judges. Bankruptcy judge participation in broader governance activities will better integrate the bankruptcy courts into the judicial institution. Representation of these judges is not a precedent for participation in governance bodies by court personnel who do not exercise judicial power.

At the local level, the matter becomes more complicated since decision making often occurs in general meetings of all judges (at least those with Article III status) in a particular court. As stated above with respect to senior judges, this plan does not seek to prescribe how each court should seek to improve participation in its governance process. However, it is important that the district courts take appropriate measures to include their bankruptcy judges and magistrate judges in court governance.

9 The United States Court of Federal Claims presents a more difficult issue. Unlike bankruptcy judges and magistrate judges, the fixed-term judges of that court serve on a tribunal established under Article I, not Article III, of the Constitution. 28 U.S.C. § 171(a) (1988 & Supp. V 1993). Although the Court of Federal Claims is lodged within the judicial branch for administrative purposes, *see id.* §§ 176, 178, 460, 604, 610, that arrangement is largely attributable to the fact that the court's jurisdiction previously was exercised by non-Article III judicial officers (similar in nature to magistrate judges) of an Article III body, the former United States Court of Claims. *See, e.g.*, 28 U.S.C. §§ 792, 2503 (1976 & Supp. V 1981). It would be inappropriate for the present Article I court to have a voice in the Judicial Conference, which is the policy making organ for the Article III courts. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9 (Mar. 1992). And since the court is not located administratively within any judicial circuit, *see* 28 U.S.C. § 41 (1988), the question of judicial council representation does not arise.

There remains, however, the anomaly of an Article I court that falls within the jurisdiction of the Judicial Conference and derives funding and administrative support from the Administrative Office (which, in turn, operates under Conference supervision). The other Article I courts—the United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals—either exist as independent entities or receive administrative support from the executive branch. Whether a similar arrangement should be made for the Court of Federal Claims is an issue that should be explored.

Judicial Branch Autonomy

■ RECOMMENDATION 50: Administration of federal court facilities, programs or operations should be conducted solely within the judicial branch.

Implementation Strategies:

50a Executive branch responsibility for the following programs should be transferred to the institutions of judicial governance or agencies operating under their supervision:

- judicial space and facilities program;
- court and judicial security program; and
- bankruptcy estate administration (i.e., the U.S. trustee program).

For the federal court system to operate with the autonomy required of a co-equal branch of government, it should not be required to rely on executive branch agencies for administrative support. This principle was first recognized in 1939 when Congress established the Administrative Office to handle many of the functions previously performed by the Justice Department. There are, however, three significant areas—buildings,[10] judge and courthouse security, and bankruptcy estate administration—in which the executive branch retains substantial responsibility for programs or activities directly related to judges, litigation or other court operations. Transfer of that responsibility will not affect Congress's legislative oversight or budgetary authority regarding these three program areas. Rather, it would remove executive branch control over areas that should be administered under the supervision and control of judicial branch policy makers.

In seeking judicial control over security matters, this plan does not recommend a change in the "primary role and mission" of the United States Marshals Service, a bureau within the Department of Justice, "to provide for the security . . . of the United States District Courts, the United States Courts of Appeals and the Court of International Trade."[11] Rather, the Judicial Conference and its committees should be accorded full responsibility for *overseeing* the provision of security-related services for the federal courts. Specifically, the Conference should have final oversight authority with respect to preparation and execution of the courts' security budget and assignment of court security personnel (in consultation with local court security committees, as described in Chapter 8).

50b Responsibility for developing and presenting to Congress requests for funding of the federal courts and agencies of judicial administration should remain solely within the judicial branch.

For the first 150 years of the federal court system, the executive branch (ultimately the Department of Justice) was responsible for managing the financial affairs of the lower courts, including the preparation of budget estimates.[12] The obvious separation of powers issue prompted the transfer of that responsibility, in 1939, from the Attorney General to the Director of the newly created Administrative Office.

10 See Chapter 8, Recommendations 60 & 76 *infra*.

11 *See* 28 U.S.C. § 566(a) (1988).

12 Until the early part of this century, the Supreme Court not only prepared its own budget requests—a function it still performs today—but also submitted them directly to Congress. Although Congress, in 1921, required the Court to forward its estimated expenditures and proposed appropriations to the President for submission as part of the budget for the entire Government, the President was enjoined to include those items in the budget "without revision." Budget and Accounting Act, ch. 18, § 201(a), 42 Stat. 20 (previously codified at 31 U.S.C. § 11(a)(5) (1976)). This arrangement was later extended to the entire judicial branch (see note 14 *infra*).

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In the legislative history of the Administrative Office Act, the authors noted the importance of relieving the executive branch of responsibility for the federal courts' budget:

> [T]he result of the provisions of the bill as now written, it is expected, will provide, first of all, the separation of the Department of Justice from immediate and actual and intimate participation in the monetary affairs of the courts, so that it will not be necessary for a judge to importune the Attorney General before getting a typewriter, or an addition to his library, . . . or some other matter of that kind . . . .[13]

Although Congress requires the President to include in the annual budgets both estimated expenditures and proposed appropriations for the entire federal government, the spending estimates and funding requests for the judicial and legislative branches are to be submitted to Congress "without change."[14] Thus, with respect to the judicial budget, "neither [the Office of Management and Budget] nor the President exercise any discretion . . . [and] inclusion of th[o]se items in the annual budget is merely a ministerial act."[15]

As the federal government continues through an era of fiscal austerity, the judicial branch will find it especially important to maintain independence from any oversight or control of its funding and financial administration by officials or agencies in the executive branch. Although the relevant statutes, as indicated, already enshrine this principle, there have been, and may continue to be, efforts by executive branch officers to protect the funding of other federal programs from deficit reduction efforts at the expense of the courts. These efforts must be resisted to preserve the courts' ability to carry out their constitutional mission.

Accountability

■ RECOMMENDATION 51: The judicial branch should continue to develop and enhance a mechanism for effective coordination and review in budget formulation and execution.

Independence from executive branch oversight and control in the budgetary process carries with it the obligation to achieve fiscal responsibility, accountability, and efficiency in all court and judicial support operations. By establishing an "Economy Subcommittee" under its Committee on the Budget,[16] the Judicial Conference has already recognized that a permanent, analytical and systematic means of developing final budget estimates—akin to that provided by the Office of Management and Budget in the executive branch—is both necessary and appropriate. In the years ahead, the Conference and its committees should continue to provide thorough scrutiny of funding requests from the various components of the judicial family before they are submitted to Congress.

The mechanism by which that scrutiny is exercised must, of course, respect the principles of collegial decision making and local autonomy that characterize judicial governance in general. Indeed, budget formulation poses a challenge in a regime where decentralized budget execution is the norm. For example, if a rural district and an urban district spend their resources in two markedly different ways, each to deliver superior judicial services to the people of those districts, which approach should be advocated when submitting the budget to Congress? A single judicial budget should be submitted which, in the main, treats every court session alike, given its work, when measured against nationwide benchmarks for such work.

13 S. Rep. No. 426, 76th Cong., 1st Sess. 3 (1939).

14 Budget and Accounting Act, as amended, 31 U.S.C. § 1105(a)(5), (b) (1988 & Supp. V 1993).

15 Matter of W. Wasserstein, No. B-198507, B-198507 L/M, 1980 WL 16612 (Comp. Gen. 1980) (applying the same restriction to OMB and presidential involvement with legislative budget requests).

16 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42 (Sept. 1993).

■ RECOMMENDATION 52: The existing mechanisms for judicial discipline should be retained. In particular, the impeachment process should continue to be the sole method of removing Article III judges from office.

The impeachment mechanism is the only means set forth in the Constitution by which a judge may be removed from office and debarred from exercising the judicial power. While the constitutional regime favors a judiciary of substantial independence, removal through impeachment is an explicit qualification on judicial independence, and one of a number of permissible mechanisms to make a judge accountable for his or her actions.

Recent impeachment proceedings which proved burdensome to Congress prompted an extensive study of the impeachment process by the National Commission on Judicial Discipline and Removal. Without endorsing all its recommendations, this plan concurs in the Commission's central recommendation—that impeachment should remain the sole method for removing life-tenured federal judges from office. While burdensome, the impeachment process has been effective in removing from office corrupt judges while insulating honest members of the judiciary from political attack.

As the Commission recognized, there are significant individual and institutional constraints on federal judges, apart from impeachment, that assure their accountability and fidelity to their oath of office. Foremost among these constraints are the character and self-discipline of individual judges, as well as the combined effect of the requirement to provide written, reasoned opinions, the doctrine of stare decisis, and the "watchful eye" of the bar. Institutional constraints include peer pressure among judges sitting in a court, the Code of Conduct for United States Judges, formal disciplinary mechanisms under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 and Congressional oversight under that Act. These formal and informal constraints have served to maintain the accountability of federal judges in cases not involving conduct which could lead to impeachment.

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Administrative Office of the United States Courts

- Director and Deputy Director are appointed by the Chief Justice after consulting the Judicial Conference
- Principal functions:
  - staff support for the Judicial Conference and its committees
  - legislative representation and liaison to other agencies
  - administrative and management support to the courts (e.g., long range planning, legal services, budget, personnel, program management, automation, supplies, space and facilities)
  - statistics and public information

Chief Justice of the United States

- Presides over the Judicial Conference and the Federal Judicial Center Board
- Appoints all members of Judicial Conference committees
- Appoints Director and Deputy Director of the Administrative Office in consultation with the Judicial Conference

Judicial Conference of the United States

Members: Chief Justice (chair); chief circuit judge from each circuit; one district judge from each of the 12 regional circuits, elected by all Article III judges in the circuit at the annual circuit judicial conference; chief judge of the Court of International Trade.

Meetings: Required to meet annually but actually assembles twice each year, in March and September.

Functions: Serves as the central policy-making body for the federal court system; surveys business of the courts and suggests improvements in the administration of justice; approves appropriations requests for submission to Congress; recommends changes in federal rules of procedure and evidence; supervises the Administrative Office; establishes court fees; performs numerous other statutory duties.

Federal Judicial Center

- Board consists of the Chief Justice (chair); two active circuit judges, three active district judges, and one active bankruptcy judge elected by the Judicial Conference; and the Director of the Administrative Office
- Director and Deputy Director are appointed by the Board
- Principal functions:
  - educational programs for judges and court employees
  - research and planning support to the courts and the Judicial Conference

Committees of the Judicial Conference

- The Executive Committee:
  - acts for the Conference in emergencies and between sessions
  - sets Conference agenda
  - resolves differences among other Conference committees
  - approves the federal courts' spending plan for each fiscal year
  - coordinates judicial branch relations with Congress and the executive branch
- 19 other standing committees and 1 ad hoc committee—each with a defined subject area
- Members appointed by the Chief Justice, generally for 3-year terms with a 6-year maximum term of service on any committee; most committees consist solely of judges, but some include academics, practicing attorneys, and state judges
- Meet twice each year (the Executive Committee and some other committees meet more frequently)
- Administrative Office performs secretariat and general staff support functions; upon request, the Federal Judicial Center may provide research, advice and educational support

Federal Court Governance—National Institutions

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District Court

- The chief judge—who has precedence over other judges in the court and presides at any session he or she attends—is the district judge most senior in commission with at least one year of service but less than 65 years of age at the time of becoming chief judge. A judge may serve as chief district judge for no more than 7 years or until he or she attains the age of 70, whichever occurs first.
- The chief district judge is responsible for enforcing court rules governing the division of business among the judges, and he or she is authorized to divide business and assign cases to the extent not provided in the court rules. Though not statutorily mandated, the chief judge is generally considered responsible for the effective and efficient administration of the district court in compliance with statutes, Judicial Conference and circuit judicial council policies, and regulations issued by the Administrative Office with Conference approval.
- The district court (i.e., the body of all district judges in regular active service) appoints magistrate judges as judicial officers of the court and designates the chief bankruptcy judge (where there is one). The court also appoints the clerk of court, court crier and court reporters, and approves the appointments of deputy clerks, clerical assistants and other court employees (other than chambers staff). The court adopts its own local rules of practice and procedure.

Court of Appeals

- The chief judge—who has precedence over other judges in the court and presides at any session he or she attends—is the circuit judge most senior in commission with at least one year of service but less than 65 years of age at the time of becoming chief judge. A judge may serve as chief circuit judge for no more than 7 years or until he or she attains the age of 70, whichever occurs first.
- Though not statutorily mandated, the chief circuit judge is generally considered responsible for the effective and efficient administration of the court of appeals in compliance with statutes, Judicial Conference and circuit judicial council policies, and regulations issued by the Administrative Office with Conference approval.
- The court of appeals (i.e., the body of all circuit judges in regular active service) appoints bankruptcy judges as judicial officers of the district court. The court also appoints the clerk of court, court crier, and circuit librarian, and approves appointments of the court's staff attorneys, deputy clerks and other court employees (other than chambers staff). The court adopts its own local rules of practice and procedure.

Bankruptcy Court

- The bankruptcy court is a unit of the district court. Judges of the bankruptcy court are appointed by the court of appeals and the chief bankruptcy judge (in districts with more than one bankruptcy judge) is designated by the district court.
- The chief bankruptcy judge (where there is one) is statutorily responsible for enforcing the rules of the district court and the bankruptcy court and seeing that bankruptcy court business is handled effectively and expeditiously.
- The bankruptcy court (i.e., the bankruptcy judges in regular active service) appoints the clerk of the bankruptcy court and approves the appointment of deputy clerks.

Circuit Judicial Council

Members: Chief judge of the court of appeals for the circuit (chair); equal number of active circuit and district judges of the circuit (precise numbers, terms, and mode of selection determined by vote of all active Article III judges of the circuit); and, in some circuits, senior judges, bankruptcy judges, and/or magistrate judges as non-voting observers.

Meetings: Required to meet at least twice a year but often does so more often.

Functions: Makes "necessary and appropriate orders for the effective and expeditious administration of justice" within the circuit (all judges and employees in the circuit are required by statute to give effect to council orders); considers complaints of judicial misconduct and disability if referred by the chief circuit judge; reviews and may abrogate district court rules; appoints the circuit executive (who is secretary to the council); authorizes law clerk and other chambers personnel; approves chambers and courtroom space; performs numerous other duties as prescribed by statute or Judicial Conference policy.

Federal Court Governance—Regional and Local Institutions (except special courts)

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Chapter 8
Resources

RESOURCES—human and economic—provide the means for the federal courts to carry out their mission. The near future will continue to be an era of austerity as far as federal budgets are concerned, and the judicial branch will have to do more with less. The plan contemplates that the federal courts will have to redouble previous efforts to cut red tape, streamline the budget process, add flexibility to personnel and procurement practices, decentralize decision-making, and eliminate inefficient and unnecessary activities. More demands will also be placed upon the system's human resources, and the courts will have to strive to recruit and develop the kinds of talent that will continue the standard of excellence that is the hallmark of the federal system. From judges' chambers to clerks' offices to probation and pretrial services operations, the federal courts will also have to initiate and support strong resources management throughout all court units.

Administering justice is expensive and legislative additions to the federal courts' jurisdiction are not cost-free. The federal courts will continue to seek the resources necessary to carry out the tasks assigned by Congress and the Constitution, and they will remind the nation and the political branches that maintaining the traditional standards of the federal courts requires sufficient resources. The level needed depends upon what vision of the federal courts is followed over the next few decades.

This chapter's recommendations assume that the federal courts will avoid the dramatic expansion of size and role discussed in Chapter 3. A greater magnitude of resources and far more resource management would be required by a federal court system with significantly greater workload and personnel. A few of the resource issues raised by the alternative future of the federal courts are discussed in Chapter 10.

Obtaining Adequate Resources

■ RECOMMENDATION 53: The federal courts should be provided with adequate resources to ensure proper discharge of the courts' constitutional and statutory mandates.

Any comparison to the state courts reveals that the federal courts have been well funded. During the past decade, Congress has provided the judicial branch with a rate of resources growth about equal to that of the Department of Justice, but well above that of executive branch agencies and, in recent years, that of the Congress itself. Congressional penury has not placed the federal courts in their current circumstances. Rather, the current situation results from the increased workload of the federal courts and their honest adherence to empirical workload formulae as a basis for budget justification. Where workload has increased, the federal judiciary has argued that resources ought to increase as well. Where workload remains flat or decreases markedly, budget requests are correspondingly limited or reduced.

Although recent judicial budgets have shown sizeable increases, the increases have not kept pace with the volume and costs of additional tasks assigned to federal courts by new legislation. Inadequate provision of resources challenges judicial branch independence. Overload and delay become the first consequence. Some judicial responses to delay may reduce the quality of federal justice. On the other hand, fail-

ure to decide cases more quickly creates access barriers to litigants unable to bear the costs and consequences of delay.

Separation of powers principles require that no branch of government deprive another of either the powers or resources it needs to perform its core functions. Discharge of the judicial function as an independent branch requires resources sufficient for the judiciary to perform all its constitutional and statutory mandates. Unlike several state judiciaries, which have asserted an inherent right to compel funding beyond regular appropriations for judicial functions, federal courts depend on the Congress to provide them with sufficient resources. Chronic failure to provide adequate resources puts federal judges in the unfortunate position of supplicants, constantly begging the Congress for funds.

■ RECOMMENDATION 54: Congress, when enacting legislation affecting the federal courts, should appropriate sufficient funds to accommodate the cost to the courts of the impact of new legislation.

The Administrative Office of the United States Courts currently prepares and makes available to Congress judicial impact statements on legislation potentially affecting the judiciary. By utilizing these impact statements to ensure that funding is commensurate with responsibility, Congress should not approve new legislation affecting federal courts unless it approves sufficient funds for the judiciary to meet its obligations under that legislation. In lieu of appropriating new funds to support the judiciary as it is assigned new obligations, Congress, when creating legislation with a quantifiable judicial impact, should reduce by legislation current obligations of the judiciary sufficiently to offset the impact of new legislation.[1]

■ RECOMMENDATION 55: Federal judges should receive adequate compensation as well as cost of living adjustments granted to all other federal employees.

Implementation Strategies:

55a Section 140 of Pub. L. 97-92 should be repealed.

55b The current practice of linking judicial and Congressional pay raises should be ended.

Denials of cost of living adjustments constitute an actual diminution of compensation. Although perhaps not contravening the irreducible salary clause of the Constitution, such denials of cost of living adjustments violate the spirit of that constitutional protection. Current practice from time to time has forced federal judges to serve with inadequate compensation, to leave the bench, or to ask Congress for compensation while at the same time sitting in review of congressional enactments. Consequently, consistent with the spirit of the irreducible salary clause, salary increases should automatically be provided to federal judges when other federal employees receive them.

This current compensation regime is a vehicle for Congressional control and a threat to an independent judiciary. In order to retain qualified judges in its service, the federal judiciary risks the very political entanglements, or the appearance of those entanglements, from which the judiciary is to be independent. Attracting and retaining qualified federal judges requires creating incentives for extended service. The disincentive of Section 140,[2] which requires affirmative legislative approval for judicial salary increases (even when those of other federal officials are automatically adjusted for cost-of-living increases), should be repealed. Also, the current practice of link-

1 See Chapter 4. Recommendation 12 *supra.*

2 Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1982).

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ing judicial and Congressional pay raises should be discontinued.

■ RECOMMENDATION 56: Congress should include budget appropriations for the constitutionally-mandated functions of federal courts as part of the non-discretionary federal budget.

Several of the current functions of the judicial branch are constitutionally mandated. As such, costs for these budgets are not discretionary with the judiciary or the Congress. Therefore, these items of the judicial budgets should be treated as non-discretionary spending by the political branches and appropriations should be afforded automatically once these items are budgeted by the judiciary.

■ RECOMMENDATION 57: The federal courts, including the bankruptcy courts, should be funded primarily through general appropriations.

Federal courts are an indispensable forum for the protection of individual constitutional rights. Accordingly, the costs of federal courts are properly borne by all citizens. Unlike other governmental operations such as national parks, for which substantial funding through user fees may be appropriate, the mission of federal courts could not be performed if users were denied access because of an inability to pay reasonable user fees.

At least three reasons support continued reliance on general appropriations instead of user fees. First, given that the frequency of federal court filings can vary substantially from year to year, economic uncertainty about the amount of revenue that can be raised annually through user fees makes user fees an unreliable and, therefore, undesirable source of funding. Second, with that uncertainty, constant fee adjustments might be necessary in order to sustain ongoing judicial programs. Finally, and most importantly, litigants should not be so burdened with fees as to effectively eliminate the access of some low and moderate income users to our federal forum. The reasonableness of fees and principles relating to revenues and fees are discussed in the next chapter at Recommendation 87.

The bankruptcy courts and bankruptcy cases should be treated similarly. Before the Bankruptcy Reform Act of 1978, the bankruptcy system had been financed through fees, with general revenue covering operating deficits in the system. The Commission on the Bankruptcy Laws of the United States recognized that the system could not be self-supporting without significantly raising financial burdens on debtors and creditors, and therefore, recommended discontinuing court financing through fees. Legislative history of the 1978 Act reflects that the bankruptcy court, like other federal courts, should be financed through appropriations.[3]

No special case can be made for making the users of the bankruptcy courts pay their own way. The bankruptcy system should continue to be funded primarily through the regular appropriations process. The alternative of high user fees will as a practical matter result in restricting access of large segments of the general population and business community, who may be legitimately in need of a form of bankruptcy relief.

Ensuring Lifetime Service on the Bench

■ RECOMMENDATION 58: Incentives should be created to allow the courts to attract and retain the best qualified persons as judges and eliminate disincentives to long judicial service. Federal judges should be encouraged to stay on the bench for the lifetime tenure that the Constitution contemplates and guarantees.

The primary resource of the federal courts is the

3 See 124 CONG. REC. S 17406 (Oct. 6, 1978) (statement by Sen. DeConcini upon introducing the Senate amendment to the House amendment to H.R. 8200), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6554.

men and women who serve as judges. Preserving the core value of excellence depends on the federal courts' ability to attract the highest caliber of lawyers and retain those persons for a lifetime of service. Constant turnover in the federal bench, through resignation or retirement, has undesirable consequences. Experienced judges who leave the bench take with them significant expertise, and, under current practice, those judges are seldom replaced for several years.

As long as their physical and mental capabilities allow them to, federal judges should continue to serve, first as active judges and then, when they reach senior status eligibility and wish to slow down, as senior judges. There should be an expectation of a lifetime commitment for federal judges from the time of appointment (despite the possible financial sacrifice). It should be made clear that "revolving door" judges—those who stay on only a few years—do not best serve the interests of the judicial branch and the nation (excluding, of course, those judges who choose to accept appointments to serve the public in high positions in the executive or legislative branch—as several FBI Directors, Attorneys and Solicitors General, a Senate Majority Leader, and a Counsel to the President have done), Nor do those judges who, when appointed, intend to serve their designated years until eligible for retirement and then return to practice or go on to other careers.

Measures that encourage judges to leave the bench after serving for specified periods of time should be avoided. For example, until fairly recently, a judge who left the bench entirely at age 65 would not continue to receive a full salary (as pension) for life. That was changed in 1984, so that now a judge eligible for senior status under the rule of 80 (age 65 and 15 years of service) can leave the bench entirely, practice law or teach or engage in any other private endeavor and still receive full pay (as pension). Such measures should be avoided in the future. For instance, lowering eligibility under the rule of 80, to an age 60 and 20 years of service requirement (as is now being considered) or change to a rule of 75 should apply only to judges who take senior status *and* stay on the bench.

■ RECOMMENDATION 59: Service-year credit toward benefits vesting for service already rendered as federal judicial officers should be awarded to bankruptcy and magistrate judges elevated to the Article III bench.

Current law contains disincentives for sitting bankruptcy and magistrate judges to accept elevation to the Article III bench. Upon elevation, these judicial officers receive no service-year credit under the retirement and disability benefits plan for Article III judges for service rendered as a federal judicial officer. These disincentives are an unnecessary impediment to the judiciary's ability to attract the best qualified persons to the Article III bench, and illogically penalize persons who have already rendered (and who upon elevation will continue to render) service for the judiciary.

■ RECOMMENDATION 60: Adequate security protection should be provided for judges and court personnel when they are away from the courthouse.

Implementation Strategies:

60a Where necessary, home security systems and portable emergency communications devices should be provided.

60b New judges and their families should receive security briefings.

60c Training for judges in the use of firearms and other self-protection should be made available.

60d Judges and probation officers should receive information whenever prisoners are released. The notification should include an assessment of the violent nature of the prisoner and the potential risk he or she poses to judicial branch personnel.

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The judiciary should be directly involved in the development of security policy, the establishment of security priorities, the implementation of a comprehensive security program, and the monitoring of the use of judicial security resources.[4] Previously, the Judicial Conference has called for legislation to enable judicial officers to carry firearms, for ensuring the safety of judicial officers while they are away from the courthouse, and for establishment of court security as the primary duty of the United States Marshals.[5]

The Judicial Conference should assume responsibility for overseeing the assignment of court security personnel in accordance with recently-developed standards for deploying court security officers for all districts. This deployment should be accomplished with sufficient flexibility to address the particular needs of a specific district, taking into consideration the district's size, location, number of judges, past history of violence, and future projections.

Making Most Effective Use of Judicial Resources

To ensure continued access and quality in federal justice, the organization and procedures for allocating existing judicial resources should be made more efficient and flexible as workload demands increase. All available judge power, including senior judges, magistrate judges, and bankruptcy judges, must be fully used. Only by drawing on all available judge power will the goal of carefully controlled growth of the federal judiciary be attained.

■ RECOMMENDATION 61: Sufficient flexibility should inform the standards and procedures for designating and assigning circuit, district, magistrate and bankruptcy judges to perform judicial duties in another district within the same or another circuit so as to allow the prompt, efficient allocation of available judge power wherever needed.

Workloads frequently shift in ways unrelated to the permanent allocation of resources among the federal judicial circuits and districts. Since intermittent increases in filings cannot be addressed effectively through creation of additional judgeships or realignment of boundaries, the courts need to make more efficient use of existing judicial resources. Consolidation of districts may assist in equalizing workloads, thus avoiding the more glaring anomalies. But there also will be increasing need for visiting circuit, district, magistrate, and bankruptcy judges to provide temporary assistance. For many years inter-circuit and intra-circuit assignments have been used to direct judge power from courts with less burdensome dockets to those where additional help is needed. Although critical to the judiciary's success in meeting workload demands to date, these procedures are often cumbersome, with a potential to frustrate prompt relief of overburdened courts even where sufficient judicial resources exist within the system at large.[6]

Given the present alignment of judicial districts, it is important to overcome rigid allocation of judge power to individual courts. The answer is to adopt and maintain standards and procedures that readily facilitate temporary assignments of judges to overburdened

4 See Chapter 7, Implementation Strategy 50a *supra*.

5 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69 (Sept. 1990); *id.*, at 12-13 (Mar. 1989).

6 An example of this potential can be seen where a judge cannot travel short distances to assist a court in another district without the approval of the chief circuit judge or circuit judicial council (located two or three states distant in some cases) or, if the other district lies within another circuit, the Chief Justice of the United States. Large metropolitan areas such as Kansas City, New York City, St. Louis, and Washington, D.C., are each divided among two or more districts, sometimes falling into different circuits. Unnecessary expenditures of judicial time on travel result in places where circuit and district boundaries are combined with substantial distances between places of holding court. An example of this can be found at New Albany, Ind. (located in the Southern Dist. of Ind., 7th Cir.), which is adjacent to Louisville (principal place of holding court in the Western Dist. of Ky., 6th Cir.), but must be served by judges travelling more than 100 miles from Indianapolis thrice annually.

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courts, including measures to assure adequate space, staff, and other resources for visiting judges. In an October 1992 survey, just over 71 percent of the respondents (approximately 75 percent of active judges responding) supported easier movement of judges for purposes of holding court in districts requiring temporary assistance.[7]

To assist in the development of this long range plan, the Judicial Conference Committee on Intercircuit Assignments examined the current process for assigning judges to temporary duty on other courts and generally reviewed the impact of district and/or circuit boundaries on efficient deployment of judicial resources.[8] Although the idea of requiring judges to accept temporary assignments to courts in serious need of assistance was rejected as potentially divisive and disruptive of courts and individual judges' efforts to manage their time and caseload,[9] the committee recognized the importance of making the system "simpler and more flexible."[10]

If the system can ensure that judge power is applied when and where it is most needed, it will be better equipped to meet future workload challenges. In the event, however, that the present arrangements are unable to address future judge power needs in a prompt and efficient manner, the judiciary should consider structural changes to streamline temporary assignment authority. One possible measure might be legislation authorizing district judges to hold court in any district located within a certain distance or travel time of their permanent duty stations upon designation by the chief judges of the respective courts. Although sound reasons may exist to retain oversight and control of judicial movements in general, there is little to recommend in a process that frustrates access by overburdened courts to nearby, underutilized judicial resources.

■ RECOMMENDATION 62: The courts should use senior and recalled judges—a significant portion of federal judge power—as much as possible to achieve the goal of carefully controlled growth.

Senior judges carry a significant portion of the caseload of the federal judiciary, accounting (in the statistical year ended June 30, 1993) for 15,047 appellate participations and conducting 3,767 trials. This amounted, respectively, to about 16% of all appeals and about 18% of all trials. In many districts and circuits, the work of senior judges has been indispensable to the effective performance of the work of the federal courts. Senior judges also take up the slack caused by vacancies in courts across the nation and contribute significantly to the administration of the federal judicial system.

Without their efforts, the federal judiciary would need substantially more judges to handle its caseload. In 1992, senior judges provided service equivalent to 92 active district judges. According to an estimate made in 1989, the nation would need an additional 80 judges, at an annual cost of approximately $45 million, to compensate for the loss of senior judges. With the number of senior judges much higher now than it was in 1989, this estimate is probably much too low.

7 PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 12, 34, 56, 78, & 100 (Federal Judicial Center 1994).

8 Report of the Judicial Conference Committee on Intercircuit Assignments to the Judicial Conference Committee on Long Range Planning (Jan. 31, 1994).

9 *See id.* at 12. The committee agreed, however, to seek a statutory amendment allowing delegation of the power to authorize intercircuit assignments if the Chief Justice finds that responsibility to be "cumbersome." *Id.* at 10.

10 To that end, the committee agreed to undertake the following measures: (1) recommend to the Chief Justice appropriate amendments to the Guidelines on Intercircuit Assignments; (2) publicize more widely the availability of temporary assignments as a case management tool; (3) identify courts that may benefit from the services of visiting judges; (4) survey active judges to determine who may be underutilized and willing to assist courts in other circuits; (5) recommend long-term (*i.e.*, up to one year) open assignments of senior judges on an experimental basis; and (6) evaluate, through voluntary, post-assignment reports, the overall effectiveness and impact of visiting judges on court caseloads, staff and facilities. The committee believes that "major improvements will result" from these actions, enabling it "to meet current and future requirements." Report, *supra* note 8, at 10-12.

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When a judge takes senior status, it creates an immediate vacancy on the court even though the judge continues to work. This means that a younger full-time judge will be appointed to fill that spot. When a senior judge continues to work, the court has a young and vigorous new judge and the assistance of an experienced senior judge often working half-time. As a result, the court enjoys in that judgeship a 50 percent increase in judge power.

New legislation allows recall of bankruptcy judges and magistrate judges to render judicial services as needed. This enables the courts to benefit further from the experience these judges bring to the courts they serve.

■ RECOMMENDATION 63: Judges should be encouraged to assume senior judge status through improvement in policies or procedures that affect senior judges.

In recent decades, there has been a new and alarming trend for federal judges to leave the bench entirely when they reach retirement eligibility, rather than take senior status. From the early days of the federal judiciary, few judges voluntarily left the bench before the age of 70. In the last 25 years, however, 81 have left, only 16 of whom were age 70 or over. The reasons for the recent trend are many, but it can be safely assumed that in most cases economic, workload, and status-related factors played a decisive role.

Senior judges should suffer no discrimination upon assuming that status. To the contrary, they should be treated with the consideration that their years of service justify. Fearing the impact of prejudicial policies, some active judges may decide to remain in full-time active status, when, because of advancing years, they should change their status to senior. Other active judges may decide to forego senior status when eligible and simply leave the bench altogether. A fair, responsive policy for utilizing this invaluable resource will deter the use of either of these alternatives.

Responses to a recently-conducted survey of senior judges and active judges eligible or soon to be eligible for senior status indicate that the treatment of senior judges often ignores their important contributions. Examples of disincentives to taking senior status and remaining on the bench, ranging from major to petty, abound. For example, the 1991 substantial pay increases for federal judges, 28 U.S.C. § 371 (b) (3), awarded certain senior judges a much smaller increment. This distinction should be repealed. In some circuits, senior judges are not considered to be "judges of the court" for purposes of comprising panels under 28 U.S.C. § 46 (b). Also, some but not all circuits treat senior judges unwisely with respect to a variety of matters, including chambers assignment, provision of court reporters, sitting preferences, participation and voting in court meetings unless otherwise provided by statute, the placing of a senior judge on the bench in panels of three and in court ceremonies, and dissemination of information and inclusion of senior judges "in the loop." In all these situations, senior judges should be treated, if practicable, as though they were active judges with the same seniority. They should be referred to, if so desired, as "judge" rather than "senior judge." In addition, current statutory prohibitions affecting senior judges should be reexamined. Each court of appeals and district court should review their practices and policies (including those dealing with annual recertification of senior judges) to ensure that senior judges are accorded full court participation and treated with the respect and dignity which is their due.

■ RECOMMENDATION 64: Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy. Individual districts should retain maximum flexibility to utilize magistrate judges in light of local conditions and changing caseload needs.

As adjunct judicial officers of the Article III district courts, magistrate judges are indispensable resources who are readily available to supplement the work of life-tenured district judges in meeting workload demands. Maintaining an appropriate division of labor between district judges and magistrate judges will pose a continuing challenge to the courts. Individual districts should retain maximum flexibility to use magistrate judges in light of local conditions

and changing caseload needs.

The need to conserve the increasingly scarce time of district judges, however, will make effective and extensive use of magistrate judges (including those retired judges available for recall service) a practical necessity in virtually all courts. Of course, there may be duties (*e.g.*, felony criminal trials) that only district judges should perform as a matter of constitutional propriety and sound policy. The district courts should maximize the use of magistrate judges to conduct civil proceedings with the parties' consent as presently authorized by 28 U.S.C. § 636(c).

District courts should adopt comprehensive plans for using magistrate judges in accordance with Judicial Conference guidelines. This process could lead to development of minimum standards to ensure that existing magistrate judge resources are used fully and effectively before additional positions are authorized. Magistrate judges should be provided adequate staff, clerical, research, and other support services to enhance their ability to perform the functions specified above.

■ RECOMMENDATION 65: Magistrate judges should exercise authority commensurate with their responsibilities, including a limited contempt power to punish litigants or counsel directly for misbehavior, disobedience or resistance to a lawful order.

To be recognized and utilized as fully effective judicial officers in the district court, magistrate judges must possess the requisite legal authority and status, including an ability to enforce their own orders. Although 28 U.S.C. § 636(e) provides that certain acts or conduct in proceedings assigned to a magistrate judge constitute a contempt of the district court, the authority of the magistrate judge in such instances is limited to certifying the operative facts to a district judge and serving a show cause order on the alleged contemner. The power to punish litigants directly for contempt in cases of misbehavior, disobedience, or resistance to a lawful order is essential. Indeed, the present lack of contempt power for magistrate judges can be a major detriment to their performance of judicial functions.

Reducing the Problem of Judicial Vacancies

Research concerning efficient provision of judicial resources demonstrates two disturbing trends in recent years: (1) an increasing percentage of vacant judicial positions and (2) a lengthening time from vacancy to confirmation. The judicial vacancy rate is among the most important problems facing the federal courts. Solving the problem, however, depends primarily on action by the other branches of government.

By constitutional design, the very nature of judicial appointments is political. Any potential solution that seeks to remove politics from the process and shorten it would also dramatically change the nature of the appointment process and may require a constitutional amendment.[11] The plan does not endorse such drastic remedies to a problem whose solution is primarily out of the control of the judicial branch. Nonetheless, several alternative solutions are outlined, here and in Chapter 10, in roughly ascending order of change to the present process, as a means of emphasizing how serious the problem is and why it requires serious attention and immediate action by the political actors most involved in the appointment process.

Filling Vacancies

■ RECOMMENDATION 66: Additional time should be gained for selection of judicial nominees by encouraging judges taking senior status or retiring from office to provide substantial (i.e., six-month or one-year) advance notice of that action.

The lengthiest delays in filling judgeships arise in the process of identifying and evaluating the suitability of potential nominees. If that process can be routinely commenced *before* a vacancy arises, the period of time

11 See Chapter 10, notes 5-8 and accompanying text *infra*.

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in which a court is required to operate at less than full strength can be substantially reduced if not eliminated. Advance notice can be used to achieve this result in two ways: (1) directly apprising executive and legislative branch officials of the impending need for a judicial appointment; and (2) allowing local bar and civic organizations to use their resources to encourage the President and the Senate to act speedily in appointing a new judge.

Even where vacancies could be anticipated, it may not always be possible to select a successor before the vacancy occurs. Such action would depend on voluntary cooperation from individuals who, for various reasons, may not otherwise wish to make their retirement plans known in advance, despite the Judicial Conference position adopted in March 1988 urging advance notification.

■ RECOMMENDATION 67: A more efficient approach to the selection of judicial nominees should be devised.

Implementation Strategies:

67a Presidential and senatorial staff should afford priority consideration to filling judicial vacancies.

67b The President and senators should rely on special commissions, committees, or staffs to assist in the identification and screening of judicial candidates.

67c Adequate resources should be devoted to the task of investigating the backgrounds of potential judicial nominees, including FBI checks and ABA inquiries.

At present, nominees for court of appeals, district court, and Court of International Trade judgeships are selected through a variety of methods that depend on the type and geographic location of the positions to be filled, the decision making styles of persons involved in the process, and the prevailing political realities. Although some judicial nominations are the product of well-organized, effective vetting procedures (*e.g.*, the nominating commissions that some Senators have employed), other nominees are often selected through a less developed, ad hoc process with variable results. It should be possible to ensure speedier, perhaps surer, decisions—resulting in shorter periods of judgeship vacancy—if more expert and regularized procedures for identifying and screening candidates for judicial office are adopted where such procedures are now lacking, and if adequate financial resources and personnel are devoted at the various stages of the nomination process, including the necessary FBI checks as well as the American Bar Association's rating process.

■ RECOMMENDATION 68: Benchmarks established by statute should cause the President to nominate a new judge and the Senate to act on the nomination in a timely manner. All vacancies which extend beyond the benchmarks should be officially communicated to Congress and the President, and publicized.

Recognized time limits on the nomination and confirmation processes would emphasize the importance of judicial appointments and create the expectation that vacancies will be filled expeditiously. They also would provide the relevant executive and legislative branch officials with specific deadlines or targets for completing various tasks required in order to nominate or confirm a new judge.

Unless, however, deadlines for presidential and senatorial action can be enforced through court action (an unlikely prospect given the inevitable questions about standing and justiciability) or serve as a "trigger" for alternative appointment authority as described in Chapter 10, a statute that requires action to fill vacancies within a particular time frame might be ignored without consequence. For that reason, it might be more worthwhile (and certainly less difficult) for the judiciary simply to suggest certain time frames as "benchmarks" or "guidelines" for presidential and senatorial action.

■ RECOMMENDATION 69: The President should exercise recess appointment authority.

Under Article II, Section 2, Clause 3 of the Constitution, the President is empowered "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Although this clause does not specifically mention judges, neither are they excluded from its operation. On two occasions, courts of appeals have upheld the historical practice of using the recess appointment power to fill judicial vacancies pending the completion of Senate action on the President's nominations.[12]

In the past, concerns had been raised about frequent use of recess appointments to fill judgeships[13] and its impact on the Senate's prerogative to scrutinize the selection of judges.[14] To avoid that problem, recess appointments should be given to individuals who are well-qualified to hold judicial office but are not candidates for permanent appointment to the vacant position. For example, magistrate judges and bankruptcy judges could be appointed temporarily as district judges during long vacancies if—

(i) legislation were enacted permitting magistrate judges and bankruptcy judges to receive recess appointments while retaining their non-Article III judgeships as well, and

(ii) either the number of magistrate judges or bankruptcy judges were increased for this purpose or retired magistrate judges or bankruptcy judges were recalled to serve in the place of the magistrate judges or bankruptcy judges temporarily appointed to district judgeships.

Offsetting the Impact of Vacancies

Ultimately it may be more effective to address the *effect* of the vacancy problem rather than its various *causes*. To a large degree, the delays experienced in filling judgeships are attributable to political factors that cannot be avoided or circumstances that cannot be anticipated. Whatever the reason, the impact of prolonged vacancies is the same: courts are required to handle caseloads without the requisite judge power. Although some or all of these measures might be used to expedite the appointment process, vacancies undoubtedly will continue to occur more rapidly than the system can fill them, and thus the courts will be adversely affected unless they possess a reserve capacity to function well at less than full strength.

■ RECOMMENDATION 70: An appropriate number of "floater" judgeships (i.e., positions not allocated to specific courts) should be created, whose incumbents would be available for assignment on a voluntary basis to requesting courts where workload capacity is diminished by vacancies.

12 *See* United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

13 During the past two centuries, 309 judges have served under recess appointments. *See* Appellee's Second Supplemental Brief, United States v. Woodley, 726 F.2d 1328 (9th Cir. 1983), *vacated*, 751 F.2d 1008 (9th Cir. 1985) (en banc).

14 Senatorial opposition to judicial recess appointments did not manifest until the mid-20th century, when 53 judges (including two Supreme Court justices) were appointed in that manner during the Eisenhower and Kennedy administrations. See *Woodley*, 751 F.2d at 1015-16 (Norris, J., dissenting). Ultimately, a "sense of the Senate" resolution was passed to discourage continued use of judicial recess appointments, at least in the Supreme Court context, "except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business." 106 CONG. REC. 18145 (1960). Since 1964, only one judge has been appointed in this manner. *Woodley*, 751 F.2d at 1009.

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Since vacancies are a system-wide problem, it may be appropriate to offset their impact through judgeships not tied to a particular court. This approach allows the judiciary to deploy additional resources as needed but avoids the possibility that individual courts will be overstaffed once their vacancies are filled. If courts in need of assistance call on senior judges and on volunteer judges from courts able to spare them, the need for any corps of "floaters" may be minimized.[15]

■ RECOMMENDATION 71: Civil Justice Reform Act advisory groups should devise and propose to the district court emergency procedures for dealing with long-standing vacancies in the district as exceptions to the plans approved for the district; statistical reports should reflect the impact of vacancies in a district.

The 94 districts have benefitted from the variety of procedural mechanisms and experiments proposed by the advisory groups formed to implement the Civil Justice Reform Act. These committees of lawyers and others involved in the justice system should be charged with assisting the district courts in devising means of coping with long-standing vacancies. Moreover, the stark impact on a district court's capacity to dispose of its caseload when one or more judgeships are vacant should be reflected in the statistical presentations of the work of the courts.

■ RECOMMENDATION 72: Rules governing the number of visiting or senior judges serving on panels in the courts of appeals should be held in abeyance during the existence of vacancies on the court constituting a judicial emergency.

Congress has required that a majority of judges on any panel in an appeals court "be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness."[16] The several circuits have differed—both through local rule and decisional law—as to whether senior judges are treated as "judges of the court" under this statute. Nonetheless it is clear that "judicial emergencies", as defined by the Judicial Conference, exist in many courts.

In dealing with the exigencies created by these judicial emergencies, the affected courts should be free to employ all available judge power, including both senior and visiting judges.

Managing Judicial Branch Resources

The governance structure of the federal courts is based on a considerable degree of local autonomy for courts and judges. The federal courts have seen a recent trend towards decentralization of management authority to local courts, although this has been combined with increasing accountability and responsiveness to centralized leadership. The federal courts' decentralizing thrust is supported by recent management theory, which emphasizes the benefits of efficiency and initiative gained by empowering small units that are closest to the core mission of the enterprise.

15 Federal judges have nearly always been drawn from, and identified with, the region or locality in which they serve. Use of "floater" judgeships, even on a limited basis, would constitute a departure from tradition that may be unacceptable, either on political or other grounds. The only previous experiment of this kind—the Commerce Court early in this century—was unsuccessful. It might be difficult to find qualified individuals who are willing to assume and remain in this kind of "roving" assignment. Rather than attempt to recruit new judges permanently for such positions, it might be more feasible to authorize the Chief Justice to assign existing judges to "floater" service for limited periods. To do so, however, would require Congress to allocate additional judgeships to one or more courts.

16 28 U.S.C. § 46 (b) (1988).

Through this process, which has begun with budget decentralization and expanded local roles in the personnel and procurement fields, the judges and court administrators in each circuit, district, and court have assumed responsibility for the direction of the operations of their units. At the same time, they have recognized the need for a planning function to organize this thrust.[17]

Budget Decentralization

■ RECOMMENDATION 73: The courts should complete the process of decentralizing the budget execution function to match responsibility with authority.

Budget decentralization has been grounded in the collegial structure of the federal judiciary, reflected in the great degree of local autonomy which has characterized the operation of the courts. This devolutionary approach is being tested during a period of fiscal stringency and will benefit from the system's experience with confronting the challenges encountered during this time.

The budget decentralization process ought to be gradual and evolutionary to serve the goals of institutional cohesiveness and equity through development of a central audit function responsibly to oversee and account for the expenditure of public monies and submission of a single judiciary budget. Each step in budget decentralization has been mirrored by the increasing sophistication of the audit trail. This must continue even as needed flexibility is insured without allowing audit requirements to ossify operations.

Technology and Facilities

Technology will bring vast change in how people meet, interact, conduct business, and resolve their disputes. Growth in communications abilities will change where people work, as well as how they work. While face-to-face meetings may remain the norm in some situations, increasing reliance will be placed on electronic media. The courthouse of the future may not always be a finite physical space. Critical issues about technology, including data security and due process rights, must be resolved, however, before these changes take effect.

■ RECOMMENDATION 74: Use of court-related technology should be expanded to improve the ability of the federal courts to provide efficient, fair, and comprehensible service to the public.

The federal courts' experience with introducing and working successfully to integrate into ongoing operations a range of innovative technologies is broadly explored in the *Long Range Plan for Automation in the Federal Judiciary.* The process by which this document is generated and reviewed by umbrella and user groups of judges, Administrative Office officials, court administrators, and support staff provides a well-conceived route for testing and bringing the best technological innovations to the courts.

In the future, technology must continue to be employed to enable the courts to function more effectively and the various technologies must be integrated. A true information management and national communications network has begun to be developed for the federal courts. Newer technologies must not only be successfully introduced into the court milieu: for the most productive use to be made of these innovative processes, all those involved in court operations — not only technically-expert staff — must be capable of identifying how and where new technological tools will improve performance.

■ RECOMMENDATION 75: The courts should continue to study how emerging technologies should be employed to improve the administration of justice generally.

The concept of the "electronic" or "virtual" courthouse—a system that networks computers to permit parties to litigation and the court to exchange materi-

17 *See. e.g.*, Henry Mintzberg, *The Fall and Rise of Strategic Planning*, HARV. BUS. REV. 107, 112 *et seq.* (1994).

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als on-line and to conduct meetings and hearings over the network, including use of simultaneous video conferencing, in lieu of the participants assembling at the same location—should be assessed to determine its suitability to meet the needs of court users and the judiciary. When courts are able to receive documents electronically from parties already equipped to submit their cases in this manner, the concept of the "virtual courthouse" envisions a court able to schedule proceedings through visual telecommunication, with participants at different locations, lessening the need for a "physical courthouse."

■ RECOMMENDATION 76: The judicial branch should maintain a comprehensive space and facilities program.

Almost all the federal district and circuit courts have completed long range plans for facilities and space requirements. Working through the Judicial Conference, the courts should continue to be active participants in the assessment of need, and the design, construction and management of space and facilities for judicial officers and court employees. Using objective planning and space standards approved by the Conference, a long range facility planning program should be continued and periodically updated to support funding requests to Congress for new court and court unit facilities. The scope of space and facilities planning by the courts should expand to include careful assessment of the likely impact of new technologies. The Conference should seek adoption of a capital budget for real property and pursue alternatives to financing new construction through annual appropriations.[18]

■ RECOMMENDATION 77: The courts should study alternative methods of organizing and allocating judicial support functions to achieve economies of scale, eliminate unnecessary duplication, and otherwise improve administrative efficiency and effectiveness.

With respect to judicial support functions, it may be possible to achieve greater efficiency and cost savings through voluntary sharing of such personnel as administrators, clerks, and probation officers, among districts. Unnecessary procedural barriers should be eliminated to expedite feasible, common sense solutions to resource needs. Given the federal judiciary's commitment to decentralized court administration and budgeting, it may be likewise appropriate for local courts to decide more freely how to allocate their personnel resources. Based on this principle, a number of districts or circuits should be selected to conduct pilot programs in which more flexible methods of organizing judicial support activities can be tested. Such experiments should also yield relevant data on which to evaluate the desirability of more far-reaching structural changes and innovations at the district court level.[19]

■ RECOMMENDATION 78: The federal courts should define, structure and, as appropriate, expand their data collection and information gathering capacity to broaden the range of perspectives and insights relating to federal court operations and policies.

Implementation Strategies:

78a To meet the needs for improving data for reporting, policy making and planning, the Judicial Conference should establish a steering group with broad membership to coordinate the process of defining all requirements and implementing actions. Such a steering group should have representation from all primary data sources, users in the judicial branch, and outside researchers studying the courts.

18 See Chapter 7, Implementation Strategy 50a *supra*.

19 This kind of resource sharing is already permitted in the defender services program under the Criminal Justice Act. *See* 18 U.S.C. § 3006A(g) (1988) (two adjacent districts or parts of districts are authorized to establish a defender organization to serve both areas).

78b This steering group should:

(1) Conduct a needs assessment for uses of data: outline data needs within the judicial branch, including (but not limited to) circuit, district, and bankruptcy courts, magistrate reporting, Administrative Office program reporting, research, budgetary impact analysis, and long range planning.

(2) Inventory data collection efforts and catalog the types of data being collected. The steering group will take advantage of recent surveys conducted by Conference committees and other organizations.

(3) Evaluate the ability of current statistical data holdings to support planning and policy.

(4) Determine how best such data can be collected and maintained. Determine also how best such efforts should be organized and managed. Determine training requirements.

(5) Taking advantage of the latest technology, design the most appropriate single or coordinated network of data bases for determined needs.

In ascertaining the judiciary's need for statistical data and other information the federal courts should seek appropriate input from interested persons outside the system, such as scholars and researchers who study the courts. Judicial data collection should include the statistical data and other information needed for planning purposes (*e.g.*, data on historical trends and their impact on the judiciary, and on the demographics of court users). Expansion of judicial data collection should be preceded, however, by careful research to determine what precisely is needed in order to run the courts fairly and efficiently. The Judicial Conference should support and promote information resources management to meet the information needs of the courts, the public, the bar, and litigants.

The Federal Courts' Workforce of the Future

The workforce for the federal courts in the future will likely reflect a continuation of the trends that have created the workforce in 1995. The current workforce is larger than ever because of significant workload growth. It rose by 66 2/3% since 1982, from 14,400 to 24,000. Most of the growth has been in supporting personnel: the number of judicial officers has grown only about 17%. Because the business before the courts reflects conditions in society generally, staffing in probation and pre-trial services, bankruptcy and public defender offices has almost tripled in size in the past decade.

The federal courts' workforce today is far more diverse than in the past. During the past ten years the number of women in professional positions has increased over 170%. Women now hold a majority, about 53%, of the judiciary's professional positions (legal, administrative and technical)—in contrast to 1982 when the judiciary's professional workforce was about 36% female. The entire judiciary workforce—including both professional and clerical personnel—has grown from 63% female in 1982 to 69% female by 1991. The federal courts have also made substantial gains in minority employees. African-Americans, Latinos, Asians and Native Americans have more than doubled their numbers and increased their percentage in both the total workforce and its professional component. The greatest minority growth was by Latinos, whose proportion of the total judiciary workforce has grown by 213%.

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What does this hold for the future? At the very least, the proportion of women and minorities in the federal court workforce will continue to increase, particularly in professional and technically-skilled positions. These jobs now constitute 60% of the federal courts' non-judicial positions.

■ RECOMMENDATION 79: The courts should maintain and foster high-quality judicial support services.

The effective operation of court units requires highly qualified, well-trained managers. Accordingly, the courts and national agencies of judicial administration should recruit, retain, and develop the skills of highly competent, efficient professional and support staff.

Increasingly, the federal courts will be competing with other employers for educated, professional, competent workers. To demonstrate that the system supports and rewards exceptional talent and strong performance:

- judicial branch employees who provide this level of support to the judiciary must be recognized and appropriately compensated

- court personnel from all levels should be used extensively to assist the courts in administration and policy development, and

- continuing education must be integrated into both the schedule of the courts and each employee's work.

■ RECOMMENDATION 80: The courts should improve working conditions and arrangements for all court support personnel.

The courts must be adequately staffed to perform all needed functions. Working conditions for court support personnel should reflect the newer policies for the general work force providing family leave, flexible work arrangements, and ombudspersons to consider concerns and complaints.

■ RECOMMENDATION 81: High-quality continuing education should be provided for judges in the law; case management, including use of dispute resolution processes appropriate to the case; and cultural diversity and understanding.

Education and training are as important for maintaining and expanding the skills of the experienced judge as for orienting the new judge. "Judicial education should not, however, end with orientation or yearly circuit conferences but should be a life-long process and pursuit."[20] Social, technological, and demographic changes will require a higher level of judicial competence.

Even if the forecasts of avalanches of cases only are validated by half the conservative estimates (see Chapter 3), massive dockets will test the management abilities of even the best judges. More intensive case management training will accordingly be essential. Appropriate dispute resolution should become the reality and will require judges who are expert and creative in "fitting the forum to the fuss."

To limit inconvenience and downtime for judges, technology exists and has been employed by the courts' education arm, the Federal Judicial Center, to educate judges via interactive video, computer-generated courtroom simulation, teleconferences, and other innovations. The federal courts have a strong

20 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 170 (1990).

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tradition of quality in judicial education programs which must be maintained and extended.

■ RECOMMENDATION 82: All federal court staff should be trained to ensure outstanding service to the public through a "customer service" approach to justice and ongoing education in the use of court system technology.

The courts' emphasis on customer service and appropriate dispute resolution will create new opportunities for court system employees. Technology will free support personnel from the crush of paper record keeping and for new, important jobs in the courts. New labor-saving systems will free staff for work that cannot be performed mechanically.

Nonjudicial court personnel should continue to be trained as service providers and facilitators. Their primary responsibility should continue to be to provide timely, accurate, and efficient service to all persons having business with the courts, and to assist litigants in reaching the next step in resolving their disputes.

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Chapter 9
The Federal Courts and Society

PLANNING for the federal courts' role in the justice system can be difficult enough. Envisioning their proper role in society poses greater challenges, for the Framers of the Constitution intended the federal courts to be ultimately accountable to the people, yet insulated from direct popular pressure. This tension endures.

The symbolic import of the Constitution, and the federal courts' historical role as "keepers of the covenant," also have an incommensurable impact on how society views the federal courts. These attitudes help explain their popularity with Congress and litigants, and why many perceived solutions to societal problems involve litigation in the federal courts. The federal courts must come to terms with these popular views in anticipating future needs, but they must also, in conserving their core values, educate society about the limitations of the federal courts.

Learned Hand's warning—that we sometimes rest our hopes too much on constitutions, laws and courts—bears repetition. Cultural and moral attitudes, changing demographics, the impact of education, families, and neighborhoods—all the multitude of influences on human behavior—all have a far greater impact on society than the actions of the federal courts. Consequently, many of the problems now causing popular dissatisfaction with the administration of justice cannot be solved simply by court reform, improved procedures or greater justice system resources. As former Chief Justice Charles Evans Hughes said:

> We must rely upon the civilizing influences which create standards and traditions beyond and above the law and upon which we must finally depend for the improvement, the adaption and the efficiency of the administration of the law.[1]

Yet, despite these limitations, the federal courts unquestionably have an obligation to meet society's expectations that "equal justice" be more than a platitude. To serve as a fair and impartial administrator of justice, the federal courts must be open and accessible to those who are drawn into or use the judicial process, including litigants, lawyers, jurors, and witnesses. All members of society must be treated fairly, free of bias and prejudice. As America enters the 21st century, the federal courts must plan to meet the needs of a population increasingly diverse in racial, ethnic, and cultural identity. Moreover, the disparities in wealth that now exist will not have disappeared; many members of society will continue to lack the means to afford legal representation. The federal courts must also recognize the need to deal with this reality.

All members of society, therefore, should have a meaningful opportunity to use and participate in the judicial process. All must be treated as valued customers of the courts. To that end, judicial proceedings should be comprehensible, physically accessible, and affordable to ordinary users, including persons with disabilities and litigants not represented by counsel.

No one is more in need of counsel than an individual accused of a crime. The federal courts remain committed to the provision of quality legal services to financially eligible criminal defendants consistent with the mandates of the Sixth Amendment and the

1 Charles Evans Hughes, Speech to the Annual Meeting of the American Law Institute (1929).

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Criminal Justice Act. Increasing demands are being placed on the defender services program as a result of more challenging criminal caseloads, federal sentencing guidelines, and added prosecution resources and initiatives. The constitutional mandate, however, has not changed. Indigent defendants still must have effective assistance of counsel, despite the growing costs of meeting the constitutional obligation. The task is to meet that need in an increasingly efficient and economical manner.

Accomplishing many of the initiatives outlined in this plan will require society's support and, ultimately, the acts of its elected representatives. Regular, direct, formal channels of communication should be maintained between the judiciary and its co-equal branches. An institutional mechanism for regular contact among the branches could serve to enhance mutual understanding, obtain needed assistance, and protect the courts from unwise action. Closer working cooperation between state and federal courts should occur as efforts proceed to increase cooperation between federal and state systems as the nation moves toward recognizing the interdependence of what is ultimately one justice system.

Public confidence in the administration of justice by the federal courts must be maintained. The courts depend on the public for support of their functions. Confidence and support can be enhanced, and user participation in judicial procedures made more meaningful, by educating the public about the role and functions of the federal courts. The judicial branch must act to enhance general public understanding of the federal courts. Better communication would inform the judicial branch of public discontent while it would educate the public regarding the federal courts' problems and limitations.

In some circumstances it is appropriate for the judicial branch, especially after implementing programs to educate the public about the role of the courts, to take steps to enlist public support to assist the judiciary. In all these endeavors to improve the relationship of the federal courts with society, the courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.

Equal Justice

■ RECOMMENDATION 83: Since bias impedes the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness in federal courts.

Effective justice by the federal courts cannot be achieved if litigants face bias based on invidious classifications by lawyers, judges, court employees, or jurors. The courts must initiate and extend efforts to elicit, investigate and resolve claims of bias and to educate judges, court employees, lawyers and litigants regarding how bias can adversely affect litigants, witnesses, attorneys and all those who work in the judicial branch.

Several studies of state court systems have identified bias as a problem in state court systems. The issue of bias has been considered by the Judicial Conference, the states' Conference of Chief Justices and the Federal Courts Study Committee, all of which have urged combatting bias through increased education. In 1992, the Judicial Conference adopted a resolution "encouraging each circuit not already doing so to sponsor educational programs for judges, supporting personnel, and attorneys to sensitize them to concerns of bias ... and the extent which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch." A 1993 Judicial Conference resolution stated that "encouraging circuit judicial councils to conduct studies with respect to gender bias in their respective circuits[,] has great merit ... ." The ongoing educational process in the circuits should continue.

Combatting bias and prejudice requires leadership from the federal bench. Strong statements and actions by federal judges that show bias cannot be tolerated will, as much as any action, help eradicate any bias that exists in the federal courts. Court users

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should be convinced that they have the right and the responsibility to complain about bias and unequal treatment. Each circuit should therefore maintain and promote mechanisms through which complaints regarding bias can be investigated and resolved.

■ RECOMMENDATION 84: Federal judges should strive to understand the diverse experiences of the parties and witnesses and attorneys before them.

The demographics of the United States population will continue to change in ways that will affect the substance of disputes, the ability of litigants to use the courts, and the way evidence is understood and presented. Strengthened training must be provided for court personnel regarding the variety of difficulties experienced by court users unfamiliar with the courts or who may speak different languages, come from different cultures, have difficulty managing family and work responsibilities while appearing in court, or whose culture makes them unfamiliar with our justice system. The courts should employ and promote personnel who are capable of understanding the diverse perspectives and of providing quality service to individuals not fluent in English.

The Future Nation

In America today, old definitions of minority groups are changing as the nation's social landscape tilts toward more concentration of population growth, greater dispersion of population density, and increasing ethnic and racial diversity.

The courts cannot ignore the profound changes underway in our population. Their effect on the future relations of the federal courts and society will shape the nature of our structure and procedures for distributing justice.

Highlights of the changes underway in our society follow:

Population growth

- The 1990 census shows that the nation's population growth is slowing. Growth, moreover, is concentrated in fewer places. City population growth is slowing for a number of reasons, while suburban area population growth is continuing to expand.
- During the 1980s, over half the nation's population growth was concentrated in three states: California, Florida, and Texas. Other growth areas are Arizona, Georgia, North Carolina, Virginia, Washington, and Nevada.

Immigration & migration

- Immigration already accounts for about one-third of the nation's population growth and appears to be increasing. Welcoming newcomers and native-born minorities into the economic and social mainstream is one of the biggest challenges facing America in the 1990s.
- In the 1980s, population gains through migration were largely in Southeastern, Southwestern, and Pacific states, while losses concentrated in states with high international immigration or declining economies.
- Six states — California, New York, Texas, New Jersey, Illinois, and Massachusetts — experienced high immigration from abroad but did not attract large numbers of internal migrants. In fact, these states exhibited an outflow of American born whites and minorities to nearby states. This pattern may be a response to economic, demographic, and social pressures brought about by the continuing wave of immigrants.

Age

- The median age of the U.S. in 1978 was 28. In 1990 it was about 33. By 2005 the median age will be close to 38. In the new century's second decade, it will pass 40.

- In 1965, 29% of the population was under 14 years old, and about the same percent was 45 and older. By 2005, the under-14 population will have declined to about 22%, while those 45 and older are expected to be nearly 40% of the population.
- That means older Americans will increase in number and grow in influence. While about 12% of today's population is 65 or older, in 2020 20% of the population will be 65 or older.

Workforce

- A significant labor force development in the United States generally over the last several decades has been the increase in the minority share of the work force. In 1980, minorities composed 18 percent of the U.S. labor force. By 1992, their share had increased to more than 22 percent.
- During the past four decades, the number of women in the workforce rose significantly. By 1990, women constituted about 45% of the workforce, and the percentage will rise to over 47 per cent by 2000. Over 81% of women ages 25 to 54 will be in the labor force in 2000.
- Two-worker families rose from about 32% of all families in 1960 to 70 percent in 1990
- By the year 2000, minorities are expected to account for 43% of new entrants into the workforce.
- As the workforce growth slows with the aging population, more non-traditional groups will be called to participate. This will include people with various disabilities.

Race and ethnicity

- The census shows that, taken as a whole, racial and ethnic minority groups are growing more than seven times as fast as the non-Latino white majority.
- The black population grew by 13 percent during the 1980s. The Latino population grew 50 percent to 22.5 million while Asian population doubled to over 7 million. Researchers forecast these growth rates will stay about the same the next ten years.
- By the year 2000, minorities are expected to reach 25% of the total workforce. This represents an 8% growth since the late 1980's. In 1990, 6 percent of U.S. counties experienced a majority of combined numbers of blacks, Latinos, Asians, and other minorities. Forty-five counties have near 50-50 balance, most in metropolitan areas.
- By 2005, California is expected to have a population that is 50% people of color speaking 80 different languages.

Social economics

- The child poverty rate has risen by one third over the past 20 years. In 1991, almost 22 percent of the nation's children — approximately 14.3 million young people — lived in families with annual incomes below federal poverty thresholds. This is two to four times the child poverty rate in Canada and Western Europe.
- One in four households with children is headed by a single parent, up from one in eight in 1970.
- Families maintained by women with no husband present doubled from 1970 to 1990 to 10.9 million.
- In the past 30 years, the birthrate among unmarried women 15 to 19 has almost tripled to 45 births per thousand.
- It is a commonly accepted estimate that 20 million people in this country are functionally illiterate. These people cannot hold a job, balance a checkbook or read and understand a newspaper. Even though 86% of our population receives diplomas, approximately 25% cannot read or write at the 8th grade level.

Crime

- In 1992 about 57% more juveniles were arrested for violent crimes than were arrested in 1982, a near-peak year for violent crime.

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■ RECOMMENDATION 85: Justice should be made fully accessible to disabled individuals. Facilities should be constructed or renovated to ensure physical access and to remove attitudinal barriers to providing full and equal justice to the disabled.

Federal courts should be physically accessible to all, including those with disabilities. Creating a barrier-free and user-friendly environment to accommodate the entire population requires implementation of "universal design" to produce facilities that are not only accessible but easy to use. Identifying the barriers and fashioning a model of full accessibility should precede development of an ongoing education program to make all judges and court system support personnel aware of and sensitive to the needs of disabled users of the courts. "Courts are required [by the Americans with Disabilities Act of 1990] to make reasonable accommodations to persons with disabilities in employment unless such an accommodation would result in undue hardship. They are required to make reasonable modifications to provide services unless [those] would fundamentally alter the nature of the service...or present an undue burden."[3]

"As stewards of the justice system, judges and court personnel need to understand both the nature of the aging process and the range of disabilities so that stereotypes don't negatively guide their actions toward members of either group.... Providing information in formats usable by a range of individuals ensures fairness to all."[2]

■ RECOMMENDATION 86: Justice should be made accessible to those who do not speak English.

Under the provisions of 28 U.S.C. §§ 1827-1828, the federal courts supply interpreters in cases instituted by the United States Government where interpreters are needed. Increasingly, the need is arising and must be addressed for interpreter services in other civil litigation.

The language of justice in the federal courts should be comprehensible and clear. Much has already been accomplished in simplifying federal court forms and in providing pamphlets and fact sheets, especially in the bankruptcy courts. Forms simplification projects in businesses and state courts can serve as models for federal courts to emulate in reviewing the forms most frequently used by the public.

Keeping Federal Courts Affordable

■ RECOMMENDATION 87: Litigants should pay reasonable filing fees and certain services above a basic level should be funded by reasonable user fees.

Federal courts are an indispensable forum for the protection of individual rights. Accordingly, the costs of federal courts, properly borne by all citizens, have traditionally been funded primarily through appropriations rather than user fees.

Nevertheless, adjudication and resolution of civil disputes in the federal courts create external benefits beyond the individual dispute and the obvious private benefits received by the individual litigants. These include establishment of precedent that might control later cases, general increases in social harmony, discouragement of violent self-help, and establishment of verdict ranges used by other litigants in settlement calculations.

2 John Albrecht, *Meeting the Needs of the Disabled and Elderly in Court*, 33 JUDGES' JOURNAL 10-11 (Summer 1994).

3 *Id.* at 15.

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Because litigants also receive a significant private benefit from their use of the federal courts, it is appropriate to charge users a reasonable filing fee for court usage. These fees should be significant enough to encourage citizens to be serious in their use of court facilities.

Fees, however, should not be so high as to discourage appropriate recourse to the courts. Nor should fee imposition be extended to indigents now exempted. Different considerations affect this issue in the bankruptcy court, where policy and case law have mandated filing fees regardless of ability to pay. A pilot program now underway in bankruptcy court will provide useful data for studying this issue.

Fees also should be adjusted to take account of inflation and rising costs. These adjustments might occur every five years to reduce the administrative burden of collecting new fee amounts each year.[4] Special services, such as file searches, copying, and electronic docket access, which go beyond the basic services provided when a case is filed, tie up court resources and are provided as a convenience. A reasonable fee is also appropriate for these services.

Representation of Criminal Defendants

Under laws passed by Congress, the federal courts are responsible for administering defender services programs for those who cannot afford counsel. Increasing demands have been placed on these programs as a result of more challenging criminal case loads, federal sentencing guidelines, new prosecution initiatives, and shortages of qualified, available private attorneys. As a consequence, the cost of providing defender services has increased greatly, and sufficient appropriations for this constitutionally-mandated activity have been hard to come by. In several recent years, funds for defender services have been exhausted before the end of the fiscal year. The task facing the federal courts in the future is to provide adequate legal representation for financially eligible individuals in an increasingly efficient and economical manner.

Principles Relating to Revenues and Fees

The following principles relating to revenues and fees have been recommended by the Judicial Conference Committee on Court Administration and Case Management as a basis for reviewing and recommending changes and modifications to the fee schedules:

1. The federal judiciary should be funded primarily from appropriated funds.

2. The federal courts provide a significant benefit to litigants. Therefore it is appropriate for all litigants to pay reasonable fees. Fees should be adjusted to take account of inflation and rising costs, but they should not be used as a means of generating revenue and addressing momentary budget shortfalls.

3. Fees should not be so high that they discourage access to the courts. Nevertheless, they should be significant enough to encourage citizens to be serious in their use of court facilities.

4. Certain services above a basic level should be funded by reasonable user fees.

5. The administrative burden of collecting fees should not outweigh the benefit of the fee.

6. The judiciary generally should be the recipient of fees charged to users of court services.

7. Fees should be assessed to encourage the use of court resources more responsibly.

8. Whenever possible, fees should be consistent from district to district.

4 *Cf.* 11 U.S.C. § 104 (1988) (requiring the Judicial Conference to recommend to Congress uniform percentage adjustments in the dollar amounts in the bankruptcy laws every six years).

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■ RECOMMENDATION 88: Federal defender organizations should be established in all judicial districts, or combination of districts, to provide direct representation to financially eligible criminal defendants and serve as a special resource to private defense counsel who provide such representation.

Implementation Strategies:

88a Full-time federal defenders should train and serve as a resource to panel attorneys, thus assuring competence of appointed counsel.

88b Guidelines should be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case.

88c Federal defender organizations should represent individuals who present more complicated issues or otherwise require more defense resources.

In its March 1993 report, the Judicial Conference recommended that the Criminal Justice Act (CJA) be amended to require establishment of a federal public defender or community defender organization in all judicial districts or combinations of districts, where (1) such an organization would be cost effective, (2) more than a specified number of appointments is made each year, or (3) the interests of effective representation otherwise require establishment of such an organization. To control the heavy costs of the CJA system, protocols—including judicially approved guidelines—should be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case. Federal defender organizations also should be encouraged to represent, in those cases, individuals who present more complicated issues or otherwise require more defense resources.

Districts with a federal defender organization generally provide a higher quality of representation to financially eligible criminal defendants than districts without one, the recent study of the CJA program disclosed.[5] Federal defenders are able to specialize full-time in federal criminal law, understand the intricacies of the sentencing process, receive regular training by the Administrative Office and the Federal Judicial Center, and become experienced at dealing with other components of the criminal justice system, i.e., United States attorneys' offices, law enforcement agencies, probation and pretrial offices, and the courts.

The federal defenders can also train and serve as a resource to panel attorneys appointed under the Criminal Justice Act (CJA), thus assuring competence of appointed counsel. Although clearer data on cost effectiveness is desirable, the Conference has concluded, based on available information, that federal defender organizations generally provide CJA services at less cost to the taxpayer than do private panel attorneys. Beyond the difference in direct costs (salaries and fees), the Conference found that federal defender organizations save public money by not requiring the judiciary to incur administrative costs associated with case-by-case appointment of panel attorneys, judges' review of compensation and expense vouchers, and voucher processing and payment.

■ RECOMMENDATION 89: Highly-qualified and fairly-compensated panels of private attorneys should be created to furnish representation in those cases not assigned to a defender organization.

Implementation Strategies:

89a The judiciary should establish national or local qualification standards, provide better training, and seek improved compensation for panel attorneys.

5 REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM, at 21 (Mar. 1993).

89b To improve the quality of representation, adequate funding should be obtained so that the Administrative Office, in coordination with the federal defenders, the Federal Judicial Center, the United States Sentencing Commission, bar associations, and local courts, can provide panel attorneys with the training needed to assure effective assistance of counsel to their clients.

89c In districts and locations where it is not feasible to establish a federal defender organization, the courts should be encouraged and afforded sufficient funding to establish panel attorney support offices which can provide the needed advice and assistance.

89d At a minimum, adequate funding should be requested so that the Judicial Conference can adjust compensation rates up to the maximum amount authorized by law.

89e The federal courts should continue to seek authority under the Criminal Justice Act to establish and modify dollar limitations on panel attorney compensation.

89f Adequate funding for the defender services program should be secured by ensuring that the program is efficient and well managed.

Although the quality of representation by federal defender organizations has been remarkably high, the representation provided to defendants by panel attorneys varies in quality from district to district and within districts. In reporting to Congress on needed changes in the panel attorney system, the Judicial Conference recommended that the judiciary establish national or local qualification standards, provide better training, and seek improved compensation.[6]

The CJA does not require that attorneys serving on a CJA panel meet qualification standards for appointment in a federal criminal case. That should be changed. Now that the practice of federal criminal law has become highly specialized and defendants face lengthy prison terms under federal law, panel attorneys should be required to meet certain minimum qualifications.

Federal defender organizations often provide legal advice, support services, and training to panel attorneys in their districts. The nature and extent of such training, however, is dependent on available funding, and in districts without defender organizations, panel attorneys receive little substantive guidance on federal law and procedure or continuing support, advice or assistance regarding the processing of claims or procedures for obtaining approval of investigative, expert and other services necessary to an adequate defense. To improve the quality of representation, more adequate funding will be needed.

The single most important problem to confront the defender services program in recent years has been the judiciary's inability to secure appropriation of sufficient funding to meet the sharp cost increases attributable to rising criminal case loads, substantial expansion of prosecutorial and law enforcement resources, and the impact of guideline sentencing and mandatory minimum sentences.

In many locations, the $40 or $60 per hour paid to panel attorneys does not even cover basic overhead costs of a law office, and many lawyers incur financial sacrifice when they accept assignments of cases from the federal courts. At a minimum, adequate funding is needed so that the Judicial Conference can adjust compensation rates up to the maximum amount authorized by law. The better approach, however, would be to amend the CJA to authorize the Conference to establish and modify dollar limitations on CJA compensation, and to require (not merely authorize) adjustment of those rates to keep pace with cost-of-living increases.

6 *Id.* at 26-32.

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In order to compete more successfully for increasingly scarce federal dollars, the defender services program must demonstrate in the years ahead that it is efficient and well-managed. Several initiatives designed to achieve this are currently (or will soon be) underway, including development of case weighting and work measurement formulas for CJA representation and implementation of a comprehensive management and operational review program for federal defender organizations and CJA attorney panels. Improved efficiency and reduced costs are also possible through enhanced coordination and communication among the various participants in the criminal justice system. Since the program cost is frequently influenced by factors and decisions outside the judiciary's control, it will be essential in the long term to maintain a high level of communication and coordination with the executive and legislative branches at the national level.[7]

Ensuring Justice for Those Who Cannot Afford Counsel in Civil Cases

■ **RECOMMENDATION 90: Provision of counsel should be increased for civil litigants and mechanisms for handling pro se cases in federal courts should be enhanced.**

Implementation Strategies:

90a Bar associations should be encouraged to promote pro bono programs to make civil counsel available to assist litigants who otherwise would have to represent themselves in federal courts.

90b Law schools should be encouraged to expand legal clinics to provide competent counsel for prisoner claims, and to low and moderate income persons in need of counsel.

90c Federal courts should adopt local rules authorizing law students involved in legal clinics to represent parties in need of counsel in federal courts under appropriate supervision.

90d Special mechanisms should be created to handle pro se cases efficiently in federal courts. The frequency of pro se filings, and the frequency of repeat filings by particular litigants, should be tracked through the judiciary's statistical system to allow informed assessment of the amount and impact of judge time and court resources devoted to pro se filings as compared with other civil filings.

90e Both district and appellate courts should continue to screen pro se cases by means of centralized staff operating under court supervision.

"Pro se" litigants, or parties without counsel, face several obstacles to effective use of the federal courts. These include unfamiliarity with procedural and substantive law, ignorance of time limits for filing claims or mechanisms for claiming (including knowing where to file). These parties suffer a disadvantage in an adversary system that relies on the parties themselves to evaluate and present their claims.

Because judges in our adversarial system must rely on litigants and their counsel to unearth facts and present legal arguments, there is an increased risk of decisional error in cases where parties lack counsel, The litigant's, society's and the judiciary's interest in correct decisions can be furthered by the provision of counsel.

Where counsel is not present, the federal courts bear the added administrative burden of ensuring that unrepresented parties with meritorious claims can

7 For example, the Conference has endorsed creation of district CJA committees in which agency and private attorney representatives propose changes in local rules and practice aimed at reducing CJA and other costs of the criminal justice system. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17-18 (Mar. 1994).

obtain the relief to which they are entitled as well to insure that parties opposed to pro se litigants with meritless claims are not unduly burdened by court processes. Here again, the system works better where competent counsel screen out frivolous claims and ensure compliance with procedures which will allow all parties to prepare a case adequately for decision on the merits or, where appropriate, for settlement.

The federal courts alone cannot solve the problems of economic disparity that underlie the inability of many litigants to obtain counsel. Nor, in this time of tight state and federal budgets, will society likely have the resources to provide counsel to all who may deserve it. The federal courts can, however, encourage ongoing efforts to help resolve this problem.

Two organized efforts outside government have succeeded in providing counsel to pro se litigants. The ABA Model Rules of Professional Conduct provide that "[a] lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service . . . . and by financial support for organizations that provide legal services to persons of limited means."[8] Several state and local bar associations have effective pro bono programs which provide counsel to federal court litigants. The bar should be encouraged to extend efforts in this area to regions where no programs are currently operating.

Second, many law schools have active clinical programs that provide competent counsel for prisoner claims, and to low and moderate-income persons in need of counsel. In addition to providing counsel, these programs educate law students regarding the importance of providing counsel to persons otherwise unable to afford representation. These programs need to be expanded where in place and initiated in law schools that currently have no such programs. It will also be necessary to amend the local rules of many courts to permit law student court appearances under these programs.

These programs can only provide for a small percentage of the need. Accordingly, it is important for the federal courts to encourage local initiatives ongoing in some courts to provide more ways to encourage pro bono representation, study additional means of providing counsel for those who need it, and to experiment with special mechanisms for handling pro se cases fairly yet efficiently in the federal courts.

Customer Service Orientation

The public sector has recognized that operations must be redirected toward serving those who use the institutions. Federal judges, administrators, and support personnel, as well as the practicing bar, should consider incorporating a precept resembling the customer service ideal recently adopted by the California court system: "Nonjudicial court personnel should be trained as service providers and facilitators. Their primary responsibility should be to provide timely, accurate, and efficient service to all persons having business with the courts, and to assist litigants in reaching the next step in resolving their disputes.... Prohibitions against providing advice to litigants should be reexamined and modified to allow court personnel to assist in moving disputes toward resolution."[9]

■ RECOMMENDATION 91: The judicial branch should act to enhance understanding of the federal courts and ensure that the fundamentals of the litigation process are understood by the public.

Implementation Strategies:

91a Information on using the courts should be provided through community institutions and in formats aimed at an increasingly diverse citizenry.

8 MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1 (1989).

9 JUSTICE IN THE BALANCE 2020—REPORT OF THE COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS §§ 11.10a and 11.10b, at 180-181 (1993).

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91b Outreach programs should be brought to educational and community organizations and other public institutions.

91c Relations with the bar and law schools should be maintained and enhanced by participating in legal education and training programs and activities which enlist those institutions in educating the public about the legal system.

91d Press and public access to court proceedings should be presumptively unrestricted, absent some compelling interest, and affirmative efforts made to reach out and educate the media and the public.

Effective justice presupposes effective understanding. Information on the law and dispute resolution options and processes should be made readily available in all appropriate languages in schools, libraries, government facilities. and other public places as well as in the courts themselves.[10] Justice information should be provided through all widely available technologies including telephone, computer, and interactive video. Information kiosks staffed by knowledgeable employees should provide information and guidance on the dispute resolution process to court users, especially those unrepresented by counsel.

An active role for the judiciary in educating the public has been supported by the American Bar Association in a resolution urging: "judges, courts, and judicial organizations to support and participate actively in public education programs about law and the justice system." The resolution also urged that "judges be allotted reasonable time away from their primary responsibilities on the bench to participate in such public education programs, consistent with the performance of their primary responsibilities and the Code of Judicial Conduct."[11]

Although there will continue to be cases where judges must exclude cameras from court facilities to promote confidentiality, safety, or other compelling interests, including the particular safety of jurors and witnesses, experimentation with cameras in the courts should continue. Due consideration of the critical role played in the justice system by jurors and witnesses must inform the implementation of this policy.

■ RECOMMENDATION 92: Public understanding should be improved of the nature and significance of the federal judiciary's role in the constitutional order, as well as the constraints under which the judiciary functions.

By and large, the public and the courts share common hopes and goals: justice that is accessible, affordable, comprehensible, and as speedy as fairness allows. Better two-way communication would inform the third branch of public discontent while it would educate the public regarding the federal courts' challenges and limitations. The courts should include significant public representation on some advisory committees, much as members of the bar are included on the rules committees. Surveys of public opinion regarding the federal courts would also benefit the system.

■ RECOMMENDATION 93: A comprehensive program, in a variety of languages and aimed at diverse individuals, should be developed to educate citizens called for jury duty about the role and function of federal courts.

The jury system offers the most readily available opportunity to educate the public about the mission of the federal courts and what the courts are doing to achieve it. Not only should judges and administrators take steps to ensure that jurors receive proper treatment, but the system should take advantage of the presence of the jurors in the courthouse—often with inevitably spacious blocks of time to spend waiting to

10 See, *e.g.*, Deanell R. Tacha, *Renewing Our Civic Commitment: Lawyers and Judges As Painters of the 'Big Picture,'* 41 KAN. L. REV. 481 (1993).

11 Resolution of the ABA House of Delegates (Aug. 1992), *quoted* in James A. Noe, *Public Education: A Judicial Imperative*, 32 JUDGES' JOURNAL 28 (Winter 1993).

serve—to prepare and exhibit educational films and other materials to increase public understanding of the role and functions of the federal court system.

■ RECOMMENDATION 94: The judiciary should seek public support on specific issues where the objective is approved by t· · Judicial Conference and where the issue has wide acceptance among the judiciary as a whole.

In some circumstances it is appropriate for the judicial branch to take steps to enlist public support to assist the federal courts. This approach should not be overused, because it could damage the judiciary's well-deserved reputation for being above politics. Accordingly, there should be two significant limits on the use of public initiatives. They should only be employed where the objective is (1) approved by the Judicial Conference and (2) has wide acceptance among the judges as a whole. Judges should also be encouraged to participate actively in organizations interested in improving the judicial process. In expressing opinions, however, judges should be careful to preserve the impartiality of the judicial office.

Normally, when an issue has the needed consensus, bar associations and other bar groups will concur with the courts' position. An active program encouraging participation by judges as individual members of bar organizations or other groups interested in the judicial process would place judges in a position to effectively enlist such organizations as allies. Judges who serve on committees of the American Bar Association or the Federal Judges Association would be particularly effective liaisons to local bar associations to communicate public policy objectives favored by the judicial branch.

■ RECOMMENDATION 95: Mechanisms should be established or simplified to receive and address public complaints about improper treatment by judges, attorneys, or court personnel.

Although formal procedures for filing complaints regarding judicial conduct with the circuit Judicial Councils have been enacted, some members of the public believe they have no effective mechanism for voicing criticism of the courts. Grievances unrelated to judicial acts may not fall within the jurisdiction of the councils. In minor matters, many aggrieved parties wish only to be heard. In more serious matters—involving bias or prejudice, for instance—more formal procedures that provide some response to the complainant are needed. Implementing these procedures should be sufficiently flexible to take account of the needs and resources of the districts and circuits.

Communications With Other Branches of Government and the Public

■ RECOMMENDATION 96: Positive communication and coordination between the judicial branch and the executive and legislative branches should be enhanced.

Implementation Strategies:

96a The Chief Justice should annually deliver an address to the nation regarding the state of the federal judiciary.

Regular, direct, formal channels of communication should be maintained between the judiciary and its co-equal branches. Judges should invite members of Congress to visit their courts to discuss the work of the judiciary and the justice system generally. One channel should allow the Chief Justice to speak annually to the nation on matters of concern to the judiciary. The reaction to the annual address could also serve to educate the judiciary about the concerns of the other two branches and the general public.

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96b Congress should be encouraged to require the legislative staff of all substantive congressional committees and the Offices of Legislative Counsel in the Senate and the House of Representatives, when reviewing proposed legislation for technical problems, to satisfy to the greatest extent possible a legislative "checklist."

This recommendation follows a similar proposal by the Federal Courts Study Committee. The rationale for a legislative checklist is to reduce the frequency of new legislation that—because of vagueness or ambiguities (*e.g.*, private rights of action, available defenses and immunities), technical errors, or gaps (*e.g.*, applicable limitations periods)—increases uncertainty and unfairness for litigants and promotes additional litigation. The checklist requires legislative staff to guard against some of the most frequent lapses and ensures that Congress's intent is clearly expressed for the courts to apply.

Though vagueness or imprecision in legislation frequently is the result of intense efforts to secure compromises necessary to enact a provision, rather than the product of oversight or omission, employment of a device such as the checklist will also benefit most directly all those who must order their affairs to comply with the statute. Consequently, any efforts devoted to anticipating and resolving ambiguities in legislation will reduce the need for, and scope of, litigation.

96c Judicial branch representatives should continue to hold periodic meetings with Justice Department officials and members of Congress to discuss matters of common interest.

Recently, a number of working groups comprised of Justice Department personnel and federal judges and Administrative Office staff organized along subject-matter lines have successfully explored areas of common interest between the Justice Department and the federal courts, such as security, budgets, civil litigation, and operation of the probation system, This kind of operating level contact should be maintained in the interest of effectuating improvements and recommending more significant changes to the Judicial Conference and the leadership of the Justice Department and the executive branch in general.

96d A permanent National Commission on the Federal Courts should be created, consisting of members from the executive, legislative, and judicial branches of the federal government, and perhaps members from the state judiciary and academic world, to study on a continuing basis and to make periodic recommendations regarding a number of issues concerning the federal courts including, but not limited to, their appropriate civil and criminal jurisdiction.

Respect for the judiciary and confidence in the rule of law depends on the judiciary's ability to be independent from political and other influences that could improperly influence, or appear to improperly influence, decisions in individual cases. An institutional mechanism to insulate the judiciary from politics could serve to ensure the independence of the judiciary and to enhance the stature of the judicial branch.

One such mechanism is an inter-branch commission, consisting of representatives from the three branches of government and perhaps persons from outside the federal government. The commission should consult when necessary with academicians, members of the bar and other interested persons. It should be small, consisting of not more than eleven members who are sufficiently possessed of institutional memory to address the problems of the judiciary effectively. The commission should be permanent, and the terms of its members should be staggered to assure continuity as membership is rotated.

The task of ensuring a distinctive role for the federal courts requires coordination and cooperation among the three branches of the federal government and the state judiciary, as well as the productive input of the academy. A commission—composed of all the relevant parties and charged with the ongoing duty of

A Proposed Legislative Checklist

- the appropriate statute of limitations
- whether a private right of action is contemplated
- whether adequate remedies are provided by state law
- whether pre-emption of state law is intended
- the definition of key terms
- severability
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation
- whether state courts are to have concurrent jurisdiction and, if so, whether and to what extent an action would be removable to federal court
- the types of relief available
- whether retroactive applicability is intended
- the conditions for any award of attorney's fees authorized
- whether exhaustion of administrative remedies is a prerequisite to any civil action authorized
- the conditions and procedures relating to personal jurisdiction over persons incurring obligations under the proposed legislation
- the viability and/or effect of private arbitration and other dispute resolution agreements under enforcement and relief provisions and
- whether any administrative proceedings provided for are to be formal or informal.

The legislative checklist could also provide for consideration of:

- whether any time deadline for judicial action appearing in proposed legislation is necessary and, if so, reasonable
- in the case of proposed legislation providing for judicial review by a multi-judge panel, whether the same policy objectives could be achieved by providing for single-judge review, and
- whether the statute applies to the territories, the District of Columbia, and the Commonwealth of Puerto Rico, as well as the states or other governmental unit.

monitoring the federal courts and making recommendations on a periodic basis—can promote serious attention to issues that require constant attention and periodic intervention. The monitoring should include attention to the factors listed in Chapter 10 that would indicate the onset of systemic breakdown.

The commission would not pre-empt the authority of the Judicial Conference to make policy for the federal judiciary. Its purpose would be to study, in a nonpartisan fashion, the problems of the federal courts and to make recommendations to Congress, to the executive branch, and to the judiciary on ways to improve federal justice (*e.g.*, the growth in pro se litigation[12]). The commission should be authorized to review conflicting statutory and federal rules interpretations, and to make recommendations for resolving those conflicts by legislative action or rule revision.

12 See Chapter 6. Implementation Strategy 32a *supra.*

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The recent convening by the Attorney General of representatives of the three branches, as well as representatives of the state judiciaries and legislatures, to discuss the respective roles of the federal and state courts and where jurisdictional lines should be drawn between them, was a positive step toward accomplishing the goal sought by this recommendation. Similar efforts should be continued in the future on a regular basis.

■ RECOMMENDATION 97: Positive communication and coordination between the federal courts and their state counterparts should be enhanced.

Much progress has been accomplished toward building closer working relationships between the federal court system and the courts of the states. State judges have been appointed by the Chief Justice to the Judicial Conference Committee on Federal-State Jurisdiction and the Conference's rules committees. Federal judges attend meetings of the state Conference of Chief Justices' comparable panel. Both participate in the recently-formed National Judicial Council of State and Federal Courts. Coordination of research efforts occurs among the Administrative Office, the Federal Judicial Center, and the National Center for State Courts.

Many more opportunities will exist for closer relations in the future. Federal and state judges already have established procedures to administer related litigation jointly.[13] State-federal councils have been rejuvenated or established in many states. Both court systems could benefit from shared use of facilities and other resources. Both systems will further gain from their encounters with each other as the nation moves toward recognizing that all of the nation's courts are part of one interdependent justice system.

Communications With the Bar

■ RECOMMENDATION 98: The federal courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.

The American bar, and in particular, the bars of the respective federal courts, are singularly situated to play a crucial role in conveying to users and the general public a clear explanation of the mission of the federal courts and in winning legislative and public support for needed improvements in the justice system.

Participation by the organized bar is critical to success in the courts' performance of their role as supervisors of the bar and in maintaining the integrity of the bar. Working together, the courts and the bar may effectively address the needs for provision of legal services to those unable to afford them.

13 See William W Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

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Chapter 10
Confronting the Alternative Future

PRESERVING the core values that have undergirded the federal courts' long tradition of excellence is the fundamental vision of this plan. The strategies outlined thus far, however, may fail to reverse current trends that place the core values at significant risk.

As shown in Chapter 3, projections based on historical trends indicate that, in another 25 years, there would be as many as 1,247 appellate court judgeships and about 1,000,000 cases commenced annually in district courts. This *four-fold* increase over present-day conditions could well result in the following court statistics in 2020:

- median time from filing to disposition for civil cases in the district courts exceeds 30 months, with 30% of cases pending more than 3 years
- trials are held in 44% of criminal cases, and the median trial length for criminal trials reaches 4 days, so that 80% of total available district court judge time is absorbed by criminal trials
- of the 174,500 criminal cases terminated in the district courts in 2019, 37% or 47,000 are appealed
- of the 156,000 appeals terminated this year, 107,500 are procedural terminations while 48,500 are terminated on the merits
- of merit terminations this year, 10% occur after granted oral argument, while the remainder are decided on submission of briefs
- slightly more than 20,000 petitions for review on writ of certiorari are received by the Supreme Court, of which 125, or 0.6% are granted.

This chapter considers how the judicial branch might adapt if caseloads increase at even half the rate suggested in the "alternative future" discussed in Chapter 3. Suppose, for example, that in the year 2020 only 500,000 cases are filed in the district courts or that there are only 336 appellate judges? Even that scenario is daunting and would have undesirable consequences.

Planning for such an alternative future would require significant changes in federal court structure, jurisdiction and resources. Thus, the alternatives presented here should be pursued only if there is:

- great expansion in federal court jurisdiction and caseloads;
- substantial growth in the number of judges and supporting staff members at all levels of court organization; and
- sharp increases in the courts' need for new buildings and equipment.

Threshold for Considering Changes

Efforts to streamline the trial and appellate processes should continue to be pursued before major structural change is considered. If innovations in court procedures and efforts to control jurisdictional expansion do not stem the rising caseloads, however, more radical changes may be required to allow the federal courts to carry out their mission. Moreover, experience shows that incremental changes in how the federal courts do business often produce inadvertent, but fundamental, changes in the quality of federal justice delivered.

For these reasons, the Judicial Conference should monitor a wide variety of statistical and other indicators to determine whether the trial and appellate court structures described earlier in this report remain adequate to meet the stresses of increasing caseload. The Conference should consider and evaluate the totality of relevant circumstances in gauging the apparent direction of the judicial system and determining what should be done. The choice of quantitative or qualitative indicators used for this purpose is, to some extent, arbitrary. The purpose, however, is not to seek authoritative harbingers of danger, but rather to study evolving conditions in order to identify whether the circumstances facing the judiciary require a fundamental change in strategy. No single indicator may indicate a breakdown in the present system. Statistics should be only a *starting point*, not the *end*, of the evaluative process.

A representative but non-exclusive group of statistical signposts might include the following:

- total numbers of filings in the courts of appeals and/or district courts;
- number of judicial circuits and corresponding increases in intercircuit case law conflicts;
- number of court of appeals judges in an individual circuit and corresponding increases in intracircuit conflicts;
- average number(s) of merits participations per judge in the courts of appeals;
- ratio of criminal to civil trials;
- average number of lengthy trials (civil and criminal) per court
- number and percentage of cases in which trials are not held;
- average number of trials (civil and criminal) per judge
- average number of criminal filings per judge;
- rate at which district court judgments are reversed on appeal;[1]
- number and percentage of civil cases pending over 3 years;
- number and percentage of motions pending over 6 months;
- number and percentage of bench trials in which a decision has been pending over 6 months;
- median disposition times for courts of appeals and/or district courts;
- percentage of district or magistrate judge hours spent on the bench;
- average number of defendants per felony case;
- number of staff assigned to U.S. Attorneys' offices;
- number of attorneys in active federal district court practice.

1 Reversal rates should take into account all published and unpublished decisions in criminal and civil cases, cases presenting issues of first impression, and cases in which the decision below was affirmed or reversed in part. Above all, the significance of a particular reversal must be evaluated in light of the reasons stated by the appellate court. *See* Edward R. Becker, Patrick E. Higginbotham, and William K. Slate, II. *Why the Numbers Don't Add Up*, 73 A.B.A. JOURNAL 83 (Oct. 1987) (response to Brian L. Weakland, *Judging the Judges*, 73 A.B.A. JOURNAL 58-60 (June 1987) (discussing federal judges' affirmance and reversal records before the courts of appeals)).

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Restructuring Appellate Review

If caseload volume renders the courts of appeals unable to complete their tasks with dispatch and fairness, the Judicial Conference should consider fundamental revision of the appellate court structure. There are two basic approaches to restructuring appellate justice. One method would increase the number of judicial officers responsible for adjudicating appeals. The other method would limit the number of judges required to decide an appeal. These approaches may be outlined as follows:

(a) **Add to the number of judicial officers in the present courts of appeals by increasing the number of circuit judgeships or instituting an expanded role for adjunct judicial officers, such as appellate commissioners.**

(b) **Add a new tier of appellate tribunals between the district and the circuit courts, and provide for discretionary review in the circuit courts.**

(c) **Assign certain appellate functions to district judges through an "appellate term" or "appellate division" at the district level.**

(d) **Reduce the size of appellate panels to two judges and/or allow single judges to review certain cases.**

Simply expanding the number of circuit judges, and/or expanding the role of adjunct judicial officers (*e.g.*, appellate commissioners), may, however, lead to inconsistency and incoherence in circuit law. Likewise, if the addition of Article III judgeships results in the creation of more circuits, the system's capacity for resolving intercircuit conflicts must be expanded. Alternative means of resolving intercircuit conflicts have been described in the work of the Federal Courts Study Committee and the Federal Judicial Center.

If the appellate bench grows significantly, realignment of the circuits to produce courts of appeals of relatively equal size and workload deserves serious consideration. Although the matter would require careful consideration, the need to maintain coherent, consistent precedent and administrative efficiency in the face of massive dockets may outweigh countervailing concerns.

Alternatively, the circuit-based courts of appeals could remain at approximately their present size and number if first-line appellate review were provided in a new tier of appellate tribunals established at an intermediate level between the districts and the circuit. If this approach were taken, the "circuit" courts would be in a position to maintain a relatively consistent and coherent body of circuit law through discretionary review of decisions rendered in the lower appellate courts.

Another method to expand the system's capacity for appellate review would be an "appellate term" or "appellate division" at the district level.[2] These panels would exist primarily to ensure correction of errors and screen legal issues for possible review in the court of appeals. Two elements would be key to implementing such a system. First, district judges should not review cases arising out of their own districts. Second, if current caseload conditions persist, the number of district judges and/or magistrate judges would have to be expanded significantly to carry out both trial and appellate functions. Since creation of additional district judgeships should not be a ready method for dealing with a workload crisis at the appellate level, appellate panels should not be drawn from areas where district judges routinely carry a maximum trial-level caseload.

A district-level appellate panel might consist of one circuit judge and two district judges, perhaps from outside the circuit. District judges sitting on review panels could be assigned for substantial terms (e.g., three years) to give them time to gain experience in their new role and to staff their chambers accordingly. Further review would be in the discretion of the courts of appeals on petition, unless the first appellate panel

2 The idea of some appellate review being located at the district court level is not new. *See* Roscoe Pound, APPELLATE PROCEDURE IN CIVIL CASES 390 (1941); Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811, 825-826 (1989) (book review). Moreover, Roscoe Pound's proposal also would limit litigants in such a forum to the arguments already made in the trial court. *See* Letter from Professor Paul D. Carrington to the Honorable Edward R. Becker 2 (Nov. 3, 1993).

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certified the case, or some portion of it, for review. The program would be instituted first on a pilot basis and, perhaps, limited to certain categories of cases (*e.g.*, diversity actions, social security disability claims). After assessing the results of the pilot program, jurisdiction of appellate panels might be expanded to additional categories of cases, or even to all matters originating in the district courts.

Finally, the appellate system could also address rising caseloads by limiting the number of appellate judges required to decide an appeal. Although the judiciary is currently committed to the principle of three-judge review as the standard for appeals, rising caseloads may require reducing the size of appellate panels to two judges, or allowing for single-judge review of some cases. Experiments with single-judge review might be conducted in cases that involve single issues and deferential standards of review, *i.e.*, "abuse of discretion" by the district court, or "substantial evidence" to support an agency order. Alternatively, courts organized on a geographic basis might move toward greater specialization in appellate review by routinely assigning individual judges or panels to handle particular subject areas.

Limiting the Right to Appeal

A fundamental restructuring of the appellate function to address a drastically increased workload would require reevaluating the principle that each litigant is guaranteed at least one appeal as of right before a panel of three Article III judges. Thus, if conditions seriously deteriorate in the courts of appeals, it may be necessary to consider some limitations on the right to appeal. The right to appeal could be eliminated completely in certain types of cases, such as administrative cases in which the district court acts as the reviewer of agency action and certain types of "federal question" cases in which state law issues predominate. In all (or some) other cases appellate review could be discretionary.

These options should be pursued only as a last resort. It does not presently appear that the stress on the courts of appeals is serious enough to justify abandoning the statutory right to appeal in all case types. Except for bankruptcy appeals and diversity actions, this plan does not identify discrete case types whose elimination from the appellate docket would be fair and workable, yet provide substantial caseload relief.

Discretionary review also could have the unintended effect of increasing the burden on district judges to provide more written support for decisions made at the trial level. It would pose difficulties in ensuring, and appearing to ensure, that all classes of litigants are treated fairly and are not cut off from the protections of the appellate process by virtue of their status.

Outright elimination of appellate review should be considered only for cases in which the "law declaration" function of appellate review is not at stake. Examples of such cases might include some administrative cases in which the district court reviews the agency decision, and cases which involve primarily state law issues.[3]

Making Best Use of Trial Court Resources

A drastic increase in the workload of the district courts would require significant changes in the use of judicial resources. Such changes may include:

(a) **Authorize judges to be more readily available for temporary assignment.**

(b) **Authorize adjunct judicial officers of the district courts (*i.e.*, magistrate judges and bankruptcy judges) to conduct a wider variety of proceedings.**

3 This plan also contains recommendations concerning the possibility of making appellate review discretionary in some types of administrative agency cases. *See* Chapter 4, Recommendation 9, and Chapter 5, Recommendation 19 *supra*.

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A vastly expanded caseload will require the maximum utilization of existing judicial resources. Although a system of mandatory assignments may not be appropriate for Article III judges, incentives should be used to allow courts to make greater and more effective use of visiting judges, and to require judges to be available for temporary assignment.

Assuming that any constitutional questions could be resolved, magistrate judges and bankruptcy judges could be assigned, as needed, to conduct a wider variety of district court proceedings with the consent of the parties. For example, magistrate judges might expand on their current role in conducting civil and non-felony criminal proceedings by playing a greater part in felony prosecutions, including the conduct of trials and/or sentencing. Similarly, bankruptcy judges might be assigned cases on the regular district court docket (*e.g.*, complex commercial actions) in which their background and experience would be particularly relevant.

The Standing Committee on Rules of Practice and Procedure should also reexamine Fed. R. Civ. P. 53 to evaluate how support for judges in the district court could appropriately be expanded through the greater use of special masters or other adjunct officers.

Diverting the Civil Caseload

If the increase in civil cases causes excessive delay in obtaining trial dates, the district courts could employ a broad range of alternative dispute resolution techniques—possibly including mandatory processes. If such a situation comes about, the Judicial Conference should seek legislation or otherwise adopt appropriate measures to:

(a) **Encourage each federal court to expand the scope and availability of alternative methods of dispute resolution.**

(b) **Develop standard rules for imposition of user fees in appropriate cases based on the amount recovered.**

Over the past decade the increase in civil causes of action in federal courts, the continuing federalization of many criminal offenses, implementation of sentencing guidelines, and other factors have made it more difficult for civil litigants to receive early and firm trial dates. Accordingly, in addition to reducing the time and costs of trials, each federal court should be able to provide its litigants expanded alternative methods of dispute resolution.

The availability of such alternative procedures would often allow litigants to resolve their disputes in a more efficient, expeditious and cost-effective manner. Along with allowing litigants to choose the dispute resolution procedure most appropriate to their cases, the provision of alternative procedures would conserve the judiciary's unique and precious resource—the trial, whether bench or jury—for those disputes in which it is most needed.

The diversion of disputes from a traditional trial process to other methods of resolution will enable judges to concentrate on improving the management and conduct of cases that proceed to trial. Imposition of user fees in appropriate cases based on the amount recovered would serve similar ends.

Limiting Jurisdiction

If caseload volume renders the courts of appeals and district courts unable to deliver timely, well-reasoned decisions and speedy trials with procedural fairness, the Judicial Conference should consider seeking more extensive reductions in federal court jurisdiction to fulfill the mission of the federal courts, as listed below:

(a) **Restore a minimum amount in controversy requirement for federal question cases, either generally or in specific categories.**

(b) **Eliminate or substantially curtail the jurisdiction of the district court in those categories of cases that may be appropriately resolved in federal administrative or state forums.**

(c) **Consistent with standards developed by the Judicial Conference, authorize district courts to decline jurisdiction in civil and/or criminal cases where state courts have concurrent jurisdiction and the federal interest is minimal.**

Restriction of federal jurisdiction is a step that should not be easily taken and, in practice, is likely to be taken only as a last resort. Nevertheless, it may become necessary to restrict access to the courts to the extent constitutionally permissible (*i.e.*, limit review to constitutional issues) so that the limited resources of the federal courts may be applied to those disputes that, under the principles of judicial federalism (see Chapter 4 *supra*), ought to be resolved in that forum.

In addition to restoration of a minimum amount in controversy requirement for federal question cases, federal court jurisdiction could be curtailed in cases appropriately resolved in Article I tribunals, administrative agencies, or state courts. Examples of such case categories include social security benefit claims, contract claims, benefit claims under ERISA welfare plans, forfeiture proceedings, and cases primarily involving state law issues. (*e.g.*, many FIRREA proceedings,[4] products liability, and ordinary tort claims). Finally, notions of comity support the possibility that district courts may be authorized to decline jurisdiction in cases involving concurrent state court jurisdiction.[5]

Maintaining Effective Governance

If federal court caseloads and the attendant need for judicial resources dramatically increase, governance of an expanded judicial system should emphasize (1) provision of administrative coordination and direction, and (2) preservation of a broadly participatory governance process encouraging expression of diverse perspectives.

Changes in governance might be required if the three branches are unable to avoid a great expansion in federal court jurisdiction and caseloads. These increases might require substantial growth in the numbers of judges and supporting staff members at all levels of court organization. The extent of this growth could also require greatly increased use of adjunct judicial officers and technologically different ways of doing business. Growth of this magnitude might be accompanied by a relative reduction in resource allocation from Congress. The historically adequate resource base afforded federal courts has been due in large part to the court system's modest size.

Under these conditions, structural changes in the courts' adjudicative framework would likely be required. For example, hard choices would have to be made among—

(a) **multiplying the numbers of circuits while keeping each circuit relatively small (*e.g.*, no larger than any current circuit); or**

(b) **keeping the numbers of circuits small while allowing each circuit to grow to contain more than 100 active circuit judges and several times that many district judges; or**

(c) **abandoning altogether the concept of regional circuits in favor of subject matter courts and traveling judges, perhaps serving in both trial and appellate capacities; or**

4 Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, as amended.

5 The concept of federal courts declining to exercise jurisdiction also has parallels in the abstention rules of federal bankruptcy law. *See* 11 U.S.C. § 305 (1988).

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(d) **reconsidering the membership of the Judicial Conference to account for more circuits and the role of small specialized courts.**

None of these alternatives is attractive from the viewpoint of protecting the best features of current court governance arrangements. Thus, they should not be taken as desirable alternatives—only as what may be the best among a series of bad choices. On the other hand, it bears emphasis that governance is merely instrumental. Governance structures should not dictate court jurisdiction or structure.

(e) **Governance authority should increasingly be grounded in procedural rules and safeguards because an increased complement of Article III judges could know only a small fraction of their colleagues well, if at all.**

Effective participation of a reasonable proportion of judges in governance might only be accomplished through some form of enhanced representational structures and procedures. There would be inevitable pressures to create democratic (electoral) procedures for the selection of governance representatives at national, regional, and local levels. These pressures would arise from competition for ever-scarcer resources to perform court work. Because judges could know only a small fraction of their colleagues well, if at all, governance authority grounded on personal acquaintance and trust would probably be replaced with authority grounded on hierarchy, procedural rules, and safeguards.

It is likely that judicial branch interest groups would become further stratified by category of judge (circuit, district, bankruptcy, magistrate, active, senior, or whatever other groups emerged through structural change, e.g., national or local, permanent, or floating) as well as by regional and local court units. The larger the judiciary becomes, the more formalized, impersonal, and bureaucratic the governance apparatus will become.

(f) **Some judges should take on full-time management responsibilities, if judges are to remain as the courts' governors.**

It is inconceivable that a judiciary of 3,000 to 5,000 or more life-tenured judges could function with the same degree of collegiality in administrative decision making as is now possible. Although some increase in executive authority would be necessary, the major changes contemplated here would require a fundamental change in governance arrangements. It would not be possible to manage the courts as a part-time job. If judges are to remain as the courts' governors, some of them might have to take on full-time management responsibilities from time to time, and the idea of a "chancellor" or "executive judge" to assume some of the Chief Justice's national leadership responsibilities could be revisited.[6]

(g) **The judicial branch should protect the core decisional independence of judges in a vastly expanded administrative infrastructure supporting the operation of chambers, courtrooms, and judicial activities.**

A greatly expanded federal court system could function efficiently only with a similar expansion of the courts' administrative apparatus. Such an expansion should be accomplished, however, without any loss of judicial autonomy with respect to the basic separation of powers among the three branches. In fact, if the judiciary were to gain control of its own space, facilities, and security programs, and retrieve from the executive branch the administration of bankruptcy estates, as recommended above, the courts would become a substantial administrative entity within the government generally.

It seems likely, however, that such an expanded federal court system would be under increased congressional scrutiny through authorizations, appropriations, and oversight. The executive branch also would be tempted to seek greater authority to monitor judicial branch operations in the name of government-wide economy. Within the judicial branch itself, establishment of strong, centralized administration might impinge on judicial independence if the new administrators seek to impose uniformity in the timing and form of judges' decisions.

Even without increased oversight, there would be

6 *Cf.* RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE 47-62 (Federal Judicial Center 1994) (discussing the idea of an "executive judge" for the federal courts).

some risk of erosion of the independence of the individual judge's administrative decision-making. Although regional and local administrative structures might vitiate some of the dangers of a vastly increased central support structure, changes instituted at either the national or regional level certainly would affect ongoing local court operations. Resource demands made by a judiciary of even 3,000 life-tenured judges would likely strain the capacity of the judicial support structure to provide the type of personalized services judges currently receive. Greater standardization and less room for exceptions to administrative rules would probably flow from the combination of large numbers and relatively reduced resources. Under these circumstances, the judiciary will face a major challenge in protecting the core decisional independence of judges from those responsible for managing the equipment, supplies, and reimbursements that constitute the administrative infrastructure of chambers, courtrooms, and judicial activities generally.

(h) The allocation of policy making and administrative authority should be reevaluated. If substantial reallocation of governance authority becomes necessary, the alternatives to be considered should include—

(1) concentrating authority in fewer hands at all levels,

(2) centralizing authority at the national level, and

(3) decentralizing authority to regional or local levels.

Provided the national governance of a greatly expanded judiciary sustains a commitment to the principle that regional and local matters should be decided at regional and local levels, and provided the procedures for establishing representative governance are fair and are perceived as such by judges generally, then the correct balance of authority among court levels can be sustained, even though it will be changed from the current balance. But there may be a need for greater executive authority nationally, as well as regionally, just by virtue of the greater numbers of people whose performance must be monitored and whose needs and legitimate interests must be met.

The accurate, reliable and efficient channeling of input about governance questions will have to be established within each level of governance and between them. This will require more governance "apparatus," which will create new overhead costs.

Even as a vast expansion in the judiciary will encourage a thrust toward increased centralization, it will also promote countervailing pressure for assigning more regional governance authority to the circuits—if the regional circuit structure survives such growth. Circuits as large as today's entire federal court system may present powerful arguments for substantial reallocation of authority to the circuit level, including direct authority to seek and obligate appropriations (rather than only delegated authority to expend appropriated money).

Appointing Article III Judges

If judicial vacancies cannot be filled expeditiously, disabling the judiciary and leaving no other viable remedy, the political branches may have to consider alternative methods for appointing Article III judges that otherwise would be unacceptable (even if constitutional revision is required). For example:

(a) The President and the Senate might each be authorized to act alone in filling judgeships that remain vacant due to inaction by the other branch in nominating or confirming new judges. For example—

(1) judicial nominations might be confirmed automatically, or recess appointments continued in effect until vacancies are filled, if the Senate fails to act on nominations within a prescribed time; and

(2) the Senate might appoint judges sua sponte if the President fails to submit a nomination (or make a recess appointment) within a prescribed period after a vacancy arises.

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This alternative is premised on the likelihood that the present judicial appointment process would be overwhelmed by the massive increase in the size of the federal judiciary anticipated by some forecasts. If that process cannot continue to function, the need to consider an approach of the kind discussed here would be clear.

This approach would put "teeth" in any statutory time limits imposed on the President and the Senate with regard to making judicial appointments. It not only might provide impetus for more efficient procedures but also encourage resolution of political disputes that postpone nominee selection and confirmation proceedings. This approach may, of course, create additional problems in the appointment process.

Although delays sometimes occur in obtaining presidential decisions or in scheduling Senate committee or floor action, much of the delay in filling judicial vacancies arises at the preliminary stages in which executive and legislative branch staff identify and review potential or actual nominees. By focusing solely on the end result, a mechanism that eliminates either the President or the Senate from the appointment process in the event of delay might serve only indirectly to expedite the necessary staff work. Thus, rather than facilitate a desirable outcome, this approach might simply encourage hasty, ill-considered action by both parties.

Legislation that reallocates the power to appoint Article III judges raises serious constitutional concerns. Like other federal officers, judges must be appointed in accordance with the "Appointments Clause" (U.S. Const. art. II, § 2, cl. 2) which authorizes the President to "nominate, and by and with the Advice and Consent of the Senate, ... appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Although that clause also permits Congress to vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments," the legislative branch cannot reserve to itself the power to appoint "officers of the United States."[7] Therefore, no statute can authorize the Senate to act on its own initiative in making judicial appointments.

The constitutional issue does not end there. Although the matter has never been adjudicated, a persuasive argument can be made that Article III judges are "principal" (not "inferior")[8] officers whom the President must nominate and the Senate confirm.[9] If so, any statute purporting to authorize presidential appointment of judges without Senate confirmation (or appointment by any officer or authority other than the President) would be invalid under the Appointments Clause absent a constitutional amendment.[10]

7 Buckley v. Valeo, 424 U.S. 1, 132-33 (1976). As defined by the Supreme Court, "officers of the United States" include "any appointee exercising significant authority pursuant to the laws of the United States." *Id.* at 126.

8 Admittedly, circuit, district and Court of International Trade judges sit on "inferior courts" established by Congress under Article III, Section 1 of the Constitution. See Morrison v. Olson, 487 U.S. 654, 719-20 (1988) (Scalia, J., dissenting) (the Constitution's use of "inferior" in that context "plainly connotes a relationship of subordination"). But "from the early days of the Republic '[t]he practical construction has uniformly been that [judges of the inferior courts] are not . . . inferior officers.'" Weiss v. United States, 114 S. Ct. 752, 768 n.7 (1994) (Souter, J., concurring) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 456 n.1 (1833)). Indeed, the Supreme Court's recent interpretation of the Appointments Clause suggests that an "inferior officer" must be "to some degree 'inferior' in rank and authority," have power to "perform only certain, limited duties," hold an office "limited in jurisdiction," and enjoy "limited . . . tenure"—attributes not easily reconciled with the independent status and broad authority of circuit, district and Court of International Trade judges. *See Morrison*, 487 U.S. at 671-72 (upholding court appointment of "independent counsels" under the Ethics in Government Act).

9 An exception to this rule applies in the context of "recess" appointments under article II, section 2, clause 3. On two occasions, courts of appeals have upheld the historical practice of using the recess appointment power to fill judicial vacancies pending the completion of Senate action on the President's nominations. *See* United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

10 A different question might be presented by a policy under which judicial nominations are deemed confirmed without formal action if the Senate fails to act on them within a prescribed time period. Since each House of Congress possesses broad authority to "determine the Rules of its Proceedings" (U.S. CONST. art. I, § 5, cl. 2), it seems plausible that the Senate might adopt a rule (or consent to legislation) that either makes confirmation "automatic" or accords a nomination priority over all other business (thus requiring some kind of action) if the Senate does not confirm or reject a judicial nominee within a certain time after his or her name is received.

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(b) The Judicial Conference (or individual courts) might designate temporary judges to exercise Article III jurisdiction whenever circuit or district judgeships remain vacant beyond a prescribed time and the affected court demonstrates an urgent need for additional judge power that cannot be met otherwise through existing resources.

Like the preceding option, a measure that allows the courts themselves to fill judicial vacancies would serve to encourage the other two branches toward greater promptness in nominating and confirming judges. Although it is unlikely that either the President or the Senate would relinquish the power to appoint judges, they might find it more acceptable to grant courts the authority to make interim appointments, particularly if such authority is reserved for filling vacancies in exigent circumstances. An analogy to that approach is the procedure by which district courts may appoint a person to serve as United States Attorney until a vacancy in that position is filled in the ordinary manner.[11] The key difference, of course, is that executive branch officials do not have constitutionally protected tenure.

As a means of ensuring that judicial vacancies are filled, though, the utility of this solution is uncertain. A court seeking to appoint a judge to serve on a permanent or interim basis would require the same if not a greater amount of time to identify and screen possible candidates. Although some time might be saved if persons already serving as non-life tenured judges were appointed, an FBI background investigation might still be required, at least to update the information on file.[12] To avoid the need for a full background investigation, a court or other judicial branch authority could either assign a bankruptcy judge or magistrate judge to sit temporarily on the affected court, or appoint a special master to conduct specified proceedings. The fundamental problem with either method would be the judicial officer's limited tenure and unprotected compensation—factors that, under existing law, could preclude exercise of full article III jurisdiction.

Again, the idea of an alternative or "backup" mechanism for making judicial appointments presents difficult constitutional questions. Legislation that shifts the power of appointing judges to a court or other judicial branch authority would pose the same issue of whether a life-tenured Article III judge can be an "inferior officer" within the meaning of the Appointments Clause. In addition, the article III requirements of "good behavior" tenure and undiminished compensation preclude Congress from authorizing interim (i.e., limited-term) appointments to the bench.[13]

11 See 28 U.S.C. § 546(d) (1988).

12 *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); CFTC v. Schor, 478 U.S. 833 (1986); Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

13 U.S. CONST. art. III, § 1. Although recess appointments to the bench (see note 7 supra) are limited in duration, they are based on express constitutional language. *See* United States v. Woodley, 751 F.2d at 1014 ("We must therefore view the recess appointee . . . as the extraordinary exception to the prescriptions of article III.").

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Chapter II
Implementation and Future Planning

THIS plan is a first step to prepare for the challenges ahead. It addresses the fundamentals of federal court jurisdiction, adjudicative structure, governance, and resource allocation as a foundation for developing future initiatives. In most respects, the plan charts only a general course for the federal courts, leaving most details and strategies of implementation to those with day-to-day responsibility. The plan should be implemented through a process that is as broadly participatory as the one through which it was developed.

Although this plan recommends goals that should prove useful to judicial policy makers in the near term, the real value of this effort is the foundation it lays for future planning. The purpose of the plan is to chart a course for the judicial branch as an institution. It therefore assumes, and builds upon, the planning already taking place at the circuit level, in individual courts or offices, and in the context of specific programs (e.g., automation and information resources, the bankruptcy system, magistrate judges, space and facilities).

This first planning exercise has not occurred without a substantial commitment of time and effort by Judicial Conference committees and others. However, the result has been beneficial to the federal court system—affording it a rare opportunity to consider the future implications of present actions and determine what future conditions it would like to see.

The Plan as a Guide

Planning is a necessary, indeed natural, part of policy making. Although this plan sets forth long-range goals for the federal courts in a number of important areas, it does not purport to cover all topics on which planning decisions should be made.

There are areas of system-wide interest that, due to time constraints, lack of consensus, or a need for further study, are not addressed fully, or at all, in this document. For example, the Standing Committee on Rules of Practice and Procedure has undertaken a thorough evaluation of the judicial rulemaking process to assess the need for future improvements in that program. It is anticipated that this study, and others being conducted within the federal court system (including experimentation under the Civil Justice Reform Act), will produce additional recommendations to be incorporated in future editions of the plan.

In one sense, the plan is a snapshot outlining the goals of the federal courts at a particular time. The judiciary must not only consider the impact of subsequent events on the specific contents of the plan, but must also revisit the plan's basic premises in view of evolving conditions. In short, there is a continuing need for planning at the national, as well as other, levels in the judicial branch.

Under a long range plan, the Judicial Conference and other governance authorities can discharge their responsibilities aware of how their actions accord with generally accepted values. A plan also gives direction to the legislative program, allowing the judi-

ciary's representatives to respond more quickly and effectively to new developments. This proactive engagement of the future adds a healthy context to everyday decisions.

Getting Started

First, the plan should be brought to the attention of all judges and other key judicial branch personnel. Also, the governance apparatus (e.g., the Judicial Conference, circuit judicial councils, chief judges) should begin to examine agendas and ongoing activities with the plan in mind.

Through this review, the judiciary's policy makers can determine what new initiatives or changes in administrative policy or practice are needed. If action is required, they should estimate the probable costs, determine relative priorities of implementation, and assess whether the necessary resources are available. More specific action plans can then be developed by those with direct responsibility.

This does not mean that all the recommendations in the preceding chapters provide a call to action. Some are already being put into effect, and others (e.g., the alternatives described in Chapter 10) should be considered only if certain circumstances come to pass. Still others need more research and assessment before workable strategies can be developed.

This is neither the first nor the only ongoing planning effort in the federal courts. Others may have already begun looking into the appropriateness of specific proposals, and their continued efforts should be encouraged and integrated into the larger scheme. The work of these groups is particularly important to the continued success of the courts' overall planning process. Likewise, the value of external partnerships—with bar organizations, state courts, research foundations—cannot be overstated.

Continuing Nature of Planning

The essence of planning is making choices. While this is not a time for radical changes, significant effort will be required if the federal courts hope to preserve their distinctive characteristics and sustain their historic role. The intent of this plan has been to outline some of those choices.

Although a linkage between plan implementation and routine decision making is crucial, the value of a participative planning process would be lost if this plan became a one-time document. This is not to say that there must be annual editions of a plan for planning itself to be continuing. The benefits of planning come from regularly contemplating and addressing the future through contemporary decisions, with a plan being only a chronicle of that decisional process. The existing judicial process of governance is an appropriate forum for continuing planning decisions and, as necessary, keeping the plan updated.

If an issue of broad, long-term significance arises that is not covered in the plan, there is an opportunity not only to address the issue at hand, but also to reserve it for consideration in the next planning cycle. Moreover, if a particular action under consideration in the normal process of governance seems advisable, even though the plan recommends a contrary approach, the difference may signal a fundamental shift in policy direction that can be reflected through a revision to the plan.

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Future Editions of the Plan

To ensure that the plan remains current, the planning process should continue on a cyclical basis. The best approach would permit both incremental adjustments and periodic reevaluation. The plan should be revised periodically to reflect any new or different goals identified through the customary policy making process. Revisions need not be extensive and might be based on experience gained through plan implementation, as well as, for example, the experiments, innovations and studies developed by Conference committees.

Periodic revisions will not be sufficient to realize the full benefits of planning. To sustain the plan's relevance as a policy guide, planning should begin afresh every ten years. Instead of merely amending the existing document, the Judicial Conference should undertake to examine de novo the role and mission of the federal courts as well as the goals that will carry them into the future. Such a "fresh start" renewal ensures that the federal courts are neither trapped by the choices of earlier planners nor oblivious to new forces—and new voices—within and outside the judicial branch that shape their role in government and society.

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Appendix A
Current Trends and Projections

THE projections reported here are based on trend analysis. Trend-based projections are intended to reflect the likely course of some variable of interest under the assumption that the aggregate weight of the factors that have influenced it in the past (demographic, economic, legislative, etc.) will continue to evolve along the same paths that they have previously followed. Consequently, trend-based projections embody a degree of "inertia," so that, for example, a variable that has exhibited perfect linear growth over time will be projected to continue a linear evolution. Trend-based projection cannot, then, reflect inherent structural or physical limitations except to the extent such influences have been effective constraints in the past and, hence, reflected in the growth of the historical data.

In analyzing the data for this appendix, minimal adjustments were made. However, some adjustments were necessary to avoid distortion of the projections. For example, certain categories of case filings were significantly affected by World War II, near the beginning of the sample period. To include such cases would bias trend estimates downward, but that effect would be an artifact of the starting point for the analysis. Such bias would be diminished by starting the data set at a much earlier date, were that possible, or by starting the data set after the war at the sacrifice of several valuable observations. Similarly, policy-based decisions by the executive branch in the 1980s to pursue recovery of veterans' benefits and student loans contributed to large increases in civil cases commenced. Exclusion of such cases reduces trend-based growth estimates and is appropriate in order to avoid over-emphasizing an historically unique event that occurred late in the sample period.

Each variable subjected to basic trend analysis was analyzed over the sample time frame using six different regression equations.[1] The equation producing the best statistical fit was then selected to provide the relevant trend projection.[2]

Trend Estimates - Civil

Components of civil case filings by jurisdictional basis were analyzed.

U.S. Defendant

U.S. defendant cases were disaggregated into (1) federal prisoner petitions, (2) Social Security cases (data reported from 1961)[3], and (3) all other U.S. defendant cases ("adjusted U.S. defendant cases"). Prisoner petitions and other U.S. defendant cases were analyzed as separate series. Social Security cases were excluded from the analysis. The number of such cases rose sharply from 1975 to 1984, but

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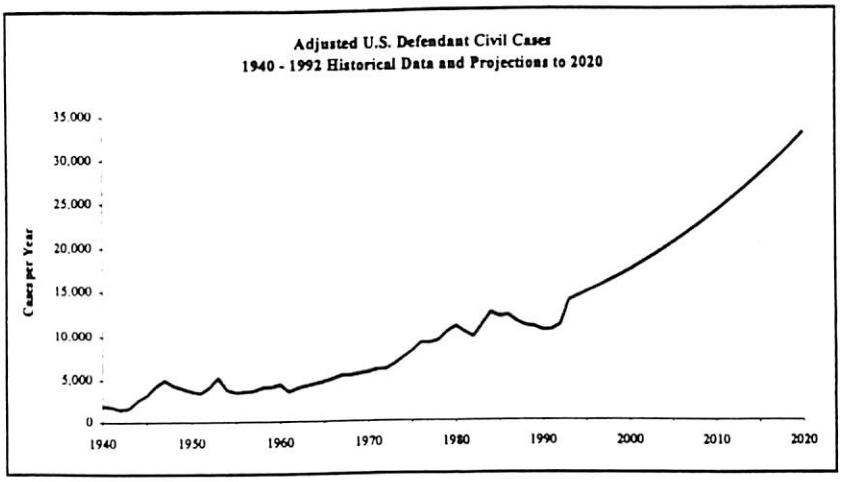
1 The functional forms employed were: linear, semi-log, exponential, double-log, hyperbolic and log-hyperbolic.

2 The selection was made based on the minimum sum of squared errors.

3 These cases are dominated by U.S. defendant cases, but there are a very small number of Social Security cases in which the U.S. appears as plaintiff. Since these cases typically represent less than 1% of all Social Security cases, they have been treated here as exclusively U.S. defendant cases.



have subsequently fallen 72% from the 1984 peak. There is insufficient basis for projecting such cases separately, yet to include them in the totals would increase the estimated trend rate of growth for U.S. defendant cases on a questionable basis.

The model estimated for adjusted U.S. defendant cases is:

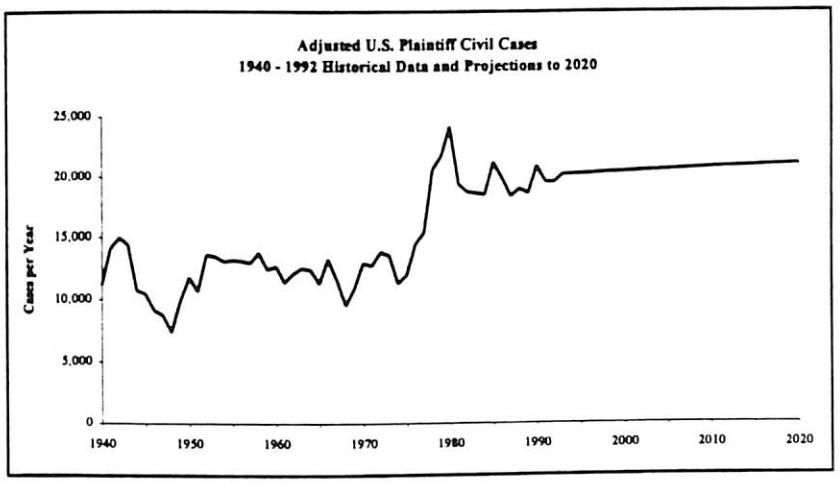
adjusted U.S. defendant =
exp{ 74.88‡ - 130247.26‡ /year } (r^2=.89).[4]

The model for federal prisoner petitions is discussed in a later section.

U.S. Plaintiff

U.S. plaintiff cases were disaggregated into (1) OPA actions (World War II related price controls), (2) recovery of overpayments and enforcement of judgments[5] (dominated by 1980s veterans benefits and student loan cases), and (3) all other U.S. plaintiff civil filings ("adjusted U.S. plaintiff cases"). For reasons of conservatism, as discussed above, only the latter was included in the analysis in order to remove from the trend projections the influence of significant one-time events.

Examination of these data over the 1940 - 1992 period clearly reveals the inadequacy of blind reliance on line-fitting. None of the six basic models routinely fitted to the data is an appropriate model of the time path of these cases.



Their history clearly shows a structural shift in the level of such cases, with an average of about 12,200 cases per year from 1940 to 1977 and a higher level of about 20,000 cases per year since 1978. In both periods the series appears to exhibit a slight upward slope. Consequently, the model estimated for this category of case is:

4 Coefficients followed by ‡ and † are significant at the 99% and 95% level, respectively.

5 Data for this category of case was first reported in 1955. Prior to that date such cases were included in "other contract actions." Cases prior to 1955 were estimated by regression interpolation.

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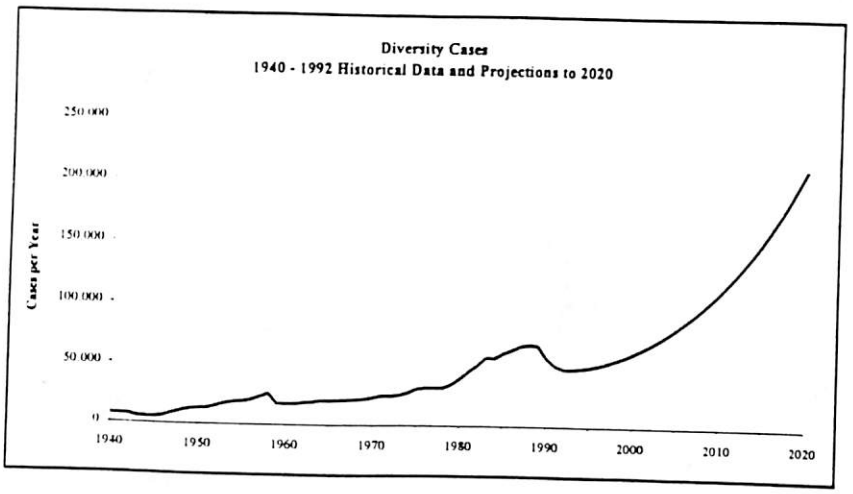
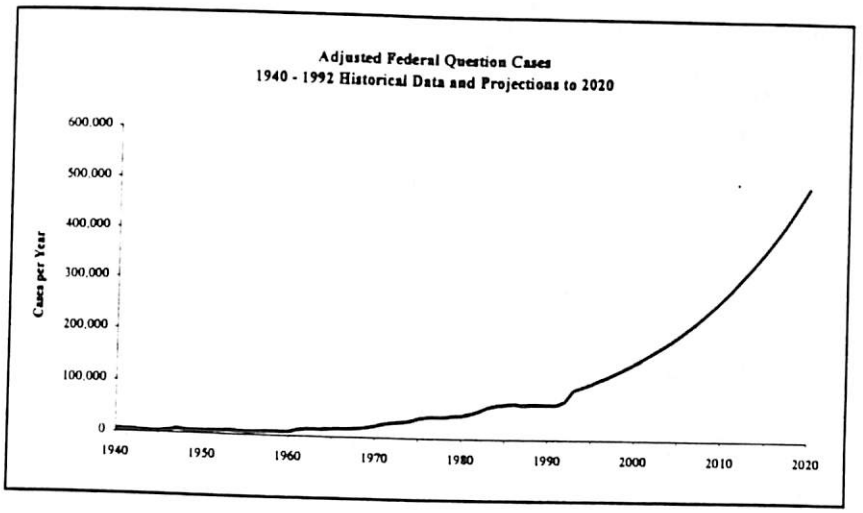


threshold. The model was extended by allowing for the possibility that diversity cases would grow even if the threshold were raised each year at the inflation rate. Thus the fitted model is:

diversity = (1.00825^{year}† · $threshold^{-0.138}$‡ · $diversity_{prior\ year}^{.8}$‡) / 350,455† ($r^2$=.99).

adjusted U.S. plaintiff = -50123.3 + 31.8·year + {6902 if year > 1977; else 0}‡ (r^2=.81).



Diversity

Diversity cases were treated somewhat differently from other series in this study insofar as the amount in controversy threshold applicable to diversity cases provides an identifiable explanatory variable in addition to pure trend elements. The analysis of diversity cases was based on both trend and threshold elements, with the statutory amount in controversy adjusted for the effects of inflation. For purposes of projection, the threshold was assumed to remain at its current level of $50,000, and the inflation rate was assumed to be a constant 3.5%.

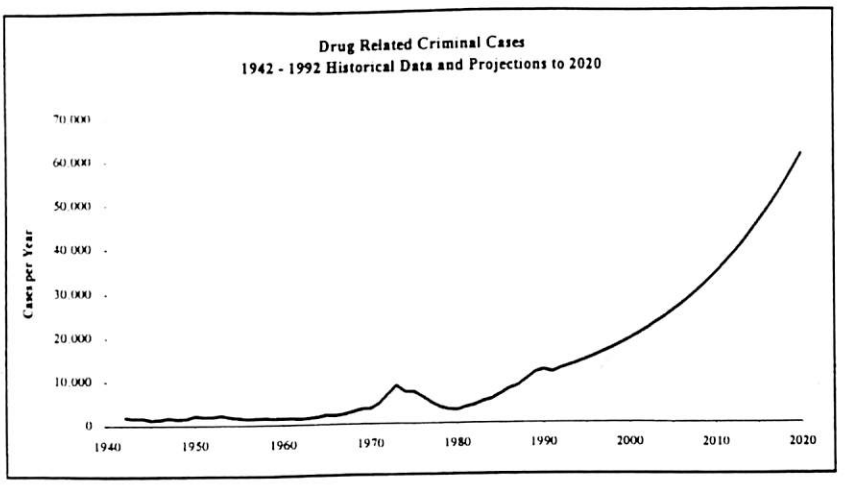
The model employed for diversity cases is an elaboration of the basic Koyck[6] model where the level of diversity filings is a function of the current and all past values of the amount in controversy

Federal Question

Federal question cases were subdivided into state prisoner petition cases and all other federal question cases("adjusted federal question cases"). The former is discussed below along with federal prisoner petitions. The fitted model for adjusted federal question cases is:

adjusted federal question = exp{ 135.08‡ - 246338.81‡/year } (r^2=.95).

6 The Koyck model assumes an infinite distributed lag with geometrically declining weights. See, *e.g.*, MICHAEL D. INTRILIGATOR, ECONOMETRIC MODELS, TECHNIQUES, & APPLICATIONS 180 (1978).



Trend Estimates - Criminal

Criminal cases were disaggregated in order to provide separate series for drug and nondrug filings. Non-drug criminal filings were adjusted by excluding war-related criminal cases (Selective Service cases, OPA criminal cases, and OHE cases) and immigration cases. Immigration cases were excluded because such cases have been subject to infrequent but significant surges which introduce bias into the analysis but which have little national significance.[7]

Drug and adjusted non-drug components of the criminal caseload were analyzed separately for trend. The fitted models are:

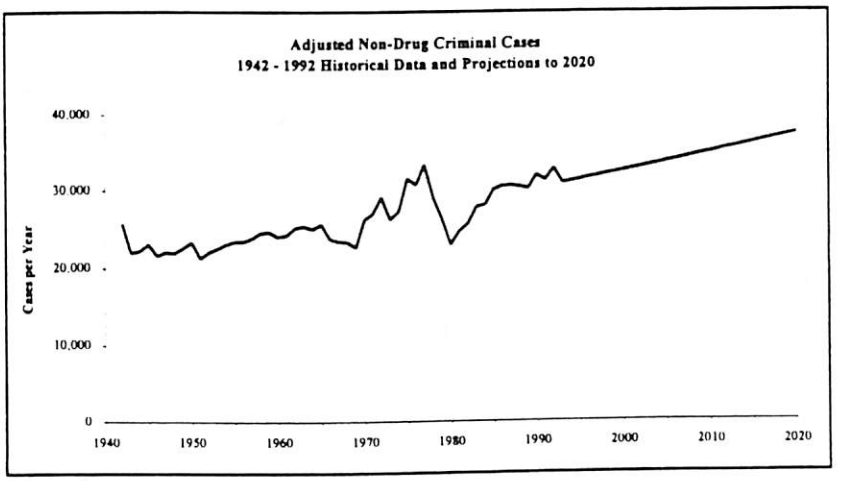
adjusted non-drug = $.023\dagger \cdot 1.0071^{year\ddagger}$ (r^2=.68),

and

drug = $(1.0071^{year\dagger} \cdot drug_{prior\ year}{}^{.88\ddagger})/ 384507\dagger$ (r^2=.78).

Prisoner Petitions

As noted above, most case types were projected on a simple trend basis. In the case of prisoner petitions, the hypothesis that prisoner petitions are related to the number of prisoners was tested. Theoretically, there should be a linkage, albeit indirect, between the number of criminal cases commenced and the federal prisoner population. The number of new prisoners in a given year should be a function of the number of criminal cases commenced, the mix of cases, the average conviction rate, the number of defendants per case, and the average sentence handed down. The number of prisoners as of a given date is the number of such prisoners one year prior plus new prisoners less prisoners released. Prisoner releases, in turn, are a function of sentence length, parole policies and the number of prisoners. Combining these considerations, and assuming that the aggregate net effect of changing sentence length, conviction rate, defendants per case, case mix, and other factors



7 For example, in 1951 immigration cases peaked at 14,965 cases, or about 40% of all criminal cases commenced in that year. However, more that 95% of these cases originated in just four districts: the Southern and Western Districts of Texas, Arizona and the Southern District of California.

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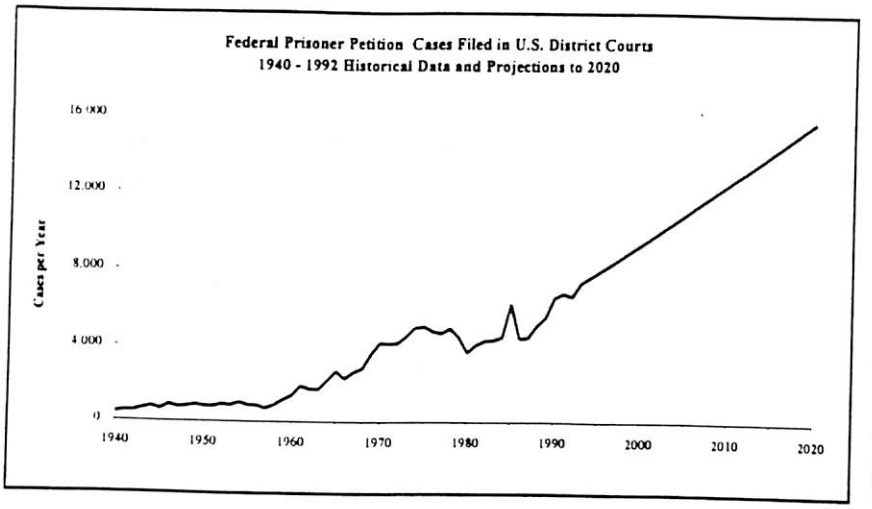


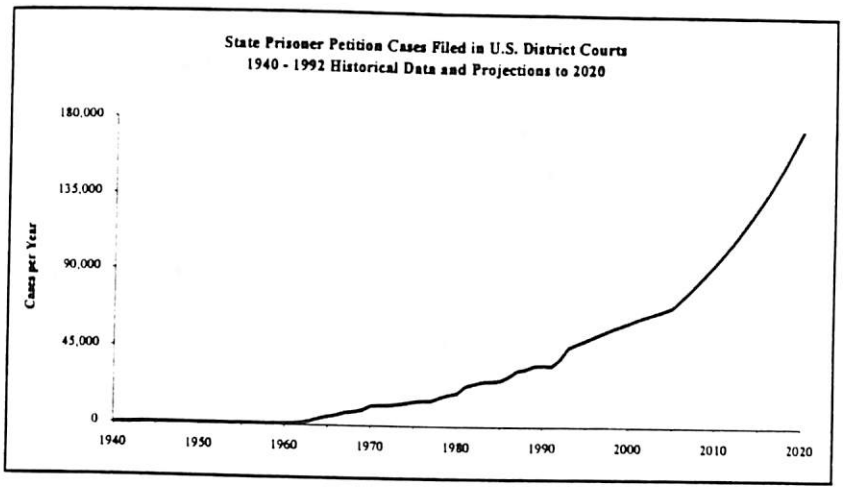
ratio = 724.84‡ - .36‡ · year
(r^2=.87).

At this rate of decline, the ratio will return to its prior average level by about the year 2005.

Using criminal case projections as described in the prior section, a projection of the federal prisoner population was generated, which, in turn, enabled an estimate of the state prisoner population. Separate analyses provided estimates of

is relatively stable, the annual net change in prisoners is a function of current and all past criminal cases commenced. As in the Koyck model, the weights of the lagged terms are assumed to decline exponentially, so that the estimated equation is

change in federal prisoners =
4070.6 + .22 · non-drug
+ .65‡ · drug
-.43‡ ·non-drug$_{\text{prior year}}$
- .16 · drug$_{\text{prior year}}$
+ .29† · change in
prisoners$_{\text{prior year}}$ (r^2=.66).

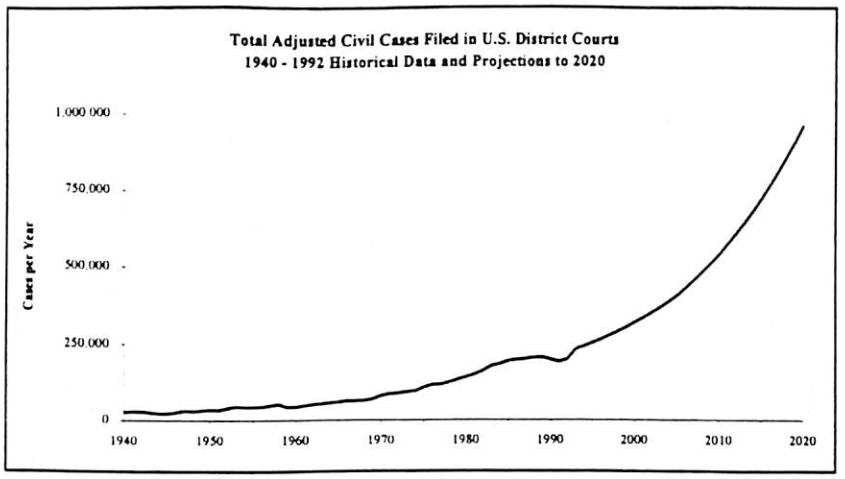


Similarly, a strong link between the number of state prisoners and the number of federal prisoners was estimated. Prior to 1978, the ratio of state to federal prisoners was a remarkably stable series averaging 8.28 over that 38 year period. Beginning in 1978, however, the ratio rose sharply to a peak in 1982 of more than double its prior average value. Since that time, the ratio has been declining. The ratio of state to federal prisoners was modeled based on the assumptions that (1) the average prior to 1978 was in some sense a "natural" level; and (2) the decline observed since 1982 reflects the system returning to the natural rate. The level of the ratio was estimated for the period since the decline began in 1982 as

the trend in the rate of filing of federal and state prisoner petitions per 1000 prisoner population. Federal prisoner petition filings per 1000 federal prisoners was relatively stable until 1957 when it began a swift rise which peaked in 1974 and again in 1979. Since 1979 the ratio has been declining. For purposes of this study, the ratio of federal prisoner petitions filed per 1000 federal prisoners was modeled from the 1979 peak. The equation estimated is

ratio = exp{ -.049‡ + 103.21‡ · year} (r^2=.79).

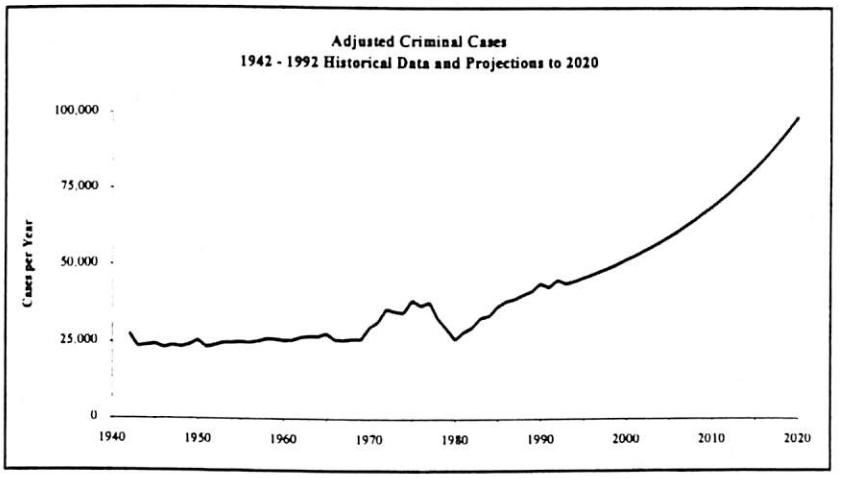
State prisoner petitions filed per 1000 state prisoner population was, much like the federal filing rate, a relatively stable series in the early years of the sample period. Beginning in 1962, the ratio rose



rapidly and significantly from a value of less than 5 filings per 1000 population to a peak of about 73 filings per 1000 population in 1981. Since 1981, the ratio has been declining. As modeled for this study, the period estimated was 1962 through 1992, using a functional form based on a modified gamma distribution. The estimated equation is

$$\text{ratio} = 2379 \cdot [(\text{year}-1961)/21248]^{3.4} \cdot [.002 + (\text{year}-1961)/4753]^{-8.87}$$

(r^2=.95)



Combining trend projections of the respective prisoner populations with projections of the filing rate per 1000 population generated district court prisoner petition filings for both federal and state prisoners.

Trend Estimates - Appeals

Appeals were divided into three components for analysis: (1) criminal appeals, (2) prisoner petitions, and (3) all other appeals. While it is possible to model trend in appeals cases directly, the approach taken in this study is to recognize the linkage between district court caseloads and appellate case filings. As a consequence, the focus was shifted to trends in appeals rates, defined as the ratio of appeals filed to district court cases commenced.[8]

The fitted model for all other appeals is:

other appeals = -2397.7‡ + .100‡ · civil cases commenced (r^2=.97).

Both the ratios of criminal appeals to district court criminal cases commenced and prisoner petitions to district court prisoner petition cases commenced showed evidence of nonlinearities which cannot be adequately treated using one of the six functional forms used elsewhere for trend analysis. Instead, the criminal and prisoner petition appeal rates were modeled using a nonlinear estimating technique and the logistic function

8 A more customary measure would use cases terminated as the denominator. Cases commenced were used here because (1) in the long run all cases commenced will be terminated; and (2) terminations and cases commenced move very closely together.

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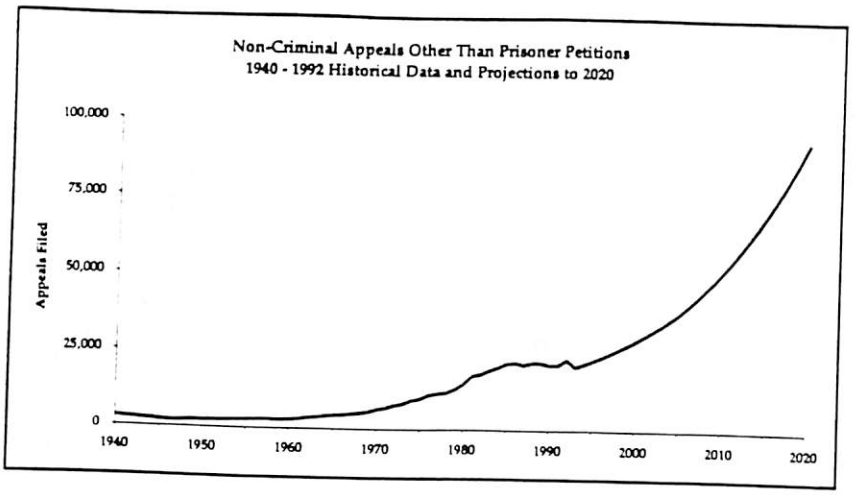


$$f(t) = a / \{[1+b \cdot \exp(-c \cdot t)]^{d}\}$$

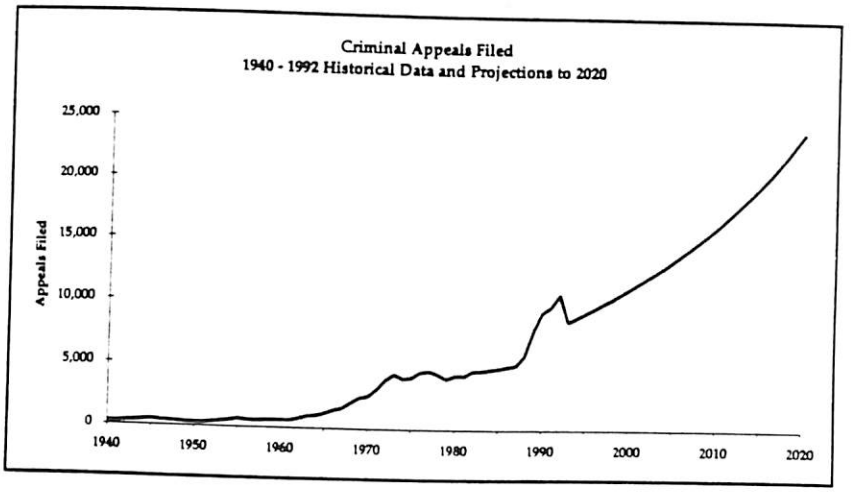
where a,b,c and d are parameters to be estimated. The logistic curve is often used to model economic phenomena where the variable in question is thought to be subject to a saturation point or upper limit. The fitted model for the criminal appeals rate is:

criminal appeals rate = $.26 / \{[1 + 21.57 \cdot \exp(-.09 \cdot t)]^{1.58}\}$ (r^2=.94).

The model fitted for the prisoner petition appeals rate is:

prisoner petition appeals rate = $.14 + .86 / \{[1 + 20.34 \cdot \exp(-.08 \cdot t)]^{6.97}\}$ (r^2=.68).[9]

It is interesting to note that the fitted model for prisoner petitions implies a gradual increase in the rate of appeal from the district courts of prisoner petitions towards a value of 100%.



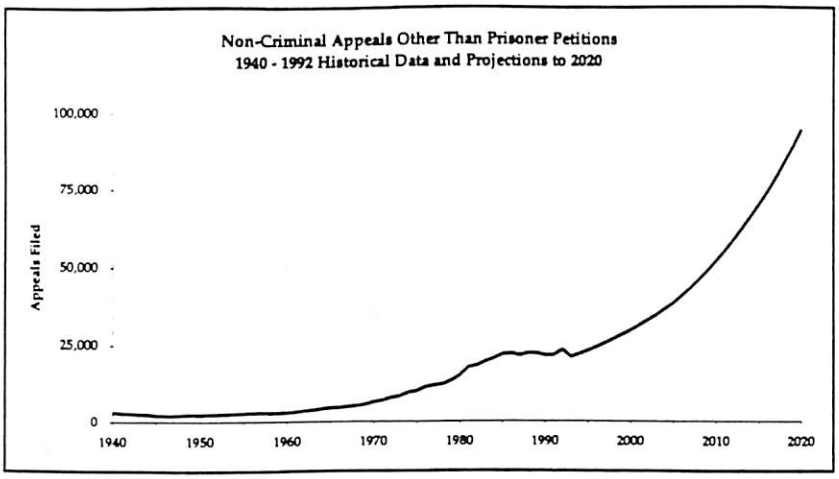
Judgeship Projections

National projections of required judgeships were developed from caseload projections for both the district and circuit courts of appeals. Two different methodologies were applied in projecting judgeships: (1) application of the current "formula" approach, and (2) application of a "production function" estimate which allows for trends in per judgeship productivity.

The Formula Approach

In the case of the district courts, required judgeships were computed as the weighted projected caseload divided by 400 (weighted cases per judgeship), which is the formula currently employed by the Committee on Judicial Resources. The weights for aggregate civil and criminal caseloads were derived

9 The estimation of this model was constrained so that the limiting value of the prisoner petition appeals rate is not greater than one. In addition, a constant serving as a location factor was added to the equation.



from the 1979 Federal District Court Time Study (FJC).[10]

Circuit judgeship projections were derived from application of the formula currently in use by the Committee on Judicial Resources. The formula, in practice, is

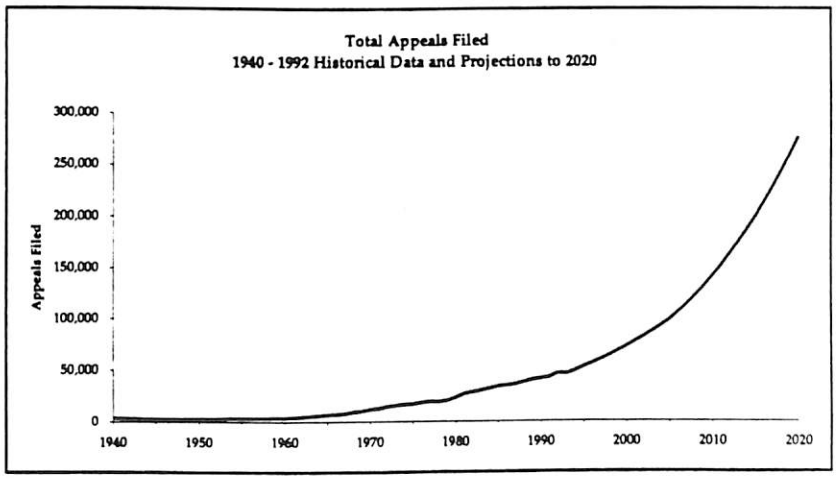
Judgeships = [(Filings - Prisoner Petitions/2) · Merit Termination Ratio] · 3 / 255.

As applied by the Committee, the merit termination ratio is the average of the ratio of merit to total terminations in each circuit over the prior five years. In these projections, the ratio is the national average of the annual ratios for the five years ended September 30, 1992.[11] No attempt was made to project the merit termination ratio. Rather, the ratio was assumed to remain constant.

The Productivity Approach

The productivity-based approach to the estimation of judgeship requirements is based on an analysis of historical case filings per authorized judgeship. As the accompanying charts indicate, appeals per authorized judgeship have trended up historically. At the district court level, civil cases per authorized judgeship have also trended up, although criminal cases per judgeship have declined slightly. At both the district and appellate levels, non-linear regressions of authorized judgeships on filings formed the basis of the estimated number of judgeships required to process the caseload.

In essence, the approach was one of estimating a "production function" where the measured input is the number of authorized judgeships, and the output is a mixture of cases, either civil/criminal at the district court level, or criminal/prisoner petition/all other at the appellate level.



For district court judgeships, the estimated equation was

Judgeships = $\exp(-39.4004‡) \cdot 1.0231^{year‡} \cdot civil^{.0691} \cdot criminal^{-.0355}$ ($r^2 = .98$) .

10 See Table 4, p. 15.

11 1992 FEDERAL COURT MANAGEMENT STATISTICS (ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS).

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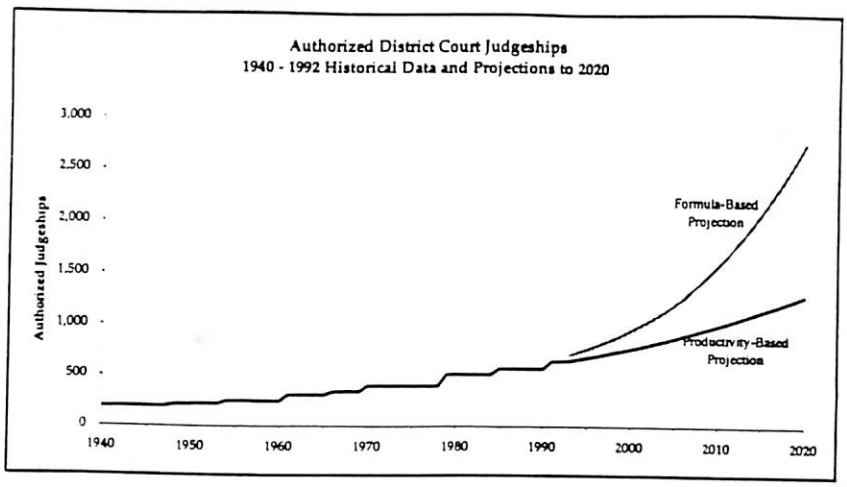
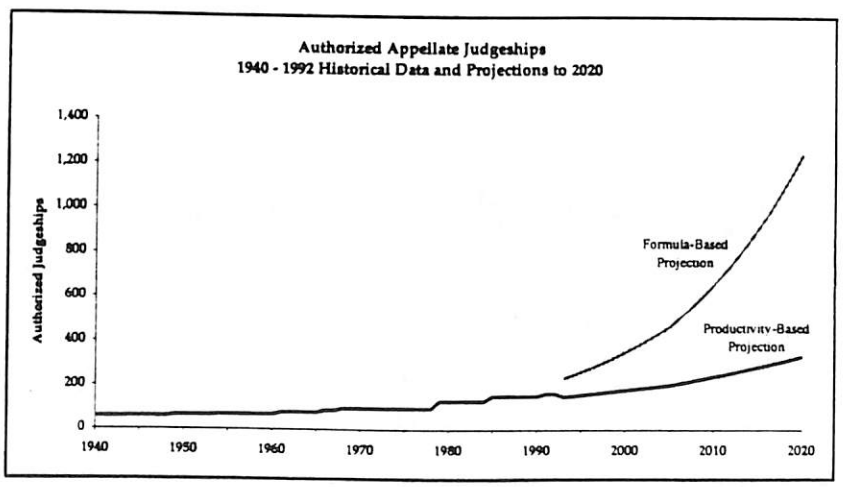


Given the projected levels of civil and criminal cases, the projected caseload per judgeship resulting from this equation reflects an upward trend in the range of 1.5% to 2.5% per year growth. For district court judgeships, the resulting projected total productivity is about 820 cases per judgeship by 2020.

The estimated equation for appellate judgeships was

$$\text{Judgeships} = \exp(-15.5082‡) \cdot 1.0094^{\text{year}}‡ \cdot \text{criminal}^{.1438}‡ \cdot \text{prisoner petitions}^{.1296}‡ \cdot \text{other appeals}^{.2007}‡ \quad (r^2 = .98).$$

Based on the projected levels of criminal, prisoner petition and other appeals filings, the total number of appeals per judgeship is projected to rise at a variable trend rate which averages about 4% per year. As a result, for appellate judgeships the implied productivity includes about 60 criminal appeals, 450 prisoner petitions, and 270 other appeals per judgeship by 2020.



The judgeship projections produced by this "productivity-based" method should be viewed as extremely conservative. Unlike caseload projections, there are valid reasons to expect a physical limit on judgeship productivity. Past increases in productivity may reflect changes in work methods of judges, increasing use of law clerks and staff attorneys, more extensive application of technology and other factors. However, there will almost certainly come a point beyond which judgeship productivity simply cannot be increased. The data examined shed little light on where that point may be, but to the extent the limit is reached before the trend productivity levels are achieved, these productivity-based judgeship projections will underestimate, perhaps significantly, actual requirements.

Circuit Level Projections

District and appellate caseload projections for the twelve circuits were generated by allocation of national totals using 1982 - 1992 circuit shares of national caseloads calculated for various case types. Judgeship projections were derived from allocation of national projected judgeships in proportion to circuit shares of caseload.

Data

Statistics on state and federal prisoner populations were obtained from the Department of Justice Bureau of Justice Statistics. All other data were taken from Judicial Facts and Figures (Administrative Office of the United States Courts) and from various editions of the Annual Report of the Director of the Administrative Office of the United States Courts.

Data on appeals filed and district court filings by circuit were compiled for the statistical years ending June 30, 1982 through June 30, 1992 for the eleven numbered circuits plus the D.C. Circuit. The Court of Appeals for the Federal Circuit was not included in this analysis.

Sample Period

National data employed in this study were assembled for the years ending June 30, 1940 through June 30, 1992. This starting point coincides with the publication of the first annual report of the Administrative Office of the United States Courts in 1940. However, criminal cases commenced by type of case were not reported until 1942. Consequently, the criminal data set is two years shorter than the majority of district civil case filing series and appellate case filings.

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Caseload and Judgeship Projections[12]

All District Courts

	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	318,210	51,665	369,875	956	776
2005	405,867	59,132	464,999	1,205	880
2010	539,385	68,906	608,292	1,581	1,000
2015	719,411	81,744	801,155	2,087	1,137
2020	961,441	98,669	1,060,110	2,766	1,291

Caseload and Judgeship Projections

	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	11,401	30,815	29,578	356	183
2005	13,673	44,777	38,389	470	205
2010	16,427	71,659	51,810	657	244
2015	19,876	108,513	69,906	910	287
2020	24,299	157,416	94,234	1,247	336

[12] For an explanation of the methodologies employed in making judgeship projections, see the discussion under **Judgeship Projections** on page 123.

Caseload and Judgeship Projections

D.C. District Court

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	4,977	694	5,671	15	12
2005	6,348	794	7,142	19	13
2010	8,436	925	9,361	24	15
2015	11,252	1,097	12,349	32	17
2020	15,038	1,325	16,362	43	20

D.C. Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	240	367	2,001	13	7
2005	288	534	2,598	16	7
2010	346	854	3,506	22	8
2015	419	1,294	4,730	30	9
2020	512	1,877	6,377	41	11

First Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	11,928	1,346	13,274	35	28
2005	15,214	1,540	16,755	44	31
2010	20,219	1,795	22,014	58	36
2015	26,968	2,129	29,097	76	41
2020	36,040	2,570	38,611	101	46

First Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	434	387	1,125	12	5
2005	521	562	1,460	15	5
2010	626	900	1,971	21	6
2015	757	1,363	2,659	28	7
2020	926	1,977	3,584	37	8

Second Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	27,187	3,335	30,523	79	64
2005	34,677	3,817	38,494	100	72
2010	46,084	4,448	50,533	132	82
2015	61,465	5,277	66,743	175	94
2020	82,144	6,370	88,514	232	106

Second Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	1,073	2,188	2,716	22	15
2005	1,287	3,180	3,524	29	17
2010	1,546	5,089	4,757	40	20
2015	1,871	7,706	6,418	56	23
2020	2,287	11,178	8,651	76	27

Third Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	27,276	2,504	29,780	78	62
2005	34,790	2,866	37,656	99	70
2010	46,235	3,340	49,575	130	80
2015	61,666	3,962	65,628	172	91
2020	82,413	4,782	87,195	229	103

Third Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	745	2,396	2,330	26	14
2005	893	3,481	3,024	35	16
2010	1,073	5,572	4,081	49	19
2015	1,299	8,437	5,507	68	22
2020	1,587	12,239	7,424	93	26

Fourth Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	26,434	7,397	33,831	86	72
2005	33,716	8,466	42,181	108	81
2010	44,807	9,865	54,672	140	92
2015	59,762	11,703	71,465	184	105
2020	79,867	14,126	93,993	242	119

Fourth Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	839	4,123	1,986	36	18
2005	1,006	5,991	2,577	48	20
2010	1,209	9,588	3,478	69	25
2015	1,463	14,518	4,693	98	30
2020	1,788	21,061	6,327	136	35

Fifth Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	40,979	6,126	47,105	122	99
2005	52,267	7,011	59,278	154	112
2010	69,462	8,170	77,632	202	127
2015	92,645	9,692	102,338	267	145
2020	123,814	11,699	135,513	354	164

Fifth Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	1,167	3,840	3,499	42	22
2005	1,399	5,579	4,541	55	24
2010	1,681	8,929	6,129	78	29
2015	2,034	13,521	8,269	108	35
2020	2,487	19,614	11,147	149	40

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Caseload and Judgeship Projections

Sixth Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	35,845	3,890	39,736	104	83
2005	45,720	4,453	50,172	131	94
2010	60,760	5,188	65,949	173	107
2015	81,040	6,155	87,195	229	122
2020	108,303	7,430	115,733	304	138

Sixth Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	928	3,699	2,875	37	19
2005	1,113	5,375	3,732	50	22
2010	1,337	8,602	5,036	71	26
2015	1,618	13,027	6,795	99	31
2020	1,978	18,897	9,160	136	37

Seventh Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	26,142	2,390	28,533	75	60
2005	33,344	2,736	36,079	94	68
2010	44,313	3,188	47,501	125	77
2015	59,103	3,782	62,885	165	87
2020	78,986	4,565	83,551	220	99

Seventh Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	711	2,781	1,911	23	14
2005	853	4,040	2,480	31	16
2010	1,025	6,466	3,347	44	19
2015	1,240	9,792	4,516	62	23
2020	1,516	14,204	6,088	86	27

Eighth Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	21,844	2,848	24,692	64	52
2005	27,861	3,260	31,121	81	59
2010	37,026	3,798	40,825	107	67
2015	49,384	4,506	53,890	141	76
2020	65,999	5,439	71,438	187	86

Eighth Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	647	2,362	1,694	26	12
2005	776	3,432	2,198	34	14
2010	932	5,492	2,967	48	16
2015	1,128	8,317	4,003	68	19
2020	1,379	12,065	5,397	93	23

Ninth Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	47,950	11,541	59,491	152	125
2005	61,159	13,209	74,368	191	142
2010	81,279	15,392	96,671	249	162
2015	108,407	18,260	126,667	327	184
2020	144,878	22,040	166,918	432	209

Ninth Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	2,074	3,336	5,168	54	27
2005	2,487	4,848	6,708	70	30
2010	2,988	7,758	9,053	97	35
2015	3,615	11,748	12,214	132	40
2020	4,420	17,043	16,465	178	46

Tenth Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Productivity Based Judgeships
2000	17,040	2,838	19,877	51	42
2005	21,734	3,248	24,982	65	47
2010	28,883	3,785	32,668	85	54
2015	38,523	4,490	43,013	112	61
2020	51,484	5,419	56,903	148	69

Tenth Circuit Court of Appeals

Year	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Formula Judgeships	Productivity Based Judgeships
2000	591	1,788	1,742	24	11
2005	709	2,597	2,261	32	12
2010	852	4,157	3,052	45	14
2015	1,031	6,295	4,118	62	17
2020	1,261	9,131	5,551	85	19

Eleventh Circuit District Courts

Year	Civil Filings	Criminal Filings	Total Filings	Formula Judgeships	Based Judgeships
2000	30,607	6,757	37,363	96	79
2005	39,038	7,733	46,771	120	89
2010	51,880	9,011	60,892	157	101
2015	69,196	10,690	79,886	207	115
2020	92,475	12,904	105,379	273	131

Eleventh Circuit Court of Appeals

Year	Appeals Filed	Petitions Filed	Appeals Filed	Formula Judgeships	Based Judgeships
2000	1,951	3,549	2,531	41	21
2005	2,340	5,156	3,285	53	23
2010	2,811	8,252	4,433	74	27
2015	3,401	12,496	5,981	102	32
2020	4,158	18,128	8,063	138	37

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Appendix B
History of the Judicial Conference Committee on Long Range Planning

THE report of the Federal Courts Study Committee, issued in April 1990, recommended that the Judicial Conference of the United States and the circuit councils each engage in long range planning. "The volatility of change throughout our society requires the federal courts to have also a more systematic capacity to anticipate broader societal changes and plan for more distant horizons."[1]

Role of the Long Range Planning Committee

Building on the recommendation of the Federal Courts Study Committee, the Judicial Conference in 1990 created the Committee on Long Range Planning, composed of four appellate judges, three district judges, a bankruptcy judge, and a magistrate judge. The membership includes six former chairs of Judicial Conference committees, two former members of the Executive Committee of the Conference, a former circuit chief judge, three former district chief judges, and a bankruptcy chief judge. The total combined years of judicial service of the committee exceeds 160 years. (See Appendix C for biographical profiles of the committee members.)

The charge of the Long Range Planning Committee is:

- Coordinate the planning activities of the judiciary.
- Promote, encourage, and coordinate planning activities within the Judicial Branch.
- Advise and make recommendations regarding planning mechanisms and strategies, including the establishment of a coordinated judiciary planning process.
- Coordinate — in consultation with and participation by other committees, members of the judiciary, and other interested parties — the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them.
- Evaluate and report on the planning efforts of the judiciary.
- Prepare and submit for Judicial Conference approval, a long range plan for the judiciary and periodic updates to that plan — after consultation with other Conference committees, judges and interested parties.

This plan represents the beginning of a judiciary-wide long range planning process. The Long Range Planning Committee had the cooperation of the other Judicial Conference committees, the circuit councils, individual courts, judges, legislators, members of the executive branch, lawyers, and many others who have an interest in the courts. Future versions of the plan will further refine the issues and strengthen the judiciary's planning process.

1 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 146 (1990).

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Framework for Committee Action

To accomplish the directive of the Judicial Conference, the committee engaged in four successive stages of development to produce a long range plan for the judiciary:

(1) An educational phase — to acquaint committee members with long range planning concepts and formal methodology and to discern how best to promote and coordinate long range planning activities within the judicial branch.

(2) An informational gathering phase — to enable the committee to target issues for long range consideration.

(3) A solution phase — to recognize the target issues and problems facing the federal judiciary and to formulate long term recom-mendations to deal with those issues and problems.

(4) An implementation and coordination phase — to work with other Judicial Conference committees in implementing all or part of this plan in continuance of the judiciary's long range planning process.

The Director of the Administrative Office, L. Ralph Mecham, established the Long Range Planning Office to assist the committee in developing strategic planning for the judiciary. The committee also received substantial assistance from the Federal Judicial Center, primarily from the Planning and Technology and Research Divisions and the committee's consultants.

Beginning in March 1991, the committee's first three meetings were devoted to the educational phase. To discern how best to promote, encourage, and coordinate long range planning activities within the judicial branch, the committee heard from the top leadership of the Federal Courts Study Committee (Judges Weis and Campbell), the Administrative Office (Director Mecham) and the Federal Judicial Center (Judge Schwarzer) to determine how to proceed. The committee also heard from people involved in planning for government, both state and federal,[2] the private sector,[3] and the academic community.[4]

At the Fall 1991 meeting of the Judicial Conference, the committee's chair, Judge Otto R. Skopil, Jr., met with all other Conference committee chairs to discuss the Long Range Planning Committee's initial activities. At that meeting Judge Skopil discussed the vital role he saw for Conference committees in plan development.

Completing the educational phase, the committee co-sponsored with the Federal Judicial Center and the Administrative Office an educational seminar on judicial planning for all chief judges of the circuits and all chairs of Conference committees.

The committee initiated its preparation of a long range plan by forming subcommittees to decide in the first instance what issues were appropriate for long range planning. To define broad issues confronting the judiciary, the committee requested the Federal Judicial Center to conduct a survey of federal judges on issues relating to planning.

2 Executive branch: Solicitor General Kenneth Starr; Justice Research Institute: William K. Slate; Hudson Institute: Mark Blitz; National Academy of Public Administration: Don Wortman; State courts: Chief Justice Malcolm Lucas (CA), Robert D. Lipscher, State Court Administrator (NJ), and Kathy Mays, Director of the Office of Planning, Supreme Court (VA).

3 IBM: Douglas Sweeny; Institute for the Future: Gregory Schmid; American Bar Association: Sandra Hughes.

4 Professor Maurice Rosenberg (Columbia); Professor Arthur Hellman (University of Pittsburgh); and Professor Tom Baker (Texas Tech).

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The committee initially established three subcommittees to identify and analyze national long range issues and coordinate the development of the plan. The committee divided the universe of planning issues generally as follows:

- One subcommittee to examine judicial structure and governance.
- Another to look at jurisdiction issues and the role of the federal judiciary and its relationship to the other branches of government and state courts.
- The third to study judicial workload and output issues.

Additionally, the committee established a liaison network with 15 committees of the Judicial Conference. One member of the Planning Committee was designated to be the point of contact for each Conference committee and, in turn, each committee appointed a liaison member to work with the Planning Committee.

Over time, the three subcommittees were reorganized into two: one to study structure, governance and workload-related issues, the other to study issues dealing with jurisdiction and the size of the judiciary. Although the subcommittees worked separately, decisions on all matters for the national plan were made by the full Long Range Planning Committee.

The National Planning Process

The first key question for the Long Range Planning Committee was posed by the Chief Justice in his 1991 Year-end Report: what should be the role of the federal courts? In response, one of the committee's first efforts was to develop a mission statement for the federal courts. This preliminary statement is included in the plan for discussion and further refinement.

Identifying Planning Issues

For development of the initial plan, the Long Range Planning Committee invested considerable effort identifying long range national and strategic issues that might be addressed. The committee used three criteria for issue selection:

- First, an issue is long range if dealing with it would require more than three years (or more than two budget cycles).
- Second, an issue is national or system-wide in scope if it transcends district and circuit boundaries.
- Third, the committee looked for what might be called strategic issues, that is, those which affect (or have the potential of affecting) the core purposes of the judiciary.

The committee reviewed recommendations from committees or commissions in the last 25 years that have studied the federal judicial system:

- Study Group on the Caseload of the Supreme Court (Freund Commission)
- Commission on Revision of the Federal Court Appellate System (Hruska Commission)
- Department of Justice Committee in Revision of the Federal Justice System (Bork Committee)
- Ad Hoc Committee on Federal Habeas Corpus in Capital Cases
- ABA study groups
- Federal Courts Study Committee
- President's Council on Competitiveness

Planning Committee members spoke personally with members of the Senate and House Judiciary Committees or their staff, soliciting their input. In addition, the committee analyzed hundreds of letters

sent by judges and others to the Federal Courts Study Committee to build and initial list of potential planning issues. To ensure that issues and suggestions are current, the chairman sent letters to circuit, district, bankruptcy and magistrate judges and others within the judiciary, asking them to identify long range issues they believe are of greatest importance to the judiciary.

Using the insight gained from these informal efforts, the committee requested the Federal Judicial Center to conduct structured surveys of all federal judges, state judges, and a random sample of attorneys. The surveys were designed to collect specific information on opinions about a wide range of judicial, structural, administrative and procedural issues.

Committee Goals and Recommendations

As a result of its research, the Planning Committee identified several dozen major topics and scores of individual issues that are long range in scope and national in character and could appropriately be included in the first national plan. The committee acted to stimulate participation by other Judicial Conference committees in the planning process by transmitting lists of issues developed from earlier reports and the results of a request to all judges and groups of court officials to the other committees. The Planning Committee acted on its commitment to the idea that the substance of the plan be developed by judges serving on the respective subject-matter Judicial Conference committees. These individuals have the in-depth knowledge of the issues and the foresight to establish appropriate strategic goals for matters within their respective jurisdictions.

Conference committees then considered the extent to which they were already engaged in planning activities and whether they should begin new planning initiatives. The Planning Committee's responsibility to coordinate the planning process with other committees of the Judicial Conference was advanced by the chairman's letter requesting other committees both to identify issues to be addressed and to make recommendations on how those issues should be treated in the plan. Many committees prepared a report to the Planning Committee. Some committee chairs attended Planning Committee meetings to advance their committees' recommendations. The results of these wide-spread efforts include:

- Report and Long Range Plan for Automation in the Federal Judiciary from the Committee on Automation and Technology (1994)
- Report of the Committee on the Administration of the Bankruptcy System (June 1993)
- Report of the Budget Committee (Feb. 1994)
- Report of the Court Administration and Case Management Committee on Size and Structure of the Federal Judiciary (February 1993)
- Report of the Court Administration and Case Management Committee on Pro Se Litigation (June 1994)
- Report of the Criminal Law Committee on Judicial Planning for the Future of Federal Sentencing Policy (May 1994)
- Report of the Committee on Intercircuit Assignments (January 1994)
- Report of the Judicial Branch Committee and its Subcommittees on Long Range Planning (Jan. 1994)
- Report of the Judicial Branch Committee on Court Governance (February 1994)
- Report of the Judicial Branch Committee on Size of the Judiciary (July 1993)
- Report and Supplements to the Long Range Plan for the Magistrate Judges System (June 1994)
- Report of the Security, Space and Facilities Committee (August 1994)

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Special Report to the Judicial Conference

The committee worked to prepare a report, specifically added to its charge by the Judicial Conference in March 1993, addressing the appropriate size of the federal judiciary and whether there should be a "cap" on the number of Article III judges. The Conference decided to refer the question to the committee, in consultation with other committees, for report and recommendation.

To develop its recommendations, the Committee conducted retreats on federal court size and jurisdiction at which invited judges, lawyers, academics, and other citizens offered wide-ranging comments. One retreat was set aside for Judicial Conference committee chairs and chief judges; another for state judges, legal and other scholars, members of the private bar, and representatives of the legislative and executive branches; and a third was conducted with mixed judiciary-bar-academia participation. (The names of participants of all retreats and hearings appear in Appendix C.)

The committee held additional meetings to review the results of the study process and develop its recommendations to the Judicial Conference for the long term direction of the size of the federal judiciary. The report was adopted by the Judicial Conference in September 1993. The major elements of that report form the basis for this plan's chapter on size and jurisdiction (Chapter 4).

Other Planning Committee Activity

Ninth Circuit Judicial Council

The chairman of the committee and the Chief of the Long Range Planning Office addressed the Ninth Circuit Judicial Council at its May 1992 retreat to promote, encourage, and coordinate long range planning.

Sixth Circuit Conference

Five members of the committee participated as members of a panel to promote, encourage, and coordinate long range planning activities at the 1993 judicial conference of the Sixth Circuit in April 1993.

Meetings and Conference Calls

To consult with other committees and members of the judiciary, the committee's subcommittees met with other Judicial Conference committees in person and through telephone conference calls:

- In September 1992, a conference call brought together the chairs of all committees concerned with issues of criminal case processing to define broad issues in this area with Subcommittee 3 of the committee.
- In October 1992, Subcommittee 2 of the committee met with the chair of the committee on Federal-State Jurisdiction to coordinate the identification of emerging trends and develop strategies and plans for addressing them.
- In December 1992, members of each of the committee's subcommittees met with the chair of the committee on the Judicial Branch and with the chair of its Long Range Planning Subcommittee to coordinate the identification of emerging trends and define broad issues confronting the judiciary.
- In December 1993, Subcommittee B of the committee conducted two conference calls to consult with several chief district judges, other district judges, and court officials to prepare a section of the long range plan on alternative dispute resolution.

Analyses and Research

Committees submitted their reports on long term issues and recommendations to the Planning Committee through January 1994. Several committees submitted detailed reports for inclusion in the plan.

In the meantime, the Planning Committee's subcommittees, supported by analyses produced by the Long Range Planning Office of the Administrative Office, continued their work synthesizing the information gained and developing additional information in the development of long term goals for the plan. Additionally, throughout the process, the committee commissioned research efforts by legal scholars to provide conceptual linkages for the various planning issues being considered.

For major issues such as size, jurisdiction, and governance, the committee's retreats allowed for expansive interchange of ideas about the future directions of the judiciary. The retreats also gave Planning Committee members a sense of the needs of both internal and external stakeholders in these issues. Those meetings helped sharpen the committee's focus on practical solutions to structural problems.

In order effectively to coordinate the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them, and to evaluate and report on the planning efforts of the judiciary, the committee sponsored the following research projects:

- A staff study by the National Academy of Public Administration, *Long Range Planning in the State Courts: Selected Features for the Federal Judiciary* (June 1992).

- A report by the expert panel formed by the National Academy of Public Administration to recommend planning strategies, *Long Range Planning in the Federal Judiciary* (June 1992).

- Two papers exploring the appropriate range of federal jurisdiction were prepared by Dean Thomas M. Mengler of the University of Illinois College of Law, a consultant to the committee: *Federal Criminal Jurisdiction* (1993) and *Federal Civil Jurisdiction* (1993).

- A Federal Judicial Center survey of federal judges on issues relating to planning, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* (1994).

A research paper, *Judicial Vacancies: An Examination of the Problem and Possible Solutions* by Gordon Bermant of the Federal Judicial Center, Jeffrey A. Hennemuth of the Administrative Office of the United States Courts, and A. Fletcher Mangum of the Federal Judicial Center (1994).

- Several papers and manuscripts analyzing trends and future directions were prepared by the AO's Long Range Planning Office, including:

  - Two prepared by Dr. William T. Rule II, *Federal Court Caseloads Since 1950* (1993) and *Estimating the Impact of Eliminating Diversity Jurisdiction* (1993), were for the use of the committee and the Committee on Federal-State Jurisdiction.

  - A study on judicial workforce trends, *Workforce Changes: Looking Ahead and Looking Back* (1993) by Dr. William M. Lucianovic.

  - A treatise on the effects of increased caseloads, *Rethinking the Federal Court System: Thinking the Unthinkable* (1994) by Charles W. Nihan and Harvey Rishikof.

  - An analysis of responses to a letter of inquiry on the role of senior judges sent by the committee, *Report on Responses of Senior Judges and Active Judges Eligible or Soon to be Eligible for Senior Status* (1994) by Richard B. Hoffman.

  - A paper by David L. Cook of the AO Statistics Division, *The Criminal Caseload: Increasing Burden on the District Courts?* (1993).

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- Three Federal Judicial Center studies were prepared for use by the committee and others: *Imposing a Moratorium on the Number of Federal Judges*, by Gordon Bermant, William W Schwarzer, Edward Sussman, and Russell R. Wheeler (1993), *On the Federalization of the Administration of Civil and Criminal Justice* by William W Schwarzer and Russell R. Wheeler (1994), and *Federal Court Governance* by Russell R. Wheeler and Gordon Bermant (1993).

- The Federal Judicial Center also prepared a report based on interviews with committee members to discuss the essential values of the courts: Gordon Bermant, *A Vision of Progress for the Federal Courts* (1992).

Completing the First Plan

Development of initial long term recommendations is merely the beginning of the work of the Long Range Planning Committee. There are a number of strategic issues affecting the judiciary, on which consensus does not exist at present and others which have not yet been addressed explicitly.

The Long Range Planning Committee intends to continue open and full discussion of the issues in the draft plan. This plan will be the focus of an extensive communication and consensus-building effort, to include additional retreats and hearings with individuals and groups, both inside and outside the judiciary, to refine solutions and fine-tune the judiciary's developing plan.

Following the comment period, the Planning Committee will meet to review the contents of the plan in the light of public and judicial branch input. The final version of this first Long Range Plan for the Federal Courts will be submitted to the Judicial Conference for consideration at its March 1995 session.

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Appendix C
Profile of the Long Range Planning Committee: Members, Staff, Consultants, and Contributors

Members of the Committee

Otto R. Skopil, Jr. of Portland, Oregon, has served on the United States Court of Appeals since 1979, taking senior status in 1986. Previously, he had served as a United States District Judge for the District of Oregon, 1972-1979 (Chief Judge, 1976-1979). He is a graduate of Willamette University and its law school. He served on the Board of the Federal Judicial Center in 1979. Judge Skopil was a member of the Judicial Conference Committee on the Administration of the Federal Magistrates System, 1977-1987, and was Chairman, 1980-1987. He was also a member of the Ad Hoc Committee on Judicial Review Provisions in Regulatory Reform Legislation, 1981-1984. Since its creation in 1990 Judge Skopil has served as the Chairman of the Committee on Long Range Planning.

Sarah Evans Barker of Indianapolis, Indiana, has served as a United States District Judge for the Southern District of Indiana since 1984 and as its Chief Judge since January 1994. She is a graduate of Indiana University and the American University College of Law. Prior to her coming to the bench, she was United States Attorney for the Southern District of Indiana from 1981-1984. In 1988 Judge Barker was elected to the United States Judicial Conference for a three year term, She served as a member of the Executive Committee from 1988 until 1991 and was a member of the Committee on Rules of Practice and Procedure from 1987 until 1991. In 1991, she served on the Ad Hoc Committee to Study the Relationship between the Federal Judicial Center and the Administrative Office. Judge Barker joined the Committee on Long Range Planning in 1991.

Edward R. Becker of Philadelphia, Pennsylvania, has been a United States Circuit Judge for the Third Circuit since 1981. Prior to his appointment to the appellate bench, Judge Becker served as a United States District Judge for the Eastern District of Pennsylvania from 1970-1981. He graduated from the University of Pennsylvania and the Yale Law School. From 1975-1976, Judge Becker was a member of the advisory committee for the Federal Judicial Center's District Court Studies Project. From 1979-1987, he served as a member of the former Committee on the Administration of the Probation System. Since 1985, he has served on the FJC Committee to Advise on Education Programs on the Crime Control Legislation. In 1987, Judge Becker became Chairman of the restructured Committee on Criminal Law and Probation Administration. From 1985 to 1990, he served on the FJC Committee on Sentencing, Probation and Pretrial Services. In 1991, he joined the Board of the FJC. Judge Becker has served on the Committee on Long Range Planning since its inception in 1990.

Wilfred Feinberg of New York, New York, was appointed United States Circuit Judge for the Second Circuit in 1966. He served as Chief Judge from 1980 through 1988, taking senior status in 1991. He had previously served as United States District Judge for the Southern District of New York from 1961-1966. He is a graduate of Columbia College and Columbia Law School. Judge Feinberg was a member of the United States Judicial Conference from 1980 until 1988; he was Chairman of the Executive Committee from 1987-88. He has also served on the Advisory Committee on Civil Rules, 1965-1970; the Subcommittee on Supporting Personnel, 1969-71; the Subcommittee on Judicial Statistics, 1971-76; the Federal Judicial Center's Advisory Committee on Experimentation in the Law; the Committee to Study Law Clerks Selection Process, 1982-1985; the Ad Hoc Committee on Judgeship Vacancies, 1982; and the Committee to Study the Judicial Conference, 1986-1987. Since 1990 he has served on the Committee on Long Range Planning.

Elmo B. Hunter of Kansas City, Missouri, has served as a United States District Judge for the Western District of Missouri since 1965; he served as Chief Judge in 1980 until he took senior status at the end of that year. He is a graduate of the University of Missouri and its law school, and has done post graduate work at the University of Michigan. Prior to joining the federal bench, Judge Hunter was Circuit Judge for the 16th Judicial Circuit, State of Missouri, 1952-1957; and Appellate Judge, Court of Appeals at Kansas City, 1957-1965. He served on the Committee on Court Administration, 1969-1987 (appointed Chairman in 1978); and served as Chairman of its Subcommittee on Judicial Improvements, 1976-1978. He was also a member of the Ad Hoc Committee on Judicial Review Provisions in Regulatory Reform Legislation, 1981-1984; and the Ad Hoc Committee on the Media Petition ("Cameras in the Courtroom"), 1983-1984. In 1990, Judge Hunter joined the Committee on Long Range Planning.

James Lawrence King of Miami, Florida, was appointed United States District Judge for the Southern District of Florida in 1970 and served as Chief Judge from 1984-1991. He took senior status in 1992. He is a graduate of the University of Florida and its law school. Before joining the federal bench, Judge King was a Circuit Judge, Eleventh Judicial Circuit of Florida, 1964-1970 and a member of the Board of Regents of Florida, 1963-1964. He served on the Advisory Committee on Judicial Activities, 1973-1976; the Committee on Standards for Admission of Attorneys to Federal Practice, 1976-1979; and the Ad Hoc Advisory Committee on the Administrative Office, 1985. He was Chairman of the Implementation Committee on Admission of Attorneys to Federal Practice from 1979-1985. He was a member of the Judicial Conference of the United States from 1984 through 1987 and a member of the Judicial Council of the Eleventh Circuit, 1989-1992. Judge King has been a member of the Committee on Long Range Planning since its creation in 1990.

Virginia M. Morgan of Detroit, Michigan, has served as a United States Magistrate Judge for the Eastern District of Michigan since 1985. She is a graduate of the University of Michigan, the University of Toledo College of Law and has done graduate work at the University of San Diego. She was an Assistant United States Attorney from 1979-1985. Judge Morgan has served on the Advisory Group of Magistrate Judges since 1988. In 1992 she joined the Committee on Long Range Planning.

A. Thomas Small of Raleigh, North Carolina, has been a United States Bankruptcy Judge for the Eastern District of North Carolina since 1982. He has served as Chief Judge since 1992. He is a graduate of Duke University and Wake Forest University School of Law. Judge Small has served on the Committee on Long Range Planning since 1992.

Harlington Wood, Jr. of Springfield, Illinois, has served as a United States Circuit Judge for the Seventh Circuit since 1976. Formerly, he was a United States District Judge for the Southern District of Illinois, 1973-1976. He is a graduate of the University of Illinois and its law school. He served as United States Attorney for the Southern District of Illinois, 1958-1961; Associate Deputy Attorney General, 1969-1972; and Assistant Attorney General, 1972-1973. Judge Wood was a member of the Committee on Bankruptcy Legislation, 1978-1979; he served on the

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Advisory Committee on Judicial Activities, 1978-1979; the Committee on Court Administration, 1981-1987; the Ad Hoc Committee on the Media Petition ("Cameras in the Courtroom"), 1983-1984; and the Ad Hoc Committee on Automation, 1983. From 1987 until 1991, Judge Wood served as Chairman of the Committee on the Administrative Office. He joined the Committee on Long Range Planning in 1990.

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Judicial Conference of the United States

Proposed Long Range Plan for the Federal Courts

Submitted to the Judicial Conference

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March 1995
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Foreword

CHIEF Justice William H. Rehnquist regarded the Judicial Conference's creation of the Long Range Planning Committee as "a recognition that the judiciary needs a permanent and sustained planning effort." This Long Range Plan for the Federal Courts is the product of the first phase of that effort. It is the result of a process of continuing dialogue among judges, court staff, Judicial Conference committees, and other components of the judicial branch and between the judicial branch and the other branches of the government, state court systems, the bar, and the public.

The central vision of this plan is to conserve the judicial branch's core values of the rule of law, equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability. This conservation provides for stability in society, but should occur in a climate of flexibility to adjust to future needs of our nation. With such a vision, the Committee on Long Range Planning proceeded to develop consensus for the treatment of issues and recommendations in the plan.

In developing this document, the committee received numerous comments and suggestions about issues for possible treatment in the plan. Many other Judicial Conference committees participated in analyzing long term issues for the plan. The committee received additional suggestions during the public comment period, which included three public hearings. Thoughtful comments came from many sources, including the federal and state bench, the bar, academics, court staff, and others. Their suggestions dealt with issues covered in the plan and impelled the committee to revise as well as clarify its recommendations and commentary.

Some suggestions concerned issues that the committee has deferred for future plans. These newly-suggested concepts and issues deserve further study and commentary by the appropriate Judicial Conference committees. Chapter 11 enumerates some of these new topics that have been left for the next planning cycle.

Planning is a continuing process. It is an ongoing communication and decision cycle that periodically sees the issuance of a new plan. The committee's intent was not to produce a one-time report on the future of the federal courts, but rather to take an incremental step in the judicial branch's planning process, to identify areas where the federal courts might change to improve, and to propose ways in which the courts' service to society can be enhanced. The committee believes that acceptance and ultimate implementation of this plan will generate a broad-based understanding of the judicial system's strengths, needs, and opportunities A continuing review process, including both implementation and feedback, will keep the plan current and allow it to keep pace with ongoing initiatives within the judicial branch.

Disagreements still do–and should–exist in the judicial branch about the future direction of the courts. This plan itself contains both a preferred and an alternate scenario of the future. However, an effective planning process, built on a base of shared values and concepts, allows for constructive debate on future direction. The committee does not claim to have accurately seen the future, but concludes that through planning, the judicial branch can take an active role in developing its preferred future.

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Chapter I
Introduction

THIS first comprehensive plan for the future of the federal courts responds to a growing awareness within and without the courts that the accelerating pace of social change requires public institutions to anticipate likely future challenges and opportunities. The Constitution vests the federal courts with the judicial power of the United States, power which the courts are bound to exercise justly, speedily and economically. To meet that responsibility, the courts must first and above all preserve the rule of law. At the same time, they must respond to the changing needs of society, litigants, and the practicing bar. The federal courts intend that this first plan, along with the planning process that it has initiated, will foster those two imperatives.

Why Plan?

Many of our nation's state courts have already begun planning efforts through "futures commissions" and long range planning bodies. This federal court planning process responds to the same imperatives, mentioned above, that have led the state courts to plan about the future of the justice system. Indeed, there is a universality about doing justice that transcends court systems. Many of the issues important to the state courts—equal justice, public trust and understanding, effective use of technology, alternative dispute resolution, obtaining adequate resources, and governance—are no less critical to the federal courts.

Planning for the federal courts, however, requires an awareness of their unique role in the nation's justice system and the special context in which they operate. State courts exist to serve all the justice needs of a geographic area; their mission is relatively straight-forward. The federal courts, on the other hand, are creatures of a *federal* Constitution. The Constitution charges Congress with ensuring that the federal courts coexist with, supplement and only rarely supplant the role of their state counterparts. As Alexander Hamilton noted "[T]he national and state systems are to be regarded as ONE WHOLE."[1]

Determining the appropriate role for the federal courts has provided the greatest challenge for this planning process. In the words of John Jay, the country's first Chief Justice, "To provide against discord between National and State jurisdiction, to render them auxiliary instead of hostile to each other, and so to connect both as to leave each sufficiently independent and yet sufficiently combined was and will be arduous."[2] Much of the plan that follows is driven by the need to carry out this "arduous" task.

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[1] THE FEDERALIST No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[2] Charge to Grand Jury at the first session of the Circuit Court for the District of New York (Apr. 4, 1790). I CHARLES WARREN, THE SUPREME COURT IN U.S. HISTORY 61 (photo. reprint 1987) (1926) (quoting COLUMBIAN CENTINEL, May 29, 1790).

Many other challenges also have affected this planning process. The federal judiciary is largely reactive to external forces beyond its control. Congress sets the courts' budgets and the scope of federal jurisdiction; the executive branch determines the government's prosecutorial and civil litigation strategies that have substantial impact on the courts' workload. The judicial branch has only a limited ability to influence these actors.

Moreover, the structure of the federal judiciary is, by its nature, non-hierarchical. Unlike business organizations that can enforce a strategic plan from the top down, the federal judiciary's work is carried out by judges whose independence, guaranteed by the U.S. Constitution, makes regimentation impossible as well as undesirable.

Social and cultural changes, generally unpredictable and certainly uncontrollable by court planning processes, have even greater effects on the courts' workload. The extraordinary increase in illegal drug importation and use has transformed the work of federal district courts, yet its scope was little anticipated even ten years ago. Given all the uncertainty that courts face, and the meager tools they have to control their fate, a skeptic might ask why they should bother with long range planning at all.

The answer is straightforward, but not obvious. Planning can orient the courts to likely and possible alternative futures. It can enable judges and administrators to think strategically about how to allocate financial and human resources most effectively under various possible alternatives. No organization can control completely the environment in which it operates, nor predict absolutely the future that it faces; neither long range planning nor alternative futures planning holds out any such promise. Indeed, if planning's purpose were to predict the future in order to master it, planning would indeed be a fool's errand.

Planning entails preservation as well as change–the preservation of cherished, historic or possibly threatened values. It is not about conforming tomorrow's courts to all shifting trends of an uncharted future. But at its best, planning can help an organization clarify its mission and the values it seeks to preserve and promote, to articulate those values in goals or objectives, and to take effective action to achieve them.

History of Federal Courts Planning and Genesis of the Current Plan

The current planning process is not the federal courts' first. Statutes establishing the Conference of Senior Circuit Judges (1922) (the forerunner of the Judicial Conference of the United States), the Administrative Office of the United States Courts (1939), and the Federal Judicial Center (1967), and the subsequent growth of those organizations, arose from a recognition by Congress and the judiciary that the federal courts should have a national capacity to identify and respond to opportunities and barriers to the effective administration of justice. At the regional level, the creation of circuit judicial councils in 1939 responded to a similar need. And at the local level, many individual courts have for decades developed their own methods to assess and respond to the need for change.

In 1990, the Federal Courts Study Committee Report took a significant step toward a long range plan One of the Committee's administrative recommendations was that the judiciary should establish a "permanent capacity to determine long-term goals and develop strategy plans by which they can reach them." The federal courts responded to this recommendation through the creation of the Judicial Conference Committee on Long Range Planning and enhanced planning support capabilities in the Administrative Office and the Federal Judicial Center.

Appendix B of the plan documents the history of the work of the Long Range Planning Committee from its inception in March, 1991, to the present day. Here it suffices to note that the

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committee has identified the major planning areas confronting the judiciary; analyzed forecasts of trends; consulted widely with state and federal judges, lawyers from all segments of the nation's bar, officials of the executive and legislative branches, and experienced planners from the public and private sectors; and assessed a range of policy alternatives that the judiciary might pursue on its own or recommend to other bodies. Far more remains to be done, but this first plan, it is hoped, will provide a strong beginning for what will follow.

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Chapter 2
Conserving Core Values, Yet Preserving Flexibility

A shared vision evokes a sense of mission and a commitment to action. This initial long range plan for the federal courts proposes a vision for the future drawn from history and from the core values that traditionally have defined the federal courts. At the same time, it is balanced by the realization that the federal courts must themselves evolve—as they have throughout the past 200 years—to meet the changing needs of the public they serve. In this sense, the administration of justice must change in response to forces that the law does not create but must recognize.

The Vision

The federal courts of the future will conserve their core values even during periods likely to be characterized by rapid change and uncertainty. The federal courts of the future will provide a base of stability for society, yet maintain flexibility to serve the nation's changing needs.

The purpose of this vision is to guide the federal courts in fulfilling the role the Constitution and Congress assign to them. The vision is threatened, however, by troublesome trends and developments of the last two decades, many of which are discussed in more detail throughout the body of this plan. A large measure of the threat derives from competing views of the role of the federal courts vis-a-vis the state justice systems, which combine together with the federal system to make up an increasingly interdependent whole.

In the increasingly complex society of the 21st century and beyond, the federal courts' role in administering justice will require them to balance many worthy but competing goals. Serving both their localities and the nation as a whole, they will seek the best allocations of responsibility between themselves and the state court systems. Balancing service to individual litigants and the public interest, the federal courts will operate with economy and efficiency without sacrificing care for the individual case.

Recognizing the inherent dignity of every human being who participates in the justice process, the federal courts will strive to make the ideal of equal justice a reality. Functioning as interpreters of the law and resolvers of disputes, the federal courts will retain their independence, collegiality and preeminent legal competence and handle impartially the causes of all parties appropriately before them. Finally, while never sacrificing the core values that make them uniquely valuable to the nation, the federal courts will remain open to innovations that improve their services, make

them more accessible, and allow them to operate more efficiently.

Mission

What role should the federal courts play in a national justice system increasingly under stress? Answering this question is difficult, because no single "constitutionally correct" role exists for the federal courts. Perhaps because they could not agree on what role the federal courts should play, or perhaps because they saw that the changing needs of the country would require differing roles for the federal courts over time, the framers of the Constitution largely left such questions for Congress.

Today and for the near future, the debate over the appropriate role of the federal courts will pit those who favor increased "federalization" of the law against those who favor limiting federal court jurisdiction. Even federalization opponents, however, acknowledge that policy and efficiency reasons support some selective additions to federal jurisdiction.

At bottom, the debate over the role of the federal courts vis-a-vis the state courts revolves around the larger question of determining the relative spheres of operation of state and federal law. That question is a complex one that is determined by political, legal, economic, social and pragmatic factors. Often it is difficult to draw hard and fast lines between issues appropriately federal and issues for the states. As the authors of one of the papers supporting this planning process noted:

> [The federalization debate] takes place within a jurisdictional framework characterized by a large overlap of state and federal jurisdiction, the absence of a bright line dividing state court and federal court jurisdiction, and a political and historical context that reflects constant shifts of judicial power between the state systems and the federal system.[1]

Now, as they did two hundred years ago, questions of the relationship of state and federal law "cannot fail to originate questions of intricacy and nicety."[2] They include questions of competence, questions of policy, questions of resources, and questions about the impact of federalization choices on other values.

In determining the appropriate role for the federal courts, this plan proposes an emphasis on the wellsprings of what has made the federal courts a unique and valuable resource for the nation. The federal courts have served the nation well because they are special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests. Those disputes frequently call for deliberative consideration by life-tenured judges specially selected for the job of performing what are often difficult counter-majoritarian tasks.

Accordingly, the mission, or role, of the federal courts now and for the foreseeable future may be stated as:

> ***The mission of the federal courts is to preserve and enhance the rule of law by providing to society a just, efficient, and inexpensive mechanism for resolving disputes that the Constitution and Congress have assigned to the federal courts. That unique mission requires a commitment to conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism, leaving to the state courts the responsibility for adjudicating matters that, in the light of history and a sound division of authority, rightfully belong there.***

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[1] WILLIAM W SCHWARZER AND RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 40 (Federal Judicial Center 1994).

[2] THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

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The mission also requires protection of judicial independence to ensure that the judicial branch can carry out its constitutional role in a governmental system of checks and balances, to preserve and protect the individual rights and liberties guaranteed by the Constitution, to interpret and enforce treaties, federal statutes and regulations, and to ensure that cases are decided fairly and impartially.

Recent history contains many examples of the federal courts acting in this quintessential role as "keepers of the covenant" and guardians of American constitutionalism. Following the Supreme Court's decision in *Brown v. Board of Education*, a small cadre of federal judges in the South, often at great personal sacrifice in the face of hostile disagreement by a majority of the local citizens, successfully enforced adherence to the law of the land. During the constitutional crisis known as "Watergate," courageous federal judges insisted that even a President elected with one of the largest mandates in history was subject to constitutional limitations. In many less momentous cases, federal judges protected unpopular movements and individuals, punished corruption that seemed immune from accountability under local laws, and reined-in popularly elected officials whose actions had strayed beyond the Constitution's mandates.

While accomplishing these difficult and delicate tasks, the federal courts have been able to retain the nation's confidence and obtain ready acquiescence to their rulings. They have been able to do so in no small part because of society's faith that federal courts follow certain norms—that federal judges are selected by an exacting process, that federal judges decide cases without improper influences, that their rulings are supported and constrained by well-articulated legal principles, and that those decisions are reviewable by an appellate system that will correct errors, reject arbitrary judicial conduct and be faithful itself to the constitutional limits imposed on the judiciary. If society loses this faith, the federal courts cannot carry out their mission.

Core Values of the Federal Judiciary

- *The Rule of Law*
- *Equal Justice*
- *Judicial Independence*
- *National Courts of Limited Jurisdiction*
- *Excellence*
- *Accountability*

Core Values

Society's faith in the federal courts depends upon the courts' adherence to certain core values that this plan is dedicated to conserve and enhance.

Rule of Law. Our nation accepts as its ideal that we are governed by the rule of law, which stands in opposition to the personal rule of one individual or body of persons. Courts epitomize the concept of a government of law, and the federal courts often serve as a role model for other courts and agencies likewise charged with the duty of enforcing law. Key features of this core value are the predictability, continuity and coherence of the law, the visibility of the decision-maker, and judges' acceptance of responsibility that law, rather than personal preference, provides the basis for making decisions.

Equal justice. Every federal judge takes an oath to "administer justice without respect to persons" and to "do equal right to the poor and to the rich," meaning that bias, partiality, and the parties' economic circumstances may play no role in the administration of justice. Fairness also permeates this core value. Courts should make decisions that comprehend the relevant individual circumstances of litigants, that empathize with their situation, that apply deliberative imagination, that give them

ample opportunity to be heard, and that reach a just result. In recent years adherence to this core value has led judges to express concerns ranging from the state of the criminal sentencing guidelines to the ability of judges to give individualized justice when faced with increasing caseloads.

Judicial independence. Federal judges must be able to perform their duties in an atmosphere free from fear that an unpopular decision will threaten their livelihood or existence. For that reason the Constitution's Article III provides for life tenure and the protection against salary decreases. As Alexander Hamilton wrote in the *Federalist Papers*, these "are the best expedients which can be devised in any government to secure a steady, upright, and impartial administration of the laws." Although the autonomy to make impartial decisions is at the heart of judicial independence, the concept extends further, as it has become apparent in the interdependent modern world that a judge's ability to function independently can be affected by more than a simple threat of job loss or salary reduction. The federal court system must continue to be in control of its own governance, albeit within the limitations set by the Constitution's system of checks and balances.

National courts of limited jurisdiction, operating within a system of federalism. Unlike the state courts, which are designed to handle all legal disputes within a geographic area, the federal courts were never intended to handle more than a small percentage of the nation's legal disputes. This notion is at the heart of judicial federalism, a concept expressed in more detail later in the plan. Our Constitution's creation of a national government exercising limited, delegated powers explains the importance of this core value, but it needs to be reaffirmed in practice time and again. Chief Justice Rehnquist has frequently noted that although the Framers gave to Congress the ultimate task of developing a role for the federal courts, they left two important guideposts. Federal courts were intended to complement state court systems, not supplant them. And federal courts were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not.

Excellence. Throughout their history, the federal courts have had to decide many of society's most contentious and important issues. The disputes that raise these issues often present a high level of factual, legal and administrative complexity. The federal courts have successfully resolved many of these issues because they have high standards of legal excellence, have obtained superior resources, and attract talented personnel. Excellence has many more components, encompassing the integrity of the nominations process, the training given to judges, resources provided for their support, a limited enough jurisdiction so they can become sufficiently expert with subject matter and procedure, the time available for contemplation and reasoned decision, and the prestige of the office. Public confidence in the federal courts is a vital ingredient of our constitutional system. That confidence in large part depends upon the courts maintaining their standards of excellence.

Accountability. American government is, at its root, government by the people. The first Chief Justice, John Jay, observed "that next to doing right, the great object in the administration of justice should be to give public satisfaction."[3] Under our Constitution, however, the judicial branch must often resolve disputes according to law rather than the majority's wishes. Preserving the power of the courts to do what is right while sustaining their legitimacy in the eyes of the public is one of the most delicate balancing acts of our constitutional system. If the federal courts alienate the public and lose its support and participation, they cannot carry out their appropriate role. In this sense, life-tenured federal judges, like all other public officials, are finally accountable to the people.

[3] Draft letter from John Jay, enclosed in letter from John Jay to James Iredell (15 Sept. 1790), *in* 2 MCCREE, THE LIFE AND CORRESPONDENCE OF JAMES IREDELL 292, 294 (1857).

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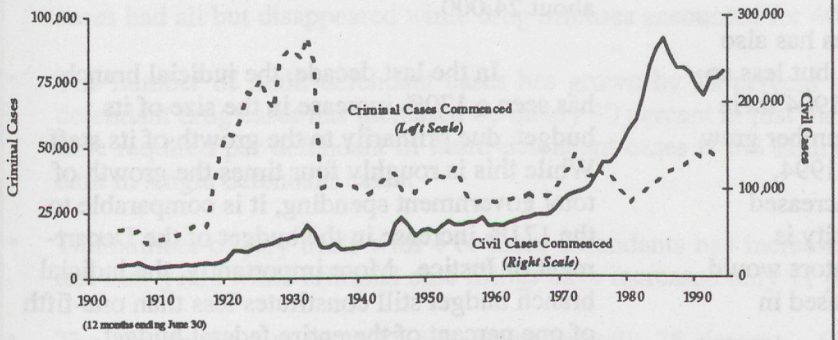
Figure 1
Civil and Criminal Cases Commenced in U.S. District Courts, 1904 - 1994



The most powerful popular influence on the federal judiciary is the judicial appointment process, which responds generally over time to changes in electoral majorities. Other elements of accountability are imposed by Congress under Articles I and III of the Constitution. Some specific elements, such as resolving most cases of judicial discipline or disability, reside in internal judiciary mechanisms. Ultimately, however, the federal courts system must ensure its own accountability through the example of its leadership, self-imposed standards of conduct that are more stringent than those for other public officials, a demonstrated ability to make efficient use of the resources it has been given, and the commitment to treat all users of the courts with understanding, dignity and respect.

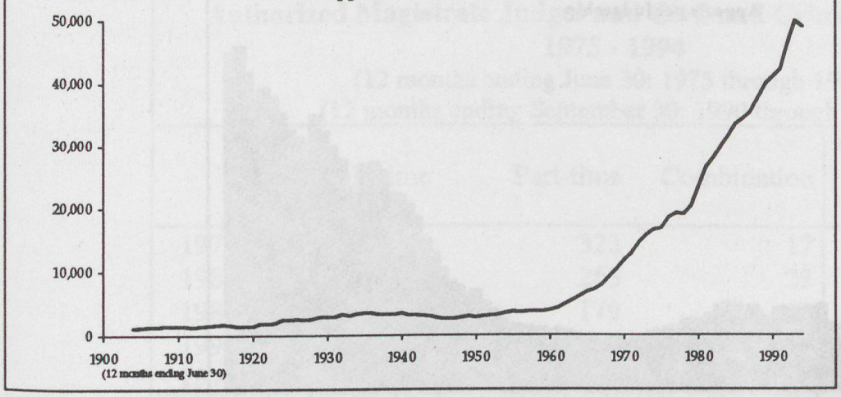
The Federal Courts Today

Today, a number of the federal court's core values are in jeopardy, largely for reasons beyond the courts' control. The increasing atomization of society, its stubborn litigiousness, the breakdown of other institutions, and, paradoxically, the very popularity and success of the federal courts, have combined to strain the courts' ability to perform their mission.

Huge burdens are now being placed on the federal courts. An historical overview of cases commenced in the federal district and appeals courts since 1904 reveals remarkable growth. U.S. population has increased slightly more than 200% since 1904. In the same period, however, while federal criminal cases commenced annually in the district courts have increased a relatively modest 157%, civil case filings have increased 1,424%, with most of that growth in the period since 1960. See Figure 1.

Most remarkably, since 1904 annual cases commenced in the federal appeals courts have increased 3,868%. While it took 20 years for the level of appeals to double its 1904 level, and 38 years (1962) to double again, it took seven (1969), ten (1979) and eleven (1990) years for each of the next three doublings. See Figure 2.

Figure 2
Federal Appeals Commenced, 1904 - 1994



Although the number of courts of appeals judgeships has increased from 27 in 1904 to 167 in 1994 (excluding the Federal Circuit) the increase has not kept up with the expanding appellate docket, in large part because the judiciary has not sought the vast increases in judgeships that would be

necessary. Figure 3 shows that while in 1970 there were about 130 appeals per judgeship, this had grown by 1993 to 298, dropping to 292 in 1994.

The number of district judges has also continued to increase over the years, but less so than the growth of the caseload. In 1904 there were 75 district judgeships. Their number grew to 649 by 1994. Between 1970 and 1994, district court filings per judgeship increased from 312 to 433. Although complexity is difficult to quantify, most commentators would agree that the average case has increased in complexity.

The criminal caseload has fluctuated widely over the last 20 years. Although in raw numbers it is currently lower than in 1972, the nature and complexity of the caseload has changed dramatically. For this reason, a simple snapshot of case filings does not provide a realistic picture of the relative burdens of the criminal caseload in 1994 compared to 20 years ago. The numbers of cases and defendants have not changed drastically over the years, but other factors affect workload as well (see box on the following page).

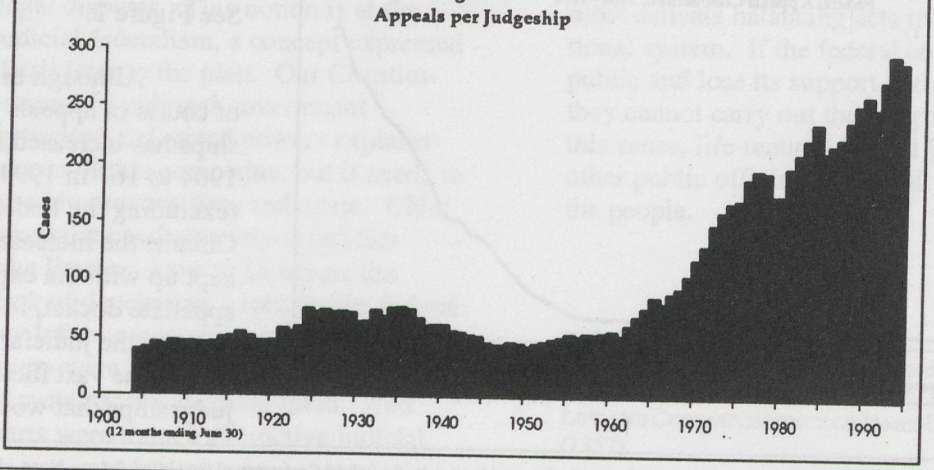
The workload of bankruptcy and magistrate judges has also increased in the past several decades. Tables 1 and 2 highlight the rapid rise of workload in these positions.

To meet the demand of increased judicial workload in the dozen years since 1982, the federal courts' full time permanent work force grew significantly from about 14,400 to about 24,000.

In the last decade, the judicial branch has seen a 170% increase in the size of its budget, due primarily to the growth of its staff. While this is roughly four times the growth of total government spending, it is comparable to the 171% increase in the budget of the Department of Justice. More importantly, the judicial branch budget still constitutes less than one-fifth of one percent of the entire federal budget.

The caseload increase has forced the courts to adopt a wide variety of new procedures and practices to cope with the influx. In the district courts, the heavy burdens of criminal cases have produced significant delays for civil suits in some judicial districts. To their great credit, those courts have responded through employment of case management techniques, alternative dispute resolution procedures, and the outstanding support of magistrate judges and support staff. In the courts of appeals, where the increase in appeals since 1960 has amounted to twice the increase in district court caseload growth, various procedural innovations have been adopted, including the use of screening programs, summary dispositions, increased complement of staff attorneys, and the elimination of oral argument in many cases.

Figure 3
Appeals per Judgeship



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Workload Changes in Criminal Cases

- In 1972, drug offenses accounted for only 18 percent of the criminal dockets, with selective service and auto theft accounting for an additional 13 percent. By 1994, both auto theft and selective service cases had all but disappeared while drug offenses accounted for 40 percent of the criminal filings.
- The number of multi-defendant cases has grown by 70 percent since 1980. The number of multi-defendant drug cases has increased by nearly 30 percent in just the last four years. The average judge time required per defendant in multi-defendant cases is 5.8 hours compared to 3.0 hours per defendant in single defendant cases.
- The number of jury trials with 4 or more defendants has increased more than 35 percent in just the last four years while criminal case filings have increased only 11 percent.
- The conviction rate in 1972 was approximately 75 percent. Since that time the rate has grown gradually to its present 85 percent. This translates into additional defendants requiring sentencing.
- In 1972 criminal case filings represented one-third of total filings in district courts and criminal trials accounted for 40 percent of all trials. In 1994 criminal filings were only 13 percent of all filings, but 42 percent of all trials.
- There were only 20 districts in 1972 where criminal cases represented more than 50 percent of the trial dockets; in 1992 38 districts devoted more than 50 percent of their trial dockets to criminal cases.
- Since 1970 the average length of a criminal jury trial has increased from 2.5 days to 4.4 days.
- Criminal jury trials in the 6-20 day range have increased 118 percent since 1973.
- The number of prosecutors has increased 125 percent since 1980 while the number of judges has increased only 17 percent.
- The number of prosecutors per judge has doubled in the last 10 years.

Table 1

Authorized Magistrate Judges and Civil and Criminal Workload 1975 - 1994

(12 months ending June 30: 1975 through 1985)
(12 months ending September 30: 1990 through 1994)

	Full-time	Part-time	Combination	Civil and Criminal Matters Disposed Of
1975	143	322	17	255,061
1980	210	263	22	280,151
1985	277	179	11	426,440
1990	329	146	8	450,565
1994	406	85	3	517,397

Table 2

Authorized Bankruptcy Judges (or Referees) and Filings
1950 - 1994

(12 months ending June 30)

	Full-time Positions	Part-time Positions	Total Bankruptcies Filed
1950	54	110	33,392
1960	107	67	110,034
1970	184	34	194,399
1980	235		360,957
1990	291		725,484
1994	326		845,257
	(Total bankruptcies in 1980 represent 67,517 cases filed in U.S. District Court plus 210,364 cases and 83,076 joint petitions filed after October 1, 1979, pursuant to the Bankruptcy Reform Act)		

Conserving Core Values

The system has coped, but many judges believe that in doing so the core values have been stretched too far. As Chief Justice Rehnquist said in a recent annual report, the federal courts are now at a crossroads. The next few years will require the nation to confront, and decide, critical questions about the federal courts and their role in our system of government. From the perspective of the federal courts, the choice is clear.

The vision of the federal courts set out in this plan has been driven fundamentally by the need to conserve the core values. No change in the jurisdiction, structure, function, governance, or role of the courts should diminish the perception or reality of the federal courts as uniquely competent national courts of limited jurisdiction serving as the embodiment of the core values discussed above.

While affirming the immutability of the core values, the plan also recognizes that specific elements of jurisdiction, structure, governance and function are not sacrosanct. The ability to adapt to changed conditions is the sign of a healthy institution, "for an institution without the means of some change is without the means of its own conservation."[4] Accordingly, the plan makes many recommendations for change. Most of them could be characterized as incremental. The plan also builds in many opportunities for experimentation and pilot programs, many of which will be critical for the more wholesale changes that will be called for if the alternative future discussed in Chapter 3 comes about.

Former Chief Justice Warren Burger once referred to the need for "systematic

[4] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 33 (1973), quoted in M.A. GLENDON, A NATION UNDER LAWYERS 107 (1994).

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anticipation."[5] Although this plan presents what is to the federal courts a preferred vision of the future, it also recognizes that the most important aspect of planning is creating structures and methods for dealing with the unanticipated. Thus, while the federal courts' mission statement embodies the core values identified above, it has built in flexibility for encouraging the spirit of experimentation and innovation that has long existed in the federal courts.

Has the Crisis Arrived?

Some believe the mission of the federal courts has already been compromised. They feel that the system to which lawyers, litigants and the American people have become accustomed has irretrievably vanished. Others believe the courts have preserved their essential nature despite the changes. Yet they too worry about the future. Certainly many warning calls have been voiced throughout the years by well-respected leaders in the federal courts community. Sixty-seven years ago, during one other period when federal courts strained under an expanded criminal jurisdiction, then Professor Felix Frankfurter expressed dismay that '[s]igns are not wanting that an enlargement of the federal judiciary [which then numbered slightly more than 170] does not make for the maintenance of its great traditions."

Twenty-five years later, Justice Frankfurter restated his message in *Lumbermen's Mutual Casualty Co. v. Elbert*,[6] that the federal courts' growing diversity docket was fundamentally altering the legitimate business of the federal courts, and that solving the jurisdictional problem by increasing the size of the judiciary was "bound to depreciate the quality of the federal judiciary and thereby adversely affect the whole system."

In the same year, Harvard professor and federal courts scholar Henry Hart declared, "The time has been long overdue for a full-dress reexamination by Congress of the use to which these [federal] courts are being put." More recently, Judge Henry Friendly (when the Article III bench numbered just under 500), Judge Richard Posner in 1985 (when it numbered a little more than 600), and the Federal Courts Study Committee in 1990 (when the Article III judiciary totaled about 750) have articulated a thesis of impending crisis. In 1992, the Chief Justice raised the following concerns:

> Unless actions are taken to reverse current trends, or slow them considerably, the federal courts of the future will be dramatically changed. Few will welcome those changes. . . .
>
> Some will say that we merely need to create more federal judgeships, which in turn would require more courthouses and supporting staff. . . . [T]he long term implications of expanding the federal judiciary should give everyone pause.[7]

Concerns about trends in the growth of the federal courts' caseload led the Judicial Conference of the United States in 1993 to endorse a policy of carefully controlled growth for the federal courts. At the same time, the Conference reaffirmed an earlier position supporting a "relatively small" federal judiciary while rejecting the notion of an artificial upper limit on the number of federal judges.

Should the Congress and the nation not heed these concerns about the implications of uncontrolled growth, one of two unfortunate consequences will inevitably follow: (1) an enormous, unwieldy federal court system that

[5] Warren E. Burger, Agenda for 2000 A.D.—Need for Systematic Anticipation, Address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976) *in* DELIVERY OF JUSTICE 101, 102 (1990) (quoting PERLOFF, THE FUTURE OF THE UNITED STATES GOVERNMENT (1971)).

[6] 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

[7] William H. Rehnquist, Remarks before the House of Delegates at the American Bar Association's Mid-Year Meeting 8-10 (Feb. 4, 1992).

has lost its special nature; or (2) a larger system incapable, because of budgetary constraints, workload and shortage of resources, of dispensing justice swiftly, inexpensively and fairly. Either consequence would result in an alternative future for the federal courts, one that is far different from the preferred vision articulated earlier in this chapter.

The projections in Tables 3 through 6 are based on historical data published by the Administrative Office of the United States Courts. (See Appendix A for additional projections and an explanation of the methodology.)

Table 3
Historical and Projected Cases Commenced in the U.S. District Courts, 1940-2020
(12 month periods ending June 30)

	Total Cases Commenced	Criminal Cases Commenced	Civil Cases Commenced	U.S. Civil Cases	Federal Question Cases	Diversity Cases	Admiralty and Local Jurisdiction
1940	68,135	33,401	34,734	13,644	6,177	7,254	7,659
1950	91,005	36,383	54,622	22,429	6,775	13,124	12,294
1960	87,421	28,137	59,284	20,840	9,207	17,024	12,213
1970	125,423	38,102	87,321	24,965	34,846	22,854	4,656
1980	196,757	27968	168,789	63,628	64,928	39,315	918
1990	264,409	46,530	217,879	56,300	103,938	57,183	458
1994	280,915	44,919	235,996	46,518	134,287	54,917	274
2000	386,200	51,600	334,600	46,300	220,600	67,700	
2010	642,500	66,000	576,500	59,900	394,500	122,200	
2020	1,109,300	89,400	1,019,900	73,500	715,700	230,600	

Table 4
Historical and Projected Appeals Filed in U.S. Courts of Appeals
1940 - 2020
(12 month periods ending June 30)

	Total Appeals	Criminal Appeals	Prisoner Petitions	Other Appeals
1940	3,505	260	65	3,180
1950	2,830	308	286	2,236
1960	3,899	623	290	2,986
1970	11,662	2,660	2,440	6,562
1980	23,200	4,405	3,675	15,120
1990	40,898	9,493	9,941	21,464
1994	48,815	11,052	12,772	24,991
2000	84,800	11,600	35,500	37,700
2010	171,600	16,000	81,900	73,700
2020	325,100	22,300	155,900	146,900

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Table 5

Total Historical and Projected Appeals Filed by Circuit
1940 - 2020
(12 month periods ending June 30)

Circuit	1940	1994	2020
D.C.	325	1,787	1,690
First	111	1,424	11,000
Second	572	4,138	28,600
Third	322	3,646	21,400
Fourth	159	4,322	26,400
Fifth†	398	6,203	46,000
Sixth	340	4,545	27,700
Seventh	377	3,136	22,000
Eighth	289	3,160	19,200
Ninth	335	8,115	62,200
Tenth	218	2,681	19,900
Eleventh		5,655	39,100

† The fifth circuit was split to form the eleventh circuit in 1982.

Table 6

Historical and Projected Judgeships
1940-2020

	Appellate Judgeships	District Judgeships
1940	57	191
1950	65	224
1960	68	245
1970	97	401
1980	132	516
1990	156	575
1994	167	649
2000	430	940
2010	840	1,510
2020	1,580	2,530

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Chapter 3
An Alternative Future for the Federal Courts?

IF the federal courts are in crisis or approaching crisis now, how will they operate 25 years from now when, assuming the continuation of present trends, projections suggest that their current workload may double, treble or quadruple?

The trend projections described in the previous chapter and Appendix A reflect one possible prediction of federal court dockets by assuming that the factors influencing caseload growth in the past will continue to do so in the future. Certainly those projections provide only a rough approximation of future caseloads and the assumptions underlying the projections are open to challenge, as would be assumptions underlying *any* future caseload projections. Recent legislative trends suggest that federal caseloads will continue to grow rapidly. Nonetheless, whether the caseload increases at the rates anticipated by the projections, or at some other rate, many of the same implications will follow.

To be sure, predictions about what the world, or a small part of it, will look like in 10 or 20 years are more properly the realm of futurists (or perhaps science fiction writers) than judges who operate in the here and now. As the Federal Courts Study Committee noted, the difficulty in predicting future demands for federal judicial resources lies in the dual challenges of predicting "any but the grossest social, economic, political, and demographic trends more than a few years in advance—if that far," and with ascertaining the relationship between those trends and the future business of the federal courts.[1]

As but one example of the problem, neither planners nor sociologists can know with

Tiers of Justice

The year is 2020. Congress has continued the federalization trends of the eighties and nineties, and federal court caseloads have grown at a rapid rate. In the United States Court of Appeals for the 21st Circuit, Lower Tier, a recently appointed federal judge arrives at her chambers, planning to consult the latest electronic advance sheets in Fed7th in order to determine the applicable law of her Circuit and the upper tier court of appeals for her region. With nearly a thousand court of appeals judges writing opinions, federal law in 2020 has become vaster and more incoherent than ever.

This is only the judge's fourth month on the job, even though she was nominated by the President three years earlier; the appointment and confirmation process has bogged down even more than in 1995 because of the numbers of judicial candidates that the Senate Judiciary Committee must consider every year. Her predecessor was only on the bench for a year and a half before resigning in protest because he felt that he was only a small cog in what had become a vast wheel of justice.

[1] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 8-9 (1990).

certainty whether the drug problems that currently plague this country—and which are the cause of many other related criminal and societal ills—will continue, moderate, or decline. Even assuming that the drug crisis persists in all its tragic manifestations, it is not possible to predict how the nation's leaders will respond to it: Will the nation, as some have urged, refocus some of its prosecutorial resources on education and rehabilitation? More radically, will we witness the decriminalization of some of the substances that are currently proscribed? Or will the status quo remain undisturbed?

The district courts and courts of appeals currently devote substantial judicial resources to resolving criminal drug cases. The extent of their future involvement in the adjudication of criminal drug offenses is a political question about which planners can only speculate.

A Possible Scenario for the Future

The projections—under the assumptions set out in Appendix A—are bleak indeed. If the federal courts' civil and criminal jurisdiction continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish. Should that occur, in twenty-five years the number of civil cases commenced annually could exceed 1 million (in 1993 the civil filings in the district courts numbered about 230,000), while the criminal filings could reach nearly 90,000 (in 1993 they numbered about 47,000). At the same time, annual appeals could approach 325,000 (in 1993 they numbered 50,000). This situation is starkly shown in Table 7.

Based on current formulas for determining judgeship needs, these levels of case filings might require a district court bench of over 2,500 judges, while the appeals bench would be nearly 1,600 judges. In other words, were such a scenario to become the future reality, more than 4,000 federal judges might be necessary to handle the federal courts' docket in 2020.

Table 7

Case Filings and Judgeships
(12 months ending June 30)

	1993	2020
District Courts		
Civil Filings	229,850	1,019,900
Criminal Filings	46,786	89,400
Total	276,636	1,109,300
Courts of Appeals		
Criminal Appeals	11,862	22,300
Prisoner Petitions	12,795	155,900
Other Appeals	25,567	146,900
Total	50,224	325,100
Judgeships		
District (by formula)	649	2,530
Circuit (by formula) (excludes Federal Circuit)	167	1,580

Numbers alone do not adequately illustrate this picture. A federal judiciary of 4,000 judges would necessarily require a different structure. The current structure of twelve regional courts of appeals (excluding the Court of Appeals for the Federal Circuit) could not be maintained in 2020, given that, on average, each of these courts would have to consist of about 100 judges. Similarly, with that many appellate judges and many more circuits, it seems virtually impossible that the Supreme Court would be able to discharge its responsibility for resolving intercircuit conflicts. Another judicial "tier," at least, would likely be needed. The Supreme Court's role as the ultimate arbiter of federal law would be diminished significantly, as it would be hard-pressed to review even a tiny fraction of the entire federal caseload.

Present-day governance mechanisms would need drastic modification. As the courts grew in size, the balance of national, regional and local authority would demand significant adjustment. With growth would come the need for additional mechanisms to ensure management and accountability. Inevitably, pressure would build for the creation of a strong central executive body for the entire court system.

Perhaps the greatest loss, however, would be in the notion of courts as collegial bodies. The current Chief Judge for the Second

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Circuit Court of Appeals expressed this fear, when he said, "When I contemplate our court in the middle of the next century . . . I despair. It will not be a court; it will be a stable of judges, each one called upon to plough through the unrelenting volume, harnessed on any given day with two other judges who barely know each other."[2]

Finally, no matter how the courts are structured or governed, the vision of coherence and consistency in decisional law likely would be a chimera. Federal law would be babel, with thousands of decisions issuing weekly and no one judge capable of comprehending the entire corpus of federal law, or even the law of his or her own circuit. This possibility is one that planners have to contemplate if today's trends continue.

Another Possible Scenario for the Future

As troubling as the above scenario may be, it is probably less so than one in which the nation has found itself unable or unwilling to fund the growth in the federal courts at the same levels it did between 1940 and 1992. Consider, for example the cost of creating and maintaining judgeships. Including salary, administrative expenses, court security and space and facilities, the initial cost of establishing a court of appeals judgeship is over $980,000 (in 1992 dollars). Annual recurring costs would amount to about $814,000. For district court judgeships, these initial and recurring costs are about $871,000 and $695,000, respectively. The costs are similar but slightly less for bankruptcy and magistrate judgeships.

Because of budgetary constraints that will severely reduce discretionary federal spending, future Congresses will not likely permit the judicial budget to grow to fund the projected judgeship needs of the next several decades. If the economic realities of the next 25 years make it impossible to provide the resources necessary to create and maintain a federal judicial system that includes thousands of Article III judges, then we must contemplate a different picture, one that more severely undermines the 200-year old mission of the federal courts.

With scarce resources and many more case filings per judge than currently exist, delay, congestion, cost, and inefficiency would increase. The paperwork burden will affect both the litigants, who would face higher legal fees, and the judges, who would have limited staff assistance. Those civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers. Already in 1994 district judges are able to spend fewer of their working hours in civil trials than ever before, and the future may make the civil jury trial—and perhaps the civil bench trial as well—a creature of the past. The federal district

Justice Without Resources?

It is 2020. Federal caseloads have quadrupled in the last 25 years, but the number of federal judges has leveled off at 1000. The federal budget remains in crisis, the product of continued growth in non-discretionary federal spending and the unwillingness to raise taxes. Congress is no longer willing to fund the increasing costs of new courthouses, support staff and judicial salaries necessary to address the rising tide of cases.

Austerity is a way of life in the federal courts. The queue for civil cases lengthens to the point where federal judges rarely conduct civil trials. User fees proliferate and would be judged onerous by 20th century standards. As a consequence, many litigants seek justice from private providers. Overworked and underpaid administrators defer maintenance on courthouses and no longer update library collections. Most vacancies on the federal bench go unfilled for long periods of time because capable lawyers, once attracted to a judicial career, are no longer willing to serve. The federal courts have by and large become criminal courts and forums for those who cannot afford private justice.

[2] Jon O. Newman, *1,000 judges—the limit for an effective federal judiciary*, 76 JUDICATURE 188 (1993).

courts, rather than being forums where the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice.

At the court of appeals level, it might become impossible to preserve the hallmarks of a sound appellate review system:

> [T]he judges do much of their own work, grant oral argument in cases that need it, decide cases with sufficient thought, and produce opinions in cases of precedential importance with the care they deserve, including independent, constructive insight and criticism from judges on the court and the panel other than the judge writing the opinion. These conditions are essential to a carefully crafted case law.[3]

In 2020 we may find a system of discretionary appellate review, of oral argument in only the exceptional case, and of staff personnel playing a dominant role in deciding the majority of the cases or at least identifying the cases that get the full attention of the judges.

In all respects the plan rejects these two apocalyptic alternatives. They are neither desirable nor acceptable. Fortunately, they are by no means inevitable if appropriate action is taken. The plan that follows contemplates conserving the federal courts as a distinctive forum of limited jurisdiction. The plan's proposals for jurisdiction, structure, governance, function, and role all stem from that fundamental objective. Nonetheless, because the future cannot be known and because long range planning also mandates consideration of alternatives to the plan's preferred vision for the future, Chapter 10 addresses alternative planning approaches should the plan's vision not be achieved.

[3] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990).

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Chapter 4
Judicial Federalism

JUDICIAL federalism relies on the principle that the state and federal courts together comprise an integrated system for the delivery of justice in the United States. Historically, the two court systems have played different but equally significant roles in our federal system. The state courts have served as the primary forums for resolving civil disputes and the chief tribunals for enforcing the criminal law. The federal courts, in contrast, have had a much more limited jurisdiction. The source and nature of federal jurisdiction derive from a number of constitutional powers vested in Congress; and the notion of a limited federal court jurisdiction is premised on the more fundamental constitutional principle that the national government is a government of delegated powers in which the residual power remains in the states.

It follows from this fundamental view of the nature of our federal system of government that the jurisdiction of the federal courts should complement, not supplant, that of the state courts. Although Article III, Section 2 of the Constitution potentially extends federal judicial power to a wide range of "cases and controversies," the Framers wisely left the actual scope of lower federal court jurisdiction to Congress' discretion. Traditionally, Congress has refrained from disturbing the jurisdiction of state courts, allocating a narrower jurisdiction to the lower federal courts than the Constitution permits[1] and allowing state courts to retain concurrent jurisdiction in numerous civil contexts. Indeed, for nearly the first century of the Republic, the federal courts did not have general original jurisdiction in matters arising under the Constitution, laws and treaties of the United States,[2] and a minimum amount in controversy was required for some "federal question" cases until fairly recently.[3] For that reason, it is possible to distinguish between federalism in the legislative context—the breadth of Congress's power to legislate under Article I, Section 8—and in the judicial context—the appropriate allocation of jurisdiction to the federal courts under Article III.

Beyond historical practice, the allocation of limited jurisdiction to the federal courts is justified by both theory and practice. Unless a distinctive role for the federal court system is preserved, there is no sound justification for having two parallel justice systems. If federal courts were to begin exercising, in the normal course, the broad range of subject-matter jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and, due to burgeoning dockets, their ability to resolve fairly and efficiently those cases of clear

[1] For example, the diversity jurisdiction conferred by statute, 28 U.S.C. § 1332 (1988) (see *infra* Recommendation 7), is narrower than that authorized by Article III, Section 2 of the Constitution. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-531 (1967).

[2] *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (now codified at 28 U.S.C. § 1331(a) (1988)).

[3] The general amount-in-controversy requirement for "federal question" cases was eliminated in 1976 for "action[s] brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, and in all cases four years later. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369.

national import and interest that properly fall within the scope of federal concern. Under that unfortunate scenario, all courts—federal and state—might as well be consolidated into a single system to handle all judicial business. To follow this course—toward either a single national court system or two systems engaged in essentially identical business—would be disastrous.

The federal courts, however, have proceeded well on their way down the latter path. As Congress continues to "federalize" crimes previously prosecuted in the state courts and to create civil causes of action over matters previously resolved in the state courts, the viability of judicial federalism is unquestionably at risk.

The following recommendations attempt to articulate and preserve a sound judicial federalism, an end that can be attained in large part—

- first, through sensible limitations on federal criminal and civil jurisdiction;
- second, by means of a cooperative federalism in which the federal government and the states work together to promote effective civil and criminal justice systems;
- third, through the carefully-controlled growth of the federal judiciary; and
- fourth, through improvement to state justice systems, which may require significant federal financial assistance to state courts, prosecutors, and law enforcement agencies.

Achieving these four goals will produce a dual benefit: federal courts embodying their core values and state courts remaining vital and efficient forums to adjudicate matters that belong there in the light of history and a sound division of authority. Moreover, reduced filings of cases that do not require a federal forum will enhance the federal courts' abilities to vindicate rights in other areas of national interest.

The first goal—limiting the federal court's jurisdiction—should be consistent with, and flow from, an understanding of the benefits of having dual systems of government. In general, the federal government can grapple with problems extending beyond the borders of individual states, problems that require uniform treatment, and problems that are too sensitive or volatile within a local community for effective local regulation or enforcement. State governments, in contrast, are better able to respond to matters of local concern—focusing on the impact that a problem may have in a discrete region, as well as any local interests, needs, or standards that may be implicated. The same principles can apply specifically in the judicial context—but with emphasis on reserving federal court jurisdiction for matters requiring adjudication in that forum.

Meeting the second goal of a cooperative federalism is essential because the missions of the federal and state justice systems, while undoubtedly distinct, nevertheless overlap. Each system can succeed only by communicating and cooperating with the other. Recommendations 4 and 14 strive to promote a healthy federalism in which both judicial systems are made better off through their collective efforts.

The third goal—controlling the growth of the federal judiciary—follows from limitations on growth of the federal courts' jurisdiction. The appropriate size of the federal judiciary is necessarily a function of its jurisdiction. If in the coming years, Congress and the American people remain committed to the principle of judicial federalism, they will remain vigilant in limiting the jurisdiction—and, consequently, the size—of the federal courts.

Finally, the fourth goal—improving state justice systems—is a necessary condition for preserving the proper roles of the state and federal courts. Active efforts to improve the quality—perceived and actual—of state justice systems may be one of the most productive courses of action for those concerned about federalization and the growth of the federal

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courts' caseload.[4] Improving perception is important because many lawyers and litigants, unfairly or not, have less confidence in the state courts than their federal counterparts. Improving the actual capacity of the state courts becomes urgent because it is unfair to solve the future caseload burdens of the federal courts by foisting them off onto the states.[5] This is particularly true now, as many fine state court systems face grave fiscal crises. Federal policy currently recognizes the need to provide additional resources to state law enforcement agencies. An effective policy of judicial federalism means that Congress must also consider making significant resources available to the state courts so that they are able to maintain their effective roles in our interdependent justice system.

The starting point in articulating a sound judicial system is identifying the essentials of federal court jurisdiction. In the following sections, the plan recommends prudential guidelines for limiting federal jurisdiction and implementing a sound judicial federalism. Any such proposals, like the ones discussed here or others, would favor certain interests over others, and may therefore be seen by some to constitute an initiative beyond the province of a non-majoritarian apolitical institution. However, sensible planning presupposes a sound allocation of jurisdiction, consistent with the overarching constitutional scheme, and what ensues is a principled effort to recommend a proper balance. The Congress, needless to say, will have the final word.

Defining and Maintaining A Limited Federal Jurisdiction[6]

■ RECOMMENDATION 1: Congress should commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.

The recommendations that follow are efforts to implement this overarching principle; in that sense, achieving the goals of this first recommendation absolutely depends on implementing those more specific recommendations. Nonetheless, the goal of a limited federal court jurisdiction is doomed unless Congress embraces the fundamental philosophy described above.

Criminal Proceedings

■ RECOMMENDATION 2: In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. Congress should allocate criminal jurisdiction to the federal courts

[4] *See* Arthur D. Hellman, Paper Presented to the Judicial Conference Committee on Long Range Planning 5 (Oct. 21, 1991).

[5] William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1 (Kastenmeier Lecture, University of Wisconsin Law School, Sept. 15, 1992).

[6] Many of the recommendations contained in this chapter—as well as the supporting rationale—are based on similar recommendations and rationales developed by the Federal Courts Study Committee and contained in that Committee's Report and Working Papers. *See* I FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 94-468 (July 1, 1990).

only in relation to the following five types of offenses:

(a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity.

No one seriously disputes that conduct directly injurious to or affecting the federal government or its agents should be subject to the exclusive jurisdiction of the federal investigative, prosecutorial, and judicial branches. Treason and counterfeiting are examples of crimes with direct impact on the federal government. Another example is criminal activity within federal enclaves, including prosecution of major crimes in Indian country.

By the same token, federal criminal jurisdiction should also reach offenses in which Congress, in the interests of uniform national regulation, has taken over or preempted an entire regulatory field. Interstate environmental concerns, nuclear regulation, and wildlife preservation (migratory birds, etc.) are examples of the latter.

Finally, this criterion also is intended to capture those occasions when local matters require national attention and resources. In most circumstances, the federal government's involvement in matters that, in one sense, are purely local, but, in another sense, have garnered the nation's interest, will be targeted to particular prosecutions, especially local matters that are beyond the reach of effective action by the state courts.

Appropriate subjects of federal criminal jurisdiction:

- *offenses against the federal government or its inherent interests*
- *criminal activity with substantial multistate or international aspects*
- *criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise*
- *serious, high-level or widespread state or local government corruption*
- *criminal cases raising highly sensitive local issues*

(b) The proscribed activity involves substantial multistate or international aspects.

Simply because criminal activity involves some incidental interstate movement does not mean that state prosecution is necessarily inappropriate or ineffective. Activity having some minor connection with and effect on interstate commerce might perhaps be constitutionally sufficient to permit federal intervention, but it should not be enough by itself to require a federal court forum. In contrast, significant interstate activity by actors engaged in a massive enterprise, such as a multistate drug operation or a multistate fraud scheme, should normally call for the resources and reach of the federal government.

(c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately

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control this type of crime, this criterion should be reconsidered.

In addition to multistate operations, there are local criminal enterprises that are so complex that they have generally received the resources and attention of the national government. Some commercial crime involving an interplay of business, financial, and government institutions—such as the recent savings and loan investigations—falls into this category. The rationale for federal involvement here is not that a federal role is essential, but that state criminal justice resources have been sorely overtaxed. To the extent that the states receive sufficient resources and develop the expertise to handle these cases, federal involvement should diminish.

(d) The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter.

Historically, federal prosecutorial and judicial resources have been utilized frequently in state and local public corruption cases. The rationale for federal involvement has been, not so much that state resolution of these matters would be ineffectual, but that federal prosecution and adjudication promote a higher level of public confidence in the country's system of justice.

(e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.

During the height of the civil rights era, there was a manifest need in some parts of the country for the federal government to prosecute acts of violence against civil rights workers when local law enforcement had moved reluctantly against the violators. Even today, some civil rights actions, because of their potential for explosiveness in the community, may be more effectively handled by the national government. Charges of a systematic use of excessive force by police officers or criminal interference with the exercise of constitutional rights also fall within this category.

■ RECOMMENDATION 3: Congress should review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose. More broadly, a thorough revision of the federal criminal code should be undertaken so that it conforms to the principles set forth in Recommendation 2 above. In addition, Congress should consider use of "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created.

There are good reasons for a comprehensive recodification of the federal criminal law wholly apart from any considerations of appropriate federal jurisdiction. As the Federal Courts Study Committee noted:

> [F]ederal criminal law is hard to find, hard to understand, redundant, and conflicting . . . . Important offenses such as murder and kidnapping are commingled with trivial offenses like reproducing the image of "Smokey Bear" without permission (18 U.S.C. § 711) and taking false teeth into a state without the approval of a local dentist (18 U.S.C. § 1821). . . . Lack of a ra-

tional criminal code has also hampered the development of a rational sentencing system.[7]

Additionally, by involving itself in a comprehensive redrafting of the criminal code, Congress might become more sensitive to the wise use of executive and judicial branch resources. If encouraged to pinpoint only those offenses worthy of prosecution in federal court, Congress might be persuaded to "weed out" current offenses not appropriate for prosecution in that forum. If "sunset" provisions are included in any new criminal legislation, the process will be an ongoing one. Additionally, continued scrutiny of the criminal code might provide legislators with a broader viewpoint on criminal justice in a federal system that will restrain Congress from creating many similar offenses in the future.

■ RECOMMENDATION 4: Congress and the executive branch should undertake cooperative efforts with the states to develop a policy to determine whether offenses should be prosecuted in the federal or state systems.

Implementation Strategies:

4a The Congress should be an increase in federal resources allocated to state criminal justice systems for prosecution of matters now handled by federal prosecutors because of lack of state resources.

4b The practice of cross-designating both federal and state prosecutors to gain efficiencies of prosecution should be increased.

4c State courts should be authorized to adjudicate certain federal crimes for which there currently is no statutory grant of concurrent jurisdiction.

The growing federalization of state crimes is due in part to Congress' belief that state resources— prosecutorial, judicial, and penal—are overtaxed or inadequate. Congress has a choice, however, in remedying perceived state inadequacies. One alternative, that chosen in recent years, is to create more federal crimes and increase the resources for criminal law enforcement in the federal system. This has had the unfortunate consequence of changing the nature of federalism and hurting the federal courts. Rather than choosing this option with its unintended consequences, Congress could accomplish the same purpose by increasing federal assistance to state criminal justice systems and encouraging cooperative efforts among federal and state prosecutors. Presently, law enforcement has been enhanced by cross-designations of federal and state prosecutors as well as other coordinated ventures between state and federal law enforcement agencies.

By authorizing concurrent state and federal jurisdiction over certain federal crimes, Congress could further this cooperation by encouraging prosecution of federal crimes in state courts. For example, federal prosecutions of local drug activity and some violent crime could take place in state court, either by the U.S. Attorney's Office (through cross-designation) or the state's attorney. Incarceration for violation of a federal criminal statute might still result in imprisonment in a federal prison, or additional federal resources could be devoted to aiding state prisons.

Adopting this proposal would require Congress to repeal 18 U.S.C. § 3231, which makes federal criminal jurisdiction an exclusively federal matter, and to replace it with a statute granting the state courts concurrent jurisdiction over some federal crimes. It would also require confronting and resolving many procedural issues arising from the complexity of

[7] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 106 (1990).

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prosecuting one system's laws in a second system's courts. Notwithstanding these difficulties, the underlying idea is a sound way to enhance cooperative initiatives between the federal and state justice systems.

■ RECOMMENDATION 5: The executive branch should be encouraged to develop standards on which the Justice Department will base the promulgation of prosecutorial guidelines. Specifically—

(a) the standards should be consistent with sound jurisdictional boundaries for federal criminal prosecution as described in Recommendation 2; and

(b) the potential for harsher federal sentencing policies and greater capacity in the federal prisons should be insufficient grounds, by themselves, to warrant prosecution under a federal, rather than a state, criminal statute.

The decisions of federal prosecutors on what offenses to prosecute in federal court rather than state court are as crucial to the success of judicial federalism as any congressional action. In recent years, executive branch policies have occasionally allowed prosecutors to bring federal criminal cases based on factors unrelated to the appropriateness of a federal forum. An established, effective set of guidelines informed by federalism principles could limit prosecutions in federal courts to those matters where national interests are paramount, and avoid using the federal system merely as a substitute for state proceedings. Among the guidelines might be the following criteria for federal prosecution:

(1) offenses commonly prosecuted in state court (*e.g.*, firearm or drug offenses) should not be federally prosecuted absent a demonstrated federal interest beyond the mere violation of a federal statute;

(2) priorities should be set in recognition of limited federal court resources and how they can be used most effectively; and

(3) targets for federal investigation should be selected in accordance with prosecutorial policies (*i.e.*, investigate only those activities that might properly be the subject of federal prosecution).

Civil Proceedings

■ RECOMMENDATION 6: Congress should exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests. Federal court jurisdiction should extend only to civil matters that—

(a) arise under the United States Constitution;

There is no serious debate that the federal courts should be charged with the core duty of enforcing and interpreting the federal constitution. One of the federal courts' principal roles is to articulate the nation's fundamental structure of government and its underlying values, including the preservation of individual rights and liberties found in the Bill of Rights and subsequent amendments. Another similar role is the federal courts' protection—through the writ of habeas corpus—of persons held in violation of the Constitution or federal law.

(b) deserve adjudication in a federal judicial forum because the issues pre-

sented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests;

A significant percentage of the federal courts' docket involves claims arising under federal statutes. This part of the docket has grown steadily over the years, due in large part to the tendency of Congress to create additional federal causes of action and to provide a federal judicial forum. This criterion identifies two general circumstances in which federal statutory law should provide an Article III forum.

The "strong need for uniformity" standard encourages Congress to be cautious in "federalizing" every matter that captures the nation's attention. It calls for Congress to do so only when uniform resolution is required on an issue that has not been, and clearly cannot be, resolved satisfactorily at the state level. The burden to satisfy this showing should be a high one if the core values of the federal courts are to be preserved. Cases brought under the patent, trademark, and copyright laws are just a few examples of categories of cases satisfying this high standard.

The "paramount interest" standard is intended to account for those areas in which the justification for a federal judicial forum is tied, not so much to a need for uniformity, but to the critical importance our federal government attaches to certain societal values.

Legislation protecting the environment and the free market system and authorizing federal court jurisdiction has arisen in response to the nation's strong interest in these matters. Legislation protecting fundamental rights and liberties also falls within this category. For example, the federal courts have played a vital role in promoting civil rights and in eliminating invidious discrimination in all parts of society. This role should continue. At the same time, Congress should recognize that all state judges take an oath to uphold the U.S. Constitution and the supremacy of federal law. Absent a showing that state courts cannot satisfactorily deal with an issue, Congress should be hesitant to enact new legislation enforceable in the federal courts, and should not do so in any event without a concomitant reduction of federal jurisdiction in other areas.

Appropriate subjects of federal civil jurisdiction:

- *cases arising under the U.S. Constitution*
- *matters deserving of federal adjudication that involve either a strong need for uniformity or a paramount federal interest*
- *matters involving foreign relations of the United States*
- *actions involving the federal government, its agencies or officials*
- *disputes between or among states*
- *substantial interstate or international disputes*

(c) involve the foreign relations of the United States;

Foreign policy is the prerogative of the federal government, and the federal courts should be the exclusive tribunal for resolving disputes that touch upon relations of the United States with other countries.

(d) involve the federal government, federal officials, or agencies as plaintiffs or defendants;

A sovereign may always sue in its own courts. Providing a forum for resolving all disputes involving the federal government is consistent with the policy of protecting the interests of the federal government as a sovereign. Federal courts also have always had

jurisdiction over actions brought by or against agencies and federal officers arising out of their official duties. Exercise of that jurisdiction over such actions ensures that those arms of the federal government can be confident of a forum for the uniform interpretation and application of federal law.

(e) involve disputes between or among the states; or

Absent a neutral forum for resolving disputes between or among the states, state governments occasionally might be tempted to retaliate against each other when a decision in one state's court system had a significant negative impact on the other. In order to promote the solidarity of our union, a federal forum is necessary to resolve controversies between and among the states.

(f) affect substantial interstate or international disputes.

Just as the federal government and its court system should be involved in the criminal prosecution of significant multistate or international activities, it is appropriate for the federal courts to resolve and adjudicate civil matters significantly affecting interstate and international commerce. For example, federal common law jurisdiction over disputes relating to navigable waters derives from the federal government's legitimate interest in substantial interstate activities. Inasmuch as one of the purposes of the federal government is to foster and regulate interstate activity, the federal court system is an appropriate forum for resolving civil disputes over those kinds of activities.

■ RECOMMENDATION 7: Congress should diminish the impact of diversity jurisdiction on the federal courts' dockets by eliminating diversity jurisdiction, except in actions involving aliens, interpleader actions, and cases in which the petitioner can clearly demonstrate the need for a federal forum. Diversity jurisdiction should also be retained for some consolidated "mass tort" litigation, which will require Congress by statute to relax the traditional "complete diversity" requirement, in order to promote effective consolidation of related cases.

Alternatively, Congress should seek to reduce the number of federal court proceedings in which jurisdiction is based on diversity of citizenship through the following measures:

(a) eliminating diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located;

(b) undertaking a full-scale study, including pilot projects as appropriate, to determine the desirability and impact of shifting to state courts appellate review of diversity cases in which review primarily involves the interpretation of state law (which may require encouraging states to revise their constitutions to permit such review); and

(c) otherwise limiting diversity jurisdiction by—

(1) requiring litigants to undertake a more rigorous showing that the jurisdic-

tional amount-in-controversy requirement has been satisfied;

(2) raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation; and/or

(3) excluding punitive damages from the calculation of the amount-in-controversy requirement.

Under Article III of the Constitution and 28 U.S.C. § 1332, the district courts are vested with original jurisdiction over controversies between—

(1) citizens of different states;

(2) citizens of a state and citizens or subjects of a foreign state;

(3) citizens of different states in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state as plaintiff and citizens of a state or of different states.

In such actions, the exercise of federal judicial power is based solely on the identity of the parties, not on any substantive rights, privileges or immunities conferred by federal law. Under the doctrine established in *Erie Railroad Co. v. Tompkins*,[8] the substantive law to be applied by the federal courts in such cases is the statutory or common law of the state in question.

Between 1950 and 1993, diversity cases annually comprised between 21 percent and 38 percent of all civil cases filed in the federal district courts. Approximately 50 percent of all civil trials in the federal courts involve diversity actions.

[8] 304 U.S. 64 (1938).

Diversity jurisdiction currently accounts for almost one of every four civil cases filed in the federal district courts, about one of every two civil trials, about one of every ten appeals, and more than one of every ten dollars in the federal judicial budget. The federal courts' diversity docket constitutes a massive diversion of federal judge power away from their principal function—adjudicating criminal cases and civil cases based on federal law.

Changes in the amount-in-controversy requirement for diversity actions:

- *1789: established at $ 500*
- *1887: increased to $2,000*
- *1911: increased to $3,000*
- *1958: increased to $10,000*
- *1989: increased to $50,000*

Perhaps no other major class of cases has a weaker claim on federal judicial resources. Many believe the original justification for diversity jurisdiction—to protect against local prejudice in state courts—no longer exists, or that it exists in very few cases.[9] Moreover, given the difficulties that federal judges frequently encounter in predicting state substantive law and the unavoidable intrusion of the federal courts in this lawmaking function of the state courts,[10] the theoretical justifications for retaining diversity jurisdiction are extremely weak.

This recommendation nonetheless falls short of recommending total elimination of the diversity docket for a couple of reasons. First, most commentators believe that the federal

[9] *See* I FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 426-35.

[10] *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

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courts should retain diversity jurisdiction in actions involving aliens or interpleader,[11] and that Congress should consider extending diversity jurisdiction in ways that could facilitate the efficient consolidation and resolution of mass tort litigation. In that connection, a National Commission on the Federal Courts, proposed in Implementation Strategy 99d, should continue the work of the American Law Institute's Complex Litigation project. It should study and recommend appropriate legislation and rules revisions to provide (1) for the aggregation or consolidation of claims for pretrial and trial, and (2) for expedited means of bringing claims to trial in ways that are consistent with the Seventh Amendment and protect the rights and interests of the parties.

Second, many believe that the historical purpose of diversity jurisdiction still has limited viability. The recommendation seeks to accommodate that purpose by maintaining diversity jurisdiction in those cases in which the petitioner can clearly demonstrate a reasonable need for a federal forum.[12] The burden should be high on the plaintiff seeking entry into federal court and on the defendant seeking to remove on that basis, because the state courts can, in most cases, provide a just and efficient resolution of all cases arising under state law. The effect of this standard would be, therefore, that the district court would have discretion to refuse to exercise jurisdiction over many cases that satisfy the jurisdictional prerequisites of diverse citizenship and amount in controversy.

Diversity jurisdiction in the federal courts should be limited to actions involving aliens or interpleader, and those in which the need for a federal forum is clearly demonstrated.

Pending complete elimination of general diversity jurisdiction, it should be limited by:

- *eliminating in-state plaintiff jurisdiction*
- *exploring possible elimination of federal appellate review in certain cases*
- *imposing higher or stricter amount-in-controversy requirements.*

The alternative recommendations, (a) through (c), track the recommendations contained in the 1990 Report of the Federal Courts Study Committee.[13] They follow from the pragmatic instinct that eliminating most of the diversity docket may have to take place gradually over time.

Alternative (a), which bars in-state plaintiffs from filing claims based on diversity jurisdiction, is based on the premise that if any vestige of the historical purpose of diversity jurisdiction remains—*i.e.*, protecting litigants against local prejudice in state courts—that rationale is wholly inapplicable to the in-state plaintiff. It also harmonizes and is fully

[11] 28 U.S.C. § 1335 (1988).

[12] This proposal should be contrasted with the 19th and early 20th century legislation that authorized removal of cases involving diversity of citizenship to a federal court upon a defendant's showing that justice could not be had in state court due to prejudice or local influence. See, *e.g.*, Act of Mar. 2, 1867, ch. 196, 14 Stat. 558; Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1087, 1094-95 (codified at 28 U.S.C. § 71 (1946)). When the judicial code (title 28, United States Code) was recodified in 1948, removal jurisdiction based on a showing local prejudice was eliminated because "[those] provisions, born of the bitter sectional feeling engendered by the Civil War and the Reconstruction Period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." 28 U.S.C. § 1441 Revision Notes (1988).

As contrasted with its earlier use—which *expanded* federal court jurisdiction because the ability of state courts to provide justice to non-residents was questioned—a new "need for a federal forum" standard for diversity cases would *limit opportunities* to litigate in federal court based on the opposite belief that state courts can and should provide just and efficient resolution of all cases arising under state law. Its adoption would restrict federal diversity litigation to the kinds of cases envisioned by the Framers when diversity jurisdiction was established in the Constitution.

[13] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-42 (1990).

consistent with 28 U.S.C. §1441(b), which prohibits an in-state defendant from removing a case to federal court on the basis of diversity jurisdiction. This alternative would not preclude an out-of-state defendant from removing a diversity case in which one or more of the plaintiffs was a citizen of the state in which the federal district court is located.

In the 12-month period ending June 30, 1993, 15,864 cases brought under diversity jurisdiction—

31 percent of the total number of diversity filings in that period

—were filed as original actions by in-state plaintiffs.

Consistent with Recommendation 14, elimination or any substantial reduction of the diversity docket will require, at least for a limited time, the congressional transfer of resources to the state courts so that they can accommodate the increased workload.[14]

■ RECOMMENDATION 8: The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts.

State court certification procedures benefit the federal courts by occasionally relieving them of the time-consuming task of deciding questions of law more wisely left—on federalism principles—to the states. In 45 states, the court of last resort has either mandatory or discretionary jurisdiction to consider state-law issues upon certification from a federal court.[15] Some, but not all, of these states permit consideration of questions certified by any Article III court. All 50 states should authorize the federal courts, both trial and appellate, to employ these procedures for obtaining authoritative interpretations of state law.

Criticism has been levied that certification procedures engender long delays in the federal appellate process and hence that "the game is not worth the candle." Certification procedures should be attentive to this problem, and federal judges should be alerted to the advisability of exercising restraint.

■ RECOMMENDATION 9: Congress and the agencies concerned should take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction, and to facilitate mediation and resolution of disputes at the agency level.

Implementation Strategies:

9a The adjudicative process for Social Security disability claims should be improved by establishing a new mechanism for administrative review of ALJ decisions and limiting the scope of appellate review in the Article III courts.

9b Agencies should be given the requisite authority and resources to review and,

[14] It can be expected that the complete elimination of diversity cases from the federal courts would add approximately 50,000 cases annually to the 20 million or more cases that state courts handle each year, increasing their caseload by less than three percent. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS—1993 ANNUAL REPORT OF THE DIRECTOR App. I, at AI-54 (Table C-2); NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, ANNUAL REPORT 1992, at xi.

[15] Jona Goldschmidt, Results of a National Survey of Federal Judges and State Supreme Court Justices Regarding Certification of Questions of Law 5-12 (Am. Judicature Soc'y Nov. 1994) (unpublished interim report).

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where possible, achieve final resolution of disputes within their jurisdiction.

The limited resources of the federal courts can be conserved, in part, by reducing the court time devoted to fact finding and review of administrative determinations that often turn primarily on factual issues. If administrative agencies are to screen and, where possible, resolve disputes before they ever reach a federal court, it may be necessary, in some instances, to expand and improve the agency process in terms of speed, accuracy, and completeness.

Congress, for example, should enact legislation to improve resolution of disability claims under the Social Security Act, as proposed by Judge Joseph F. Weis, Jr. and two other dissenting members of the Federal Courts Study Committee.[16] That proposal contemplates a thorough administrative review of ALJ decisions, followed by opportunities for review of all issues in the district court, review of constitutional issues and matters of statutory or regulatory interpretation (and discretionary review of "substantial evidence" questions) in the court of appeals, and discretionary review in the Supreme Court.

Improvement is needed in other program areas, as well. Because of serious underfunding, the EEOC, for example, accords claims of employment discrimination only cursory review before issuing "right-to-sue" letters. If the resources were provided for the kind of careful investigation, evaluation and conciliation originally contemplated by Congress, the number of employment discrimination cases requiring federal court action might be reduced. Indeed, all agencies with jurisdiction over various kinds of disputes should be empowered and required to conduct more thorough review and encouraged to resolve disputes before they may be brought to the federal courts.

Implementation of this recommendation, however, depends on providing adequate funding so that agencies can effectively resolve as many disputes as possible at the agency level, either through an administrative process or through private mediation and arbitration services. It also requires clear statutory authority. The present Administrative Dispute Resolution Act[17] clarifies agency authority to employ alternative dispute resolution methods and encourages the use of such methods. Although that statute is scheduled to expire later this year,[18] it should be extended as an important means of promoting final resolution of disputes before they require federal court review.

■ RECOMMENDATION 10: Where constitutionally permissible, Congress should assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.

In addition to strengthening the existing adjudicative processes of federal agencies,[19] Congress should empower agencies or Article I courts to adjudicate, in the first instance, those types of cases involving government benefits or regulation that routinely require substantial fact-finding and do not implicate the right to a jury trial under the Seventh Amendment. This approach is desirable in subject areas where a consistently large volume of cases is expected and initial consideration in a single forum is important to the uniformity of program administration. It has been utilized in a variety of contexts for many years.[20]

[16] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 58-59 (1990).

[17] 5 U.S.C. §§ 571-583 (Supp. V. 1993).

[18] Pub. L. No. 101-552, § 11, 104 Stat. 2736, 2747-48 (1990) (agency authority to use dispute resolution procedures under the Act terminates October 1, 1995).

[19] *See* Recommendation 9 *supra*.

[20] See, *e.g.*, 15 U.S.C. § 21 (1988) (Federal Trade Commission and other agencies) 29 U.S.C. § 160 (1988) (National Labor Relations Board); *id.* § 659 (Occu-

This recommendation urges Congress, when enacting benefit and regulatory schemes, to follow the historical success of the existing schemes that have provided Article I courts or administrative agencies as the first-tier fact finders. The approach conserves judicial resources by providing Article III reviewers with an established evidentiary record and limiting the scope of review. Also, with a more streamlined mechanism for initial dispute resolution, it should be possible for agencies to enforce important federal mandates more expeditiously.

■ RECOMMENDATION 11: Congress should enact legislation to—

(a) generally prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular federal circuit; and

(b) require agencies to demonstrate special circumstances for relitigating an issue in an additional circuit when a uniform precedent has been established already in multiple courts of appeals.

A policy of non-acquiescence to precedent established in a particular circuit, which some agencies, such as the Department of Health and Human Services, the Department of the Treasury, and the National Labor Relations Board, have sometimes followed, undermines the fundamental principle that an appellate court's decision on a particular point of law is controlling precedent for other cases raising the same issue. Indeed, apart from its questionable propriety and inefficiency, non-acquiescence is unfair to litigants, many of whom are pro se, who frequently are unaware of precedent favorable to their cases.[21]

Congress is urged to go beyond simply repudiating the policy of intracircuit non-acquiescence. It should enact legislation that, except under certain specified exceptions, generally prohibits a federal agency from relitigating a precedent established in a particular circuit rejecting agency policy. Those exceptions should include circumstances when a federal agency is unable to seek review of a particular decision—for example, because the case has become moot on appeal and vacatur has not been granted, or because the decision otherwise reaches a favorable outcome for the agency. In such circumstances, intracircuit non-acquiescence allows an agency to challenge an unfavorable precedent in a later case in the same circuit, through en banc or Supreme Court review.

Congress should also establish standards for deciding when an agency should be permitted to relitigate an issue in an additional circuit when a uniform precedent has been established in multiple courts of appeals. Congress should require an agency to make some additional showing—for example, changes in societal or other relevant circumstances or empirical data—before relitigating in another circuit an issue that has received the careful scrutiny (*e.g.*, published opinions) and uniform interpretation by several (perhaps three or more) appellate panels. Congress alternatively could require an agency to petition the Supreme Court for certiorari before relitigating in another circuit an issue that has received the careful scrutiny and uniform interpretation of a number of circuits.

■ RECOMMENDATION 12: Congress should refrain from providing federal district court jurisdiction over disputes that primarily raise questions of state law or involve workplace injuries where the

pational Safety and Health Review Commission); 38 U.S.C. §7252 (1988 & Supp. V 1993) (Court of Veterans Appeals); 42 U.S.C. § 5851(b) (1988 & Supp. V 1993) (adjudication of nuclear industry "whistleblower" complaints by the Secretary of Labor)

[21] *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 59-60 (1990) (discussing the problem of non-acquiescence).

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state courts have substantial experience. Existing federal jurisdiction in these matters should be eliminated in favor of dispute-resolution or compensation mechanisms available under state law.

Implementation Strategies:

12a Congress should eliminate federal court jurisdiction over work-related personal injury actions, such as that provided by the Federal Employers' Liability Act and the Jones Act, where the states have proven effective in resolving worker compensation disputes in other industries and occupations.

12b The jurisdiction of the federal courts to adjudicate routine claims for benefits under ERISA employee welfare benefit plans should be abolished, except when application or interpretation of federal statutory or regulatory requirements are at issue.

12c Any new cooperative federal-state program to establish national standards for employee benefits (e.g., health care) should designate state courts as the primary forum for review of benefit denial claims.

Over the years, Congress has provided for federal court resolution of a variety of work-related disputes that involve essentially state-law questions. Rather than ensuring an expert, uniform interpretation and application of federal law, the availability of a federal forum in these cases suggests—erroneously—that state courts and agencies are inadequate to the task of providing fair, adequate remedies.

Early examples can be found in the Federal Employers' Liability Act (FELA) and the Jones Act—legislation that opened the federal courts to worker injury claims in the railway and maritime industries, respectively. These statutes were enacted at a time when workers' compensation schemes did not exist or were regarded as inadequate. That perception is no longer valid, and, notwithstanding that these cases are small in number, the jurisdiction of the federal courts under these statutes should be eliminated, allowing claims by railway employees and seamen to be subsumed under state law. Alternatively, if uniform federal remedies are regarded as desirable, they should be provided through federally administered workers' compensation systems.

During the statistical year ending September 30, 1993, 10,536 ERISA actions, 2,149 FELA actions, and 2,601 maritime (including Jones Act) actions were filed in the district courts. In the same year, civil filings in those courts totalled 229,850.

A similar situation exists with respect to certain litigation arising under the Employee Retirement Income Security Act of 1974 (ERISA). In addition to providing exclusive federal court jurisdiction to enforce fiduciary obligations, plan funding and vesting requirements, and other congressional mandates—most of which apply exclusively to pension plans—ERISA allows participants and beneficiaries of employee welfare (*e.g.*, health insurance and severance pay) plans to bring actions in either federal or state court to recover benefits due under the terms of the plan and to enforce or clarify plan terms.[22] Resolution of those cases turn, not on the specific substantive provisions of ERISA or its underlying regulations, but on contract and trust law principles embodied in a "federal common law" developed from state legislation and common law. Under a system of judicial federalism, the federal courts should not be involved in the adjudication of disputes that do not require their particular expertise because they essentially involve application of state law.

[22] *See* 28 U.S.C. § 1132(a), (d) (1988).

The same holds true for any national health insurance or other employee benefit program that Congress may establish in the future. Apart from cases in which specific federal requirements (*e.g.*, any prohibition on discriminatory administration of plan benefits) are at issue, a state court should be the sole forum for litigation of routine claims relating to benefit entitlement.

In each of these situations, Congress should provide adequate resources to state justice systems so that they can handle any increased burden these new cases will bring.

Confronting the Effects of Allocating Jurisdiction

Impact of Legislation

■ RECOMMENDATION 13: When legislation is considered that may affect the federal courts directly or indirectly, Congress should take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for the federal courts.

New criminal legislation inevitably imposes financial and other burdens on the judicial branch associated with the investigation, prosecution, resolution, and punishment of those offenses. While judges feel these burdens directly, it is other parts of the judicial system—probation and pretrial services officers, public defenders and panel attorneys, and court reporters, interpreters, and clerks—who are most affected. Likewise, the enactment of new civil causes of action produces additional costs to the courts when litigation is brought to assert or defend newly created rights.

Although some of the increases in workload are also attributable to interpretations of legislation by the courts themselves, the ultimate policy making authority lies with Congress. If the same institution that provides a budget for the federal courts is required to take the costs associated with jurisdictional and procedural changes into account, workload may be allocated to the federal courts in a more reasoned, responsible manner.

During the past quarter century, both Congress—through more than 200 pieces of new or amended legislation—and the federal courts—through interpretation of constitutional and statutory provisions—have contributed to an enormous expansion of federal judicial workload.

Beyond jurisdictional expansions, Congress has imposed specific deadlines for judicial action and other procedural or reporting requirements—*e.g.*, the Speedy Trial Act of 1974 and the Civil Justice Reform Act of 1990—that require the courts to shift priorities, hold additional hearings or other proceedings, and alter methods of case management. Although these statutory mandates do not create new workload as such, they profoundly affect the allocation of judicial time and other resources.

Since 1991, the Administrative Office has supplied Congress with judicial impact statements on legislation potentially affecting federal court workload and budgets. This process should be continued in the hope that reminding legislators of the cost of their policy initiatives will result in fewer and more tailored expansions of federal jurisdiction, and a recognition that the courts cannot carry new burdens without concomitant resources or the reduction of jurisdiction in other areas.

■ RECOMMENDATION 14: In considering measures that would shift jurisdiction away from the federal courts, Congress should also consider and address the

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impact of the proposed legislation on the states. Specifically—

(a) there should be consultation with state authorities in defining any new limits on federal jurisdiction; and

(b) federal financial and other assistance should be provided to state justice systems to permit them to handle the increased workload that would result from the reduction or elimination of existing federal court jurisdiction.

As explained above, cooperation between federal and state authorities (legislative, executive, and judicial) is essential to judicial federalism—to maintaining the "harmonious and consistent WHOLE" that Hamilton envisioned.[23] The purpose of limiting federal jurisdiction is to preserve *both* the distinctive role of the federal courts *and* the critical role of the state courts as general dispute-resolution forums. If both ends are to be achieved, no reduction in federal jurisdiction should be undertaken without also ensuring the states' capacity to handle the extra burden. This requires both effective federal-state communication[24] and a commitment by Congress to provide states with the necessary financial resources.

■ RECOMMENDATION 15: In considering measures that relate to the allocation of jurisdiction, Congress should consider authorizing the courts to provide discretionary access in those cases in which there is a strong federal interest and a need for a federal forum.

In implementing some of the jurisdictional changes recommended in this plan, Congress may be reluctant to eliminate entire categories of civil or criminal cases from the federal courts' dockets, from a belief that, in some portion of those cases, there is a strong federal interest and there exists a need for a federal forum. Another recommendation in this plan expressly contemplates one instance—diversity jurisdiction—where that calculus may be appropriate: regarding those diversity cases where there is a federal interest either because they have significant multistate implications or because the historical rationale for diversity jurisdiction is still applicable to them.

There may be other, unstated instances where a federal forum is appropriate as an exception to a general statutory provision that eliminates federal jurisdiction over a whole category of cases. The recommendation calls for a reallocation approach that can best be described as "discretionary access," a system under which federal judges, either at the trial or appellate level, are given discretion to make specific decisions in individual cases as to whether a particular case should be pursued in federal court or in state court. Those cases in which a reasonable need for a federal forum can be shown would proceed in federal court; when such a need cannot be shown, the petitioner for discretionary access would be dismissed, allowing the litigation to proceed in a state forum where it would be decided by applicable federal law.

In implementing this recommendation, Congress should consider experimenting with pilot projects of five to seven years in jurisdictions in which the state courts have been particularly effective in adjudicating federal claims. Pilot projects of this length and nature would allow the courts to develop access standards and permit Congress to evaluate the results of the experiments.

[23] THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961); see Chapter 1 *supra*.
[24] *See* Chapter 9, Recommendation 100 *infra*.

Growth of the Article III Judiciary

■ RECOMMENDATION 16: The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise the jurisdiction conferred on the federal courts.

Implementation Strategies:

16a The limited jurisdiction of the federal courts should be preserved as described in Recommendations 1 through 12.

16b The Judicial Conference should employ up-to-date, comprehensive methods to evaluate judgeship needs.

16c The need for additional judgeships should be reduced through operational improvements in the courts that increase efficiency without sacrificing either quality in the judicial work product or access to the remedies available only in a federal forum.

In response to an ever-increasing judicial workload, some (including legal scholars, representatives of the bar, and, at times, the federal judiciary itself) have seen additional judgeships as the key to ensuring continued access to federal justice. The potential risks of that approach, however, should not be ignored. While no available data indicate a precise point at which the federal judiciary would reach the "feasible limits on its growth," it is apparent that unlimited increases in Article III judgeships are far from being a complete (much less an appropriate) answer to workload pressures. To the contrary, a future of unrestrained growth would alter irrevocably the nature of the judicial institution and impose a substantial burden on the federal treasury in terms of additional costs for support personnel, logistical support, and space and facilities.

In 1950, there were 65 authorized judgeships in the geographic courts of appeals and 221 authorized district judgeships. By 1990, those figures had grown to 167 circuit judgeships (a 257 percent increase) and 649 district judgeships (a 297 percent increase).

During the same 40 years, annual district court filings increased by 128 percent on the criminal docket and nearly 400 percent on the civil docket. Annual court of appeals filings increased by 1,445 percent.

It has also been suggested that the most effective means of curbing growth in the federal judiciary would be an inflexible "cap" or "ceiling" on the number of Article III circuit and district judgeships. While that approach may be meritorious in theory, it would not allow the federal courts to maintain both the excellence for which they are known and appropriate access to federal remedies. Any specific limit would be artificial and of questionable utility in deterring the legislative and prosecutorial policies that increase the workload of the federal courts.

The best strategy for ensuring both access and excellence is to tread a middle path that rejects unlimited expansion yet avoids a policy of zero growth. Although this path may be followed in large part by controlling expansion of federal court jurisdiction, there must also be restraint in the creation of new judgeships. The court system must evaluate its judicial resource needs using formulas and standards that are current and take into account all relevant data and factors. Additional judgeships should be requested only after other appropriate alternatives have been exhausted, including improvements in case management and reallocation of existing resources.

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Chapter 5
Structure

THE federal courts function effectively under their present structures, but major problems loom on the horizon if judicial workloads continue to grow.

Projections based on available data indicate that the volume of cases adjudicated in the district courts and courts of appeals will continue to rise in the foreseeable future.[1] As discussed in Chapters 2 and 3, there is debate on how steep this rise will be and how quickly it will occur. The recommendations in this chapter are geared to a future of relatively modest growth in size and workload for the federal courts. In that scenario the courts' mission can be achieved without compromising the core values underlying the systems of trial and appellate justice.

It is possible, however, that the federal courts will be unable to avert a dramatic increase in caseload and a substantial need for additional judges, support staff, space, and facilities. If that future lies ahead, the quality of both the courts' process and product will be at risk. To ensure that a viable system of justice can be preserved with its core values intact, the necessary preparations must occur now. Otherwise, the present structure and function of the federal courts will require reevaluation as outlined in Chapter 10.

United States district courts (which include the United States bankruptcy courts) are charged with securing a just, speedy, and inexpensive determination in every controversy brought before them. In the federal system, these courts are the factfinders and first-line dispute resolvers.

United States courts of appeals perform two primary functions, often described in shorthand as "error correction" and "law declaration." Review for error entails determining whether the first-level decision-maker applied the correct law to the facts of the case, and whether procedural error occurred that fatally tainted the process. Law declaration is the articulation of a rule of law; it serves to guide prospective behavior, control future cases, and ensure that all cases receive the same treatment.

To accomplish these functions, federal courts are best structured in a manner that: facilitates access for litigants, affords procedural fairness, ensures the correctness of individual decisions, promotes the consistent, accurate application of federal law, and maintains the independence of judges to decide matters before them. This plan is premised on the belief that the present structure of the federal courts is by-and-large appropriate for carrying out their functions[2]; it therefore

[1] See Chapter 2 *supra* and Appendix A *infra*.

[2] In reporting on the "problems and issues currently facing the courts of the United States," *see* Federal Courts Study Act, Pub. L. No. 100-702, § 102(b)(1), 102 Stat. 4642, 4644, the Federal Courts Study Committee (FCSC) neither identified the structure of the district courts as a problem area nor proposed any fundamental reorganization of the district courts. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

recommends no major structural changes in the near term.[3] Proposals are made in this plan to target emerging or existing problems that are likely to be exacerbated if present trends continue.

Organization of the Appellate Function

Traditionally, appellate review in the federal court system has had four characteristics:

- access to at least one meaningful review for litigants aggrieved by a decision of a trial court or federal agency
- review by a panel of three Article III judges
- consistent application of federal law
- appellate review performed by judges from the region in which the first-level tribunal sits.

Today, the greatest challenge to the appellate system is to ensure the continued high quality, coherence, and consistency of appellate decisions in the face of a surging workload that, since 1960, has increased twice as fast as that of the district courts, and has mandated "streamlining" changes in traditional appellate procedure. Among such measures are the institution of various screening programs, elimination of oral argument in some cases, and an increasing but necessary abandonment of fully articulated opinions to explain a court's decisions. There is also a greatly increased reliance on staff personnel at the appellate level.

Table 8
Appeals Filed in the United States Courts of Appeals[4]

1960	3,899
1965	6,766
1970	11,662
1975	16,658
1980	23,200
1985	33,360
1990	40,898
1994	48,815

These innovations have changed the face of federal appellate justice, some would say for the worse. Nonetheless, the plan is based on the assumption that the hallmarks of the federal appellate system will remain. Among them are:

- oral argument heard in all appropriate matters
- cases decided with sufficient thought
- opinions carefully produced after collegial deliberation in all cases of precedential importance.

The following recommendations are intended to preserve these hallmarks. They have been developed after considering the views expressed and options discussed in the Federal Courts Study Committee report and the subsequent Federal Judicial Center report on structural alternatives for the courts of appeals.[5]

[3] Although the FCSC recommended further study of structural alternatives for the courts of appeals, the ensuing Federal Judicial Center report concluded that the stresses imposed by "continuing expansion of federal jurisdiction without a concomitant increase in resources" were unlikely to "be significantly relieved by structural change to the appellate system at this time." JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 155 (Federal Judicial Center 1993).

[4] These figures exclude the Court of Appeals for the Federal Circuit and its predecessors, the Court of Customs and Patent Appeals and the Court of Claims.

[5] MCKENNA, *supra* note 3.

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Courts of Appeals

■ RECOMMENDATION 17: The federal appellate function should be performed primarily in:

(a) a generalist court of appeals established in each regional judicial circuit; and

(b) a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas.

Federal judicial credibility and accountability are fostered when appellate judges are drawn primarily from the region they will serve. History suggests the value of maintaining regional connections between appellate judges and the trial judges whose decisions they review, and between appellate judges and the litigants who appear in their courts. Regional courts of appeals should therefore continue as the bodies primarily responsible for reviewing the decisions of the district courts and other adjudicators whose decisions are now reviewable in the courts of appeals. Although the present geographical boundaries of twelve regional judicial circuits are not ideal, the arrangement nevertheless has served the country well. No problem has been identified that would be simply solved by the wholesale redrawing of circuit boundaries, a remedy that would cause more disruption than benefits.

This plan also declines to adopt proposals to create new specialized or subject-matter courts in the judicial branch. There are, admittedly, benefits in the centralized review of certain types of cases, particularly those involving areas of law in which national uniformity is crucial and the courts of appeals have taken significantly different approaches. The same is true where the subject matter is so technical that specialized expertise is necessary to render high quality decisions. (The experience with patent matters that led to the creation of the Court of Appeals for the Federal Circuit is an example of this latter class of cases.)

Nevertheless, in most instances the well-known dangers of judicial specialization outweigh any such benefits. Rather than create a new specialized Article III appellate court, it would be preferable to consolidate in the Federal Circuit those limited categories of cases in which centralized review is helpful.[6] Moreover, the present jurisdiction of that court should be carefully evaluated. Some matters now committed to its jurisdiction (*e.g.*, cases arising from the Court of Veterans Appeals) may not satisfy the above-stated rationale for centralized appellate review, while other subject areas in the jurisdiction of the generalist courts of appeals (*e.g.*, tax cases) might be handled more appropriately in a single forum. The principles supporting a preference for generalist appellate review might be served by some reallocation of jurisdiction between the Federal Circuit and the other courts of appeals.

Finally, except in the limited circumstances discussed under Recommendation 21 *infra*, this vision of the future rejects the notion of discretionary appellate review. To ensure the continued fairness and quality of federal justice, the principle of allowing litigants at least one appeal as of right to an Article III forum should be upheld.

Circuit Size and Workload

■ RECOMMENDATION 18: Each court of appeals should comprise a number of judges sufficient to maintain access to

[6] Since the Federal Circuit has jurisdiction in only a few topical areas, it may be fairly characterized as a "subject-matter" rather than a "generalist" court. It is not, however, "specialized" in the sense of a tribunal limited to adjudicating a single category of cases involving relatively narrow issues.

and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.

As explained in Chapter 4, preservation of a distinct system of federal courts requires both a policy of "carefully controlled growth" in the Article III judiciary and limitations on federal jurisdiction that will obviate the need for more rapid growth. These general principles apply with special force to the courts of appeals.

Unrestrained growth has a different effect on the courts of appeals than on the district courts. The effectiveness, credibility, and efficiency of a court of appeals is intricately linked to its ability to function as a unified body. A judge's sense that he or she speaks for the whole court and not merely as an individual is critical to an appellate court's ability to shape and maintain a coherent body of law, and it contributes to the satisfaction of appellate judges. The resulting stability can make radical shifts in the law of the circuit less likely and thereby moderate to some extent the adverse effects of growth.

Although it is the view of some that a comparatively small number of judges might be necessary for an appellate court to be collegial and perform effectively, others believe that the size of such a court is unrelated to its ability to shape and maintain a coherent body of circuit law. Indeed, it is true that having too few judges on a court can endanger both collegiality and quality; an inadequate number of judges can produce onerous workloads and make it more difficult for judges to maintain essential professional contact with other members of the court. On the other hand, as a court grows it may become more difficult for its judges to become familiar with their colleagues' views and to preserve the consistency of decisions. This may be a particular problem when new judges are added to courts in large groups.

Because reasonable minds may disagree on the extent to which a court of appeals may grow while maintaining its effectiveness, this plan does not suggest a fixed numerical limit to circuit size. In principle, each court of appeals should consist of a number of judges sufficient to: maintain traditional access to, and excellence of, federal appellate justice; preserve judicial collegiality and the consistency, coherence, and quality of circuit precedent; and facilitate effective court administration and governance. An appellate "court," in this special sense, is not merely an administrative entity. Nor should it consist of a large group of strangers—like a jury venire—who are essentially unknown to one another. Rather, a "court" is a cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading, and being persuaded. The court becomes an institution—an incorporeal body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring its predictability), and adjudicating cases in like manner.

Increasing workload burdens on appellate judges pose a threat—and a challenge—to circuits of all sizes. Procedures currently utilized by various courts of appeals—*e.g.*, issue tracking, oral motion screening panels, and limited *in banc* courts—can effectively address some of these burdens. Technological solutions, such as circuit-wide electronic mail networks and chambers access to court dockets, can keep a court in close communication, helping to maintain a level of collegiality that otherwise would be unattainable.

Larger courts might appropriately undertake pilot projects involving internal structural or procedural innovations aimed at preserving decisional coherence and consistency. These experiments might include stable,

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but gradually rotating appellate panels to which cases are assigned on a subject-matter basis. By exchanging such useful ideas—born of necessity in large courts but applicable to smaller ones, as well—the circuits may find it possible to meet the challenge of increased workload without abandoning the flexibility the current structure allows.[7]

Fortunately, the federal courts of appeals have been successful in maintaining their tradition of excellence in the face of mounting appellate filings. In the future, however, other structural alternatives should be considered if these courts fail, through productivity and case management improvements, to fulfill their mission of providing litigants access to coherent, consistent decisions on issues of federal law. Restructuring of the judicial circuits—division of a particular circuit or realignment of circuit boundaries—should continue to be, as it has been historically,[8] an infrequent event. It should occur only when compelling empirical evidence demonstrates the relevant court's (or courts') inability to operate effectively as an adjudicative body or in the administrative realm. Any changes proposed to rectify such problems must be considered in the light of the disruption of precedent and judicial administration that such changes generally entail.

[7] Consideration should be given to a statutory amendment that would authorize courts of appeals baving more than 13 active judges to establish administrative units within the court and perform the court's in banc functions with less than the full number of active circuit judges on the court. *Cf.* 28 U.S.C. § 46(c) (1988); Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (authorizing creation of administrative units and "limited" in banc panels where a court of appeals has more than *15* active circuit judges).

[8] Apart from the division of the Eighth Circuit (creating the Tenth Circuit) in 1929, the division of the Fifth Circuit (creating the Eleventh Circuit) in 1981, and the creation of the Federal Circuit in 1982, the present arrangement of judicial circuits has endured since 1866. Nevertheless, realigning the states and territories in different combinations is not a novel idea: early in the nation's history, the New England states and New York comprised a single circuit and, since 1789, Congress has made 11 major changes to circuit boundaries (*i.e.*, in addition to adding new states to existing circuits).

■ RECOMMENDATION 19: To the extent practicable, workload should be equalized among judges of the courts of appeals nationally.

Today, the caseloads of the courts of appeals are, for the most part, nondiscretionary and effectively beyond the control of the federal judicial system. Caseload fluctuations among circuits cannot be predicted with confidence. Neither through circuit restructuring nor attrition is it possible to realign courts of appeals to achieve equality in either workload or the number of judges.

Notwithstanding such limitations, some measure of workload equalization can be achieved by applying improved workload measures or other appropriate formulae to the determination of future judgeship needs. Where necessary, short-term equalization of workload can be achieved through flexible arrangements for the temporary assignment of circuit judges to assist courts of appeals in other circuits.[9]

Resolution of Intercircuit Conflicts

■ RECOMMENDATION 20: The United States Supreme Court should continue to be the sole arbiter of conflicting precedents among the courts of appeals.

Current empirical data on the number, frequency, tolerability, and persistence of unresolved intercircuit conflicts (*i.e.*, those not heard by the Supreme Court) indicate that intercircuit inconsistency is not a problem that

[9] See Chapter 8, Recommendation 64 *infra*. In making use of temporarily assignments to meet workload needs, the courts of appeals should also consider the impact of visiting judges on collegiality and decisional consistency within a court.

now calls for change.[10] At the present time, the Supreme Court appears to be capable of resolving significant differences of decisional law among the circuits with reasonable promptness. Until that situation seriously worsens, any attempt to expand the system's capacity for resolution on intercircuit conflicts is likely to generate more cost than benefit to the system. Therefore, the plan rejects, for the foreseeable future, proposals to consolidate the present circuits into a few "jumbo" circuits, create new appellate structures (*e.g.*, an intercircuit tribunal or a new tier of federal courts), or allow the Supreme Court to refer cases presenting conflicts to a court of appeals not involved in the conflict.[11]

Review of Administrative Proceedings

■ RECOMMENDATION 21: In general, the actions of administrative agencies and decisions of Article I courts should be reviewable directly in the regional courts of appeals. For those cases in which the initial forum for judicial review is the district court, further review in the court of appeals should be available only on a discretionary basis except with respect to constitutional matters and questions of statutory or regulatory interpretation.

The point is made in Chapter 4 (see Recommendation 10 *supra*), that limited court resources can be conserved by relying on administrative agencies and Article I courts to adjudicate, in the first instance, claims for benefits and other fact-intensive issues arising under federal law. In such cases, both the trial function and the first level of appellate review should be conducted in an administrative or Article I judicial forum.

As a general matter, and except for the limited circumstances in which a centralized forum for review is appropriate (see Recommendation 17 *supra*), the regional court of appeals should be the sole Article III forum in which review of administrative agency and Article I court proceedings can be obtained as a matter of right. No new specialized Article III court should be created for review of agency action or Article I court decisions.

Under current law, the adjudicatory and rulemaking actions of administrative agencies are directly reviewable in a court of appeals only if that method of review is expressly authorized by statute.[12] Where no review process is specified, and in certain other cases,[13] a litigant seeking review of an agency decision or rule must first pursue a civil action in the district court. Although direct review in the court of appeals is generally preferable because agency cases require a court to engage in a process similar to appellate review of trial proceedings, these cases also frequently turn on application of settled law to specific facts—a process well suited to a trial-level forum like the district court.[14] When this is coupled, however, with a right to subsequent review in the court of appeals (which applies in these cases the same standards of review as the district court), the result is an often-unnecessary duplication of function between the two Article III forums.

The critical importance of Article III judicial review to ensure compliance with constitutional and other legal norms is histori-

[10] *See* Arthur D. Hellman, Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem (Draft Final Report to the Federal Judicial Center, Oct. 1994).

[11] But see Chapter 4, Recommendation 11 *supra* (proposing that federal agencies be limited statutorily from seeking intercircuit conflicts through relitigation in multiple courts of appeals).

[12] No Article I court decisions are presently reviewable in the district courts.

[13] See, *e.g.*, 42 U.S.C. § 405(g) (1988) (Social Security Act).

[14] See Chapter 4, Implementation Strategy 9a *supra* (concerning judicial review of Social Security disability claims).

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cally proven. But on "substantial evidence" questions regarding the sufficiency of an agency's factual findings, only one opportunity for that review should be guaranteed as of right. Consequently, a party to an agency case that has been considered in a district court should be permitted further review in the court of appeals only with respect to constitutional questions or the interpretation of relevant statutes or regulations unless the latter court grants leave to appeal on other issues.

Appeals in Bankruptcy Cases

■ RECOMMENDATION 22: The existing mechanism for review of dispositive orders of bankruptcy judges should be studied to determine what appellate structure will ensure prompt, inexpensive resolution of bankruptcy cases and foster coherent, consistent development of bankruptcy precedents.

Presently, there are two methods for appellate review of bankruptcy judges' final or other dispositive orders entered under 28 U.S.C. § 157(b)(1), (c)(2).[15] The first is by appeal to a bankruptcy appellate panel ("BAP"), if (a) one has been established by the circuit judicial council,[16] and (b) the district judges in the respective district have authorized such appeals by majority vote.[17] The second is by appeal to the district court if (a) BAP review is not available, or (b) either party elects to have the appeal heard in the district court.[18] Final orders in either appellate forum may be further appealed as of right to the pertinent courts of appeals, with discretionary review thereafter possible by the Supreme Court.[19]

Some have argued that this two-tier system of appellate review promotes unnecessary delay without any meaningful corresponding benefit and have suggested moving to a single system of review by courts of appeals.[20] Empirical evidence, however, suggests that a two-tier appeals process may not be a problem in most cases. A recent review of the process by the Federal Judicial Center indicates that 73% of bankruptcy appeals in the district courts were disposed of with little or no judicial involvement. Moreover, appeals were handled more expeditiously in the district courts than in the courts of appeals: an average of 145 days in the district court versus 245 days in courts of appeals.[21] Preserving the opportunity for review at the district court level is also consistent with the bankruptcy court's configuration as a unit of the district court.[22]

This does not necessarily mean, however, that court of appeals jurisdiction in bankruptcy cases should be made discretionary. Under current practice, district court and BAP decisions are not treated as stare decisis in other cases—resulting in a "patchwork" of differing legal interpretations that encourage forum shopping and undermine the national system of

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[15] 28 U.S.C. § 158(a), (b) (1988 & Supp. V 1993), *amended by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104, 108 Stat. 4106, 4109-11.

[16] At present, a BAP exists in only one circuit, the Ninth. However, Congress has recently required each circuit to establish a BAP (either for itself or in conjunction with one or more other circuits) unless the circuit judicial council finds that "there are insufficient judicial resources available in the circuit . . . or establishment of [a BAP] would result in undue delay or increased cost to parties in cases under title 11." Bankruptcy Reform Act of 1994, § 104(c), 108 Stat. at 4109-10 (amending 28 U.S.C. § 158(b)).

[17] *Id.* § 104(c), 108 Stat. at 4110 (enacting 28 U.S.C. § 158(b)(6)).

[18] *Id.* § 104(d), 108 Stat. at 4110-11 (enacting 28 U.S.C. § 158(c)(1)).

[19] *See* 28 U.S.C. §§ 158(d), 1254 (1988).

[20] *See* Final Report and Recommendations of the Long-Range Planning Subcommittee of the Judicial Conference Committee on the Administration of the Bankruptcy System 16-17 (June 1, 1993).

[21] Memorandum from Fletcher Mangum, Federal Judicial Center, to the Judicial Conference Committee on Long Range Planning (Dec. 23, 1993).

[22] However, the practice of referring bankruptcy appeals to magistrate judges should be discontinued. It is questionable both in terms of efficient resource allocation and in its impact on expeditious resolution of appeals.

bankruptcy law. If court of appeals review is not available as a matter of right, the problem of inter- and intra-district conflicts might be exacerbated unless other means of establishing binding precedent are developed.

It would be premature, at this point, for the judiciary to propose a different approach to bankruptcy appeals. The recent legislation requiring every circuit to establish a BAP (absent certain circumstances) may alter the process in unforeseen ways. Also, Congress has just created a National Bankruptcy Review Commission to "investigate and study issues and problems relating to the Bankruptcy Code . . . evaluate the advisibility of proposals and current arrangements with respect to such issues and problems," and report findings and conclusions to Congress, the Chief Justice, and the President within two years after its first meeting.[23] Examination of both existing and possible alternative mechanisms for appellate review of bankruptcy judges' orders would be a logical part of that study. Any permanent change in the operative statutes should await the commission's report in that respect.

■ RECOMMENDATION 23: Pending completion of the study of bankruptcy appellate structure recommended above, the dispositive orders of bankruptcy judges should be reviewable directly in the court of appeals in those cases where the parties stipulate, or the district court or bankruptcy appellate panel (BAP) certifies, that such review is needed immediately to establish legal principles on which subsequent proceedings in the case may depend.

There are bankruptcy cases in which direct review of bankruptcy judges' orders by the court of appeals—bypassing consideration by a district judge or BAP—is more expedient. One example is when there is a conflict of law within a district or circuit. Another is when the stakes are sufficiently high that the parties will exhaust the entire panoply of their appellate options, but where an expeditious determination is essential to the success of the overall bankruptcy case. As noted, the average times for resolving bankruptcy appeals are long in both the district courts and courts of appeals.

According to the preceding recommendation, the overall approach to bankruptcy appeals should be reexamined by the new Bankruptcy Review Commission and, if appropriate, revised according to the commission's findings. Until that reexamination occurs, it is essential that some temporary mechanism to short-cut the existing appellate process be provided in those cases where circuit precedent is needed without delay.[24] This kind of bypass should not be used for routine issues—leading to increased workload for the already overburdened courts of appeals. However, a requirement that the parties stipulate, or the district court or BAP certify, the need for direct court of appeals review should be sufficient—at least on an interim basis—to limit that route of appeal to appropriate cases.[25]

Appeals of Magistrate Judge Decisions

■ RECOMMENDATION 24: Where parties to a civil action have consented to the case-dispositive authority of a magistrate judge, judgments entered in such actions

[23] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 601-610, 108 Stat. at 4147-50.

[24] A similar mechanism for review of bankruptcy court orders was provided in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 236(a), 92 Stat. 2549, 2667.

[25] The legislation required to implement this change should also authorize interlocutory appeals from bankruptcy appellate panels to the courts of appeals under the same circumstances as such appeals are presently allowed from the district courts. *Cf.* 28 U.S.C. § 1292(b) (1988).

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should be reviewable only in the courts of appeals, and not by a district judge.

In civil cases decided by magistrate judges with the consent of the parties, current law permits an appeal of the judgment either directly to the court of appeals or, if the parties agree, to a district judge followed by discretionary review in the court of appeals.[26] Although the latter route was intended as a less-expensive means of obtaining appellate review, its existence is inconsistent with the principle underlying the "consent" authority of magistrate judges—that the parties agree to disposition of their case without involving a district judge.

To encourage the full utilization of magistrate judges needed to relieve workload burdens in the district courts, review by a district judge should be eliminated as an alternative route of appeal in civil consent cases. The practical impact of this change on litigants should be modest: from 1992 through 1993, only 33 districts reported appeals to district judges in civil consent cases, with 25 of those districts having three or fewer such appeals and 18 having only one.

Organization of the Trial Function

The federal courts are committed to affording litigants access to just, speedy, and economical resolution of civil and criminal disputes. At the trial (*i.e.*, initial dispute resolution) level, adjudication in national, specialized tribunals is appropriate—and well established—in limited subject areas: certain tax litigation, claims against the federal government, and matters involving international trade. Bankruptcy proceedings are properly conducted in the first instance by judges who specialize in that field. With those exceptions, however, the traditional allocation of original jurisdiction to generalist trial courts organized on a geographic basis should be preserved. Public confidence in and respect for the federal judiciary is best fostered when justice is dispensed and administered by judges, jurors, and other court officials associated with the geographical region served by the court. Moreover, to ensure continued access and quality in federal justice, it is important that court organization and procedures be made more efficient and flexible as workload demands increase.

District Courts

■ RECOMMENDATION 25: Except in certain limited contexts (*i.e.*, bankruptcy proceedings, international trade matters, and claims against the federal government), the primary trial forum for disputes committed to federal jurisdiction should be a generalist district court whose judges are affiliated with, and required to reside in, the general geographic region served by the court, and whose facilities are reasonably accessible to litigants, jurors, witnesses and other participants in the judicial process.

Generalist trial courts have worked very well in the federal system and should be retained. Any change to the existing geographic arrangement of judicial districts should seek to redress inefficient and inflexible allocation of judicial resources.

Over time, various approaches have been suggested to improving resource allocation in the federal district courts, including partial restructuring (*e.g.*, consolidating existing districts within state borders; redrawing district lines across borders where major metropolitan areas might be better served) and total restruc-

[26] *See* 28 U.S.C. § 636(c)(3)-(5) (1988). Under FED. R. CIV. P. 73(c), review directly in the court of appeals is the normal route for appeals in these cases.

turing (*e.g.*, all district, magistrate, and bankruptcy judges would be available at any time for service anywhere in the nation). However, because of the key historical connection between state affiliation and district judge appointments and its proven fairness and effectiveness, this plan calls for no such restructuring at this time.

Consistent with our federal system and for reasons of credibility and accountability (*i.e.*, familiarity with local law and legal traditions), judges in the district courts should continue to be drawn from the states they are appointed to serve or at least endorsed by representatives of those states. It is important to maintain a state-defined organization for the district courts so long as local affiliations remain integral to the judicial selection process. Although some may regard judges selected in this manner more as regional or local officials than as jurists chosen to interpret and apply national law, the process has withstood the test of time.

The system should not, however, be inflexible with regard to geographic boundaries in allocation of resources. As discussed below, the existing district boundaries and methods of organizing support functions should be reexamined to assess the extent to which merger or sharing of judicial and administrative resources can enhance performance. In addition, the standards and procedures for assigning judges between districts should remain sufficiently flexible that judge power can be allocated wherever needed.[27]

District Alignment

■ RECOMMENDATION 26: The judicial districts should continue to be allocated among and within the states so that each district comprises a single state or part of a state.

By adhering to state boundaries, the current alignment of judicial districts comports with traditional concepts of federalism and reflects long-standing political conventions with respect to selection of candidates for judicial appointment. In the past, states have been divided into two or more judicial districts for reasons not necessarily related to the needs of judicial administration. As a result, the current array of 94 judicial districts may not be optimal for allocating work and resources at the trial level. Although districts should not be combined in states where geographic distances and other factors would make a single district court impractical, administrative redundancies might be avoided and existing judge power utilized more effectively if certain existing districts were combined.[28]

While arguments exist for creation of multistate or regional districts (*e.g.*, districts with the same boundaries as the judicial circuits), this plan does not adopt that view. The preferable approach is to maintain the current system of districts organized within state boundaries absent convincing evidence that such realignment would increase efficiency. In certain areas, however, administrative convenience and flexible resource allocation ultimately may compel establishment of districts that include more than one state or an entire region.[29]

As a first step, consideration should be given to merging districts within states, or at least to merging judicial support functions between and among those districts.[30] In time,

[27] See Chapter 8, Recommendation 64 *infra*.

[28] An example of this may be found in Oklahoma, which currently is divided into three judicial districts. 28 U.S.C. § 116 (1988).

[29] At present, one judicial district (Wyoming) includes territory of adjoining states—those parts of Yellowstone National Park located within Idaho and Montana. 28 U.S.C. § 131 (1988). Similarly, the District of Hawaii includes certain Pacific island territories that are not part of the state. *Id.* § 91. For purposes of legal uniformity and administrative efficiency, an exception to the principle of state-based districts should be retained in these cases and similar ones that may arise in the future.

[30] In considering the alignment of districts within states, attention should be given to federal enclaves currently located within more than one district.

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further consolidation may be appropriate, but in the near term the advantages of larger court organization should be demonstrated through statewide entities or small-scale consolidations.

■ RECOMMENDATION 27: The impact of district alignment on access to the courts and efficient judicial administration should be studied periodically. Where merger would produce administrative and/or cost efficiencies, multiple districts within a single state should be combined, if feasible, to form a single district or reduced number of districts within the state. In these larger districts, smaller geographic units should be maintained or established to administer functions for which more localized operation is appropriate.

The time has come to begin a serious and recurring inquiry into the optimal manner of organizing districts. Periodic study of existing districts within states (and divisions within districts) would make it possible to evaluate whether existing organizational structure aids or inhibits access to the courts and efficient judicial administration. Assessment of the continued need for more than one district within a state (or divisions within a district) should include input from each of the affected districts and coordination with pertinent representatives of the executive and legislative branches. Even if political considerations dictate retention of most district boundaries as they presently exist, serious consideration should be given to merging at least those smaller districts within states where adjudicative and administrative efficiencies can be realized.

This general emphasis on organizing the courts on a larger geographic scale does not mean that functions such as jury selection should not be administered more locally. Where local administration is appropriate, smaller administrative units could still be established for limited purposes within a statewide or larger court. For example, such units might be used to accommodate the special challenges and needs faced by courts in large metropolitan areas. Likewise, it may be desirable for districts to share administrative support functions (*e.g.*, probation and pretrial services) without altering district boundaries.

Bankruptcy Courts

The 1978 Bankruptcy Reform Act[31] assumed that all bankruptcy matters should be handled expeditiously by a specialized bankruptcy court. Although the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[32] later held that the Act's jurisdictional scheme extended unconstitutionally the exercise of Article III power to non-Article III courts, the fact remains that the nature and complexity of bankruptcy matters require judges who are expert in the field. The Bankruptcy Amendments and Federal Judgeship Act of 1984,[33] which attempted to address the constitutional infirmities of the 1978 Reform Act, nevertheless sought to do so in a way that would promote the efficient resolution of all bankruptcy matters by a corps of experts, the bankruptcy judiciary. The following recommendations attempt to further that basic premise.

■ RECOMMENDATION 28: Each district court should continue to include a bankruptcy court consisting of fixed-term

[31] Bankruptcy Reform Act of 1978, Pub L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1501 and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993)).

[32] 458 U.S. 50 (1982).

[33] Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 11 U.S.C. §§ 101-1501 and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993)).

judges with expertise in the field of bankruptcy law.

Implementation Strategies:

28a The bankruptcy court should exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible.

28b Congress should be encouraged to clarify the authority of the bankruptcy courts. For example, legislation should be enacted that expressly recognizes the civil contempt power of bankruptcy judges and also affords them limited jurisdiction to hold litigants or counsel criminally liable for misbehavior, disobedience or resistance to a lawful order.

Serious constitutional and statutory questions remain regarding the authority of bankruptcy courts. At this juncture, however, most of those questions—particularly constitutional ones—are largely speculative. Despite such uncertainties, the bankruptcy system continues to work well. Therefore, no major changes are needed other than to urge Congress to clarify bankruptcy judges' authority to conduct the proceedings before them, including express authority to deal directly with civil contempt and limited power to punish criminal contempt.[34] Jurisdictional lines in bankruptcy, as elsewhere, need to be made clear and bright. At a minimum, however, the bankruptcy courts must continue to exercise pervasive jurisdiction over matters affecting a debtor's bankruptcy.[35]

■ RECOMMENDATION 29: If constitutional questions concerning bankruptcy court jurisdiction render impossible the efficient resolution of bankruptcy matters in the present bankruptcy courts, then the question of whether some or all bankruptcy judgeships should have Article III status should be considered.

For the bankruptcy system to be fair and efficient, there must be specialized courts with plenary authority over all bankruptcy matters. If serious jurisdictional difficulties arise in the future because bankruptcy judges do not enjoy "good behavior" tenure and guaranteed compensation under Article III of the Constitution, Congress should then consider reestablishing some or all bankruptcy judgeships with Article III protections to make the bankruptcy court a viable, efficient forum for the resolution or restructuring of debtors' estates.

[34] *Cf.* Chapter 8, Recommendation 68 *infra* (limited contempt power for magistrate judges). At the present time, there is conflicting appellate precedent regarding civil contempt authority in the bankruptcy courts. *Compare* In re Walters, 868 F.2d 665 (4th Cir.. 1989) (bankruptcy judges possess civil contempt power under 11 U.S.C. § 105(a)), *with* In re Sequoia Auto Brokers Ltd., 827 F.2d 1281 (9th Cir. 1987) (Congress has not provided civil contempt authority to bankruptcy judges).

[35] Recent legislation has clarified certain powers relating to bankruptcy case management and expressly authorized bankruptcy judges, in proceedings where the right to trial by jury applies, to conduct jury trials "if specially designated to exercise such jurisdiction by the district court and with the express consent of the parties." Bankruptcy Reform Act of 1994, §§ 104(a), 112, 108 Stat. 4108-09, 4117 (enacting 11 U.S.C. § 105(d) and 28 U.S.C. § 157(e)).

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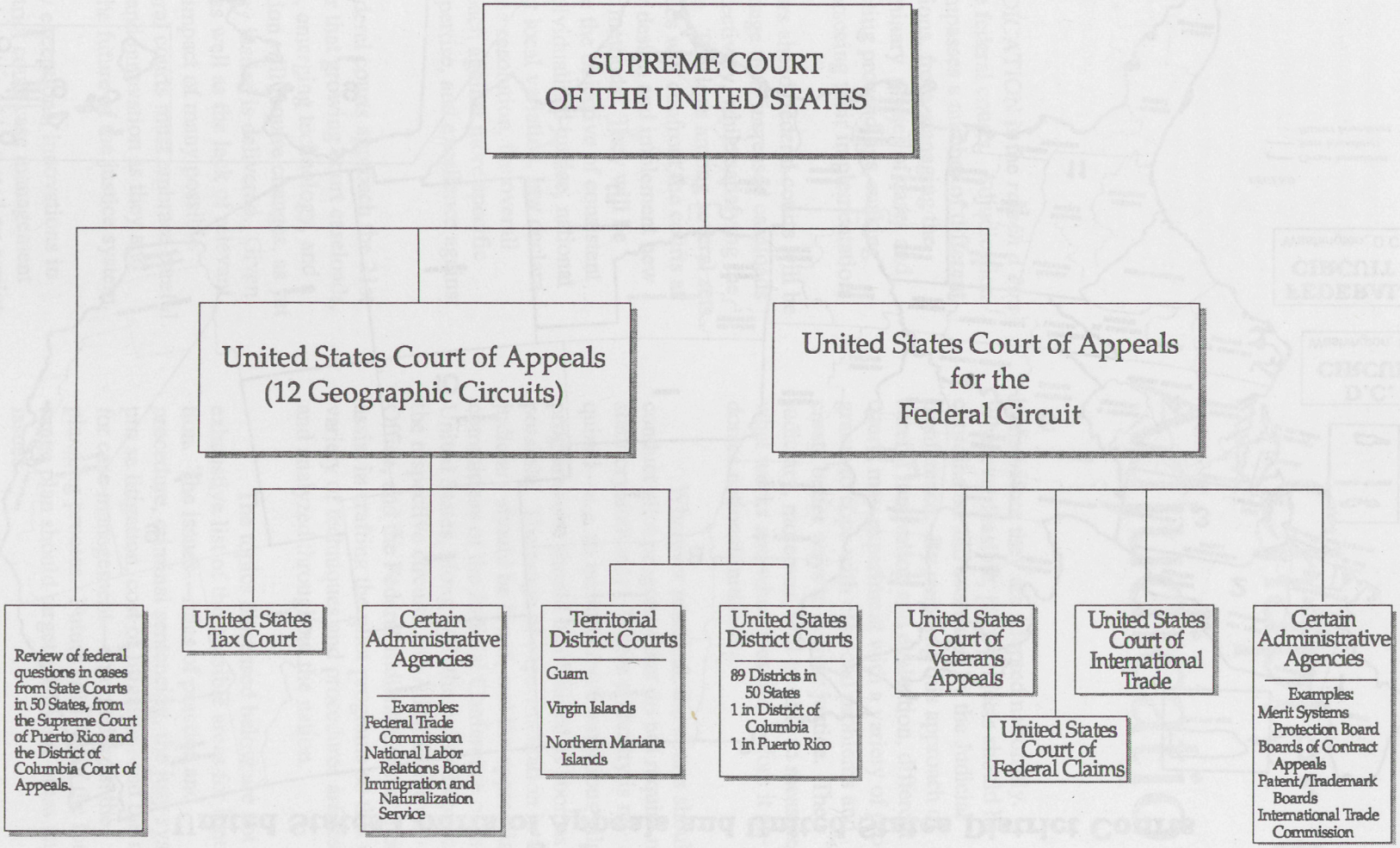
THE UNITED STATES COURT SYSTEM



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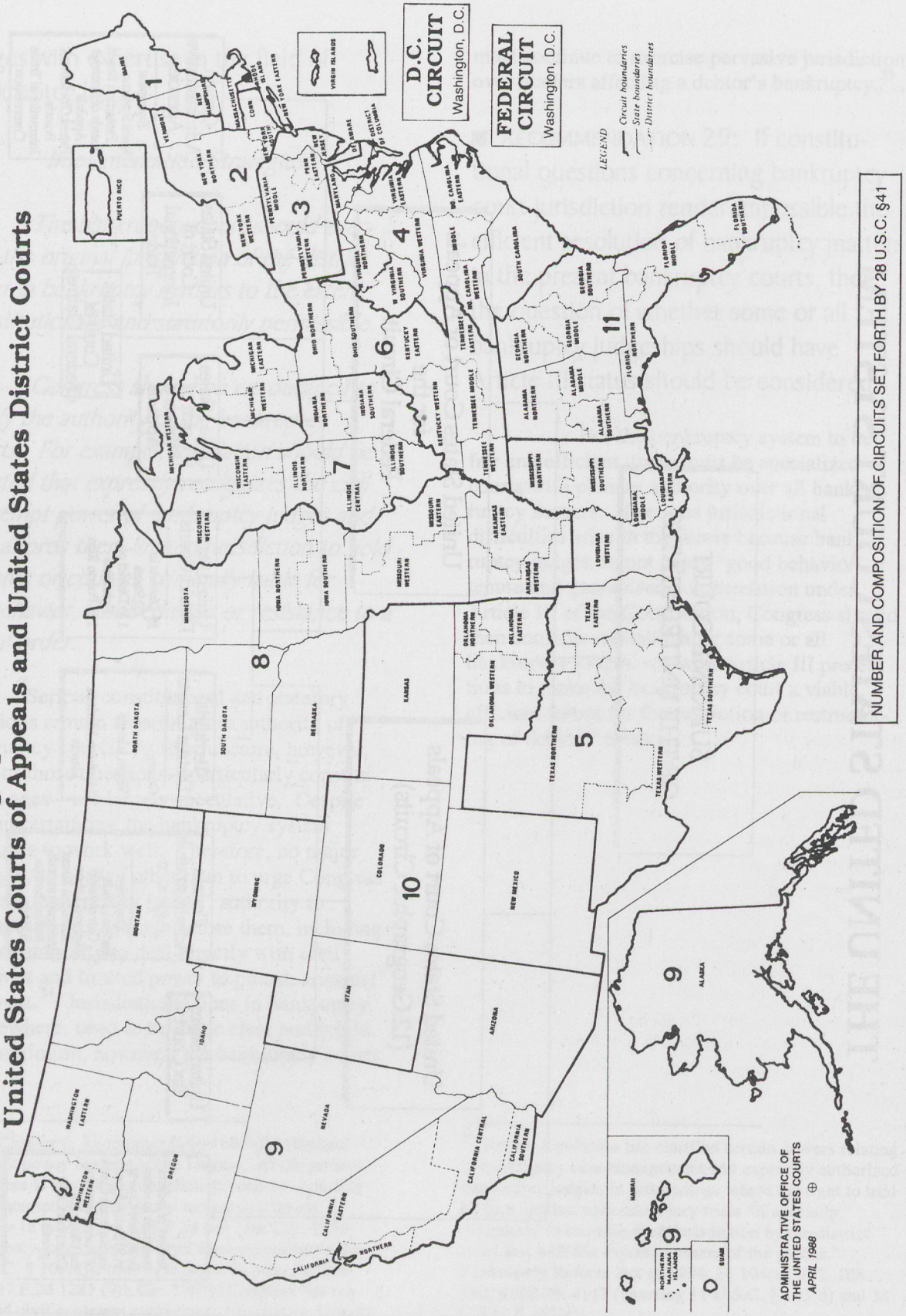

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Chapter 6
Adjudication

ADJUDICATION is the *raison d'être* of the federal courts. Adjudication encompasses a number of different functions, from managing the preliminary phases of cases and appeals to conducting proceedings, making decisions and overseeing their implementation.

In the years ahead, federal courts will be challenged to manage their increased caseloads efficiently and effectively, while satisfying the interests of justice. Tensions among several sets of competing values will confront the courts at every turn as they design and implement new case management methods. They will be obliged to balance the objective of consistent results against individualized justice, national uniformity against local variation, law declaration against dispute resolution, the overall generalist's approach against more specific subject-matter expertise, and excellence against delay.

As the federal courts approach the 21st century, it is clear that growing court caseloads, limited resources, emerging technology, and a changing population will require changes, as yet unclear, in the way justice is delivered. Given this uncertainty, as well as the lack of relevant data to show the impact of many possible changes, the federal courts must embrace careful experimentation and innovation as they and Congress shape the future of the justice system.

With few exceptions, innovations in appellate and district court case management and decision making should be tested on a pilot basis before they are adopted nationally. Wherever feasible, pilot projects should be coordinated and evaluated by the Judicial Conference. By pursuing this approach of careful innovation and evaluation, different courts may experiment with a variety of programs to cope with caseload problems and create better ways to deliver justice. The judiciary, moreover, will be able to measure what works and what does not, before it endorses national initiatives.

Wherever practical, the courts should conduct pilot programs that do not require new statutory authority. Where authority is required—*e.g.* to institute more ambitious pilot programs—it should be obtained as soon as possible. The range of experimentation in the judiciary should be broad, and the appropriate committees of the Judicial Conference of the United States, along with the judicial councils of the respective circuits, the Administrative Office, and the Federal Judicial Center, should assist in crafting the pilot programs so that a variety of techniques and procedures are tested and analyzed throughout the nation.

The topics discussed below are not an exhaustive list of the possible areas for innovation. The issues—rules of practice and procedure, criminal sentencing, the jury system, pro se litigation, cost of litigation, and the need for case management—emerged from the planning process. Future editions of the long range plan should target additional areas and issues.

Rules of Practice and Procedure

■ RECOMMENDATION 30: Rules of practice, procedure, and evidence for the federal courts should be adopted and, as needed, revised to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation.

Implementation Strategies:

30a Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.

30b The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures.

30c In developing rules, the Judicial Conference and the courts should seek significant participation by representatives of the bar.

Under the Rules Enabling Act of 1934,[1] the Supreme Court prescribes nationally applicable rules of practice, procedure, and evidence for the federal courts based on recommendations from the Judicial Conference of the United States. The Conference is specifically charged by the Act with drafting and recommending rules that "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[2]

Rule making under the Act proceeds in an exacting and meticulous manner, assuring broad-based consideration of the rules and taking into account the needs of the justice system and the public as a whole. Proposed amendments to the rules receive fresh and thorough review at several levels—by the respective rules advisory committees, through public comments and hearings, by the Standing Committee on Rules of Practice and Procedure, by the Judicial Conference itself, and finally by the Supreme Court. The amendments are then submitted to the Congress, which has the opportunity to amend, reject, or defer any of the rules.

The rules procedure is perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules. "Neutral" describes rules that cause cases to be resolved impartially, *i.e.*, on findings of fact that are as close to the truth as it is reasonably possible to make them and that follow the law, as interpreted and applied with fidelity to the Constitution, statutes, and precedents.

It is troubling, therefore, that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act. The openness of the rule making process ensures that all interested persons have an opportunity to identify and comment on drafting ambiguities and potential problems. It is essential that the bench, the bar, and the Congress do their best, working together—as intended under the Rules Enabling Act—to keep procedural rules substantively neutral and fair.

The federal rules are designed to establish an essentially uniform, national practice in the federal courts. Nevertheless, they authorize individual courts to prescribe legitimate local variations in practice and procedure

[1] 28 U.S.C. §§ 2071-2077 (1988).

[2] 28 U.S.C. § 331 (1988).

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through local court rules that are "not inconsistent" with the national rules. Members of the bar have complained about the proliferation of local rules imposing procedural requirements. Moreover, the Civil Justice Reform Act of 1990 has encouraged each district court to engage in its own procedural experimentation and impose additional case management requirements. Accordingly, it is difficult for lawyers, particularly those with a national practice, to know all the current procedural requirements district by district.

Some local procedural variations are appropriate to account for differing local conditions and to allow experimentation with new and innovative procedures. Nevertheless, the long-term emphasis of the courts—at the conclusion of the period of experimentation and evaluation prescribed by the Civil Justice Reform Act—should be on promoting nationally uniform rules of practice and procedure. To this end, an effort should be made to reduce the number of local rules and standing orders. Local rules should be limited in scope and "not inconsistent" with national rules. The Judicial Conference and the judicial councils of the circuits should discourage further "balkanization" of federal practice by exercising their statutory authority to review local court rules.[3]

The bar should be an active partner in the rule making process. Effective participation by the bar is essential, both through membership of practicing attorneys on the rules committees and the willingness of attorneys and bar associations to suggest and comment thoughtfully on proposed amendments to the rules.

The Standing Committee on Rules of Practice and Procedure recently completed a comprehensive study of the rule making process. As a result, several steps have been taken to enhance bar participation by increasing bar membership on the rules committees, expanding rules publications and educational efforts, adding more attorneys and organizations to the mailing lists, increasing rules committee contacts with the bar, inviting state bar associations to appoint coordinators to the rules committees, and undertaking more empirical studies to measure the impact of the operation and effect of the federal rules on the bar and litigants. The Standing Committee should continue and expand these outreach efforts to the bar.

Sentencing in Criminal Cases

Sentencing of criminal defendants upon conviction is perhaps the single most important area in which the federal courts experience the tension between the competing goals of uniform practice and attention to individual circumstances. The question of how to punish or deter criminal activity is a substantive legislative policy issue left to the Congress. In 1984, that body created the United States Sentencing Commission and charged it with formulating sentencing guidelines as a means of avoiding sentencing disparities among similarly-situated criminals convicted of the same crime. However, some of the Commission's attempts to carry out its mandate—and the interest that Congress has shown in creating harsher criminal penalties that limit judges' sentencing discretion—have led many judges to question whether the current sentencing scheme adequately takes into account individual circumstances.

■ RECOMMENDATION 31: The Judicial Conference should continue and strengthen efforts to express judicial concerns about sentencing policy.

Sentencing policy has been and will inevitably continue to be a focus of federal crime legislation and policy making. Despite major changes in the criminal justice system at both federal and state levels, there is continuing public demand for harsher sentencing policies.

[3] These efforts should be supported, as necessary, through allocation of adequate funding and other resources.

The continuing challenge for the federal courts is to ensure that legislation and sentencing guidelines reflect sound public policy while taking into consideration the impact on court resources. The Judicial Conference, by statute, reports to the Sentencing Commission on the operation of the guidelines, suggests potential changes in the guidelines, and assesses the performance of the Commission.[4] In the emotionally charged area of criminal justice, both the unique perspective and expertise of judges and the relevant data collected by the courts should be brought to bear in developing positions that will serve the public interest in criminal sentencing and judicial administration.

■ RECOMMENDATION 32: The legal standards for criminal sentencing should encourage both uniformity of practice and attention to individual circumstances.

Implementation Strategies:

32a Congress should be encouraged not to prescribe mandatory minimum sentences.

32b The United States Sentencing Commission should be encouraged to develop sentencing guidelines that—

(1) afford sentencing judges the ability to impose more alternatives to imprisonment;

(2) encourage departures from guideline levels where factual differences should appropriately be taken into account; and

(3) enable sentencing judges to consider within the guideline scheme a greater number of offender characteristics.

The sentencing regime of mandatory minimum penalties and sentencing guidelines has hampered the ability of federal judges to tailor appropriate sentences to the individual offender. The Judicial Conference has opposed mandatory minimum sentences where this approach has skewed the philosophy behind the sentencing guidelines—which are also the product of congressional enactment. In enacting these provisions, Congress intended that the offenders for certain crimes should receive at least the minimum prison term specified. This has sometimes produced unintended consequences.

Rather than narrowly targeting violent criminals or major drug traffickers for long prison terms, the guidelines also impose lengthy sentences on relatively low-level offenders due to anomalies, for example, over the weight of the drugs involved in the crime. Although the goal was to reduce disparity in sentencing, more culpable offenders can receive shorter sentences than low level offenders who participated in the same conspiracy. The process shifts discretion from judges to the prosecutors who, through plea bargaining, reward cooperation. Research also indicates that mandatory minimum sentences arguably have a disparate impact depending on race, and this, too, has become a subject of debate. Finally, mandatory minimums have contributed to an ever growing federal prison population and the need for more prisons—at an average annual cost of $20,747 per prisoner.[5]

These are effects that judges see firsthand as they impose sentence and are not as readily apparent to Congress. Clearly it is the prerogative of the legislative branch to design a sentencing scheme and structure, but the

[4] *See* 28 U.S.C. § 994(o) (1988)

[5] See BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 9 (Federal Judicial Center 1994).

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judiciary has a unique perspective to comment on the effects of these approaches as they are implemented.

In this context, alternatives to imprisonment, community service or home confinement are underused, especially for non-violent first offenders. The average time served for all types of crimes has increased while the proportion of offenders sentenced to probation without confinement has fallen. Probation, when employed correctly, is a resource that should not be neglected in times of expanding prison populations.

The guidelines were intended to eliminate the evil of disparate sentencing caused by inconsistency—where offenders who were similarly situated received markedly different sentences. However, they have only replaced it with a new disparity born of uniformity—where offenders who are different in relevant ways are often treated the same.[6] Indeed, the Sentencing Reform Act recognized that flexibility in sentencing is needed. The Act authorizes judges to depart from the guidelines when factors are present of a type or to a degree that the Sentencing Commission did not anticipate.[7] Most importantly, Congress granted the sentencing judge the authority to determine whether or not the Commission had adequately taken into account relevant factors in determining a guideline sentence. To ensure that this authority did not confer unlimited discretion, Congress made sentencing decisions subject to appellate review.

Despite these safeguards, the impression remains among judges that departures from guidelines are suspect and should be made only in extreme cases. The Sentencing Commission has contributed to this impression through language in the guidelines manual that is interpreted to discourage departures, and by repeatedly amending the guidelines to eliminate from future consideration those factors on which departures from guideline levels have been based. The Commission should encourage, not discourage, departures in appropriate cases in the interests of justice. More broadly, it should adopt guidelines that permit judges to take into account a greater number of offender characteristics and impose more alternatives to incarceration.

■ RECOMMENDATION 33: A well supported and managed system of highly competent probation and pretrial services officers should be maintained in the interest of public safety and as a necessary source of accurate, adequate information for judges who make sentencing and pretrial release decisions.

The current system of probation and pretrial services offices serves multiple purposes. Because sentencing requires both uniformity of practice and attention to individual circumstances, probation officers are called upon to provide the court with reliable information concerning the offender, the victim, and the offense committed, as well as an impartial application of the sentencing guidelines. Likewise, a pretrial services officer is a source of information upon which the court can base release and detention decisions while criminal cases are pending adjudication. Once these decisions are made, the courts further require the ability to enforce the conditions they impose as part of a criminal sentence or conditional release order. Probation and pretrial services officers must then protect the public through the critical task of supervising accused persons and offenders within the federal criminal justice system.

The Federal Courts Study Committee noted concerns over the difficult role probation

[6] *See* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992); Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

[7] *See* 18 U.S.C. § 3553 (1988).

officers were being asked to play between prosecutors and defense counsel at sentencing.[8] In light of the key importance of the probation system as a source of impartial information and assistance to the court, continued efforts should be made to ensure that probation officers play a neutral role in the sentencing process.

The Jury System

■ RECOMMENDATION 34: In the interests of promoting justice and fairness, all aspects of the administration and operation of the jury system—grand juries, criminal, petit, and civil—should continue to be studied and improved.

To ensure that the federal jury system remains vital well into the 21st century and beyond, courts and legislatures must be sensitive to the changing characteristics, needs, and expectations of the American people. Enshrined as a fundamental right under the United States Constitution, the jury trial is an essential element in the Anglo-American tradition of justice.

Juries have received much attention in recent years.[9] Even so, every aspect of the operation of civil and criminal juries will require continued close analysis and repeated monitoring to ensure that jury practice—the formation of jury wheels, selection of jury panels and individual juries, and the treatment and utilization of jurors during the period of their service, comport with the highest standards of fairness to the jurors and the parties who appear before them.

Much of the planning and administrative work that needs to be done will require close coordination of planners in the judiciary with experts in the fields of sociology, demography, and statistics. Special needs of jurors (*e.g.*, accommodation of hearing-impaired individuals) may need enhanced attention and respect. And all proposals for change must be thoroughly justified in terms of serving the needs of the public generally, so that there is neither the fact nor the appearance of responding to demands from special interests.

Improvements in administration and operation of the jury system should take into account four overlapping elements of the system and the environment in which it operates. First are the essential differences between criminal juries (grand and petit) and civil juries. The constitutional protections and functional roles of criminal and civil juries differ enough to warrant separate consideration in an assessment of the status and possible futures of lay fact-finding in federal litigation. Second, studies should review the major sub-systems of the jury system, including the mechanics of creating the master and qualified jury wheels,[10] summoning a jury panel for a case or a set of cases,[11] selecting the jury for a case,[12] and managing jury matters until the jury is discharged. Third, any innovations considered should comprehend that the role and significance of juries in federal court litigation in the future will change as the population of the nation becomes ever larger and more diverse while federal litigation becomes faster-paced and more complex. Finally, planning for changes in how and when juries are used must take into account the *appearance* of change as well as its substance, because the jury trial is a potent public symbol of the quality justice in America as well as a device for the disposition of court business.

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[8] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138-39 (1990).

[9] In addition to efforts at the federal level, there have been state courts projects aimed at improving jury administration and operation. See, *e.g.*, JURORS: THE POWER OF 12—REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES (Sept. 1994) (containing recommendations on improving public awareness, juror summoning, jury selection, jury trial procedures, jury deliberations, and other juror-related policies).

[10] See 28 U.S.C. §§ 1863-1866 (1988 & Supp. V 1993).

[11] See 28 U.S.C. §§ 1866-1867 (1988).

[12] See FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

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Pro Se Litigation

■ RECOMMENDATION 35: Steps must be taken to confront the growing demands pro se litigation places on the federal courts.

Access to a court to present claims has been held to be a fundamental right. When deprivation of constitutional rights is attributed to actions by government agents, access to the courts to redress these violations is even more important. Congress enacted 42 U.S.C. § 1983 and related civil rights statutes to allow affected plaintiffs to bring their causes of action in federal court when they were deprived of rights under the Constitution or laws of the United States and there was no adequate remedy at state law. A significant number of these plaintiffs proceed pro se.

Pro se litigation places great stress on the resources of the federal courts; a large proportion of recent caseload increases is due to pro se filings.[13] While these cases create some burdens at the appellate level, the district courts must face numerous practical difficulties in dealing with unrepresented litigants.

Most pro se cases are filed under 28 U.S.C. § 1915, which allows plaintiffs to avoid payment of filing fees and causes the court to direct service by the United States Marshals Service. The court must screen these cases to determine whether a plaintiff should be allowed to proceed "in forma pauperis" (IFP). Often, pro se IFP cases involve plaintiffs with claims of employment discrimination, denial of social security benefits, habeas corpus, or egregious conduct by governmental authorities other than prison officials. The great majority, however, are civil rights cases brought by prisoners alleging that conditions of their confinement constitute a deprivation of their civil rights.

Implementation Strategies:

35a A broad-based study, with participation from within and outside the courts, should be conducted to evaluate the impact of pro se litigation and recommend changes.

The courts, in conjunction with ongoing efforts by the Federal Judicial Center, should gather and study additional statistical data on pro se litigation to determine how much of the future caseload could be expected to result from pro se filings and to find better ways of addressing the disputes underlying these cases. Statutory changes may be necessary, and input from all those involved in the process should be sought. In Chapter 9, this plan proposes creation of a permanent National Commission on the Federal Courts to study and make recommendations on a variety of issues affecting the judicial system.[14] Such a commission, which might include judges (both federal and state), representatives of the other two branches of the federal government, members of the bar, and academic experts, would be an appropriate body to inquire into the growing problem of pro se litigation.

The importance of adjudicating meritorious cases suggests that significant jurisdictional changes and changes in case management techniques should be considered. A study of pro se litigation should also consider

[13] Statistics are limited with regard to pro se cases, although the Administrative Office continues to take steps to expand the range of data available. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 112 (1990) (recommending regular collection and reporting of pro se litigation data). In the district courts, prisoner petition filings increased in 66 of 94 districts between 1992 and 1993; approximately 53,500 prisoner petitions were filed in 1993, or 23% of all civil case filings.

In the courts of appeals approximately 17,700 pro se cases were filed in the year ended September 30, 1993, constituting over 35% of all filings in those courts. Prisoner petitions represented approximately 63% of these pro se filings. Although the Supreme Court does not separately track pro se or prisoner filings, 4,240 in forma pauperis (IFP) petitions were filed in 1992, accounting for 65% of all certiorari petitions.

[14] See Chapter 9, Implementation Strategy 99d *infra*.

the issue of adequate funding for staff attorneys and law clerks—on whom courts currently rely to determine, in the first instance, which cases are meritorious as opposed to frivolous. The study should also include consideration of ways to improve the courts' handling of pro se cases, to provide better information to pro se litigants, and the means to provide counsel to those who would otherwise proceed pro se.[15]

35b Alternative avenues for pro se prisoner litigation should be explored.

Most prisoner pro se cases are brought by state prisoners. Federal prisoners have an extensive administrative procedure that often results in their obtaining some relief.

There are several types of prisoner pro se plaintiffs. Many are illiterate, most are unschooled in the law, and some are in need of mental health counseling. Others have legitimate claims of assaults or medical needs that should be addressed immediately. Some are "frequent filers," having upwards of 20 cases in court at one time. Occasionally, some of these latter plaintiffs are very sophisticated and adept at pleading practices, forcing the court to continue cases even on claims without any basis in fact or law. Although the obvious purpose of some filings is to harass prison or court authorities, other cases are brought merely to enable a plaintiff to confer with another inmate, or to travel outside the prison for a court hearing.

Changes in state law or procedures may well exacerbate the litigation pressure. Many states are implementing procedures to lengthen the time spent in prison before an inmate is eligible for parole or to eliminate parole entirely for certain kinds of crimes or numbers of convictions. Increasingly violent prison populations in overcrowded conditions are likely to increase: (1) the number of inmate-on-inmate assaults and resulting claims of deliberate indifference by prison authorities; (2) actions by guards alleged to violate the cruel and unusual punishment clause; and (3) claims for deprivations of due process following prison misconduct incidents. Currently these disputes are all resolved by filing a case in a federal court.

Maintaining the federal courts as a forum of limited jurisdiction requires that changes be made in the manner in which prisoner pro se claims are handled. States should be encouraged (financially, if feasible) to provide a means of reviewing claims of abuse of due process, deliberate indifference to medical needs, or other conduct in violation of constitutional prohibitions. It is anticipated that fewer pro se filings will occur where such changes are effectuated.[16] Filing in forma pauperis petitions should be protected, but guarded from abuse. Consideration should also be given to furnishing legal services to aid in the screening and drafting of prisoners' complaints.

35c The courts should develop workable standards for addressing the substantive and procedural problems presented by pro se prisoner litigation.

Pro se claims are processed through the system in some manner. Many of these claims receive too much attention because staff attorneys, clerks, magistrate judges *and* district judges must review them, while others receive too little attention because sheer volume renders court personnel unable to afford them sufficient attention until significant time has passed

[15] See Recommendation 93 *infra*.

[16] Federal district courts are now authorized to stay proceedings in state prisoner cases brought under 42 U.S.C. § 1983 for up to 180 days to require exhaustion of prison administrative grievance procedures that the U.S. Attorney General certifies, and the district court determines, are in "substantial compliance" with certain minimum standards prescribed in the statute or "are otherwise fair and effective." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20416, 108 Stat. 1796, 1833-34 (amending section 1997e(a)(2)). This change was recommended by the Federal Courts Study Committee and the Judicial Conference, and it should promote earlier resolution of state prisoner claims. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 48 (1990); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 60 (Sept. 1990).

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(assuming that the claim is clearly drafted, which it often is not). Determining what claims are meritorious is too often a search for the proverbial needle in the haystack.

In the near term, the courts must continue to develop more effective and efficient case management systems for adjudicating pro se litigation. Creating a workable system involves several factors: the jurisprudential standards set by the court of appeals of the circuit for dismissal as frivolous under 28 U.S.C. § 1915(d), the number of prison inmates in the state or district court, whether the state has a death penalty, the statute of limitations for § 1983 claims (currently the state personal injury statute of limitations), whether the state has a statute which tolls any statute of limitations for a person who is incarcerated, and the jurisprudential standards applicable to frequent filers.

35d The district courts should make more effective use of pro se law clerks.

For those district courts that qualify by virtue of the number of pro se filings, the use of a pro se law clerk may be one answer to developing sufficient expertise within the court to screen and recognize claims that deserve further attention by the court. Several courts have been quite innovative in this area. The most effective use of pro se law clerks should be studied and information about their effective use should be distributed widely.

Costs of Litigation

■ RECOMMENDATION 36: The federal court system should continue to study possible shifting of attorneys' fees and other litigation costs in particular categories of cases.

In assessing how the federal courts may continue to provide access to all who seek justice, the judicial system will benefit from further consideration of the subject of attorneys' fees, the shifting of other costs of litigation, and the imposition of court costs. Whether fees should be shifted, or costs imposed, based on the outcome of a case, has been an intensely debated and controversial issue for many years. Appropriate data are needed to assess the potential impact of fee and cost shifting on users of the federal courts.[17] For example, while the plan rejects the "loser-pays" or "English" rule for shifting attorneys' fees for all federal claims, it believes that evaluation of fee shifting to deter frivolous or abusive litigation conduct should continue. Consideration should also be given to modifying current Federal Rule of Civil Procedure 68, which allows for cost shifting in connection with offers of judgment.

The Need for Case Management

The challenges of broadened jurisdiction, rising caseloads, increased access, and a rigid sentencing process have magnified federal court workload to such an extent that the system now operates under severe strain in many courts. While striving to manage the impact of major increases in the criminal docket, the courts still seek to accomplish fair and efficient outcomes in every civil action—a goal reinforced by the requirements of the Civil Justice Reform Act of 1990 (CJRA).[18]

Special attention to managing the process of litigation may once have been necessary only in certain specialized categories of cases, especially complex litigation and mass tort claims. Indeed, trial judge involvement in overseeing complex litigation is well accepted.[19]

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[17] A related issue of interest to the courts is *how* attorneys fees are paid. *See, e.g.*, Sarah Evans Barker, *How the shift from hourly rates will affect the justice system*, 77 JUDICATURE 201 (1994).

[18] 28 U.S.C. §§ 471-482 (Supp. V 1993).

[19] *See, e.g.*, AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND

The confluence of pressures on the federal judicial system, however, has made reliance on effective case management vital to the effective disposition of all types of cases at all levels in the system. The early involvement and active role of federal district judges "in the management of litigation" was credited by the Federal Courts Study Committee with explaining "the federal district courts' ability to keep abreast of their increased workload."[20] And the availability of magistrate judges to conduct pretrial and settlement proceedings, as well as trials, has made the magistrate judge system an indispensable tool to the modern district courts.

Although the central role of the federal district judge in effecting the appropriate pace of civil litigation has been clear to judges for many years,[21] case management has proven equally useful to appellate courts faced with increased case filings. Recommendations for dramatic structural change in the appellate courts have not been supported by objective data, but there clearly is a need to continue procedural experiments and innovations in the way the courts of appeals cope with their burgeoning caseloads, while maintaining the quality of justice.

Case Management in the Courts of Appeals

Unfortunately, the processes by which appeals are actually decided in each circuit are generally not well known, and they have not been sufficiently studied. In the text that follows, programs are discussed that would help address the current caseload and allow for the testing of procedural variations short of wholesale court restructuring. Ideally, all the techniques suggested would be selected by one or more circuits, so that the entire universe of possibilities could be canvassed.

■ RECOMMENDATION 37: The courts of appeals should exchange information on appellate case management.

Federal appellate courts have developed a variety of different case management systems.[22] It is important that the appellate courts take advantage of the varied experiences of other circuits by exchanging information about the operation and results of the use of particular case management techniques and systems.

This exchange might well be stimulated by more frequent intercircuit assignment, as now occurs frequently for senior judges. On a voluntary basis, it would also be beneficial for active appellate judges to observe first-hand how other courts handle their work.[23] The Administrative Office and the Federal Judicial Center should promote the growth of institutionalized means of enabling the appellate courts to make full use of this information.

■ RECOMMENDATION 38: The federal court system should collect and analyze information on various courts of appeals case management practices.

Providing access to meaningful review in the courts of appeals by a panel of three Article III judges does not imply that all cases

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ANALYSIS WITH REPORTER'S STUDY § 3.06, at 106-09 (1994); MANUAL FOR COMPLEX LITIGATION, THIRD §§ 20.1, 20.13 (Federal Judicial Center 1995).

[20] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 99 (1990). The FCSC predicted that "[g]reater use of active case management, and development—in cooperation with the bar—of local plans to control cost and delay in civil cases, will be necessary to keep courts abreast of rising workloads and secure 'the just, speedy, and inexpensive determination of every action' promised by Federal Rule of Civil Procedure 1." *Id.*

[21] *See* STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (Federal Judicial Center 1977).

[22] *See* ROBERT A. KATZMANN & MICHAEL TONRY, EDS., MANAGING APPEALS IN FEDERAL COURTS (Federal Judicial Center 1988).

[23] Consistent with a Federal Courts Study Committee recommendation, Congress amended 28 U.S.C. § 291(a) to authorize intercircuit assignments of court of appeals judges "in the public interest." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 104, 106 Stat. 4506, 4507. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 155 (1990).

merit the same procedures or level of judicial attention. To the contrary, many appeals can be handled effectively and fairly with a minimum of judicial attention.[24] Appeals that are exclusively fact-driven differ greatly from those that raise novel legal issues. Most appeals are disposed of without a decision on the merits[25] and many of those that require the attention of a three-judge panel do not require the full panoply of traditional appellate procedure such as oral argument and full briefing. Accordingly, evaluation of what appellate procedures are best suited to different types of cases or issues on appeal would be helpful in guiding efficient resource allocation.

Many streamlining efforts are underway today in the courts of appeals. New strategies are being explored for appeal diversion, appeal management, expanded use of non-judicial staff, restricted publication of opinions, and maintaining consistency of circuit law. Information about how the courts handle their workloads will be collected as part of an appellate case management study initiated by the Judicial Conference's Committee on Court Administration and Case Management. This is a worthwhile effort, since it is important that all appellate courts receive the benefit of the varied experiences of other circuits and exchange information about the operation and results of their use of particular case management techniques and systems.

■ RECOMMENDATION 39: The courts of appeals should adopt internal procedures and organizational structures to promote the effective delivery of high-quality appellate justice and to maintain the consistency of circuit law.

Implementation Strategies:

39a There should be further development of appellate adjudicative programs, such as the Civil Appeals Management Plan ("CAMP").

Experience has shown that some courts have been able to settle significant numbers of civil appeals through dispute resolution programs. Under such procedures as CAMP, attorneys in selected civil appeals are required to confer with a judge, a court staff attorney, or a volunteer private lawyer in an effort designed to dispose of appeals through settlement, improve the quality of briefs and arguments in those appeals that do not settle, resolve procedural problems that might arise, and conform to scheduling orders with deadlines.

39b Innovative management of appeals and screening for oral argument should continue and be expanded as needed.

Not all appeals require oral argument. Some may not require full briefing and may be evaluated on short briefs limited to fifteen pages, without extensive records.[26] Courts may also wish to experiment with adjunct judicial officers, such as appellate commissioners, to act as evaluators and managers of appeals. Some courts may find it useful to have appeals screened first by nonjudicial court staff. Others may find it preferable to have one judge or a panel of judges determine the process due before the case is scheduled for a particular track. Still others may opt for no screening at all.

[24] More than 50% of all filed appeals are currently disposed of by means other than a decision on the merits of the case. Some of these nonmerits terminations require judicial attention (*e.g.*, dismissals for want of jurisdiction), but many do not.

[25] *See* JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (Federal Judicial Center 1993).

[26] *See* Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning 8 (Feb. 16, 1993).

39c There should be increased use of nonjudicial staff and use of adjunct judicial officers to handle certain routine matters.

Courts differ greatly in how they use their central staff counsel, particularly with respect to the level of their involvement in the nonargument decision making process.[27] These differing practices can reflect strong differences of opinion among judges regarding the proper role of staff—differences that are heightened in the face of current proposals to expand the use of adjunct judicial officers to the appellate context. It is clearly not appropriate to delegate essential appellate decision making functions, such as affirming or reversing a district court judgment, to "appellate commissioners" in the courts of appeals. Those officials, however, might play a useful role in a variety of properly delegable functions, such as conducting settlement programs and making findings and recommendations to the court on matters (*e.g.*, counsel fee petitions and contempt petitions) that require fact finding by the appellate court.

39d Opinions should be restricted to appellate decisions of precedential import. A uniform set of procedures and mechanisms for access to circuit court opinions, guidelines for publication or distribution, and clear standards for citation should be developed.

Not all appellate decisions warrant publication and citation for precedential purposes. Uncomplicated applications of clear precedent, for example, do not add to the law of the circuit and need not be published. Opinions published for precedent by the appellate court tend to require more judicial time and resources than opinions restricted and distributed primarily for the benefit of the parties directly involved in a dispute. Historically, these opinions had not been published in the official reporters and were sent only to the parties, although they were part of the public file and available for public inspection.

Widespread electronic distribution of appellate decisions has changed the traditional relationship between publication and citation. In the past, widespread distribution of decisions was accomplished only through their publication in the official reporters; this is no longer true. The courts cannot very well control the eventual availability of their written decisions in electronic databases and bulletin boards. As the Federal Courts Study Committee noted in 1990, efforts by courts to restrict distribution could lead to those having better access to the court's original written decision having unfair advantage. On the other hand, courts must be able to establish which of their decisions were intended to further the law on the points of the case. What is to be cited is becoming only a portion of what has been widely distributed.

The Federal Courts Study Committee recommended the creation of an ad hoc committee, under the auspices of the Judicial Conference, to review the policy on unpublished opinions.[28] In the interim, non-publication and citation rules have been in the process of evolving. Some circuits have enforced strict non-citation rules for unpublished opinions, others have invited bar associations to monitor and ensure that opinions with precedential value are published, while a few are experimenting with suspension of the non-citation rule.

Clearly this is an area in flux that requires study and assessment. In light of these developments, the relevant committees of the Judicial Conference should work together to develop a uniform set of procedures and mechanisms for access to circuit court opinions, guidelines for publication or distribution, and clear standards for citation.

[27] *See* JOE S. CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (Federal Judicial Center 1985).

[28] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130-31 (1990).

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39e Internal efforts to maintain the consistency of circuit law should be continued and enhanced.

Courts should consider whether they might maintain the consistency and coherence of circuit law by methods short of gathering the full court for an en banc proceeding. These might include: (1) circulating a concise list each week of the significant issues in cases heard or submitted that week on which opinions will be written; and (2) monitoring by staff attorneys to ensure strict adherence to the policy that no panel may overrule or disregard the decision of a prior panel unless the court as a whole so agrees either informally (by prior circulation of the proposed opinion) or formally (by in banc rehearing).

Case Management in the District Courts

■ RECOMMENDATION 40: The district courts should enhance efforts to manage cases effectively.

This plan acknowledges the need for broader, more effective use of case management to meet increasing caseload burdens at the trial level. Because it is anticipated that there will be continuing growth at the trial level due to expanding civil and criminal federal jurisdiction, continued experimentation in the district courts with innovative case management techniques should be encouraged.

■ RECOMMENDATION 41: District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation.

Bench and jury trials resolve only a very small proportion of the district court's civil docket. More than ninety percent of cases are resolved without trial by such means as summary judgment, default, voluntary or involuntary dismissal, and settlement. Most litigants' experience, therefore, is based upon a resolution in federal court without a trial. Judicial case management efforts would benefit from increased focus on this large proportion of the civil caseload that does not reach trial, taking into account the simplicity or complexity of various categories of civil cases, the costs of litigation, and the need to achieve timely and just dispositions for the litigants.

A conventional bench or jury trial is very expensive and not the best resolution for every dispute initiated in the district courts. Often, a fair settlement by the parties, with or without court involvement, is the preferable resolution for particular litigation. To this end, the federal trial courts should be encouraged to offer a wide array of means and methods for resolving civil disputes—while preserving the traditional trial process—through settlement efforts by district judges and magistrate judges, by the effective use of supporting court personnel, and by a variety of alternative dispute resolution techniques that involve members of the bar and other court adjuncts.

Primary emphasis should be placed on fairness and justice. Simplicity, cost and timeliness must also be considered and obviously contribute to the perception of fairness and justice on the part of the litigants and the public. Even conventional jury and bench trials should continue to be evaluated against these benchmarks, and steps should be taken to enhance their performance on these standards as well.

A goal of our judicial system must be to resolve disputes expeditiously and inexpen-

sively—with resolutions that are, and are perceived by litigants, attorneys, and other members of the public to be, both procedurally fair and substantively just. The effective operation of the federal civil justice system depends on average citizens being confident that there exists a public forum in which they can secure a fair and just resolution of their disputes without risking personal or professional bankruptcy.

Using time-honored procedures for case management, federal judges resolve approximately ninety-four percent of all civil cases without trial. These procedures include early control of discovery, prompt ruling on motions, and ample notice of firm dates for pre-trial conference and trial. Lawyers, confronted with the certainty of firm pre-trial and trial dates, settle those cases that can be settled. Those cases that should be resolved by summary judgment are resolved by timely consideration of motions. The five-to-six percent of those cases not resolved proceed to trial expeditiously before a judge who has controlled discovery and ruled on all pending motions.

Over the past decade the increasing civil caseload, the continuing federalization of crime, the implementation of the Sentencing Guidelines, and the Civil Justice Reform Act of 1990 have caused the judiciary to examine case management carefully with a view towards resolving civil disputes with methods other than the traditional trial process. Federal courts have experimented with broader use of magistrate judges and supporting court personnel, and have developed a variety of alternative dispute resolution techniques that involve members of the bar and other court adjuncts.

Private forums should be encouraged, but the federal courts must not shed their obligation to provide public forums for disputes that need qualities that federal courts have traditionally provided, including at a minimum a neutral and competent decision-maker and the protection of weaker parties' access to information and power to negotiate a dispute. Court supervision of ADR programs may be the only means of ensuring satisfaction of those conditions in some cases, although referral to private dispute resolvers may well serve as part of a court-supervised program.

This proposal will have a budgetary impact in that additional funds may be necessary to compensate neutrals who participate in ADR programs, and additional staff may be needed in some courts to administer the programs. The Federal Judicial Center should continue to sponsor the requisite training and education for judges and assist the courts in developing programs for arbitrators, mediators and other ADR neutrals to implement this recommendation.

Accordingly, this plan proposes that courts wishing to experiment with ADR programs be encouraged to do so.

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Chapter 7
Governance: Management and Accountability

JUDICIAL governance involves the development and implementation of administrative policies that support the federal courts' adjudicatory activities. Although deciding cases is the independent act of one or more judges in a particular court, the management of judicial resources and formulation of administrative policy is essentially a cooperative process. Through that process the third branch preserves its own necessary autonomy, while at the same time reaffirming its fiscal and administrative accountability to Congress and the taxpayers.

The nature and mission of the federal courts require an approach to internal governance rather different than that of executive branch agencies and other more hierarchical institutions. Unlike other forms, *judicial* governance is derived from, and must adhere to, the following principles:

Separation of powers. Under Articles I and III of the Constitution, Congress is authorized to structure the federal courts, define their jurisdiction, and determine what resources will be allocated for their use. Although those prerogatives necessarily require some congressional policy making and oversight in judicial administration, the courts are a co-equal branch of government. It is essential that Congress consult with the courts in the exercise of its constitutional responsibilities vis-a-vis the third branch. And, to the extent practicable, Congress should allow those in whom the Constitution vests judicial power to govern the courts autonomously.

Key functions of judicial branch governance include:

- *budget formulation and execution*
- *assignment of caseloads*
- *resource allocation and administration*
- *personnel management*
- *procedural rulemaking*
- *financial and property controls*
- *enforcement of ethical and legal standards*
- *program management*
- *data collection and dissemination*
- *interbranch, intergovernmental and public relations*
- *strategic planning*
- *research and education*

Judicial independence and accountability. The federal courts are charged with the administration of justice under law. To do so

effectively, they must be free from political pressure by other governmental entities, and from the heated public and political sentiments of the day. This adjudicatory independence requires a substantial degree of administrative independence. At the same time, the courts are accountable to the public for the efficient administration of justice. Through internal coordination and review, the organs of judicial governance promote the responsible use of tax dollars and equitable, appropriate treatment of litigants, witnesses, jurors, and the public. Although tension may exist between the twin goals of judicial independence and efficient management, the latter, if pursued with careful deference to constitutional principles, can also enhance the courts' effectiveness as an independent branch within the federal government.

Decentralized authority. Under Article III of the Constitution, judicial power is vested directly in the respective courts of appeals, district courts, and other courts whose judges serve during good behavior with undiminished compensation. Because governance is ancillary to the adjudicative function, primary responsibility for establishing and executing administrative policy naturally resides with each court.

Broad participation. The governance process of the federal courts is broadly participatory because autonomous judges are the ultimate source of judicial branch authority. In such an environment, informed policy making requires full consideration of a wide range of opinions and options. Accordingly, the courts rely for national policy making on the 27-member Judicial Conference, which is in turn advised by 25 committees with a rotating membership of nearly 300. More than one federal judge in six plays a role in national judicial governance through membership on: the Judicial Conference or one of its committees; the Board or an advisory committee of the Federal Judicial Center; or an ad hoc advisory group for the Administrative Office of the United States Courts. Participation is also high at the regional and local levels through membership on circuit councils and conferences, committees attached to both, and governance mechanisms in the circuit, district, and bankruptcy courts. With substantial numbers of judges involved in this process there are opportunities, perhaps otherwise unavailable, for exchanging ideas and perspectives, on legal as well as administrative issues, from different parts of the country.

Functional, not proportional representation. Judicial governance bodies represent the interests of all judges. Membership in those bodies is based on the need to bring together institutional experience and opinion found at all levels of the judiciary. While individual members inevitably bring their own perspectives (as a trial judge, appellate judge, etc.) to the task, they are not intended to serve as agents of specific courts, circuits, or categories of judges. For that reason, judges from a smaller circuit have the same number of votes in the Judicial Conference as judges from a large circuit, and circuit judges serve on the Conference and councils without regard to their proportionate numbers in the larger judicial population.

Evolutionary development. Over time, the federal courts' governance institutions have developed sufficient administrative authority to meet effectively the evolving administrative needs of the courts in a rapidly changing society.[1] Although governance authority has tended to be concentrated in fewer hands over time, the degree of consolidation has, appropriately, been modest. It has been directed largely at rationalizing administration in an expanding judiciary, and at providing effective oversight against abuse and inefficiency. The concept of strong, centralized authority and autocratic leadership is foreign to the courts, inconsistent with the deliberative, consensus-oriented decision making appropriate to a judicial

[1] The Judicial Conference, which began as a purely advisory body in 1922, acquired administrative authority in 1939 when the Administrative Office was created to act under its supervision. It has more recently delegated to its Executive Committee the authority to act for, and steer, the Conference on a day to day basis. Likewise, the circuit judicial councils, created in 1939 solely to supervise district docket management, have acquired greater responsibility to oversee judicial administration at the regional level.

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institution, and contrary to current management trends generally.

The following recommendations are intended to provide the federal courts with the means to retain their unique character and perform their constitutional mission, while at the same time meeting their legal, ethical, and societal responsibilities.

Distribution of Authority

■ RECOMMENDATION 42: In the interests of administrative efficiency, accountable resource utilization, and effective external relations, the present distribution of governance authority among the national, regional (circuit), and individual court levels should be preserved. Governance structures and mechanisms should continue to strike a careful balance among individual judge autonomy, local court initiative and control, and coordination of effort.

Implementation Strategies:

42a The judicial branch should obtain funding for the operation of the courts solely through direct appropriations to the Administrative Office of the United States Courts, for expenditure under the direction and supervision of the Judicial Conference of the United States. Appropriated funds should not be obtained directly by a circuit council or any other regional or local body.

42b The agencies of judicial administration at the national level should continue to decentralize administrative responsibility wherever appropriate, while maintaining sufficient oversight to ensure that courts are accountable for the proper use of the authority vested in them.

For most of their history, the federal courts have been administratively autonomous—both individually and collectively—subject only to the common administrative support provided, in turn, by the Treasury, Interior, and Justice Departments, and occasional management oversight by the Supreme Court justices assigned to the respective circuits. In 1922, however, Congress established the Conference of Senior Circuit Judges (the forerunner of the present Judicial Conference of the United States), primarily as an advisory and coordinating body. In 1939, Congress transferred national administrative responsibility for the courts from the executive branch to a newly created Administrative Office of the United States Courts, which functions under the Conference's supervision. At the same time, Congress created a Judicial Council in each circuit, initially to monitor the district courts' dockets.

These national and regional bodies (and others added since) have evolved and grown to meet changing needs. The circuit judicial councils—through their statutory power to oversee regional judicial administration—and the Judicial Conference—through its control of the judicial budget and supervision of the Administrative Office—exercise significant authority to formulate and execute policies for the entire judicial branch. The individual courts, however, remain autonomous in important ways and continue to have primary responsibility for their own administration.[2]

[2] Indeed, even though circuit councils may issue "necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit," 28 U.S.C. § 332(d)(1) (1988), that power is used only

This allocation of authority has served the federal courts well and should be retained. Broad participation and consensus at each level, as well as deference by national and regional policy makers to localized initiative and control, are essential in a judicial system that constitutionally must honor the independence of individual jurists.

By the same token, national or regional coordination or direction is necessary to ensure efficiency and economies of scale, accountability in the discharge of the public trust, and effective relations with the other branches of government, the bar, and the general public. Budgetary policy is a key area in which national coordination is necessary to ensure that resources are adequately obtained and properly allocated: appropriations should not be obtained directly from Congress by a circuit council or any other regional or local judicial authority.

As a general rule, authority to make policy and spending choices should reside with those whose interests are most directly affected. This is consistent with the current management theory—articulated in the 1993 report of the National Performance Review—that "empowerment" of front-line managers and employees results in more efficient, less costly operations.[3] Put differently, decentralization provides the tools needed for appellate, district, and bankruptcy courts to administer themselves.

With increased authority, however, should come increased accountability. Through their respective functions and activities, the Judicial Conference and the national judicial support agencies should encourage court personnel to manage decentralized resources wisely, always with the aim of better serving the public.

The Administrative Office should continue to delegate to individual courts appropriate programmatic responsibility in the areas of budget execution and personnel classification and management, consistent with the broader interests of the judicial branch and the responsibilities that Congress imposes on the Administrative Office by statute or through the appropriations process. Likewise, the Federal Judicial Center should continue to encourage and, through technical and financial support, assist individual courts in making local education programs a key element of personnel management and organizational development.

Effective Organization and Operation

The success of the existing governance institutions is attributable in significant part to Congress's appropriate willingness to entrust to the courts responsibility for most operational details. This has allowed the organization and methods of judicial administration to evolve and adapt to meet the changing needs of the federal courts. For that reason, the governance system should maintain its current flexible distribution of authority and responsibility, making only slight adjustments in the role and organization of various institutions to ensure adequate capacity for well-informed, coordinated, and timely action.

■ RECOMMENDATION 43: The Chief Justice of the United States should remain the head of the federal judicial system, retaining the traditional authority and responsibility of that office in matters of judicial administration.

By statute and custom, the Chief Justice, in consultation with the Judicial Conference and others, structures federal judicial administration at the national level according to his or her management preferences. To create effective administrative and working relationships, the Chief Justice can allocate responsibility (other than statutorily prescribed

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sparingly to remedy exceptional problems arising at the district court level.

[3] *See* CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS—REPORT OF THE NATIONAL PERFORMANCE REVIEW 69-72 (1993).

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functions) among the Director of the Administrative Office, the Director of the Federal Judicial Center, the Administrative Assistant to the Chief Justice, and the chair of the Judicial Conference Executive Committee.[4] This approach assures needed flexibility in judicial governance arrangements while preserving the Chief Justice's permanent role as head of the judicial branch.

The current system is adaptable, and it works well. It is unnecessary to establish an additional high-level management position—such as a "chancellor," "associate justice for administration" or "executive judge"—to oversee judicial administration. Existing institutions can be structured, as needed, to ensure prompt, effective decision making. Creation of a permanent statutory office with a new and fixed mandate would only reduce the system's flexibility and undermine regional and local administrative autonomy.

■ RECOMMENDATION 44: The Judicial Conference of the United States should continue to set broad-scale policies and make critical decisions.

Implementation Strategy:

44a The Conference should continue to evaluate its procedures periodically to ensure that its members have adequate time and information for decision making.

The Judicial Conference of the United States consists of the Chief Justice, the chief judge of each circuit, a district judge representative from each circuit, and the chief judge of the Court of International Trade. Its structure and function complement the unique nature of the judicial branch. The primary role of judicial governance is to ensure that judges receive the support they need to perform their constitutional duties. A large, broadly representative Conference, supported by an effective committee structure and administrative staff, is the best suited to preserving broad-based judicial control and involvement in carrying out that role.

This does not mean that Conference procedures and internal organization should remain static. In 1986-87, the Chief Justice commissioned a Committee to Study the Judicial Conference that reviewed the decision making process and committee organization and recommended a series of significant modifications in how the Conference transacts its business. Among the recommendations adopted by the Conference was a policy requiring internal review of the Conference committee structure every five years.

It is important that these periodic studies continue, and that they focus not only on committee operations but also on the manner in which the Conference itself makes decisions. In an age of increasingly complex and technical problems, it is essential that Conference members have sufficient, accurate information—from committee reports and other sources—to evaluate policy alternatives and make well-informed decisions. Also, with increasing judicial participation in Conference activity,[5] the effectiveness of the Conference as a deliberative body will be tested. Use of executive sessions and greater limitations on staff participation should be studied as possible means of preserving the Conference members' ability to debate issues in a relatively small, collegial forum.

■ RECOMMENDATION 45: The leadership role of the Judicial Conference's Executive Committee should be enhanced.

[4] *See* RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE 49 (Federal Judicial Center 1994).

[5] See Implementation Strategy 46b and Recommendations 47 and 52 *infra*.

Implementation Strategies:

45a The Executive Committee should be allowed a more active role in steering the Conference and acting on its behalf.

The Judicial Conference meets only twice a year. No body with that kind of schedule can or should be expected to provide day-to-day administrative oversight and control of a complex organization. In recent years, the Executive Committee of the Conference has developed as the arm of the Conference primarily responsible for making timely decisions and managing relations with the Congress and the executive branch in rapidly changing areas of policy development.

Given the increasing number and range of administrative issues confronting the federal courts, it is appropriate that the Judicial Conference focus on fundamental or long-term policies and matters on which a full airing of views is needed, leaving more routine matters to the Executive Committee. Indeed, this reallocation of responsibility should be expanded so that the Conference can utilize its limited meeting time more effectively. For example, the Executive Committee could assume a more pro-active role in determining both the content of the Conference agenda and the manner and order in which it is considered. In addition, many of the ministerial and routine matters now placed on the "consent" calendar at Conference sessions could be formally delegated to the Executive Committee.

More broadly, the Conference might wish to consider greater system-wide leadership for this body. For example, Executive Committee members could serve as policy advocates and emissaries who encourage courts to exercise decentralized budget and personnel management authority to improve and enhance services to court users and other aspects of judicial administration.

45b Consideration should be given to at least partial reduction in the chair's judicial workload, so as to offset the time required for performance of administrative duties.

An expansion of Executive Committee responsibility would naturally impose greater time demands on its members, especially the chair. It is not clear, at present, whether the judge chairing the Executive Committee in fact needs a special measure of docket relief. In time, however, the administrative duties of that position may grow to the point where at least some relief from judicial duties will be needed.[6]

45c While maintaining its modest size, the Executive Committee should include, ex officio, the chair or chairs of those Conference committees with major resource allocation or policy making responsibilities, even if they are not Conference members.

With expanded authority, the Executive Committee's ability to make prompt and sound decisions will become even more essential. That ability will depend in large part on the expertise of its members. Although the full Judicial Conference—from which the Executive Committee ordinarily is drawn—typically includes judges with wide ranging experience and expertise, there are some policy areas in which special knowledge of current issues and problems may be critical. Accordingly, it would be helpful to include regularly in Executive Committee deliberations the chairs of Confer-

[6] Docket relief can be provided in more than one way. For example, inter- and intra-circuit assignments could be used to bring visiting judges to the chair's home court so that the chair could devote a greater amount of time to Executive Committee work. Alternatively, Congress could authorize a temporary judgeship for the chair's home court, either in all cases or whenever the Chief Justice certifies the need to relieve the chair of some or all judicial duties. A similar approach is already taken whenever a full-time judge assumes an "office of federal judicial administration"—presently defined as the Director of the Administrative Office, the Director of the Federal Judicial Center, or the Administrative Assistant to the Chief Justice. *See* 28 U.S.C. § 133(b) (Supp. V 1993).

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ence committees with responsibility for particularly important programs or activities. As but one example, on budgetary and fiscal issues it is presently appropriate—and, indeed, is the practice at this time—to include the chair of the Conference's Budget Committee in the Executive Committee.

■ RECOMMENDATION 46: The Judicial Conference should continue to rely on a broad committee structure for policy development. It should strengthen the committees' ability to provide sound advice and needed information.

Implementation Strategies:

46a Membership in Conference committees should continue to rotate periodically, to provide new and diverse perspectives while at the same time preserving the insight, experience, and legislative contacts that come with long-term committee service.

In setting policies on the tenure and composition of committee membership, the Conference should balance the need for fresh perspectives against the value of continuity and experience. Before 1987, committee members served indefinite terms, severely reducing the number of judges who could become involved in national judicial administration. A key element of the reforms adopted that year was establishment of a fixed three-year term for committee appointments and an overall six-year limit on service by an individual judge on any committee. Although exceptions to the limits have been made on rare occasions, these norms have been credited with the much broader degree of judge participation in Conference work in recent years.

The difficulty with any rule of this kind is that it deprives the organization of valuable service and expertise at the same time that it provides a needed infusion of new and different ideas. Whether a particular limit on committee service is the appropriate one depends, in large part, on the context. If the work of a particular committee exposes a member to a substantial "learning curve" or involves lengthy projects (the federal rules process is a good example but by no means the only one), the appropriate balance between continuity and renewal may be found in longer terms for its members or chairs, or in the occasional waiver of the overall committee service limit.

46b The Conference should afford the committee chairs a meaningful role in relevant Conference debates and an opportunity to meet together at least once a year.

Because of the familiarity and expertise they acquire with their committees' subject areas, Conference committee chairs are a valuable resource that should be utilized more effectively. Although the chair of a committee whose report is on the Conference discussion agenda typically is invited to make an oral presentation at the Conference session, there are other situations (*e.g.*, not involving a proposal of that specific committee) when it would be helpful for Conference members to hear the views of a committee chair on an issue generally within his or her committee's area of concern.

It is not uncommon for issues to arise that cut across the jurisdictions of more than one Conference committee. Proposals to authorize electronic or facsimile filing of court documents—which fall within the respective bailiwicks of the committees responsible for court administration, rules of practice and procedure, and automation—are only a recent example. Staff-level coordination can help considerably in avoiding duplication of effort or misunderstanding among the committees. But regular meetings of the committee chairs also would be useful to promote information sharing

on common issues and an awareness of matters under consideration elsewhere. These gatherings should not, of course, become a policy-making forum in lieu of the Conference or any particular committee.

■ RECOMMENDATION 47: The number of judges participating in the Judicial Conference and its committees should not increase in proportion to growth in the judiciary overall.

At present, 17 to 18 percent of all life-tenured and fixed-term judges serve on the Judicial Conference and its committees. To maintain a decentralized, consensus-oriented process for administrative decision making, the judicial branch should preserve and, indeed, expand on this wide degree of participation in governance structures.[7] However, if the Article III judiciary were to increase in size to 2,700 judges but keep its current proportion of judges holding governance appointments, the size of the Conference organization would increase from approximately 300 to around 475 judges. Although a governance process with that number of participants might still be manageable, at some point the problems of coordination and effective discussion will outweigh the benefits of large-scale participation.

■ RECOMMENDATION 48: The Administrative Office of the United States Courts and the Federal Judicial Center should retain their separate institutional status and respective missions.

The functions of the Administrative Office and the Federal Judicial Center are sufficiently distinct to merit the retention of two separate organizations. Although these agencies must work cooperatively and in a coordinated fashion, maintaining distinct but mutually supportive agencies for administration and policy support and education and research, respectively, will be important in years to come. When shortages occur in funding and other resources, it will be necessary to ensure that research and education are not sacrificed for the sake of day-to-day operational needs.

As a practical matter, the judicial system benefits from having two distinct sources of advice on major policy matters. With their different perspectives, the Administrative Office and the Federal Judicial Center can individually supply information and analysis that provide judicial policy makers and administrators with a complete understanding of the issues presented.

■ RECOMMENDATION 49: The basic organization and authority of governance institutions at the regional and individual court levels should be retained.

Implementation Strategies:

49a Circuit judicial councils should continue to provide administrative coordination and oversight to all courts within the respective regional circuits.

The judicial circuits are an essential component in the machinery of federal judicial administration. As the courts face a future of increasingly scarce resources, it will become more, not less, important to have a regional mechanism—the circuit judicial council—in which collective needs and interests of all courts (appellate and trial, large and small, urban and rural, overworked and underworked) can be weighed before resources are allocated. Although proposals have been made to sever this administrative connection between the courts of appeals and district courts,[8] circuit judge participation in regional administration affords

[7] See Recommendation 52 *infra*.

[8] See, *e.g.*, Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning (Feb. 1993 & Jan. 1994).

the decision-making process a broad perspective, detachment, and credibility that are very useful in confronting difficult issues. Despite the need to increase district judge participation in this area,[9] it would not be desirable to eliminate the important role of circuit judges in judicial council business.

49b The chief judges of the courts of appeals and district courts should continue to be selected on the basis of seniority subject to statutory limitations on age and tenure.

Currently, chief circuit and district judges rise to those positions based on seniority in their courts, subject to statutory age and length of service limitations. The value of this system lies in the certainty it provides, and in ensuring equal opportunity and avoiding the divisiveness of an electoral process. Although there is a widely held view among judges that administrative ability should be a criterion for service as chief judge, there is also widespread hostility toward any system of chief judge selection that departs from the seniority model. Given that the current system has generally worked well, this plan does not propose an alternative selection method. The better approach is to concentrate on training and technical assistance to chief judges so that they can effectively discharge their increasingly complex administrative responsibilities.

■ RECOMMENDATION 50: To assist the governance process and enforce its decisions, the judicial branch should continue to develop and enhance the capabilities of court administrators and managers.

The need for staff support of court operations has expanded to an even greater degree than additional judge power requirements: judges now constitute less than 9 percent—as compared with nearly 25 percent in 1970—of the total judicial branch workforce, Accordingly, the key to successful administration of the federal courts lies more than ever in strong, effective court managers (circuit executives, clerks of court, etc.) and in adequate funding for administrative as well as adjudicative functions. As discussed in greater detail in Chapter 8,[10] an expanded, concerted effort by the federal courts to recruit, train, and retain the services of highly qualified, competent administrators will enhance the judges' ability to perform their constitutional functions. It will also foster the efficient, responsible use of judicial branch resources required in an era of tight budgets and close public scrutiny.

■ RECOMMENDATION 51: All judicial governance institutions should continue to develop and integrate long-range planning capabilities into their policy making processes.

In its 1990 report, the Federal Courts Study Committee recommended that the Judicial Conference and the circuit judicial councils undertake or enhance their respective capacities for long-range—as opposed to short-term or operational—planning. In addition to this national plan, successful planning efforts are continuing by Judicial Conference committees and have taken root at the circuit and district court levels. The judicial branch is well served by continuing national planning efforts in, among other areas, the automation, judicial security, and space and facilities programs. The long range planning process in the Ninth Circuit Court of Appeals is a landmark effort that has begun implementation. Successful planning efforts have occurred, with training and technical assistance from the Administrative Office[11]

[9] See Implementation Strategy 52a(3) *infra.*

[10] See Recommendations 82 and 85 *infra.*

[11] In support of the Long Range Planning Committee's charge to promote and encourage planning within the judicial branch, the Administrative Office of the United States Courts has published a *Judicial Branch Planning*

and the Federal Judicial Center, in several individual courts and judicial branch programs. As described more fully in Chapter 11, a continuing planning process is essential—not only to establish formal goals or objectives, but also to ensure well-informed, coherent day-to-day decision making. Planning should continue and be expanded at all levels as an integral part of the governance process.

Participation

Judicial governance should represent all judges. It is essential that the different perspectives and experiences of trial and appellate judges, and of life-tenured and fixed-term judges, be reflected in the decision making process. Over the years, the membership of federal court governance bodies has become steadily broader and more inclusive. Nevertheless, there is room for improvement.

■ RECOMMENDATION 52: There should be broad, meaningful participation of judges in governance activities at all levels.

Implementation Strategies:

52a District judges should be afforded the opportunity to participate effectively in national and regional governance. To that end—

(1) only district judges should participate in selecting district judge representatives to the Judicial Conference;

(2) district judge members of the Judicial Conference should be afforded a term of service comparable to the average tenure of chief circuit judges (i.e., five years); and

(3) each circuit judicial council should have an equal number of district judge and circuit judge members, including the chief circuit judge.

District judges have participated in the Judicial Conference since 1957, and in circuit judicial councils since 1980. However, the rules governing their membership in these bodies continue to place them at a disadvantage vis-a-vis circuit judges. For example, circuit judges participate in selecting district judge representatives to the Judicial Conference even though the chief circuit judge is automatically seated on the Conference.

Another inequality between district and circuit judges can be found in the tenure of Conference members. While district judge members have a statutory term of three years, the circuit judges are represented on the Conference by their chief judges who may serve for up to seven years. Many district judges with experience in national leadership believe that the three-year terms disadvantage district judge members. Because in fact most chief circuit judges serve between four and five years, a five-year term for district judge members of the Conference is appropriate, notwithstanding the fact that extending the term will reduce the number of district judges who can serve on the Conference over time. A longer term would make the district judge member a more effective participant in the decision making process—thus better reflecting the district judge perspective and improving the overall quality of Conference deliberations.

Despite the fact that the work of circuit judicial councils, as a practical matter, is focused primarily on trial-level administration, circuit judges continue to represent a majority on those bodies. In 1990, Congress amended the council statute to include "an equal number of circuit judges and district judges of the

Guide and a *Planning Handbook for Federal Courts* that have been used by local planning committees.

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circuit," but allowed the chief circuit judge to remain as presiding officer.[12] Circuit judges should continue to participate equally with district judges in council business, but the chief circuit judge should be included *among* the "equal" number of circuit judge members on the council.[13] This is consistent with the above-mentioned principle of sound management—that those closest to problems should have the authority and responsibility for developing solutions.

52b Senior judges should be afforded a greater opportunity to participate in governance. To that end—

(1) senior judges should be expressly authorized to serve on the Judicial Conference;

(2) senior judges should be authorized to serve on the Board of the Federal Judicial Center;

(3) senior judges should be authorized to serve on circuit judicial councils; and

(4) individual courts should take appropriate steps to include senior judges in local governance mechanisms.

As discussed further in Chapter 8,[14] senior circuit and district judges provide an invaluable resource to the federal courts. They should be treated with the respect and consideration befitting their experience and dedication to the law and public service. Although they serve on Judicial Conference committees and, occasionally, on local court committees, both statute and prevailing practice often exclude senior judges from governance activity.[15] This not only deprives senior judges of a voice in making policies that apply to them, it also deprives the governance process of views acquired through years of judicial service. To rectify this problem, both law and practice should be amended to guarantee senior judges who remain substantially active a role in national and regional governance.[16]

Unlike most governance mechanisms discussed in this plan, many important mechanisms in individual courts (*e.g.*, boards and committees) are not founded by statute or national rule, and thus are not amenable to national prescription. Nevertheless, each court is encouraged to establish goals for broader senior judge participation that parallel those suggested here for national and regional bodies.

52c Non-Article III judges should be afforded the opportunity for meaningful participation in governance. Specifically—

(1) the Judicial Conference should include one bankruptcy judge and one magistrate judge designated by the Chief

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[12] *See* Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 323, 104 Stat. 5104, 5120 (codified at 28 U.S.C. § 332(a)(1) (Supp. V 1993)).

[13] This plan does not suggest any change in the role of the chief circuit judge as presiding officer of the judicial council.

[14] See Recommendations 61, 65, and 66 *infra*.

[15] Thus, the legislation excluding all but "circuit and district judges in regular active service" from membership on circuit judicial councils, 28 U.S.C. § 332(a)(3) (Supp. V 1993), and requiring active status for circuit and district judge members of the Federal Judicial Center's Board, 28 U.S.C. § 621(a)(2) (1988), should be amended to make senior judges eligible to serve as circuit or district judge members of those bodies. Similarly, the statute that governs representation in the Judicial Conference, 28 U.S.C. § 331 (1988), should be amended to clarify that senior district judges certified under 28 U.S.C. § 371(f) (see note 16 *infra*) may serve as district judge members of the Conference. (While senior judges are not expressly excluded from Conference membership, the statutory language is open to differing interpretations.)

[16] Those senior judges who continue to carry 25 percent of an active judge's workload, and are accordingly certified to receive salary increases payable to judges in regular active service (28 U.S.C. § 371(b)(1), (f) (Supp. V 1993)), should be considered substantially active.

Justice, each of whom serves for a term equal to that specified for district judge members and possesses the right to vote on all matters before the Conference except judicial discipline of Article III judges;

(2) the Board of the Federal Judicial Center should include a magistrate judge as well as a bankruptcy judge;

(3) every circuit judicial council should include one bankruptcy judge and one magistrate judge, to be selected in the manner determined by the respective council, and each should have the right to vote on all matters before the council except judicial discipline of Article III judges and the designation or certification of senior judges for workload assignment or salary purposes;

(4) judges of the territorial district courts should be eligible to participate in the selection of, and to serve as, district judge members of the Judicial Conference and the respective circuit judicial councils; and

(5) individual district courts should take appropriate steps to include bankruptcy judges and magistrate judges in their local governance mechanisms.

Although governance of the judicial branch is principally the responsibility of judges who enjoy life tenure and undiminished compensation under Article III of the Constitution, there is an appropriate role in the governance process for fixed-term judges who serve as adjuncts to Article III courts or otherwise exercise the jurisdiction of an Article III court.[17] Bankruptcy judges, magistrate judges, and judges of the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands should have an opportunity to be represented directly in the Judicial Conference, the Board of the Federal Judicial Center,[18] and circuit judicial councils. They perform many similar duties to the Article III judges and have differing, yet relevant perspectives that will inform and enrich the decision-making process.

[17] The United States Court of Federal Claims presents a more difficult issue. Unlike bankruptcy judges and magistrate judges, the fixed-term judges of that court serve on a tribunal established under Article I, not Article III, of the Constitution. 28 U.S.C. § 171(a) (1988 & Supp. V 1993). Although the Court of Federal Claims is lodged within the judicial branch for administrative purposes, *see id.* §§ 176, 178, 460, 604, 610, that arrangement is largely attributable to the fact that the court's jurisdiction previously had been exercised by an Article III body, the former United States Court of Claims. *See, e.g.*, 28 U.S.C. §§ 792, 2503 (1976 & Supp. V 1981). However, the judges of the present court are, in a real sense, the legal successors of the fixed-term trial judges of that court, *not* the judges whose tenure and compensation were protected under Article III (and whose legal successors are judges of the Court of Appeals for the Federal Circuit). *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 165, 167(a), 96 Stat. 25, 50. It would be inappropriate for the present Article I court to have a voice in the Judicial Conference, which is the policy making organ for the Article III courts. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9 (Mar. 1992). And since the court is not located administratively within any judicial circuit, *see* 28 U.S.C. § 41 (1988), the question of judicial council representation does not arise.

There remains, however, the anomaly of an Article I court that falls within the jurisdiction of the Judicial Conference and derives funding and administrative support from the Administrative Office (which, in turn, operates under Conference supervision). The other Article I courts—the United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals—either exist as independent entities or receive administrative support from the executive branch. Barring a change to Article III status, future planning should include consideration of whether the Court of Federal Claims would be better served by an administrative arrangement similar to that of other Article I courts.

[18] The Federal Judicial Center Board already includes a bankruptcy judge. 28 U.S.C. § 621(a)(2) (1988). Permitting a magistrate judge to participate in the Board is consistent with the basic principles stated above, and with the general policy of comparable treatment for bankruptcy judges and magistrate judges in administrative matters, including salaries and resource allocation.

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Representation of fixed-term judges on the Judicial Conference and circuit councils will also enhance communication and problem-solving among all judges which, with respect to magistrate judges, will likely lead to their greater utilization. Greater bankruptcy judge participation in governance will better integrate the bankruptcy courts into the judiciary generally. Representation of these judges should not be viewed as a precedent for participation in governance bodies by court personnel who do not exercise judicial power.

The matter becomes more complicated at the local level where decision making often occurs in general meetings of all (or at least all Article III) judges on a particular court. Again, this plan does not seek to prescribe how individual courts should seek to improve participation in their governance processes. However, it is important that the district courts take appropriate measures to involve their bankruptcy judges and magistrate judges in court governance.

Administrative Autonomy

■ RECOMMENDATION 53: Administration of federal court facilities, programs or operations should be the sole province of the judicial branch.

Implementation Strategies:

53a Executive branch responsibility for the following programs should be transferred to the institutions of judicial governance or agencies operating under their supervision:

- *judicial space and facilities program;*
- *court and judicial security program; and*
- *bankruptcy estate administration (i.e., the U.S. trustee system).*

The federal courts are a constitutionally created co-equal branch of government. They should and must operate will all reasonable autonomy. It is incongruous and inappropriate that they should be required to rely on the executive branch for administrative support in any area. This principle dates back to 1939, when Congress established the Administrative Office to handle many of the functions previously performed by the Justice Department.

There are today three significant areas—buildings,[19] judge and courthouse security,[20] and bankruptcy estate administration—in which the executive branch retains substantial responsibility for programs or activities directly related to judges, litigation or other court operations. Transfer of that responsibility to the third branch will not adversely affect Congress's legislative oversight or budgetary authority regarding these three program areas. Rather, it would remove executive branch control over areas that should logically and appropriately be within the purview of judicial branch administration and policy making.

In seeking to establish programmatic oversight of security matters within the judicial branch, this plan does not recommend a change in the institutional status of the United States Marshals Service, a bureau within the Department of Justice. However, the Service's "primary role and mission [is] . . . to provide for

[19] See Chapter 8, Recommendation 79 *infra*. For the past five years, the Judicial Conference has sought legislation to obtain authority, independent of the General Services Administration (but subject to congressional authorization and oversight), "to determine and execute the judiciary's priorities with respect to space and facilities management." REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 81 (Sept. 1989). Although coordination of effort with GSA has improved since that time, the need for judicial (rather than executive) branch control over the assessment of need, and the design, construction, and management of judicial space and facilities ultimately remains.

[20] See Chapter 8, Recommendation 63 *infra*.

the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade."[21] On occasion, concerns have arisen about the relative priority of marshals' duties relating to court and judicial security vis-a-vis their other law enforcement responsibilities. To ensure that the Marshals Service can fulfill its primary responsibility (particularly in an era of limited resources), the Judicial Conference and its committees should be responsible for reviewing, and developing when necessary, policy relevant to court security matters. Among other things, the Conference should have final oversight authority with respect to preparation and execution of the courts' security budget.

Transfer of oversight authority for bankruptcy estate administration was among the measures recommended nearly five years ago by the Federal Courts Study Committee.[22] Placing the U.S. trustee system under judicial branch control would eliminate separation of powers issues and avoid potential conflicts of interest in cases where the federal government, represented by the Justice Department, is a creditor. It would also be considerably less expensive to operate, and would minimize duplication of function and case management conflicts between the U.S. trustees and the bankruptcy courts.[23] At the very least, the parallel bankruptcy administrator program in the judicial branch should be permitted to continue in those districts that currently operate outside the U.S. trustee system or may in the future elect to do so.

53b Responsibility for developing and presenting to Congress requests for funding of the federal courts and agencies of judicial administration should remain solely within the judicial branch.

For the first 150 years of the federal court system, the executive branch (ultimately the Department of Justice) was responsible for managing the financial affairs of the lower courts, including the preparation of budget estimates.[24] The obvious separation of powers issue prompted the transfer of that responsibility, in 1939, from the Attorney General to the Director of the newly created Administrative Office.

In the legislative history of the Administrative Office Act, the authors noted the importance of relieving the executive branch of responsibility for the federal courts' budget:

> [T]he result of the provisions of the bill as now written, it is expected, will provide, first of all, the separation of the Department of Justice from immediate and actual and intimate participation in the monetary affairs of the courts, so that it will not be necessary for a judge to importune the Attorney General before getting a typewriter, or an addition to his library, . . . or some other matter of that kind . . . .[25]

Although Congress requires the President to include in the annual budgets both estimated expenditures and proposed appropriations for the entire federal government, the spending estimates and funding requests for the

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[21] *See* 28 U.S.C. § 566(a) (1988).

[22] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 77-78 (1990).

[23] Final Report and Recommendations of the Long-Range Planning Subcommittee of the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States 18-19 (June 1, 1993).

[24] Until the early part of this century, the Supreme Court not only prepared its own budget requests—a function it still performs today—but also submitted them directly to Congress. Although Congress, in 1921, required the Court to forward its estimated expenditures and proposed appropriations to the President for submission as part of the budget for the entire Government, the President was enjoined to include those items in the budget "without revision." Budget and Accounting Act, ch. 18, § 201(a), 42 Stat. 20 (previously codified at 31 U.S.C. § 11(a)(5) (1976)). This arrangement was later extended to the entire judicial branch (see text accompanying note 26 *infra*).

[25] S. Rep. No. 426, 76th Cong., 1st Sess. 3 (1939).

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judicial and legislative branches are to be submitted to Congress "without change."[26] Thus, with respect to the judicial budget, "neither [the Office of Management and Budget] nor the President exercise any discretion . . . [and] inclusion of th[o]se items in the annual budget is merely a ministerial act."[27]

As the federal government continues to chart its course through an era of fiscal austerity, the judicial branch must maintain its independence from fiscal oversight or control by the executive branch. Although statutory law already reflects this principle, there have been and may continue to be efforts by the executive branch to protect the funding of other federal programs at the expense of the courts. If the courts are to perform their constitutional mission, these efforts must be resisted.

Accountability

■ RECOMMENDATION 54: The judicial branch should continue to develop and enhance a mechanism for effective coordination and review in budget formulation and execution.

Independence from executive branch oversight and control in the budgetary process carries with it important obligations of fiscal responsibility, accountability, and efficiency in all court and judicial support operations. By establishing an "Economy Subcommittee" under its Committee on the Budget,[28] the Judicial Conference has acknowledged the importance of a permanent, analytical and systematic means of developing final budget estimates—one akin to that provided by the Office of Management and Budget in the executive branch. In the years ahead, the Conference and its committees should continue to scrutinize thoroughly funding requests from the various components of the judicial family, before they are submitted to Congress.

The mechanism by which that scrutiny is exercised must, of course, respect the principles of collegial decision making and local autonomy that characterize judicial governance generally. Indeed, budget formulation is a challenge in an institutional culture where decentralized budget execution is the norm. If a rural district and an urban district spend their resources in two markedly different ways, yet each delivers superior judicial services to the people of those districts, should one approach be favored over the other in the courts' budget submission to Congress? A single judicial budget should be submitted which, in the main, treats every court session the same, according to the kind of work involved, when measured against nationwide benchmarks for such work.

■ RECOMMENDATION 55: The existing mechanisms for judicial discipline should be retained. In particular, the impeachment process should continue to be the sole method of removing Article III judges from office.

Impeachment is the only means set forth in the Constitution for removing an Article III judge from office and barring that individual from the further exercise of judicial power. While the constitutional regime favors a judiciary of substantial independence, removal through impeachment is an explicit qualification on judicial independence, and one of a number of permissible mechanisms to make a judge accountable for his or her actions.

Recent impeachment proceedings that proved burdensome to Congress prompted an extensive study of the impeachment process by

[26] Budget and Accounting Act, as amended, 31 U.S.C. § 1105(a)(5), (b) (1988 & Supp. V 1993).

[27] Matter of W. Wasserstein, No. B-198507, B-198507 L/M, 1980 WL 16612 (Comp. Gen. 1980) (applying the same restriction to OMB and presidential involvement with legislative budget requests).

[28] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42 (Sept. 1993).

the National Commission on Judicial Discipline and Removal. Without endorsing all its recommendations, this plan concurs in the Commission's central recommendation—that impeachment should remain the sole method for removing life-tenured federal judges from office. While cumbersome, the impeachment process has proven itself effective in removing from office judges who fail to honor their oaths, while at the same time insulating honest members of the judiciary from political attack.

As the Commission recognized, there are significant individual and institutional constraints on federal judges, apart from impeachment, that assure their accountability and fidelity to their oath of office. Foremost among these constraints are the character and self-discipline of individual judges, as well as the combined effect of the requirement to provide written, reasoned opinions, the doctrine of stare decisis, and the "watchful eye" of the bar. Institutional constraints include: peer pressure among judges sitting in a court; the Code of Conduct for United States Judges; formal disciplinary mechanisms under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980; and congressional oversight under that Act. These formal and informal constraints guarantee the everyday accountability of federal judges yet ensure that impeachment is an exceedingly rare event.

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Chief Justice of the United States

- Presides over the Judicial Conference and the Federal Judicial Center Board
- Appoints all members of Judicial Conference committees
- Appoints Director and Deputy Director of the Administrative Office in consultation with the Judicial Conference

Administrative Office of the United States Courts

- Director and Deputy Director are appointed by the Chief Justice after consulting the Judicial Conference
- Principal functions:
  - staff support for the Judicial Conference and its committees
  - legislative representation and liaison to other agencies
  - administrative and management support to the courts (e.g., long range planning, legal services, budget, personnel, program management, automation, supplies, space and facilities)
  - statistics and public information

Judicial Conference of the United States

Members: Chief Justice (chair); chief circuit judge from each circuit; one district judge from each of the 12 regional circuits, elected by all Article III judges in the circuit at the annual circuit judicial conference; chief judge of the Court of International Trade

Meetings: Required to meet annually but actually assembles twice each year, in March and September

Functions: Serves as the central policy-making body for the federal court system; surveys business of the courts and suggests improvements in the administration of justice; approves appropriations requests for submission to Congress; recommends changes in federal rules of procedure and evidence; supervises the Administrative Office; establishes court fees; performs numerous other statutory duties

Committees of the Judicial Conference

- The Executive Committee:
  - acts for the Conference in emergencies and between sessions
  - sets Conference agenda
  - resolves differences among other Conference committees
  - approves the federal courts' spending plan for each fiscal year
  - coordinates judicial branch relations with Congress and the executive branch
- 19 other standing committees and 1 ad hoc committee—each with a defined subject area
- Members appointed by the Chief Justice, generally for 3-year terms with a 6-year maximum term of service on any committee; most committees consist solely of judges, but some include academics, practicing attorneys, and state judges
- Meet twice each year (the Executive Committee and some other committees meet more frequently)
- Administrative Office performs secretariat and general staff support functions; upon request, the Federal Judicial Center may provide research, advice and educational support

Federal Judicial Center

- Board consists of the Chief Justice (chair); two active circuit judges, three active district judges, and one active bankruptcy judge elected by the Judicial Conference; and the Director of the Administrative Office
- Director and Deputy Director are appointed by the Board
- Principal functions:
  - educational programs for judges and court employees
  - research and planning support to the courts and the Judicial Conference

Federal Court Governance —National Institutions

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District Court

- The chief judge—who has precedence over other judges in the court and presides at any session he or she attends—is the district judge most senior in commission with at least one year of service but less than 65 years of age at the time of becoming chief judge. A judge may serve as chief district judge for no more than 7 years or until he or she attains the age of 70, whichever occurs first.
- The chief district judge is responsible for enforcing court rules governing the division of business among the judges, and he or she is authorized to divide business and assign cases to the extent not provided in the court rules. Though not statutorily mandated, the chief judge is generally considered responsible for the effective and efficient administration of the district court in compliance with statutes, Judicial Conference and circuit judicial council policies, and regulations issued by the Administrative Office with Conference approval.
- The district court (i.e., the body of all district judges in regular active service) appoints magistrate judges as judicial officers of the court and designates the chief bankruptcy judge (where there is one). The court also appoints the clerk of court, court crier and court reporters, and approves the appointments of deputy clerks, clerical assistants and other court employees (other than chambers staff). The court adopts its own local rules of practice and procedure.

Court of Appeals

- The chief judge—who has precedence over other judges in the court and presides at any session he or she attends—is the circuit judge most senior in commission with at least one year of service but less than 65 years of age at the time of becoming chief judge. A judge may serve as chief circuit judge for no more than 7 years or until he or she attains the age of 70, whichever occurs first.
- Though not statutorily mandated, the chief circuit judge is generally considered responsible for the effective and efficient administration of the court of appeals in compliance with statutes, Judicial Conference and circuit judicial council policies, and regulations issued by the Administrative Office with Conference approval.
- The court of appeals (i.e., the body of all circuit judges in regular active service) appoints bankruptcy judges as judicial officers of the district court. The court also appoints the clerk of court, court crier, and circuit librarian, and approves appointments of the court's staff attorneys, deputy clerks and other court employees (other than chambers staff). The court adopts its own local rules of practice and procedure.

Bankruptcy Court

- The bankruptcy court is a unit of the district court. Judges of the bankruptcy court are appointed by the court of appeals and the chief bankruptcy judge (in districts with more than one bankruptcy judge) is designated by the district court.
- The chief bankruptcy judge (where there is one) is statutorily responsible for enforcing the rules of the district court and the bankruptcy court and seeing that bankruptcy court business is handled effectively and expeditiously.
- The bankruptcy court (i.e., the bankruptcy judges in regular active service) appoints the clerk of the bankruptcy court and approves the appointment of deputy clerks.

Circuit Judicial Council

Members: Chief judge of the court of appeals for the circuit (chair); equal number of active circuit and district judges of the circuit (precise numbers, terms, and mode of selection determined by vote of all active Article III judges of the circuit); and, in some circuits, senior judges, bankruptcy judges, and/or magistrate judges as non-voting observers

Meetings: Required to meet at least twice a year but often does so more often

Functions: Makes "necessary and appropriate orders for the effective and expeditious administration of justice" within the circuit (all judges and employees in the circuit are required by statute to give effect to council orders); considers complaints of judicial misconduct and disability if referred by the chief circuit judge; reviews and may abrogate district court rules; appoints the circuit executive (who is secretary to the council); authorizes law clerk and other chambers personnel; approves chambers and courtroom space; performs numerous other duties as prescribed by statute or Judicial Conference policy

Federal Court Governance—Regional and Local Institutions (except special courts)

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Chapter 8
Resources

RESOURCES—human and economic—provide the means for the federal courts to carry out their mission. The near future will continue to be an era of austerity as far as federal budgets are concerned, and the judicial branch will have to do more with less. The plan contemplates that the federal courts will have to redouble previous efforts to cut red tape, streamline the budget process, add flexibility to personnel and procurement practices, decentralize decision-making, and eliminate inefficient and unnecessary activities.

The plan also assumes that court personnel will be subject to growing demands, and that the federal judiciary will have to compete vigorously for the new talent necessary to maintain the standard of excellence that is the hallmark of the federal system. From judges' chambers to clerks' offices to probation and pretrial services operations, the federal courts must implement strong resource management practices.

Justice is expensive, and legislative additions to the federal courts' jurisdiction are not cheap. The federal courts must continue to seek the resources necessary to carry out the tasks assigned by Congress and the Constitution, and they will remind the nation and the political branches that maintaining the traditional standards of the federal courts will be worth the added cost. The extent of that cost will depend on which vision of justice the nation decides should be the next century's reality.

This chapter's recommendations assume that the federal courts will avoid the dramatic expansion of size and role discussed in Chapter 3. A greater magnitude of resources and far more resource management would be required by a federal court system with significantly greater workload and personnel. A system of such gargantuan proportions would, if it were to provide justice anything like that which we know today, generate costs that the nation will quite simply be unable to afford. The recommendations are also based on the belief that the nation cares about quality justice and will pay a fair price to obtain it. A few of the resource issues raised by the alternative future of the federal courts are discussed in Chapter 10.

Obtaining Adequate Resources

■ RECOMMENDATION 56: The federal courts must have resources adequate to ensure the proper discharge of their constitutional and statutory mandates.

Any comparison to the state courts discloses that the federal courts have been well funded. During the past decade, Congress has provided the judicial branch with a rate of resources growth about equal to that of the Department of Justice, but well above that of executive branch agencies and, in recent years, that of the Congress itself. Congressional penury has not placed the federal courts in their current circumstances. Rather, the current

situation results from the increased workload of the federal courts and their honest adherence to empirical workload formulae as the basis for budget justification. Where workload has increased, the federal judiciary has argued that resources ought to increase as well. Where workload remains flat or decreases markedly, budget requests are correspondingly limited or reduced.

The regrettable reality is that while recent judicial budgets have shown sizeable increases, the increases have not kept pace with the volume and costs of additional tasks that the courts have assumed under new congressional mandates. Insufficient resources are ultimately a threat to judicial branch independence. Overload and delay become the first consequence. Some judicial responses to delay may reduce the quality of federal justice. On the other hand, failure to decide cases more quickly creates access barriers to litigants unable to bear the costs and consequences of delay.

Separation of powers principles require that no branch of government deprive another of either the powers or resources it needs to perform its core functions. Discharge of the judicial function as an independent branch requires resources sufficient for the judiciary to perform all its constitutional and statutory mandates. Unlike several state judiciaries, which have asserted an inherent right to compel funding beyond regular appropriations for judicial functions, federal courts depend on the Congress to provide them with sufficient resources. Chronic failure to provide adequate resources puts federal judges in the unfortunate position of supplicants, constantly begging the Congress for funds.

■ RECOMMENDATION 57: Congress, when enacting legislation affecting the federal courts, should appropriate sufficient funds to accommodate the cost to the courts of the impact of new legislation.

The Administrative Office of the United States Courts currently prepares and makes available to Congress judicial impact statements on legislation potentially affecting the judiciary, on the principle that funding should be commensurate with responsibility. Congress should not enact new legislation that adds to the workload of the federal courts without also approving sufficient funds for the judiciary to meet its obligations under that legislation. In lieu of appropriating new funds to support the judiciary as it is assigned new obligations. Alternatively, Congress, when creating legislation with a quantifiable judicial impact, should reduce existing obligations of the judiciary sufficiently to offset the impact of new legislation.[1]

■ RECOMMENDATION 58: Federal judges should receive adequate compensation as well as cost of living adjustments granted to all other federal employees.

Implementation Strategies:

58a Section 140 of Public Law No. 97-92 should be repealed.

58b The current practice of linking judicial and Congressional pay raises should be ended.

The real compensation of Article III judges must not be diminished. The matter of adequate compensation, including routine cost-of-living adjustments, is at the heart of an independent judiciary. The erosion of the real compensation of judges amounts to a *de facto* diminution in the salary of the judicial office. While perhaps not violating the irreducible salary clause of Article III, any denial violates the spirit of the clause and undermines the independence of the judiciary from Congress. Current practice from time to time has forced

[1] See Chapter 4, Recommendation 13 *supra*.

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federal judges to serve with inadequate compensation, to leave the bench, or to ask Congress for compensation while at the same time sitting in review of congressional enactments. It also threatens the ability of the judiciary to attract and retain judges.

The present mechanisms for setting judicial compensation have failed to protect federal judges from erosion in their real pay. This may be attributable, in part, to section 140 of Public Law No. 97-92, which requires affirmative congressional approval of a judiciary pay increase.[2] This statute should be repealed and a system devised to protect against diminution in the salary of the judicial office. Formerly, the Quadrennial Commission played a useful though imperfect role in facilitating pay increases. A similar mechanism should be devised in place of the present non-viable structure.

At present, federal judicial compensation has fallen to more than 20% below that received in 1969 as adjusted for inflation. Consequently, consistent with the spirit of the irreducible salary clause, salary increases should automatically be provided to federal judges when other federal employees receive them.

■ RECOMMENDATION 59: Congress should include budget appropriations for the constitutionally-mandated functions of federal courts as part of the non-discretionary federal budget.

Several of the current functions of the judicial branch are constitutionally mandated. As such, costs for these budgets are not discretionary with the judiciary or the Congress. Therefore, these items of the judicial budgets should be treated as non-discretionary spending by the political branches and appropriations should be afforded automatically once these items are budgeted by the judiciary.

■ RECOMMENDATION 60: The federal courts, including the bankruptcy courts, should be funded primarily through general appropriations.

Federal courts are an indispensable forum for the protection of individual constitutional rights; their costs are properly borne by all citizens. Unlike other governmental operations such as national parks, for which substantial funding through user fees may be appropriate, the mission of federal courts could not be performed if users were denied access because of an inability to pay reasonable user fees.

At least three reasons support continued reliance on general appropriations instead of user fees. First, given that the frequency of federal court filings can vary substantially from year to year, economic uncertainty about the amount of revenue that can be raised annually through user fees makes user fees an unreliable and, therefore, undesirable source of funding. Second, with that uncertainty, constant fee adjustments might be necessary in order to sustain ongoing judicial programs. Finally, and most importantly, litigants should not be so burdened with fees as to effectively eliminate the access of some low and moderate income users to our federal forum. The reasonableness of fees and principles relating to revenues and fees are discussed in the next chapter at Recommendation 90.

The bankruptcy courts and bankruptcy cases should be treated similarly. Before the Bankruptcy Reform Act of 1978, the bankruptcy

[2] Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1982). This provision, enacted in a continuing appropriations resolution 13 years ago, bars all automatic cost-of-living adjustments for federal judges except as specifically authorized by Congress. Although the sponsor of the provision originally intended that it apply only to a single year, it has been interpreted by the Comptroller General as permanent law. The Comptroller General recommended repeal of section 140 to the 99th Congress, but Congress instead has adopted a practice of suspending application of section 140 to particular cost-of-living raises.

system had been financed through fees, with general revenue covering operating deficits in the system. The Commission on the Bankruptcy Laws of the United States recognized that the system could not be self-supporting without significantly raising financial burdens on debtors and creditors, and therefore recommended discontinuing court financing through fees. Legislative history of the 1978 Act reflects that the bankruptcy court, like other federal courts, should be financed through appropriations.[3]

Ensuring Lifetime Service on the Bench

■ RECOMMENDATION 61: Incentives should be created to allow the courts to attract and retain the best qualified persons as judges and eliminate disincentives to long judicial service. Federal judges should be encouraged to stay on the bench for the lifetime tenure that the Constitution contemplates and guarantees.

The primary resource of the federal courts is the men and women who serve as judges. Preserving the core value of excellence depends on the federal courts' ability to attract the highest caliber of lawyers and retain those persons for a lifetime of service. Constant turnover in the federal bench, through resignation or retirement, has undesirable consequences. Experienced judges who leave the bench take with them significant expertise, and, under current practice, those judges are seldom replaced for several years.

As long as their physical and mental capabilities allow them to, federal judges should continue to serve, first as active judges and then, when they reach senior status eligibility and wish to slow down, as senior judges. There should be an expectation of a lifetime commitment for federal judges from the time of appointment (despite the possible financial sacrifice). It should be made clear that "revolving door" judges—those who stay on only a few years—do not best serve the interests of the judicial branch and the nation (excluding those judges who choose to accept exceptional appointments to serve the public in high positions in the executive or legislative branch—as several FBI Directors, Attorneys and Solicitors General, a Senate Majority Leader, and a Counsel to the President have done), Nor do those few judges who, when appointed, already intend to serve only for their designated years until eligible for retirement and then return to practice or go on to other careers.

Measures that encourage judges to leave the bench after serving for specified periods of time should be avoided. For example, until fairly recently, a judge who left the bench entirely at age 65 would not continue to receive a full salary (as pension) for life. That was changed in 1984, so that now a judge eligible for senior status under the rule of 80 (age 65 and 15 years of service) can leave the bench entirely, practice law or teach or engage in any other private endeavor and still receive full pay (as pension). Such measures should be avoided in the future. For instance, lowering eligibility under the rule of 80, to an age 60 and 20 years of service requirement (as is now being considered) or change to a rule of 75 should apply only to judges who take senior status *and* stay on the bench.[4]

[3] *See* 124 CONG. REC. S 17406 (Oct. 6, 1978) (statement by Senator DeConcini upon introducing the Senate amendment to the House amendment to H.R. 8200), reprinted in 1978 U.S.C.C.A.N. 6505, 6554.

[4] See also Recommendation 58 regarding judicial compensation. For over 25 years, the Judicial Conference has supported expansion of the rule of 80 to allow earlier eligibility for *senior status*, not for *complete retirement from the bench*. *See, e.g.*, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 54 (Oct.-Nov. 1969); *id.* at 77 (Oct. 1970); *id.* at 11-12 (Mar. 1978).

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■ RECOMMENDATION 62: Service-year credit toward benefits vesting for service already rendered as federal judicial officers should be awarded to bankruptcy and magistrate judges elevated to the Article III bench.

Current law contains disincentives for sitting bankruptcy and magistrate judges to accept elevation to the Article III bench. Upon elevation, these judicial officers receive no service-year credit under the retirement and disability benefits plan for Article III judges for service rendered as a federal judicial officer. These disincentives are an unnecessary impediment to the judiciary's ability to attract the best qualified persons to the Article III bench, and illogically penalize those who have serve and will continue to serve in the federal courts.

■ RECOMMENDATION 63: Adequate security protection should be provided for judges and court personnel at all court facilities and when they are away from the courthouse.

Implementation Strategies:

63a Where necessary, home security systems and portable emergency communications devices should be provided.

63b New judges and their families should receive security briefings.

63c Training for judges in security should be made available.

63d Judges and probation officers should receive information whenever prisoners are released. The notification should include an assessment of the violent nature of the prisoner and the potential risk he or she poses to judicial branch personnel.

The judiciary should be directly involved in the development of security policy, the establishment of security priorities, the implementation of a comprehensive security program, and the monitoring of the use of judicial security resources.[5]

The Judicial Conference Security, Space and Facilities Committee has noted the need to bring all federal judicial court buildings under judicial branch direction in order to comply more effectively with security standards. In addition, that committee has proposed changing courthouse design, where possible, to allow only one public entrance and to have at least one maximum security courtroom, as well as to avoid housing judicial facilities in multi-use facilities. Current federal property regulations should be modified to permit needed new courthouses to be placed in areas representing new and projected population centers. Moreover, security briefings should be offered to judges and court personnel at least annually.

All judicial officers should be provided with an appropriate level of security protection at all times when they are away from the courthouse. The level of off-site security provided should be determined based upon an assessment utilizing risk management principles. Previously, the Judicial Conference has called for legislation to enable judicial officers to carry firearms, for ensuring the safety of judicial officers while they are away from the courthouse, and for establishment of court security as the primary duty of the United States Marshals.[6]

The Judicial Conference should assume responsibility for overseeing the assignment of

[5] See Chapter 7, Implementation Strategy 53a *supra*.

[6] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69 (Sept. 1990); *id.*, at 12-13 (Mar. 1989).

court security personnel in accordance with recently-developed standards for deploying court security officers for all districts. This deployment should be accomplished with sufficient flexibility to address the particular needs of a specific district, taking into consideration the district's size, location, number of judges, past history of violence, and future projections.

Making Most Effective Use of Judicial Resources

To ensure continued access to quality federal justice, the structure and processes for judicial resource allocation should be made more efficient and flexible. All judges—including senior judges, magistrate judges, and bankruptcy judges—should be used effectively, efficiently, and fully. Only in so doing will the goal of carefully controlled growth of the federal judiciary be attained.

■ RECOMMENDATION 64: Standards and procedures for the assignment of circuit, district, magistrate and bankruptcy judges to perform judicial duties in other jurisdictions should be flexible.

Workloads frequently shift among judicial districts, often with little relation to the number of judges serving in them. Intermittent increases in filings cannot be addressed effectively through creation of additional judgeships or realignment of boundaries. What is needed is greater flexibility and efficiency in the use of existing judicial resources.

Consolidation of districts can assist in equalizing workloads and thus ameliorate some of the worst workload/resource imbalances. But there is a growing need for visiting circuit, district, magistrate, and bankruptcy judges to provide temporary assistance. For many years inter-circuit and intra-circuit assignments have been used to direct judge power from courts with less burdensome dockets to those where additional help is needed. Although critical to the judiciary's success in meeting workload demands to date, these procedures are often cumbersome, potentially frustrating prompt relief of overburdened courts even where sufficient judicial resources exist within the system at large.[7]

The present alignment of judicial districts calls for rethinking the rigid allocation of judges to individual courts. New standards and procedures are needed for the temporary assignments of judges to overburdened courts, and to ensure adequate space, staff, and other resources when they get there. In an October 1992 survey, just over 71 percent of the respondents (approximately 75 percent of active judges responding) supported easier movement of judges for purposes of holding court in districts requiring temporary assistance.[8]

To assist in the development of this long range plan, the Judicial Conference Committee on Intercircuit Assignments examined the current process for assigning judges to temporary duty on other courts and generally reviewed the impact of district and/or circuit boundaries on efficient deployment of judicial

[7] An example of this potential can be seen where a judge cannot travel short distances to assist a court in another district without the approval of the chief circuit judge or circuit judicial council (located two or three states distant in some cases) or, if the other district lies within another circuit, the Chief Justice of the United States. Large metropolitan areas such as Kansas City, New York City, St. Louis, and Washington, D.C., are each divided among two or more districts, sometimes falling into different circuits. Unnecessary expenditures of judicial time on travel result in places where circuit and district boundaries are combined with substantial distances between places of holding court. An example of this can be found at New Albany (located in the Southern District of Indiana, Seventh Circuit), which is adjacent to Louisville (principal place of holding court in the Western District of Kentucky, Sixth Circuit), but must be served by judges travelling more than 100 miles from Indianapolis thrice annually.

[8] PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 12, 34, 56, 78, & 100 (Federal Judicial Center 1994).

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resources.[9] Although the idea of requiring judges to accept temporary assignments to courts in serious need of assistance was rejected as potentially divisive and disruptive of courts' and individual judges' efforts to manage their time and caseload,[10] the committee recognized the importance of making the system "simpler and more flexible."[11]

In the event that the federal judicial system is unable to address future judge power needs in a prompt and efficient manner, the judiciary should consider structural changes to streamline temporary assignment authority. One approach might be to authorize district judges to hold court in any district located within a certain distance or travel time of their permanent duty stations upon designation by the chief judges of the respective courts.

Another innovative approach, already employed in some districts and circuits, employs a standing agreement for a set period, *e.g.*, one year, among several contiguous districts, and approved by the councils of the concerned circuits, to permit immediate cross-assignment of judicial personnel upon request and agreement between the two courts involved. Although sound reasons may exist to retain oversight and control of judicial movements in general, there is little to recommend in a process that frustrates access by overburdened courts to nearby, underutilized judicial resources.

Further steps may be taken to cope with disparate workloads:

- Corporate venue and transfer statutes should be amended to remove all obstacles to the interdistrict transfer of cases for judicial economy;
- Obstacles, such as funding restraints, to the interdistrict and intercircuit assignment of judges to districts in need should be removed;
- Rules and procedures should be promulgated to make clear a judge's authority to conduct proceedings in a case in another district from the judge's home district; and
- "Judicial emergency teams" comprised, in one instance, of an available district judge and an accompanying magistrate judge, should be an alternative for dispatch to districts seriously understaffed or overburdened by caseload.[12]

■ RECOMMENDATION 65: The courts should use senior and recalled judges—a significant portion of federal judge power—as much as possible to achieve the goal of carefully controlled growth.

Senior judges carry a significant portion of the caseload of the federal judiciary, accounting (in the statistical year ended June 30, 1993) for 15,047 appellate participations and conducting 3,767 trials. This amounted, respectively, to about 16% of all appeals and about 18% of all

[9] Report of the Judicial Conference Committee on Intercircuit Assignments to the Judicial Conference Committee on Long Range Planning (Jan. 31, 1994).

[10] *See id.* at 12. The committee agreed, however, to seek a statutory amendment allowing delegation of the power to authorize intercircuit assignments if the Chief Justice finds that responsibility to be "cumbersome." *Id.* at 10.

[11] To that end, the committee agreed to undertake the following measures: (1) recommend to the Chief Justice appropriate amendments to the Guidelines on Intercircuit Assignments; (2) publicize more widely the availability of temporary assignments as a case management tool; (3) identify courts that may benefit from the services of visiting judges; (4) survey active judges to determine who may be underutilized and willing to assist courts in other circuits; (5) recommend long-term (*i.e.*, up to one year) open assignments of senior judges on an experimental basis; and (6) evaluate, through voluntary, post-assignment reports, the overall effectiveness and impact of visiting judges on court caseloads, staff and facilities. The committee believes that "major improvements will result" from these actions, enabling it "to meet current and future requirements." Report, *supra* note 9, at 10-12.

[12] Such a judicial emergency team has been formed in the Southern District of Iowa. *See* Statement of Chief Judge Charles R. Wolle to Committee on Long Range Planning, *in* Transcript of Public Hearing on the Proposed Long Range Plan for the Federal Courts, Dec. 16, 1994, at 151, 161*ff.*

trials. In many districts and circuits, the work of senior judges has been indispensable to the effective performance of the work of the federal courts. Senior judges also take up the slack caused by vacancies in courts across the nation and contribute significantly to the administration of the federal judicial system.

Without their efforts, the federal judiciary would need substantially more judges to handle its caseload. In 1992, senior judges provided service equivalent to 92 active district judges. According to an estimate made in 1989, the nation would need an additional 80 judges, at an annual cost of approximately $45 million, to compensate for the loss of senior judges. With the number of senior judges much higher now than it was in 1989, this estimate is probably much too low.

When a judge takes senior status, it creates an immediate vacancy on the court even though the judge continues to work. This means that a younger full-time judge will be appointed to fill that spot. When a senior judge continues to work, the court has both a new judge and the assistance of an experienced senior judge often working half-time. As a result, the court enjoys in that judgeship a 50 percent increase in judge power.

New legislation allows recall of bankruptcy judges and magistrate judges to render judicial services as needed. This enables the courts to benefit further from the experience these judges bring to the courts they serve.

■ RECOMMENDATION 66: Judges should be encouraged to assume senior judge status through improvement in policies or procedures that affect senior judges.

In recent decades, there has been a new and alarming trend for federal judges to leave the bench entirely when they reach retirement eligibility, rather than take senior status. From the early days of the federal judiciary, few judges voluntarily left the bench before the age of 70. In the last 25 years, however, 81 have left, only 16 of whom were age 70 or over. The reasons for the recent trend are many, but it can be safely assumed that in most cases economic, workload, and status-related factors played a decisive role.

Senior judges should suffer no discrimination upon assuming that status. To the contrary, they should be treated with the consideration that their years of service justify. Fearing the impact of prejudicial policies, some active judges may decide to remain in full-time active status, when, because of advancing years, they should change their status to senior. Other active judges may decide to forego senior status when eligible and simply leave the bench altogether. A fair, responsive policy for utilizing this invaluable resource will deter the use of either of these alternatives.

Responses to a recently-conducted survey of senior judges and active judges eligible or soon to be eligible for senior status indicate that the treatment of senior judges often ignores their important contributions. Examples of disincentives to taking senior status and remaining on the bench, ranging from major to petty, abound. For example, the 1991 substantial pay increases for federal judges, 28 U.S.C. § 371(b)(3), awarded certain senior judges a much smaller increment. This distinction should be repealed. In some circuits, senior judges are not considered to be "judges of the court" for purposes of comprising panels under 28 U.S.C. § 46 (b). Also, some but not all circuits treat senior judges unwisely with respect to a variety of matters, including chambers assignment, provision of court reporters, sitting preferences, participation and voting in court meetings unless otherwise provided by statute, the placing of a senior judge on the bench in panels of three and in court ceremonies, and dissemination of information and inclusion of senior judges "in the loop." In all these situations, senior judges should be treated, if practicable, as though they were active judges with the same seniority. They should be referred to, if so desired, as "judge" rather than "senior judge." In addition, current statutory

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prohibitions affecting senior judges should be reexamined.

Each court of appeals and district court should review their practices and policies (including those dealing with annual recertification of senior judges) to ensure that senior judges are accorded full court participation and treated with the respect and dignity which is their due.

■ RECOMMENDATION 67: Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy. Individual districts should retain flexibility, consistent with the national goal of full and effective utilization of all magistrate judge resources, to have magistrate judges perform judicial services most needed in light of local conditions and changing caseloads.

As adjunct judicial officers of the Article III district courts, magistrate judges are indispensable resources who are readily available to supplement the work of life-tenured district judges in meeting workload demands. Maintaining an appropriate division of labor between district judges and magistrate judges will pose a continuing challenge to the courts. Maximum flexibility should be retained in the district courts to promote the most effective use of magistrate judges in each district in light of local conditions and changing caseload needs. Although each district court exercises discretion in its use of magistrate judges, the effort to encourage maximum utilization of magistrate judges must be national in approach and effect.

The need to conserve the increasingly scarce time of district judges will make effective and extensive use of magistrate judges (including those retired judges available for recall service) a practical necessity in virtually all courts. Expanding the role of the magistrate judge in the area of felony criminal trials should be examined, taking into account constitutional considerations and sound judicial policy. The district courts should maximize the use of magistrate judges to conduct civil proceedings with the parties' consent as currently authorized by 28 U.S.C. § 636(c). Use of magistrate judges for this purpose may necessitate reassessment of how they perform other functions. It has been suggested, for example, that where only an issue of law must be resolved, use of the report and recommendation procedure is inefficient because it is a duplicative use of resources.

District courts should adopt comprehensive plans for using magistrate judges in accordance with Judicial Conference guidelines. This process could lead to development of minimum standards to ensure that existing magistrate judge resources are used fully and effectively before additional positions are authorized. Magistrate judges should be provided adequate staff, clerical, research, and other support services to enhance their ability to perform the functions specified above.

■ RECOMMENDATION 68: Magistrate judges should be vested with a limited contempt power to punish litigants or counsel directly for misbehavior, disobedience or resistance to a lawful order.

To be recognized and utilized as fully effective judicial officers in the district court, magistrate judges must possess the requisite legal authority and status, including an ability to enforce their own orders. Although 28 U.S.C. § 636(e) provides that certain acts or conduct in proceedings assigned to a magistrate judge constitute a contempt of the district court, the authority of the magistrate judge in such instances is limited to certifying the operative facts to a district judge and serving a show cause order on the alleged contemner. The power to punish litigants directly for contempt in cases of misbehavior, disobedience, or resistance to a

lawful order is essential. Indeed, the present lack of contempt power for magistrate judges can be a major detriment to their performance of judicial functions.

Reducing Judicial Vacancies

Research aimed at eliminating obstacles to efficiency in the federal courts shows two disturbing trends: (1) an increasing percentage of vacant judicial positions; and (2) a lengthening time from vacancy to confirmation. Unfortunately, while the judicial vacancy rate is among the most serious problems facing the federal courts today, the solution to the problem lies primarily with the Congress and the executive branch.

By constitutional design, the very nature of judicial appointments is political. Any potential solution that seeks to remove politics from the process and shorten it would also dramatically change the nature of the appointment process and may require a constitutional amendment.[13] The plan does not endorse such drastic remedies. Nonetheless, several alternative solutions are outlined, here and in Chapter 10, in roughly ascending order of change to the present process, as a means of emphasizing how serious the problem is and why it requires serious attention and immediate action by the political actors most involved in the appointment process.

Filling Vacancies

■ RECOMMENDATION 69: Delays in filling judicial vacancies can be reduced by encouraging retiring judges and those taking senior status to provide substantial (*i.e.*, six-month or one-year) advance notice of that action.

The lengthiest delays in filling judgeships arise in the process of identifying and evaluating the suitability of potential nominees. If that process can be routinely commenced *before* a vacancy arises, the period of time in which a court is required to operate at less than full strength can be substantially reduced if not eliminated. Advance notice can be used to achieve this result in two ways: (1) directly apprising executive and legislative branch officials of the impending need for a judicial appointment; and (2) allowing local bar and civic organizations to use their resources to encourage the President and the Senate to act speedily in appointing a new judge.

Even where vacancies could be anticipated, it may not always be possible to select a successor before the vacancy occurs. Such action would depend on voluntary cooperation from individuals who, for various reasons, may not otherwise wish to make their retirement plans known in advance, despite the Judicial Conference position adopted in March 1988 urging advance notification.

■ RECOMMENDATION 70: A more efficient approach to the selection of judicial nominees should be devised.

Implementation Strategies:

70a Presidential and senatorial staff should afford priority consideration to filling judicial vacancies.

70b The President and senators should consider using special commissions, committees, or staffs to assist in the identification and screening of judicial candidates, if these are found to be helpful in expediting the selection process.

70c Adequate resources should be devoted to the task of investigating the

[13] See Chapter 10, notes 10-13 and accompanying text *infra*.

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backgrounds of potential judicial nominees, including FBI checks and ABA inquiries.

At present, nominees for court of appeals, district court, and Court of International Trade judgeships are selected through a variety of methods that depend on the type and geographic location of the positions to be filled, the decision making styles of persons involved in the process, and the prevailing political realities. Although some judicial nominations are the product of well-organized, effective vetting procedures, other nominees are often selected through a less developed, ad hoc process. Predictably, the results vary.

Speedier and surer decisions could be obtained through more systematic and sophisticated procedures for identifying and screening candidates for judicial office. Delays could also be reduced by devoting adequate financial and personnel resources to the various stages of the nomination process, including the necessary FBI checks as well as the American Bar Association's rating process.

■ RECOMMENDATION 71: Statutory benchmarks and timelines should be created for the nomination and confirmation of all judges. All vacancies which extend beyond the benchmarks should be officially communicated to Congress and the President, and publicized through semiannual reports issued by both the President and the Senate on the status of judicial vacancies.

Recognized time limits on the nomination and confirmation processes would emphasize the importance of judicial appointments and create the expectation that vacancies will be promptly filled. Unless such deadlines for presidential and senatorial action can be enforced through court action (an unlikely prospect given the inevitable questions about standing and justiciability) or serve as a "trigger" for alternative appointment authority as described in Chapter 10, such requirements may well have little effect. Such a scenario suggests the potentially greater utility of "benchmarks" or "guidelines" for presidential and senatorial action as well as the use of semiannual reports to bring the situation to public attention on a regular basis.

■ RECOMMENDATION 72: The President should exercise recess appointment authority.

Under Article II, Section 2, Clause 3 of the Constitution, the President is empowered "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Although this clause does not specifically mention judges, neither are judges expressly excluded. On two occasions, courts of appeals have upheld judicial recess appointments, pending the completion of Senate action on the President's nominations.[14]

There are concerns with the use of recess appointments to fill judgeships[15] and the practice's impact on the Senate's prerogative to scrutinize the selection of judges.[16] To avoid

[14] *See* United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

[15] During the past two centuries, 309 judges have served under recess appointments. *See* Appellee's Second Supplemental Brief, United States v. Woodley, 726 F.2d 1328 (9th Cir. 1983), *vacated*, 751 F.2d 1008 (9th Cir. 1985) (en banc).

[16] Senatorial opposition to judicial recess appointments did not manifest until the mid-20th century, when 53 judges (including two Supreme Court justices) were appointed in that manner during the Eisenhower and Kennedy administrations. *See* Woodley, 751 F.2d at 1015-16 (Norris, J., dissenting). Ultimately, a "sense of the Senate" resolution was passed to discourage continued use of judicial recess appointments, at least in the Supreme Court context, "except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business." 106 CONG. REC. 18145 (1960). Since

that problem, recess appointments should be given to individuals who are well-qualified to hold judicial office but are not candidates for permanent appointment to the vacant position. For example, magistrate judges and bankruptcy judges could be appointed temporarily as district judges during long vacancies if—

(i) legislation were enacted permitting magistrate judges and bankruptcy judges to receive recess appointments while retaining their non-Article III judgeships as well, and

(ii) either the number of magistrate judges or bankruptcy judges were increased for this purpose or retired magistrate judges or bankruptcy judges were recalled to serve in the place of the magistrate judges or bankruptcy judges temporarily appointed to district judgeships.

Offsetting the Impact of Vacancies

Ultimately it may be more effective to address the *effect* of the vacancy problem rather than its various *causes*. The impact of prolonged vacancies is invariably the same: courts are required to manage caseloads without adequate judicial resources. Although some or all of these measures could be used to expedite the appointment process, vacancies undoubtedly will continue to occur more rapidly than the system can fill them. The courts, in order to continue to meet their mandates, must maintain the ability to function well at less than full strength.

■ RECOMMENDATION 73: An appropriate number of "floater" judgeships (*i.e.*, positions not allocated to specific courts) should be created. Judges holding such positions should be available, on a voluntary basis, to assist courts, at the court's request, where workload capacity is diminished by vacancies.

Because vacancies are a system-wide problem, at least one appropriate solution lies in the creation of judgeships not tied to a particular court. This approach would allow the judiciary to deploy additional resources as needed but avoids potential court overstaffing once the vacancies are filled. Of course, if understaffed courts would call on senior judges and on volunteer judges from courts able to spare them, the need for any corps of "floaters" may be minimized.[17] The useful approach of "judicial emergency teams" comprised of available district and magistrate judges with support staff has been advanced to assist districts overwhelmed by sudden or other influx in caseload.[18]

■ RECOMMENDATION 74: Civil Justice Reform Act advisory groups should devise and propose to the district court emergency procedures for dealing with long-standing vacancies in the district. Such procedures should be treated as exceptions to the plans approved for the district. Vacancies in a district should be reported, and the statistical impact on the docket documented.

1964, only one judge has been appointed in this manner. Woodley, 751 F.2d at 1009.

[17] Federal judges have nearly always been drawn from, and identified with, the region or locality in which they serve. Use of "floater" judgeships, even on a limited basis, would constitute a departure from tradition that may be unacceptable, either on political or other grounds. The only previous experiment of this kind—the Commerce Court early in this century—was unsuccessful. It might be difficult to find qualified individuals who are willing to assume and remain in this kind of "roving" assignment. Rather than attempt to recruit new judges permanently for such positions, it might be more feasible to authorize the Chief Justice to assign existing judges to "floater" service for limited periods. To do so, however, would require Congress to allocate additional judgeships to one or more courts.

[18] See note 12 *supra* and accompanying discussion.

The 94 districts have benefitted from the various procedural mechanisms and experiments proposed by the advisory groups created to implement the Civil Justice Reform Act. These committees of lawyers and others involved in the justice system should be charged with assisting the district courts in devising means of coping with long-standing vacancies. Moreover, the stark impact on a district court's capacity to dispose of its caseload when one or more judgeships are vacant should be reflected in the statistical presentations of the work of the courts.

■ RECOMMENDATION 75: Rules governing the number of visiting or senior judges serving on panels in the courts of appeals should be held in abeyance during the existence of vacancies on the court constituting a judicial emergency.

Applicable law provides that a majority of judges on any panel in an appeals court "be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness."[19] The several circuits sometimes differ—both in local rule and decisional law—as to whether senior judges are considered "judges of the court" under this statute. Such questions aside, it is clear that "judicial emergencies", as defined by the Judicial Conference, will continue to exist in many courts. The affected courts should be free to employ all available judge power, including both senior and visiting judges.

[19] 28 U.S.C. § 46 (b) (1988).

Managing Judicial Branch Resources

The governance structure of the federal courts reserves considerable local autonomy to individual courts and their judges. Recently, the decentralization of management authority has increased. With this trend has come increased accountability and responsiveness to centralized leadership. The trend is consistent with modern management theory, which emphasizes the efficiency benefits of empowering those small units closest to an enterprise's core mission.

Budget decentralization and expanded local roles in personnel and procurement have made judges and court administrators increasingly responsible for the direction and operations of their units. Planning—both near- and long-term—has become even more crucial.[20] In an environment of inadequate resources, priorities will constantly need to be set and reset. Thus while budget decentralization deals with the limited spending authority over these insufficient resources allocated to individual courts, the larger problem of resource allocation among the various levels of the judicial branch remains. Development and implementation of administrative policies, as noted in Chapter 7, might affect the decentralized governance of resource management.

Budget Decentralization

■ RECOMMENDATION 76: To match responsibility with authority, the courts should further decentralize the budget execution function.

Budget decentralization has its roots in the collegiality and local autonomy of the federal courts. In this period of fiscal austerity,

[20] *See, e.g.*, Henry Mintzberg, *The Fall and Rise of Strategic Planning*, 72 HARV. BUS. REV. (No. 3) 107, 112*ff.* (1994).

the workability of the model will surely be tested.

Budget decentralization should be gradual. It should promote institutional cohesiveness and equity through implementation of a central audit function. That function should include spending oversight and responsibility for the submission of a single budget for the courts. To date, each step in budget decentralization has been mirrored by an increasing sophistication in the audit trail. This process must continue while at the same time preserving sufficient local flexibility to allow productive differences in local court cultures.

A proposal meriting further consideration is to use a fixed formula in the budget process use to allot a specific number of dollars to a court per case or judgeship so as to produce a more predictable form of funding. Judges and staff would be accordingly stimulated to plan more effectively, although courts would still be permitted to establish special funding needs over and above the formula.

Technology and Facilities

Technology will bring vast change in how people meet, interact, conduct business, and resolve their disputes. Growth in communications abilities will change where people work, as well as how they work. While face-to-face meetings may remain the norm in some situations, increasing reliance will be placed on electronic media. The courthouse of the future may not always be a finite physical space. Critical issues about technology, including data security and due process rights, must be resolved, however, before these changes take effect.

■ RECOMMENDATION 77: Use of court-related technology should be expanded to improve the ability of the federal courts to provide efficient, fair, and comprehensible service to the public.

The federal courts' experience with technological innovation is explored in depth in the *Long Range Plan for Automation in the Federal Judiciary*, a document generated and reviewed by umbrella and user groups of judges, Administrative Office officials, court administrators, and support staff. It is a well-conceived plan for testing and bringing the best technological innovations to the courts.

In the future, technology must continue to facilitate the work of the courts. To do so, the approach to its adoption must be integrated. A true federal courts information management and national communications network is emerging. For the courts to successfully embrace the technological future, however, everyone involved in court operations—not only technically expert staff—must be capable of identifying how and where new technological tools will improve performance.

■ RECOMMENDATION 78: The courts must remain current with emerging technologies and how they can be employed to improve the administration of justice generally.

The concept of the "electronic" or "virtual" courthouse—a system that networks computers to permit parties to litigation and the court to exchange materials on-line and to conduct meetings and hearings over the network, including use of simultaneous video conferencing, in lieu of the participants assembling at the same location—should be assessed to determine its suitability to meet the needs of court users and the judiciary. When courts are able to receive documents electronically from parties already equipped to submit their cases in this manner, the concept of the "virtual courthouse" envisions a court able to schedule proceedings through visual telecommunication,

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with participants at different locations, lessening the need for a "physical courthouse."

■ RECOMMENDATION 79: The judicial branch should maintain a comprehensive space and facilities program, giving careful attention to economy in a time of austerity.

Almost all the federal district and circuit courts have completed long range plans for facilities and space requirements. Working through the Judicial Conference, the courts should continue to participate actively in needs assessments, and in the design, construction and management of space and facilities for judicial officers and court employees. At a time of extreme budgetary austerity, it is essential that the courts exercise prudence and economy in the design of new facilities.

Using Conference-approved planning and space standards, a long range facility planning program should be periodically updated. That plan should be the basis for funding requests to Congress for new court and court unit facilities. It should address increasingly the need for and the likely impact of new technology. The Conference should adopt a real property capital budget and pursue alternatives to financing new construction through annual appropriations.[21]

■ RECOMMENDATION 80: To achieve economies of scale, eliminate unnecessary duplication, and otherwise improve administrative efficiency and effectiveness, the courts should study alternative methods of organizing and allocating judicial support functions .

Efficiency and cost savings are possible through voluntary sharing of such personnel as administrators, clerks, and probation officers, among districts. To expedite feasible, common sense solutions to resource needs, unnecessary procedural barriers should be eliminated. Given the courts' commitment to decentralized court administration and budgeting, local courts should have the ability freely to allocate their personnel resources. A number of districts or circuits should be selected to test more flexible methods of organizing judicial support activities. Such experiments will surely suggest more far-reaching structural changes and innovations at the district court level.[22]

■ RECOMMENDATION 81: To refine both operations and policy, the federal courts should define, structure and, as appropriate, expand their data collection and information gathering capacity.

Implementation Strategies:

81a To obtain better data for reporting, policy making and planning purposes, the Judicial Conference should establish a steering group to coordinate and define the process. Members of the group should include representatives from all primary data sources, judicial branch users, and outside researchers.

81b This steering group should:

(1) Conduct a data needs assessment that includes but is not limited to: circuit, district, and bankruptcy courts, magistrate judge reporting, Administrative Office

[21] See Chapter 7, Implementation Strategy 53a *supra*.

[22] This kind of resource sharing is already permitted in the defender services program under the Criminal Justice Act. *See* 18 U.S.C. § 3006A(g) (1988) (two adjacent districts or parts of districts are authorized to establish a defender organization to serve both areas).

program reporting, research, budgetary impact analysis, and long range planning.

(2) Inventory and catalog data collection efforts. The steering group should utilize recent surveys conducted by Conference committees and other organizations.

(3) Evaluate the ability of current statistical data holdings to support planning and policy.

(4) Determine how best to collect and maintain such data. Determine how best to organize and manage such efforts. Determine training requirements.

(5) Design the most appropriate single or coordinated network of data bases.

In determining the judiciary's need for statistical data and other information, the federal courts should seek input from interested persons outside the system, including scholars and researchers who study the courts. Judicial data collection should include the statistical data and other information needed for planning purposes, *e.g.*, data on historical trends and their impact on the judiciary, and on the demographics of court users. However, expansion of judicial data collection should be preceded by careful research to determine what precisely is needed in order to run the courts fairly and efficiently.

Clearly, a broad-based inquiry into what data and statistics should be regularly collected and how they are used must be made a high, immediate priority. Personnel from all levels and units of the federal court system, and others, should participate in specifying the contours of these data and statistics. The Judicial Conference should support and promote information resources management to meet the information needs of the courts, the public, the bar, and litigants.

The Federal Courts' Workforce of the Future

The workforce of the federal courts of the future will be shaped by trends similar to those that have created the workforce of today. The current workforce is larger than ever, reflecting significant workload growth. It rose by 66 2/3% since 1982, from 14,400 to 24,000. Most of the growth has been in supporting personnel: the number of judicial officers has grown only about 17%. Because the business before the courts reflects conditions in society generally, staffing in probation and pre-trial services, bankruptcy and public defender offices has almost tripled in size in the past decade.

The federal courts' workforce today is far more diverse than in the past. In the past ten years the number of women in professional positions has increased over 170%. Women now hold a majority, about 53%, of the judiciary's professional positions (legal, administrative and technical), compared to 1982 when the judiciary's professional workforce was about 36% female. The entire judiciary workforce—including both professional and clerical personnel—has grown from 63% female in 1982 to 69% female in 1991. The federal courts have also made substantial gains in minority employment. African-Americans, Latinos, Asians and Native Americans have more than doubled in number; their percentage in both the total workforce and its professional component has increased. Latinos represent the greatest number of new minority employees; their representation in the courts' workforce has grown by 213%.

What does this hold for the future? At the very least, the proportion of women and minorities in the federal courts will continue to increase, particularly in professional and technically-skilled positions. These jobs now constitute 60% of the federal courts' non-judicial positions.

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■ RECOMMENDATION 82: The courts should maintain and foster high-quality judicial support services.

The effective operation of court units requires highly qualified, well-trained managers. The courts and national judicial administration agencies should recruit and retain the best possible professional and support staff, and develop their skills assiduously.

Increasingly, the federal courts will be competing with other employers for educated, professional, competent workers. To demonstrate that the system supports and rewards exceptional talent and strong performance:

- judicial branch employees must be recognized and compensated appropriately
- court personnel at all levels should be used extensively to assist the courts in administration and policy development, and
- continuing education must be integrated into both the schedule of the courts and each employee's work.

■ RECOMMENDATION 83: The courts should improve working conditions and arrangements for all court support personnel.

The courts must be adequately staffed to perform all needed functions. Working conditions for court support personnel should be progressive and make provision for: family leave, flexible work arrangements, and ombudsmen to consider concerns and complaints.

■ RECOMMENDATION 84: High-quality continuing education for judges should focus on the law; case management, including use of appropriate dispute resolution processes; and cultural diversity.

Education and training are as important for maintaining and expanding the skills of the experienced judge as for orienting the new judge. "Judicial education should not, however, end with orientation or yearly circuit conferences but should be a life-long process and pursuit."[23] Social, technological, and demographic changes will require a higher level of judicial competence.

In the future, large dockets will test the management abilities of even the best judges. Intensive case management training will be essential. Appropriate dispute resolution must be the reality; it will demand judges who are expert and creative in "fitting the forum to the fuss."

To limit inconvenience and downtime for judges, the Federal Judicial Center, should wherever possible educate judges via interactive video, computer-generated courtroom simulation, teleconferences, and other innovations. The federal courts' strong tradition of quality judicial education should be continued.

■ RECOMMENDATION 85: All federal court staff should be trained to ensure outstanding service to the public through adopting a "customer service" approach to justice. They should be educated regularly in the use of court technology.

An emphasis on customer service and appropriate dispute resolution will create new opportunities for court system employees. Technology will free support personnel from the crush of paper record keeping for new, important jobs in the courts. New labor-saving

[23] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 170 (1990).

systems will free staff for work that cannot be performed mechanically.

Nonjudicial court personnel should continue to be trained as service providers and facilitators. Their primary responsibility should continue to be the provision of timely, accurate, and efficient service to all persons having business with the courts, and assisting litigants in reaching the next step in resolving their disputes.

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Chapter 9
The Federal Courts and Society

PLANNING for the federal courts' role in the justice system is no easy task; planning for their proper role in society is even harder. While the Constitution's Framers intended the federal courts to be ultimately accountable to the people, they also sought to insulate the courts from direct popular pressure. This tension endures to this day.

The federal courts' link with the nation's earliest history, their roots in the Constitution, and their enduring role as "keepers of the covenant," have an incommensurable impact on how society views the federal courts. These attitudes help explain their popularity with Congress and litigants, and why many perceived solutions to societal problems involve litigation in the federal courts. The federal courts must come to terms with these popular views in anticipating future needs, but they must also, in conserving their core values, educate society about the limitations of the federal courts.

Learned Hand's warning—that we sometimes rest our hopes too much on constitutions, laws and courts—bears repetition. Cultural and moral attitudes, changing demographics, the impact of education, families, and neighborhoods—all the multitude of influences on human behavior—have a far greater impact on society than the actions of the federal courts. Consequently, many of the problems now causing popular dissatisfaction with the administration of justice cannot be solved simply by court reform, improved procedures or greater justice system resources. As former Chief Justice Charles Evans Hughes said:

> We must rely upon the civilizing influences which create standards and traditions beyond and above the law and upon which we must finally depend for the improvement, the adaption and the efficiency of the administration of the law.[1]

Yet, despite these limitations, the federal courts unquestionably have an obligation to meet society's expectations that "equal justice" be more than a platitude. To serve as a fair and impartial administrator of justice, the federal courts must be open and accessible to those who are drawn into or use the judicial process, including litigants, lawyers, jurors, and witnesses. They must be scrupulously fair, and free from bias and prejudice. As America enters the 21st century, the federal courts must plan to meet the needs of a population increasingly diverse in racial, ethnic, and cultural identity. Moreover, the disparities in wealth that now exist will not have disappeared; many members

[1] Charles Evans Hughes, Speech to the Annual Meeting of the American Law Institute (1929).

of society will continue to lack the means to afford legal representation. The federal courts must also recognize the need to deal with this reality.

All members of society, therefore, should have a meaningful opportunity to use and participate in the judicial process. All must be treated as valued customers of the courts. To that end, judicial proceedings should be comprehensible, physically accessible, and affordable to ordinary users, including persons with disabilities and litigants not represented by counsel.

For no one is the need for counsel greater than the individual accused of a crime. The federal courts remain committed to the provision of quality legal services to financially eligible criminal defendants consistent with the mandates of the Sixth Amendment and the Criminal Justice Act. Increasing demands are being placed on the defender services program as a result of more challenging criminal caseloads, federal sentencing guidelines, and added prosecution resources and initiatives. The constitutional mandate, however, has not changed. Indigent defendants still must have effective assistance of counsel, despite the growing costs of meeting the constitutional obligation. The task is to meet that need in an increasingly efficient and economical manner.

Accomplishing many of the initiatives outlined in this plan will require society's support and, ultimately, the acts of its elected representatives. Regular, direct, formal channels of communication should be maintained between the judiciary and its co-equal branches. An institutional mechanism for regular contact among the branches could serve to enhance mutual understanding, obtain needed assistance, and protect the courts from unwise action. Closer working cooperation between state and federal courts should occur as efforts proceed to increase cooperation between federal and state systems as the nation moves toward recognizing the interdependence of what is ultimately one justice system.

Public confidence in the administration of justice by the federal courts must be maintained. The courts depend on the public for support of their functions. Confidence and support can be enhanced, and user participation in judicial procedures made more meaningful, by educating the public about the role and functions of the federal courts. The judicial branch must act to enhance general public understanding of the federal courts. Better communication would inform the judicial branch of public discontent while it would educate the public regarding the federal courts' problems and limitations.

In some circumstances it will be appropriate for the judicial branch, especially after implementing programs to educate the public about the role of the courts, to take steps to enlist public support to assist the judiciary. In all these endeavors to improve the relationship of the federal courts with society, the courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.

Equal Justice

■ RECOMMENDATION 86: Since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts.

Bias is patently inconsistent with effective justice, especially bias that is based on invidious classifications by lawyers, judges, court employees, or jurors. The courts must initiate and reinvigorate efforts to elicit, investigate and resolve claims of bias. They must also do a better job of educating judges, court employees, lawyers and litigants about how both

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intended bias and the perception or appearance of bias can adversely affect all those who seek and dispense justice.

The Judicial Conference, the states' Conference of Chief Justices, and the Federal Courts Study Committee have all studied bias and urged that it be combatted through increased education. Several studies of state court systems have identified bias as a significant problem and numerous states have convened commissions to combat bias based on gender, race, ethnicity, and disability.

In 1992, the Judicial Conference adopted a resolution "encouraging each circuit not already doing so to sponsor educational programs for judges, supporting personnel, and attorneys to sensitize them to concerns of bias . . . and the extent which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch." A 1993 Judicial Conference resolution stated that "encouraging circuit judicial councils to conduct studies with respect to gender bias in their respective circuits[,] has great merit . . . ." Several federal circuits have undertaken such studies; the Ninth Circuit's sets a high standard, one that other courts would do well to emulate. The ongoing educational process in the circuits should continue.

Combatting bias and prejudice requires the vigorous leadership of the federal bench. Strong statements and actions by federal judges have shown and continue to demonstrate that bias cannot be tolerated. The need is to maintain and expand this judicial leadership to eradicate any bias that exists in the federal courts. Court users should be convinced that they have the right and the responsibility to complain about bias and unequal treatment. Each circuit should maintain and promote mechanisms to investigate and resolve bias complaints.

■ RECOMMENDATION 87: Federal judges and all court personnel should strive to understand the diverse cultural backgrounds and experiences of the parties, witnesses, and attorneys who appear before them.

In coming decades, the nation's demographics will continue to change in ways that will affect the substance of disputes, the ability of litigants to use the courts, and the way evidence is understood and presented. All court personnel should receive enlightened education and training that addresses the difficulties experienced by court users unfamiliar with the courts, who speak a language other than English, who have difficulty balancing family and work responsibilities, and whose cultural background leaves them unfamiliar with American justice. This should include assessing the need for court-based child-care facilities in the federal court system and developing needed programs patterned after state court services which have proven effective.

After assuring that the particular need in a defined locality is sufficient and continuing, courts should ensure that their personnel understand the diverse cultural perspectives and that they are providing quality service to those justice seekers not fluent in English.

■ RECOMMENDATION 88: Justice should be made fully accessible to individuals with disabilities. Facilities should be constructed or renovated to ensure physical access and to remove attitudinal barriers to providing full and equal justice to those with disabilities.

Federal courts should be physically accessible to all, including individuals with disabilities. Creating a barrier-free and user-friendly environment to accommodate the entire population requires implementation of "universal

The Future Nation

In America today, old definitions of minority groups are changing as the nation's social landscape tilts toward more concentration of population growth, greater dispersion of population density, and increasing ethnic and racial diversity.

The courts cannot ignore the profound changes underway in our population. Their effect on the future relations of the federal courts and society will shape the nature of our structure and procedures for distributing justice.

Highlights of the changes underway in our society follow:

Population growth

- The 1990 census shows that the nation's population growth is slowing. Growth, moreover, is concentrated in fewer places. City population growth is slowing for a number of reasons, while suburban area population growth is continuing to expand.

- During the 1980s, over half the nation's population growth was concentrated in three states: California, Florida, and Texas. Other growth areas are Arizona, Georgia, North Carolina, Virginia, Washington, and Nevada.

Immigration & migration

- Immigration already accounts for about one-third of the nation's population growth and appears to be increasing. Welcoming newcomers and native-born minorities into the economic and social mainstream is one of the biggest challenges facing America in the 1990s.

- In the 1980s, population gains through migration were largely in Southeastern, Southwestern, and Pacific states, while losses concentrated in states with high international immigration or declining economies.

- Six states—California, New York, Texas, New Jersey, Illinois, and Massachusetts—experienced high immigration from abroad but did not attract large numbers of internal migrants. In fact, these states exhibited an outflow of American born whites and minorities to nearby states. This pattern may be a response to economic, demographic, and social pressures brought about by the continuing wave of immigrants.

Age

- The median age of the U.S. in 1978 was 28. In 1990 it was about 33. By 2005 the median age will be close to 38. In the new century's second decade, it will pass 40.

- In 1965, 29% of the population was under 14 years old, and about the same percent was 45 and older. By 2005, the under-14 population will have declined to about 22%, while those 45 and older are expected to be nearly 40% of the population.

- That means older Americans will increase in number and grow in influence. While about 12% of today's population is 65 or older, in 2020 20% of the population will be 65 or older.

Workforce

- A significant labor force development in the United States generally over the last several decades has been the increase in the minority share of the work force. In 1980, minorities composed 18 percent of the U.S. labor force. By 1992, their share had increased to more than 22 percent.

- During the past four decades, the number of women in the workforce rose significantly. By 1990, women constituted about 45% of the workforce, and the percentage will rise to over 47 per cent by 2000. Over 81% of women ages 25 to 54 will be in the labor force in 2000.

- Two-worker families rose from about 32% of all families in 1960 to 70 percent in 1990

- By the year 2000, minorities are expected to account for 43% of new entrants into the workforce.

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• As the workforce growth slows with the aging population, more non-traditional groups will be called to participate. This will include people with various disabilities.

Race and ethnicity

• The census shows that, taken as a whole, racial and ethnic minority groups are growing more than seven times as fast as the non-Latino white majority.

• The black population grew by 13 percent during the 1980s. The Latino population grew 50 percent to 22.5 million while Asian population doubled to over 7 million. Researchers forecast these growth rates will stay about the same the next ten years.

• By the year 2000, minorities are expected to reach 25% of the total workforce. This represents an 8% growth since the late 1980's. In 1990, 6 percent of U.S. counties experienced a majority of combined numbers of blacks, Latinos, Asians, and other minorities. Forty-five counties have near 50-50 balance, most in metropolitan areas.

• By 2005, California is expected to have a population that is 50% people of color speaking 80 different languages.

Social economics

• The child poverty rate has risen by one third over the past 20 years. In 1991, almost 22 percent of the nation's children—approximately 14.3 million young people—lived in families with annual incomes below federal poverty thresholds. This is two to four times the child poverty rate in Canada and Western Europe.

• One in four households with children is headed by a single parent, up from one in eight in 1970.

• Families maintained by women with no husband present doubled from 1970 to 1990 to 10.9 million.

• In the past 30 years, the birthrate among unmarried women 15 to 19 has almost tripled to 45 births per thousand.

• It is a commonly accepted estimate that 20 million people in this country are functionally illiterate. These people cannot hold a job, balance a checkbook or read and understand a newspaper. Even though 86% of our population receives diplomas, approximately 25% cannot read or write at the 8th grade level.

Crime

• In 1992 about 57% more juveniles were arrested for violent crimes than were arrested in 1982, a near-peak year for violent crime.

design" principles in order to produce facilities that are not only accessible but easy to use.

The Judicial Conference has approved steps to be taken both in new courthouse construction and alteration of existing facilities. Architects will be instructed to be "handicapped aware." Improvements will include the following: witness and jury boxes will be handicap accessible, spectator areas of courtrooms will include wheelchair stations, and service counters will have stations available for persons in wheelchairs. Systems to assist those who are hearing-impaired ill also be available in all courts. The Conference also approved the use of realtime reporting technologies that provide instantaneous translation of the court reporter's shorthand notes and allow display of the text on a monitor.[2]

Identifying and eliminating the barriers, including those not readily visible, and creating a model of full accessibility, must be the courts' first priority in this realm. The second objective—which can be pursued simultaneously—must be the development of an ongoing education program to make all judges and court

[2] See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 49 (Sept. 1994); Judicial Conference Press Release, Sept. 20, 1994.

system support personnel aware of and sensitive to the needs of disabled users. "Courts are required [by the Americans with Disabilities Act of 1990] to make reasonable accommodations to persons with disabilities in employment unless such an accommodation would result in undue hardship. They are required to make reasonable modifications to provide services unless [those] would fundamentally alter the nature of the service . . . or present an undue burden."[4]

"As stewards of the justice system, judges and court personnel need to understand both the nature of the aging process and the range of disabilities so that stereotypes don't negatively guide their actions toward members of either group . . . . Providing information in formats usable by a range of individuals ensures fairness to all."[3]

■ RECOMMENDATION 89: Justice should be made accessible to those who do not speak English.

The obvious desirability of achieving this goal should not obscure the complexity of fashioning a plan for its accomplishment. As the numbers of non-English speakers and the number of languages spoken in the U.S. population increase, the courts will be challenged as the seek to ensure the integrity of the truth-finding process. Under the provisions of 28 U.S.C. §§ 1827-1828, the federal courts must supply interpreters in cases instituted by the United States Government where interpreters are needed. The need for accurate and precise translation services in other civil litigation must also be addressed.[5] The Judicial Conference is seeking amendment of the Federal Interpreters Act to allow reimbursement for sign language interpreters in proceedings not initiated by the government. The federal courts should work with the state courts to develop testing and training procedures for court interpreters and to establish a nationally accessible database of qualified interpreters.

Non-fluency in English is only one of the linguistic issues facing the courts. The language of justice in the federal courts should be comprehensible and clear to English speakers too. Much has already been accomplished in simplifying federal court forms and in providing explanatory pamphlets and fact sheets, especially in the bankruptcy courts. Businesses and state courts have launched forms-simplification projects that seek to ensure the use of "plain English." Such initiatives can serve as models for federal courts as they seek to make justice comprehensible to all.

Keeping Federal Courts Affordable

■ RECOMMENDATION 90: Litigants should pay reasonable filing fees and certain services above a basic level should be funded by reasonable user fees.

Federal courts are an indispensable forum for the protection of individual rights. Accordingly, the costs of federal courts, properly borne by all citizens, have traditionally been funded primarily through appropriations rather than user fees.

Adjudication and resolution of civil disputes in the federal courts create external benefits beyond the obvious private benefits received by individual litigants. These include the creation of precedent, general increases in social harmony, discouragement of violent self-help, and establishment of verdict ranges used by other litigants in settlement calculations.

Because litigants receive a private benefit from their use of the federal courts, it is appropriate to charge users a reasonable filing fee for court usage. These fees should be

[3] John Albrecht, *Meeting the Needs of the Disabled and Elderly in Court*, 33 JUDGES' JOURNAL 10-11 (Summer 1994).
[4] *Id.* at 15.
[5] See Recommendation 87 *supra*.

significant enough to encourage citizens to be serious in their use of court facilities. Fees, however, should not be so high as to discourage appropriate recourse to the courts. Nor should fee imposition be extended to indigents now exempted. This issue is somewhat different in the bankruptcy court, where policy and case law mandate filing fees regardless of ability to pay. A pilot program now underway in bankruptcy court will provide useful data on this policy.

Fees also should be adjusted to take account of inflation and rising costs. These adjustments might occur every five years to reduce the administrative burden of collecting new fee amounts each year.[6] Special services, such as file searches, copying, and electronic docket access,[7] are provided as a convenience and warrant an additional fee.

Representation of Criminal Defendants

Under laws passed by Congress, the federal courts are responsible for administering defender services programs for those who cannot afford counsel. The demands on such programs are increasing in direct response to more challenging criminal case loads, federal sentencing guidelines, new prosecution initiatives, and shortages of qualified, available private attorneys. As a consequence, the cost of providing defender services has increased greatly, at the same time that appropriations for this constitutionally-mandated function have become harder to find. In several recent years, funds for defender services have been exhausted

Principles Relating to Revenues and Fees

The following principles relating to revenues and fees have been recommended by the Judicial Conference Committee on Court Administration and Case Management as a basis for reviewing and recommending changes and modifications to the fee schedules:

1. The federal judiciary should be funded primarily from appropriated funds.

2. The federal courts provide a significant benefit to litigants. Therefore it is appropriate for all litigants to pay reasonable fees. Fees should be adjusted to take account of inflation and rising costs, but they should not be used as a means of generating revenue and addressing momentary budget shortfalls.

3. Fees should not be so high that they discourage access to the courts. Nevertheless, they should be significant enough to discourage inappropriate or frivolous use of the courts.

4. Certain services above a basic level should be funded by reasonable user fees.

5. The administrative burden of collecting fees should not outweigh the benefit of the fee.

6. The judiciary generally should be the recipient of fees charged to users of court services.

7. Fees should be assessed to encourage the use of court resources more responsibly.

8. Whenever possible, fees should be consistent from district to district.

[6] *Cf.* 11 U.S.C. § 104 (1988) (requiring the Judicial Conference to recommend to Congress uniform percentage adjustments in the dollar amounts in the bankruptcy laws every six years).

[7] Fees for electronic docket access have been approved by the Judicial Conference of the United States. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16 (Mar. 1991); *id.* at 16 (Mar. 1994); and *id.* at 47-48 (Sept. 1994). A court "may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information." Misc. Fee Schedules promulgated pursuant to 28 U.S.C. §§ 1913, 1914, 1926 and 1930.

before the end of the fiscal year. In the future, the courts must find ways to administer such programs in an increasingly efficient and economical manner.

■ RECOMMENDATION 91: Federal defender organizations should be established in all judicial districts (or combined districts), where feasible, to provide direct representation to financially eligible criminal defendants and serve as a resource to private defense counsel who provide such representation.

Implementation Strategies:

91a Full-time federal defenders should train and serve as a resource to panel attorneys, thus assuring competence of appointed counsel.

91b A study should be conducted to determine whether guidelines may be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case, if such representation is otherwise appropriate.

91c Federal defender organizations should represent individuals who present more complicated issues or otherwise require more defense resources.

In its March 1993 report, the Judicial Conference recommended that the Criminal Justice Act (CJA) be amended to require establishment of a federal public defender or community defender organization in all judicial districts or combinations of districts, where (1) such an organization would be cost effective, (2) more than a specified number of appointments is made each year, or (3) the interests of effective representation otherwise require establishment of such an organization. To control the heavy costs of the CJA system, a study should be initiated to determine whether protocols—including judicially approved guidelines—could be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case if such representation is otherwise appropriate. Federal defender organizations also should be encouraged to represent, in those cases, individuals who present more complicated issues or otherwise require more defense resources.

The recent CJA study disclosed that those districts with a federal defender organization generally provide higher quality representation to financially eligible criminal defendants than do districts without one.[8] Federal defenders are federal criminal law specialists. They understand the intricacies of the sentencing process, receive regular training by the Administrative Office and the Federal Judicial Center, and become experienced at dealing with other components of the criminal justice system, *i.e.*, United States attorneys' offices, law enforcement agencies, probation and pretrial offices, and the courts.

As specialists, federal defenders are well equipped to train and serve as a resource for panel attorneys appointed under the Criminal Justice Act (CJA). Although better data on cost effectiveness is needed, based on available information the Conference has concluded that federal defender organizations generally provide CJA services at less cost than do private panel attorneys. Beyond the difference in direct costs (salaries and fees), the Conference found that federal defender organizations save money by sparing the judiciary: the administrative costs of case-by-case appointment of panel attorneys; a judge's review of compensation and expense vouchers; and voucher processing and payment.

[8] REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM 21 (Mar. 1993).

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■ RECOMMENDATION 92: Highly-qualified, fairly-compensated, and smaller panels of private attorneys should be created to furnish representation in those cases not assigned to a defender organization.

Implementation Strategies:

92a The judiciary should establish national or local qualification standards, provide better training, and seek improved compensation for panel attorneys.

92b To improve the quality of representation, adequate funding should be obtained so that the Administrative Office, in coordination with the federal defenders, the Federal Judicial Center, the United States Sentencing Commission, bar associations, and local courts, can provide panel attorneys with the training needed to assure effective assistance of counsel to their clients.

92c In districts and locations where it is not feasible to establish a federal defender organization, the courts should be encouraged and afforded sufficient funding to establish panel attorney support offices which can provide the needed advice and assistance.

92d At a minimum, adequate funding should be requested so that the Judicial Conference can adjust compensation rates up to the maximum amount authorized by law.

92e The federal courts should continue to seek authority under the Criminal Justice Act to establish and modify dollar limitations on panel attorney and other compensation.

92f Adequate funding for the defender services program should be secured by ensuring that the program is efficient and well managed.

92g Courts should be discouraged from routinely reducing fees to panel attorneys and should strive to create a system that ensures fair compensation to such attorneys.

Although the quality of representation by federal defender organizations has been remarkably high, the representation provided to defendants by panel attorneys varies in quality from district to district and within districts. In reporting to Congress on needed changes in the panel attorney system, the Judicial Conference recommended that the judiciary establish national or local qualification standards, provide better training, and seek improved compensation.[9]

The CJA does not establish qualification standards for attorneys serving on CJA panels. The practice of federal criminal law has become highly specialized. Defendants face increasingly lengthy prison terms. It is time for panel attorneys to be held to certain minimum qualifications.

Federal defender organizations often provide legal advice, support services, and training to panel attorneys. The nature and extent of such training, however, depends on available funding. In districts without defender organizations, panel attorneys receive little substantive guidance on federal law and procedure. Nor do they receive continuing support or

[9] *Id.* at 26-32.

advice regarding procedures for obtaining approval of investigative and expert services necessary to an adequate defense. To improve the quality of representation, adequate funding will be needed.

The single most important problem to confront the defender services program in recent years has been the judiciary's inability to secure appropriation of sufficient funding to meet the sharp cost increases attributable to rising criminal case loads, substantial expansion of prosecutorial and law enforcement resources, and the impact of guideline sentencing and mandatory minimum sentences.

In many locations, the $40 or $60 per hour paid to panel attorneys does not even cover basic overhead costs of a law office. Thus, a lawyer who accepts a panel appointment may actually be making a financial sacrifice. At a minimum, sufficient funding is needed to allow the Judicial Conference to adjust compensation rates to the maximum authorized by law. The better approach, however, would be to amend the CJA to authorize the Conference to establish and modify dollar limitations on CJA compensation, and to mandate (not merely authorize) cost-of-living adjustments.

In order to compete more successfully for increasingly scarce federal dollars, the defender services program must demonstrate in the years ahead that it is efficient and well-managed. Several initiatives designed to achieve this are now underway or soon will be. They include development of case weighting and work measurement formulas for CJA representation, and implementation of a comprehensive management and operational review program for federal defender organizations and CJA attorney panels.

Improved efficiency and reduced costs can also be achieved by enhancing coordination and communication among the criminal justice system's various participants. And because program costs are frequently influenced by factors and decisions outside the judiciary's control, it will be essential to maintain a high level of communication and coordination with the nation's executive and legislative branches.[10]

Ensuring Justice for Those Who Cannot Afford Counsel in Civil Cases

■ RECOMMENDATION 93: Provision of counsel should be increased for civil litigants and mechanisms, including legal aid societies and similar organizations, for handling indigent and pro se cases in federal courts should be enhanced.

Implementation Strategies:

93a Bar associations should be encouraged to promote pro bono programs to make civil counsel available to assist litigants who otherwise would have to represent themselves in federal courts. Funding sources should be developed for provision of legal assistance by legal aid societies and similar organizations.

93b Law schools should be encouraged to expand legal clinics to provide competent counsel for prisoner claims, and to low and moderate income persons in need of counsel.

93c Federal courts should adopt local rules authorizing law students involved in

[10] For example, the Conference has endorsed creation of district CJA committees in which agency and private attorney representatives propose changes in local rules and practice aimed at reducing CJA and other costs of the criminal justice system. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17-18 (Mar. 1994).

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legal clinics to represent—with appropriate supervision—parties in need of counsel in federal courts.

93d Special mechanisms should be created to handle pro se cases efficiently. The frequency of pro se filings, and the frequency of repeat filings by particular litigants, should be tracked through the judiciary's statistical system to allow informed assessment of the amount and impact of judge time and court resources devoted to pro se filings.

93e Through the use of centralized staff operating under court supervision, district and appellate courts should continue to screen pro se cases.

"Pro se" litigants (parties without counsel) face several obstacles to effective use of the federal courts, including unfamiliarity with procedural and substantive law, and ignorance of time limits for filing claims. Such parties are distinctly disadvantaged in an adversary system that relies on the parties themselves to evaluate and present their claims.

Because judges in our adversarial system rely on litigants and their counsel to unearth facts and present legal arguments, there is an increased risk of decisional error in cases where parties lack counsel, Where counsel is not present the federal courts bear the extra administrative burden of ensuring that unrepresented parties with meritorious claims obtain the relief to which they are entitled, as well as ensuring that the litigant adversaries are not burdened by unduly protracted proceedings. Here again, the system works better when counsel are available to screen out frivolous claims, ensure procedural compliance, present cases on the merits, and settle cases where appropriate. Legal aid and similar organizations have provided much of this needed legal assistance in the past; it will be important to assure adequate funding for this essential function.

The federal courts cannot, of course, eliminate the economic disparity that underlies the inability of many litigants to obtain counsel. Nor, in this time of tight state and federal budgets, is society likely have the resources to provide counsel to all who need it. The courts can, however, encourage ongoing efforts to resolve this problem.

Two organized efforts outside of government have made real strides in providing counsel to pro se litigants. The ABA Model Rules of Professional Conduct provide that "[a] lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service . . . . and by financial support for organizations that provide legal services to persons of limited means."[11] A number of state and local bar associations have launched effective pro bono programs that provide counsel to federal court litigants. The bar should extend such efforts into geographical areas not now served.

Second, many law schools have active clinical programs that provide competent counsel for prisoner claims, and to low and moderate-income persons in need of counsel. In addition to providing counsel to those in need, these programs provide valuable education and instill in law students a sense of responsibility to society. Where necessary, local federal court rules should be amended to permit law student court appearances under these programs.

These programs can only provide for a small percentage of the need. The federal courts should encourage local initiatives that provide pro bono representation, study additional means of providing counsel for those who need it, and

[11] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1 (1989).

experiment with new mechanisms for handling pro se cases fairly and efficiently.[12]

Customer Service Orientation

The public sector is taking a lesson from private enterprise and is increasingly emphasizing the need to serve the consumer. Federal judges, administrators, and support personnel, and the bar, should actively seek to learn what their customers expect from the courts. They might consider a precept stating the customer service ideal recently adopted by the California court system: "Nonjudicial court personnel should be trained as service providers and facilitators. Their primary responsibility should be to provide timely, accurate, and efficient service to all persons having business with the courts, and to assist litigants in reaching the next step in resolving their disputes . . . . Prohibitions against providing advice to litigants should be reexamined and modified to allow court personnel to assist in moving disputes toward resolution."[13]

■ RECOMMENDATION 94: The judicial branch should act to enhance understanding of the federal courts and ensure that the fundamentals of the litigation process are understood by all who use it. The federal courts should encourage feedback from the public on how successfully the judicial branch meets public expectations about the administration of justice.

Implementation Strategies:

94a Information on using the courts should be provided through community institutions and in formats aimed at an increasingly diverse citizenry.

94b Judicial outreach programs should be brought to educational and community organizations and other public institutions.

94c Relations with the bar and law schools should be maintained and enhanced by participating in legal education and training programs and activities that enlist those institutions in educating the public about the legal system.

94d Press and public access to court proceedings should be presumptively unrestricted, absent some compelling interest to the contrary. Efforts should be made to reach out and educate the media and the public.

Effective justice presupposes effective understanding. Information on the law and dispute resolution options and processes should be readily available in all appropriate languages in schools, libraries, government facilities, and other public places as well as in the courts themselves.[14] Justice information should be provided through all widely available technologies including telephone, computer, and interactive video. Information kiosks staffed by knowledgeable employees should provide information and guidance on the dispute resolution process to court users, especially those unrepresented by counsel.

[12] See Chapter 6, Recommendation 35 and supporting commentary *supra*.

[13] JUSTICE IN THE BALANCE 2020—REPORT OF THE COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS §§ 11.10a and 11.10b, at 180-181 (1993).

[14] See, *e.g.*, Deanell R. Tacha, *Renewing Our Civic Commitment: Lawyers and Judges As Painters of the 'Big Picture,'* 41 KAN. L. REV. 481 (1993).

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An active role for the judiciary in educating the public has been supported by the American Bar Association in a resolution urging: "judges, courts, and judicial organizations to support and participate actively in public education programs about law and the justice system." The resolution also urged that "judges be allotted reasonable time away from their primary responsibilities on the bench to participate in such public education programs, consistent with the performance of their primary responsibilities and the Code of Judicial Conduct."[15]

Although there will continue to be cases where judges must exclude cameras from court facilities to promote confidentiality, safety, or other compelling interests (expressly including ensuring the particular safety of jurors and witnesses) experimentation with cameras in the courts should continue. Due consideration of the rights and needs of jurors and witnesses must inform the implementation of this policy.

An important part of developing a strong working partnership with the public is creating an effective means for justice system customers—*i.e.*, litigants, witnesses, jurors, the bar, the press, and the public at large—to register their feedback on how well the institution is meeting their needs. Increasingly, cost-conscious litigants have begun to bring their concerns about the courts to their counsel; they are often outspoken when given the chance to be heard. One litigant complained about the arguably outdated practice in some courts of ruling on motions at the eve of trial, and the unnecessary expense to which that practice had subjected him.

■ RECOMMENDATION 95: Public understanding of the nature and significance of the federal judiciary's role in the constitutional order (and the constraints under which the judiciary functions) should be improved.

With few exceptions the public and the courts share common hopes and goals with respect to justice. They seek justice that is accessible, affordable, comprehensible, and as speedy as fairness allows. Better two-way communication would inform the third branch of public satisfactions and discontent, at the same time that it educated the public about the federal courts' challenges and limitations. The courts should include significant public representation on some advisory committees, much as members of the bar are included on the rules committees. Surveys of public opinion regarding the federal courts would also benefit the system. The courts should also consider how they may best address the needs and rights of victims of crimes.[16]

■ RECOMMENDATION 96: A comprehensive program should be developed to educate jurors about the role and function of federal courts. It should be available in numerous languages, and address the various cultural reference points of diverse populations.

The jury system offers a ready-made opportunity to educate the public about the mission of the federal courts. Not only should judges and administrators take steps to ensure that jurors are treated with dignity and respect, but the system should take advantage of the presence of the jurors in the courthouse—often with inevitably spacious blocks of time to spend waiting to serve—to share with jurors educational films and other materials to increase public understanding of the role and functions of the courts.

[15] Resolution of the ABA House of Delegates (Aug. 1992), *quoted in* James A. Noe, *Public Education: A Judicial Imperative*, 32 JUDGES' JOURNAL 28 (Winter 1993).

[16] See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982).

■ RECOMMENDATION 97: The judiciary should seek public support on specific issues where the objective is approved by the Judicial Conference and where the issue has wide acceptance among the judiciary as a whole.

In some circumstances it is appropriate for the judicial branch to seek public support for the federal courts, although the practice should not be overused lest it damage the judiciary's good reputation for objectivity and being above politics. Public initiatives should be employed only when they are: (1) approved by the Judicial Conference; and (2) have wide acceptance among judges generally.

Judges should also be encouraged to participate actively in organizations interested in improving the judicial process. In expressing opinions, however, judges should be careful to preserve the impartiality of the judicial office. Such participation places judges in a position to effectively enlist such organizations as allies. Judges who serve on committees of the American Bar Association or the Federal Judges Association would be particularly effective liaisons to local bar associations to communicate public policy objectives favored by the judicial branch.

■ RECOMMENDATION 98: Mechanisms should be established or simplified to receive and address public complaints about improper treatment by judges, attorneys, or court personnel.

Formal procedures exist today for filing complaints with the clerks of the courts of appeals in each circuit regarding alleged judicial misconduct.[17] Despite this fact, the public is not always sure that it has an effective mechanism for voicing such complaints. Grievances unrelated to judicial acts may not fall within the jurisdiction of the councils. In minor matters, many aggrieved parties wish only to be heard. In more serious matters—involving bias or prejudice, for instance—more formal procedures and responses are needed. Such procedures should be sufficiently flexible to accommodate the needs and resources of the districts and circuits.

Communications With Other Branches of Government and the Public

■ RECOMMENDATION 99: Positive communication and coordination between the judicial branch and the executive and legislative branches should be enhanced.

Implementation Strategies:

99a The Chief Justice should annually deliver an address to the nation regarding the state of the federal judiciary.

Regular, direct, formal channels of communication should be maintained between the judiciary and its co-equal branches. The Chief Justice to speak annually to the nation on matters of concern to the judiciary. In a related vein, judges should invite members of Congress to visit their courts and to discuss the work of the judiciary and the justice system generally.

99b Congress should be encouraged to require the legislative staff of all substantive congressional committees and the Offices of Legislative Counsel in the Senate and the House of Representatives, when reviewing proposed legislation for technical problems, to satisfy to the greatest extent possible a legislative "checklist."

[17] *See* 28 U.S.C. § 372(c) (1988 & Supp. V 1993).

A Proposed Legislative Checklist

- the appropriate statute of limitations
- whether a private right of action is contemplated
- whether adequate remedies are provided by state law
- whether pre-emption of state law is intended
- the definition of key terms
- severability
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation
- whether state courts are to have concurrent jurisdiction and, if so, whether and to what extent an action would be removable to federal court
- the types of relief available
- whether retroactive applicability is intended
- the conditions for any award of attorney's fees authorized
- whether exhaustion of administrative remedies is a prerequisite to any civil action authorized
- the conditions and procedures relating to personal jurisdiction over persons incurring obligations under the proposed legislation
- the viability and/or effect of private arbitration and other dispute resolution agreements under enforcement and relief provisions and
- whether any administrative proceedings provided for are to be formal or informal.

The legislative checklist could also provide for consideration of:

- whether any time deadline for judicial action appearing in proposed legislation is necessary and, if so, reasonable
- in the case of proposed legislation providing for judicial review by a multi-judge panel, whether the same policy objectives could be achieved by providing for single-judge review, and
- whether the statute applies to the territories, the District of Columbia, and the Commonwealth of Puerto Rico, as well as the states or other governmental unit.

This recommendation follows a similar proposal by the Federal Courts Study Committee. The rationale for a legislative checklist is to reduce the frequency of new legislation that—because of vagueness or ambiguities (*e.g.*, private rights of action, available defenses and immunities), technical errors, or gaps (*e.g.*, applicable limitations periods)—increases uncertainty and unfairness for litigants and promotes additional litigation. The checklist

would require legislative staff to address such issues and would help to ensure that Congress's intent is clear.

Statutory vagueness and imprecision is often the product of necessary legislative compromise rather than the result of oversight or omission. Whatever the cause, eliminating such ambiguities tends to improve clarity and reduce litigation. A legislative checklist would advance that objective.

99c Judicial branch representatives should continue to hold periodic meetings with Justice Department officials and members of Congress to discuss matters of common interest.

Recently, a number of working groups composed of Justice Department personnel, federal judges, and Administrative Office staff have successfully explored issues that include: security, budgets, civil litigation, and the probation system, This sort of operating level contact should continue. Not only does it produce immediate improvements in the system, but it serves as a forum to develop agendas for more significant change in the courts, the Justice Department and the executive branch generally.

99d A permanent National Commission on the Federal Courts should be created, consisting of members from the executive, legislative, and judicial branches of the federal government, and members from the state judiciary and academic world, to study on a continuing basis and to make periodic recommendations regarding a number of issues concerning the federal courts including, but not limited to, their appropriate civil and criminal jurisdiction.

Respect for the judiciary and confidence in the rule of law depends on the judiciary's ability to be independent from political and other influences that could improperly influence, or appear to improperly influence, decisions in individual cases. An institutional mechanism to insulate the judiciary from politics could serve to ensure the independence of the judiciary and to enhance the stature of the judicial branch.

One such mechanism is an inter-branch commission, consisting of representatives from the three branches of government and persons from outside the federal government. The commission should consult with academicians, members of the bar and other interested persons. It should be small, consisting of not more than eleven members who are sufficiently possessed of institutional memory to address the problems of the judiciary effectively. The commission should be permanent, and the terms of its members should be staggered to assure continuity of membership.

The commission should be charged with monitoring the federal courts and making periodic recommendations. It should pay special attention to the factors listed in Chapter 10 that would indicate the onset of systemic breakdown.

The commission's purpose would be to complement—not supplant—the Judicial Conference in making policy for the federal judiciary. It should study ways to improve federal justice—*e.g.*, how best to address the growth in pro se litigation.[18] It should be authorized to review conflicting statutory and federal rules interpretations, and to make recommendations for resolving those conflicts by legislative action or rule revision.

The Attorney General recently convened a meeting of representatives of the three federal branches of government that included representatives of state judiciaries and legislatures. Among other issues, the participants discussed the respective roles of the federal and state courts and where jurisdictional lines should be drawn between them. The exercise was a positive step toward the goal that is the subject of this recommendation—intergovernmental

[18] See Chapter 6, Implementation Strategy 35a *supra*.

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coordination and cooperation. Similar efforts should continue on a regular basis.

99e All courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of same.

This project had its origins in the opinions of the U.S. Court of Appeals for the District of Columbia Circuit. It is supported by the leadership of both parties in Congress and the Office of Legislative Counsel, who have called for its expansion to all circuits. It is hoped that it will ultimately yield improvements in drafting, interpreting, and revising federal statutory law.

■ RECOMMENDATION 100: The federal and state courts should communicate and cooperate regularly and effectively.

Great progress has been made in building closer working relationships between the federal and state court systems. State judges have been appointed by the Chief Justice to the Judicial Conference Committee on Federal-State Jurisdiction and the Conference's rules committees. Federal judges attend meetings of the state Conference of Chief Justices' comparable panel. State and federal judges participate in the recently-formed National Judicial Council of State and Federal Courts. Coordination of research efforts occurs among the Administrative Office, the Federal Judicial Center, and the National Center for State Courts.

Many more opportunities will exist for closer relations in the future. Federal and state judges already have established procedures to administer related litigation jointly.[19] State-federal judicial councils have been established or rejuvenated in many states. Both court systems would benefit from shared use of facilities and other resources. Both systems will gain from the nation's evolving recognition that our judicial systems comprise an interdependent whole.

Communications With the Bar

■ RECOMMENDATION 101: The federal courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.

The American bar, and in particular, the bars of the respective federal courts, are especially well situated to educate court users and the general public about the mission of the federal courts and to assist in winning legislative and public support for justice system improvements.

Participation by the organized bar is critical to success in the courts' performance of their role as supervisors of the bar and in ensuring its continued integrity. Working together, the courts and the bar can make real progress in effectively addressing the need for legal services for those otherwise unable to afford them.

Organizations which provide advice and assistance to the courts and which often include many members of the bar and frequent litigants, offer another useful source of obtaining information and support for further improvements, as well as generating better understanding of the special role of the federal courts in the justice system.

[19] See William W Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

Chapter 10
Confronting the Alternative Future

PRESERVING the core values that have undergirded the federal courts' long tradition of excellence is the fundamental vision of this plan. By planning for the future, the courts will be able to meet with confidence the numerous challenges they face. Still, the courts cannot control the societal trends that have placed the core values at significant risk in recent decades.

This chapter considers how the judicial branch might adapt if caseloads increase at even half the rate suggested in the "alternative future" discussed in Chapter 3. Suppose, for example, that in the year 2020 only 500,000 cases are filed in the district courts or that there are only 336 appellate judges? Even that scenario is daunting and would have undesirable consequences.

As shown in Chapter 3, projections based on historical trends indicate that, in another 25 years, there would be as many as 1,580 appellate court judgeships and about 1,100,000 cases commenced annually in district courts. This *four-fold* increase over present-day conditions could well result in the following court statistics in 2020:

- median time from filing to disposition for civil cases in the district courts exceeds 30 months, with 30% of cases pending more than 3 years
- trials are held in 44% of criminal cases; the median length for criminal trials reaches 4 days; and 80% of total district court judge time is consumed by criminal trials
- of the 174,500 criminal cases terminated in the district courts in 2019, 37% (47,000) are appealed
- of the 156,000 appeals terminated this year, 107,500 are procedural terminations; only 48,500 are terminated on the merits
- 10% of merit terminations occur after oral argument; the remainder are decided on submission of briefs
- slightly more than 20,000 petitions for review on writ of certiorari are received by the Supreme Court, of which 125, or 0.6% are granted.

This plan rejects drastic alternatives as neither desirable nor inevitable. The discussion in this chapter, then, must be viewed in the limited context of an undesirable alternative future that would require significant changes in federal court structure, jurisdiction and resources. In sum, the alternatives presented here should be pursued only if the coming decades bring:

- great expansion in federal court jurisdiction and caseloads;
- substantial growth in the number of judges and supporting staff at all levels of the courts; and
- sharp increases in the courts' need for new buildings and equipment.

Threshold for Considering Changes

Efforts to streamline the trial and appellate processes should continue to be pursued before major structural change is considered. If innovations in court procedures and efforts to control jurisdictional expansion do not stem the rising caseloads, however, more radical changes may be required to allow the federal courts to carry out their mission. Moreover, experience shows that incremental changes in how the federal courts do business often produce inadvertent, but fundamental, changes in the quality of federal justice delivered.

For these reasons, the Judicial Conference should monitor a wide variety of statistical and other indicators to determine whether trial and appellate court structures remain adequate to meet the stresses of increasing caseload. The Conference should consider and evaluate the totality of relevant circumstances in gauging the apparent direction of the judicial system and determining what should be done. The choice of quantitative or qualitative indicators used for this purpose is, to some extent, arbitrary. The purpose, however, is not to seek authoritative harbingers of danger, but rather to study evolving conditions in order to identify whether the circumstances facing the judiciary require a fundamental change in strategy. No single indicator may point to a breakdown in the present system. Statistics are only *a starting point,* not the *end,* of the evaluative process.

A representative but non-exclusive group of statistical signposts might include the following:

- total numbers of filings in the courts of appeals and/or district courts;
- number of judicial circuits and corresponding increases in intercircuit case law conflicts;
- number of court of appeals judges in an individual circuit and corresponding increases in intracircuit conflicts;
- average number(s) of merits participations per judge in the courts of appeals;
- ratio of criminal to civil trials;
- average number of lengthy trials (civil and criminal) per court
- number and percentage of cases in which trials are not held;
- average number of trials (civil and criminal) per judge
- average number of criminal filings per judge;
- rate at which district court judgments are reversed on appeal;[1]
- number and percentage of civil cases pending over 3 years;
- number and percentage of motions pending over 6 months;
- number and percentage of bench trials in which a decision has been pending over 6 months;
- median disposition times for courts of appeals and/or district courts;
- percentage of district or magistrate judge hours spent on the bench;
- average number of defendants per felony case;

[1] Reversal rates should take into account all published and unpublished decisions in criminal and civil cases, cases presenting issues of first impression, and cases in which the decision below was affirmed or reversed in part. Above all, the significance of a particular reversal must be evaluated in light of the reasons stated by the appellate court. *See* Edward R. Becker, Patrick E. Higginbotham, and William K. Slate, II, *Why the Numbers Don't Add Up*, 73 A.B.A. J. 83 (Oct. 1987) (response to Brian L. Weakland, *Judging the Judges*, 73 A.B.A. J. 58-60 (June 1987) (discussing federal judges' affirmance and reversal records before the courts of appeals)).

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- number of staff assigned to U.S. Attorneys' offices;
- number of attorneys in active federal district court practice.

Restructuring Appellate Review

If caseload volume renders the courts of appeals unable to complete their tasks with dispatch and fairness, the Judicial Conference should consider fundamental revision of the appellate court structure.[2] There are two basic approaches to restructuring appellate justice. One method would increase the number of judicial officers responsible for adjudicating appeals. The other method would limit the number of judges required to decide an appeal. These approaches may be outlined as follows:

(a) Add to the number of judicial officers in the present courts of appeals by increasing the number of circuit judgeships, or by expanding the role of adjunct judicial officers, such as appellate commissioners.

(b) Add a new tier of appellate tribunals between the district and the circuit courts, and provide for discretionary review in the circuit courts.

(c) Assign certain appellate functions to district judges through an "appellate term" or "appellate division" at the district level.

(d) Reduce the size of appellate panels to two judges and/or allow single judges to review certain cases.

Simply expanding the number of circuit judges, and/or expanding the role of adjunct judicial officers (*e.g.*, appellate commissioners), may, however, lead to inconsistency and incoherence in circuit law. Likewise, if the addition of Article III judgeships results in the creation of more circuits, the system's capacity for resolving intercircuit conflicts must be expanded. Alternative means of resolving intercircuit conflicts have been described in the work of the Federal Courts Study Committee and the Federal Judicial Center.[3]

If the appellate bench grows significantly, realignment of the circuits to produce courts of appeals of relatively equal size and workload deserves serious consideration. Although the matter would require careful consideration, the need to maintain coherent, consistent precedent and administrative efficiency in the face of massive dockets may outweigh countervailing concerns.

Alternatively, the circuit-based courts of appeals could remain at approximately their present size and number if first-line appellate review were provided in a new tier of appellate tribunals established at an intermediate level between the districts and the circuit. If this approach were taken, the "circuit" courts would be in a position to maintain a relatively consistent and coherent body of circuit law through discretionary review of decisions rendered in the lower appellate courts.

Another method to expand the system's capacity for appellate review would be an "appellate term" or "appellate division" at the district level.[4] These panels would exist primarily to ensure correction of errors and screen legal issues for possible review in the court of appeals. Two elements would be key to implementing such a system. First, district

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[2] For a detailed discussion of various options, see JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS—REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 105-39 (Federal Judicial Center 1993).

[3] MCKENNA, *supra* note 2; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 125-30 (1990).

[4] The idea of some appellate review being located at the district court level is not new. *See* Roscoe Pound, APPELLATE PROCEDURE IN CIVIL CASES 390 (1941); Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811, 825-826 (1989) (book review). Moreover, Roscoe Pound's proposal also would limit litigants in such a forum to the arguments already made in the trial court. *See* Letter from Professor Paul D. Carrington to the Honorable Edward R. Becker 2 (Nov. 3, 1993).

judges should not review cases arising out of their own districts. Second, if current caseload conditions persist, the number of district judges and/or magistrate judges would have to be expanded significantly to carry out both trial and appellate functions. Since creation of additional district judgeships is not a desirable method to address a workload crisis at the appellate level, appellate panels should not be drawn from areas where district judges routinely carry a maximum trial-level caseload.

A district-level appellate panel might consist of one circuit judge and two district judges, perhaps from outside the circuit. District judges sitting on review panels could be assigned for substantial terms (*e.g.*, three years) to give them time to gain experience in their new role and to staff their chambers accordingly. Further review would be in the discretion of the courts of appeals on petition, unless the first appellate panel certified the case, or some portion of it, for review. The program would be instituted first on a pilot basis and, perhaps, limited to certain categories of cases (*e.g.*, diversity actions, social security disability claims). After assessing the results of the pilot program, jurisdiction of appellate panels might be expanded to additional categories of cases, or even to all matters originating in the district courts.

Finally, the appellate system could also address rising caseloads by limiting the number of appellate judges required to decide an appeal. Although the judiciary is currently committed to the principle of three-judge review as the standard for appeals, rising caseloads may require reducing the size of appellate panels to two judges, or allowing for single-judge review of some cases. Experiments with single-judge review might be conducted in cases that involve single issues and deferential standards of review, *i.e.*, "abuse of discretion" by the district court, or "substantial evidence" to support an agency order. Alternatively, courts organized on a geographic basis might move toward greater specialization by routinely assigning individual judges or panels to handle particular subject areas. Creating new courts with more limited subject-matter jurisdiction also might be considered.

Limiting the Right to Appeal

Fundamental restructuring of the appellate function is one possible approach to a dramatic increase in the appellate workload. It would likely require a reevaluation of the principle that each litigant is guaranteed at least one appeal as of right before a panel of three Article III judges. Thus, if conditions seriously deteriorate in the courts of appeals, it may be necessary to consider some limitations on the right to appeal. The right to appeal could be eliminated completely in certain types of cases, such as administrative cases in which the district court acts as the reviewer of agency action and certain types of "federal question" cases in which state law issues predominate. In all (or some) other cases appellate review could be discretionary.

These options should be pursued only as a last resort. It does not presently appear that the stress on the courts of appeals is serious enough to justify abandoning the statutory right to appeal in all case types. Except for certain agency cases and diversity actions, this plan does not identify discrete case types whose elimination from the *appellate* docket (while retaining district court jurisdiction) would be fair and workable, yet provide substantial caseload relief.

Discretionary review also could have the unintended effect of increasing the burden on district judges to provide more written support for decisions made at the trial level. It would pose difficulties in ensuring, and appearing to ensure, that all classes of litigants are treated fairly and are not cut off from the protections of the appellate process by virtue of their status.

Outright elimination of appellate review should be considered only for cases in which the "law declaration" function of appellate review is not at stake. Examples of such cases might

include some administrative cases involving district court review of agency action, and cases raising primarily state law issues.[5]

Making Best Use of Trial Court Resources

A drastic increase in the workload of the district courts would require significant changes in the use of judicial resources. Such changes may include the following:

(a) Require judges to be more readily available for temporary assignment.

(b) Authorize adjunct judicial officers of the district courts (i.e., magistrate judges and bankruptcy judges) to conduct a wider variety of proceedings.

A vastly expanded caseload will require the maximum utilization of existing judicial resources. Although a system of mandatory assignments may not be appropriate for Article III judges, incentives should be used to allow courts to make greater and more effective use of visiting judges, and to require judges to be available for temporary assignment.

Assuming that any constitutional questions could be resolved, magistrate judges and bankruptcy judges could be assigned, as needed, to conduct a wider variety of district court proceedings with the consent of the parties. For example, magistrate judges might expand on their current role in conducting civil and non-felony criminal proceedings by playing a greater part in felony prosecutions, including the conduct of trials and/or sentencing. Similarly, bankruptcy judges might be assigned cases on the regular district court docket (*e.g.*, complex commercial actions) in which their background and experience would be particularly relevant.

The Standing Committee on Rules of Practice and Procedure should also reexamine Fed. R. Civ. P. 53 to evaluate how support for judges in the district court might be expanded through the greater use of special masters or other adjunct officers.

Diverting the Civil Caseload

If the increase in civil cases causes excessive delay in obtaining trial dates, the district courts could employ a broad range of alternative dispute resolution techniques—possibly including mandatory processes. If such a situation comes about, the Judicial Conference should seek legislation or otherwise adopt appropriate measures to:

Encourage each federal court to expand the scope and availability of alternative methods of dispute resolution.

Over the past decade the increase in civil causes of action in federal courts, the continuing federalization of many criminal offenses, implementation of sentencing guidelines, and other factors have made it more difficult for civil litigants to receive early and firm trial dates. Accordingly, in addition to reducing the time and costs of trials, each federal court should be able to provide its litigants expanded alternative methods of dispute resolution.

The availability of such alternative procedures would often allow litigants to resolve their disputes in a more efficient, expeditious and cost-effective manner. Along with allowing litigants to choose the dispute resolution procedure most appropriate to their cases, the provision of alternative procedures would conserve the judiciary's unique and precious resource—the trial, whether bench or jury—for those disputes in which it is most needed. The diversion of disputes from a traditional trial

[5] This plan also contains recommendations concerning the possibility of making appellate review discretionary in some types of administrative agency cases. See Chapter 4, Recommendation 10, and Chapter 5, Recommendation 21 *supra*.

process to other methods of resolution will enable judges to concentrate on improving the management and conduct of cases that proceed to trial.[6]

Limiting Jurisdiction

If caseload volume renders the courts of appeals and district courts unable to deliver timely, well-reasoned decisions and speedy trials with procedural fairness, the Judicial Conference should consider seeking more extensive reductions in federal court jurisdiction to fulfill the mission of the federal courts, as listed below:

(a) Restore a minimum amount in controversy requirement for federal question cases, either generally or in specific categories.

(b) Eliminate or substantially curtail the jurisdiction of the district court in those categories of cases that may be appropriately resolved in federal administrative or state forums.

(c) Consistent with standards developed by the Judicial Conference, authorize district courts to decline jurisdiction in civil and/or criminal cases where state courts have concurrent jurisdiction and the federal interest is minimal.

Restriction of federal jurisdiction is a step that should not be easily taken and, in practice, is likely to be taken only as a last resort. Nevertheless, it may become necessary to restrict access to the courts to the extent constitutionally permissible (*i.e.*, limit review to constitutional issues) so that the limited resources of the federal courts may be applied to those disputes that, under the principles of judicial federalism (see Chapter 4 *supra*), ought to be resolved in that forum.

In addition to restoration of a minimum amount in controversy requirement for federal question cases, federal court jurisdiction could be curtailed in cases appropriately resolved in Article I tribunals, administrative agencies, or state courts. Examples of such case categories include social security benefit claims, contract claims, benefit claims under ERISA welfare plans, forfeiture proceedings, and cases primarily involving state law issues (*e.g.*, many FIRREA proceedings,[7] products liability, and ordinary tort claims). Finally, notions of comity support the possibility that district courts may be authorized to decline jurisdiction in cases involving concurrent state court jurisdiction.[8]

Maintaining Effective Governance

If federal court caseloads and the attendant need for judicial resources dramatically increase, governance of an expanded judicial system should emphasize (1) provision of administrative coordination and direction, and (2) preservation of a broadly participatory governance process encouraging expression of diverse perspectives.

Changes in governance might be required if the three branches are unable to avoid a great expansion in federal court jurisdiction and caseloads. These increases might require substantial growth in the numbers of judges and supporting staff members at all levels of court organization. The extent of this growth could also require greatly increased use of adjunct judicial officers and technologically different ways of doing business. Growth of this magnitude might be accompanied by a relative reduction in resource allocation from Congress. The historically adequate resource base afforded

[6] It should be emphasized that traditional case management and trial procedures have been, and are, working well. Those procedures best preserve the core values undergirding the federal courts' long tradition of excellence. This chapter, however, is concerned with problems that may arise in the future

[7] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, as amended.

[8] The concept of federal courts declining to exercise jurisdiction also has parallels in the abstention rules of federal bankruptcy law. *See* 11 U.S.C. § 305 (1988).

federal courts has been due in large part to the court system's modest size.

Under these conditions, structural changes in the courts' adjudicative framework would likely be required. For example, hard choices would have to be made among—

(a) increasing the number of circuits while keeping each circuit relatively small (e.g., no larger than any current circuit); or

(b) keeping the numbers of circuits small while allowing each circuit to grow to contain more than 100 active circuit judges and several times that many district judges; or

(c) abandoning altogether the concept of regional circuits in favor of subject matter courts and traveling judges, perhaps serving in both trial and appellate capacities; or

(d) reconsidering the membership of the Judicial Conference to account for more circuits and the role of small specialized courts.

None of these alternatives is attractive from the viewpoint of protecting the best features of current court governance arrangements. Thus, they should not be taken as desirable alternatives—only as what may be the best among a series of bad choices. On the other hand, it bears emphasis that governance is merely instrumental. Governance structures should not dictate court jurisdiction or structure.

(e) Governance authority should increasingly be grounded in procedural rules and safeguards because an increased complement of Article III judges could know only a small fraction of their colleagues well, if at all.

Effective participation of a reasonable proportion of judges in governance might only be accomplished through some form of enhanced representational structures and procedures. There would be inevitable pressures to create democratic (electoral) procedures for the selection of governance representatives at national, regional, and local levels. These pressures would arise from competition for ever-scarcer resources to perform court work. Because judges could know only a small fraction of their colleagues well, if at all, governance authority grounded on personal acquaintance and trust would probably be replaced with authority grounded on hierarchy, procedural rules, and safeguards.

It is likely that judicial branch interest groups would become further stratified by category of judge (circuit, district, bankruptcy, magistrate, active, senior, or whatever other groups emerged through structural change, *e.g.*, national or local, permanent or floating) as well as by regional and local court units. The larger the judiciary becomes, the more formalized, impersonal, and bureaucratic the governance apparatus will become.

(f) Some judges should take on full-time management responsibilities, if judges are to remain as the courts' governors.

It is inconceivable that a judiciary of 3,000 to 5,000 or more life-tenured judges could function with the same degree of collegiality in administrative decision making as is now possible. Although some increase in executive authority would be necessary, the major changes contemplated here would require a fundamental change in governance arrangements. It would not be possible to manage the courts as a part-time job. If judges are to remain as the courts' governors, some of them might have to take on full-time management responsibilities from time to time, and the idea of a "chancellor" or "executive judge" to assume some of the Chief Justice's national leadership responsibilities could be revisited.[9]

(g) The judicial branch should protect the core decisional independence of judges in a vastly

[9] *Cf.* RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE 47-62 (Federal Judicial Center 1994) (discussing the idea of an "executive judge" for the federal courts).

expanded administrative infrastructure supporting the operation of chambers, courtrooms, and judicial activities.

A greatly expanded federal court system could function efficiently only with a similar expansion of the courts' administrative apparatus. Such an expansion should be accomplished, however, without any loss of judicial autonomy with respect to the basic separation of powers among the three branches. In fact, if the judiciary were to gain control of its own space, facilities, and security programs, and retrieve from the executive branch the administration of bankruptcy estates, as recommended above, the courts would become a substantial administrative entity within the government generally.

It seems likely, however, that such an expanded federal court system would be under increased congressional scrutiny through authorizations, appropriations, and oversight. The executive branch also would be tempted to seek greater authority to monitor judicial branch operations in the name of government-wide economy. Within the judicial branch itself, establishment of strong, centralized administration might impinge on judicial independence if the new administrators seek to impose uniformity in the timing and form of judges' decisions.

Even without increased oversight, there would be some risk of erosion of the independence of the individual judge's administrative decision-making. Although regional and local administrative structures might vitiate some of the dangers of a vastly increased central support structure, changes instituted at either the national or regional level certainly would affect ongoing local court operations. Resource demands made by a judiciary of even 3,000 life-tenured judges would likely strain the capacity of the judicial support structure to provide the type of personalized services judges currently receive. Greater standardization and less room for exceptions to administrative rules would probably flow from the combination of large numbers and relatively reduced resources. Under these circumstances, the judiciary will face a major challenge in protecting the core decisional independence of judges from those responsible for managing the equipment, supplies, and reimbursements that constitute the administrative infrastructure of chambers, courtrooms, and judicial activities generally.

(h) The allocation of policy making and administrative authority should be reevaluated. If substantial reallocation of governance authority becomes necessary, the alternatives to be considered should include—

(1) concentrating authority in fewer hands at all levels,

(2) centralizing authority at the national level, and

(3) decentralizing authority to regional or local levels.

Even in a greatly expanded judiciary, national governance institutions should honor the principle that regional and local matters should be decided at regional and local levels. This principle assumes the procedures for establishing representative governance are fair, and are perceived to be fair, by judges generally. In that scenario, an appropriate balance of authority among court levels can be sustained, even though it will differ from the current balance. But there may be a need for greater executive authority nationally, as well as regionally, just by virtue of the greater numbers of people whose performance must be monitored and whose needs and legitimate interests must be met.

The accurate, reliable and efficient channeling of input about governance questions will have to be established within each level of governance and between them. This will require more governance "apparatus," which will create new overhead costs.

Even as a vast expansion in the judiciary will encourage a thrust toward increased centralization, it will also promote countervailing pressure for assigning more regional

governance authority to the circuits—if the regional circuit structure survives such growth. Circuits as large as today's entire federal appellate bench may present powerful arguments for substantial reallocation of authority to the circuit level, including direct authority to seek and obligate appropriations (rather than only delegated authority to expend appropriated money).

Appointing Article III Judges

If judicial vacancies cannot be filled expeditiously, disabling the judiciary and leaving no other viable remedy, the political branches may have to consider alternative methods for appointing Article III judges that otherwise would be unacceptable (even if constitutional revision is required). For example:

(a) The President and the Senate might each be authorized to act alone in filling judgeships that remain vacant due to inaction by the other branch in nominating or confirming new judges. For example—

(1) judicial nominations might be confirmed automatically, or recess appointments continued in effect until vacancies are filled, if the Senate fails to act on nominations within a prescribed time; and

(2) the Senate might appoint judges sua sponte if the President fails to submit a nomination (or make a recess appointment) within a prescribed period after a vacancy arises.

This alternative is premised on the likelihood that the present judicial appointment process would be overwhelmed by the massive increase in the size of the federal judiciary anticipated by some forecasts. If that process cannot continue to function, the need to consider an approach of the kind discussed here would be clear.

This approach would put "teeth" in any statutory time limits imposed on the President and the Senate with regard to making judicial appointments. It not only might provide impetus for more efficient procedures but also encourage resolution of political disputes that postpone nominee selection and confirmation proceedings. This approach may, of course, create additional problems in the appointment process.

Although delays sometimes occur in obtaining presidential decisions or in scheduling Senate committee or floor action, much of the delay in filling judicial vacancies arises at the preliminary stages in which executive and legislative branch staff identify and review potential or actual nominees. By focusing solely on the end result, a mechanism that eliminates either the President or the Senate from the appointment process in the event of delay might serve only indirectly to expedite the necessary staff work. Thus, rather than facilitate a desirable outcome, this approach might simply encourage hasty, ill-considered action by both parties.

Legislation that reallocates the power to appoint Article III judges raises serious constitutional concerns. Like other federal officers, judges must be appointed in accordance with the "Appointments Clause" (U.S. Const. art. II, § 2, cl. 2) which authorizes the President to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Although that clause also permits Congress to vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments," the legislative branch cannot reserve to itself the power to appoint "officers of the United States."[10] Therefore, no statute can

[10] Buckley v. Valeo, 424 U.S. 1, 132-33 (1976). As defined by the Supreme Court, "officers of the United States" include "any appointee exercising significant

authorize the Senate to act on its own initiative in making judicial appointments.

The constitutional issue does not end there. Although the matter has never been adjudicated, a persuasive argument can be made that Article III judges are "principal" (not "inferior")[11] officers whom the President must nominate and the Senate confirm.[12] If so, any statute purporting to authorize presidential appointment of judges without Senate confirmation (or appointment by any officer or authority other than the President) would be invalid under the Appointments Clause absent a constitutional amendment.[13]

(b) The Judicial Conference (or individual courts) might designate temporary judges to exercise Article III jurisdiction whenever circuit or district judgeships remain vacant beyond a prescribed time and the affected court demonstrates an urgent need for additional judge power that cannot be met otherwise through existing resources.

Like the preceding option, a measure that allows the courts to fill judicial vacancies would encourage the other two branches to act more promptly in nominating and confirming judges. Although it is unlikely that either the President or the Senate would relinquish the power to appoint judges, they might find it more acceptable to grant courts the authority to make interim appointments, particularly if such authority is reserved for filling vacancies in exigent circumstances. An analogy to that approach is the procedure by which district courts may appoint a person to serve as United States Attorney until a vacancy in that position is filled in the ordinary manner.[14] The key difference, of course, is that executive branch officials do not have constitutionally protected tenure.

As a means of ensuring that judicial vacancies are filled, though, the utility of this solution is uncertain. A court seeking to appoint a judge to serve on a permanent or interim basis would require the same if not a greater amount of time to identify and screen possible candidates. Although some time might be saved if persons already serving as non-life tenured judges were appointed, an FBI background investigation might still be required, at least to update the information on file.[15] To avoid the need for a full background investigation, a court or other judicial branch authority could either

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authority pursuant to the laws of the United States." *Id.* at 126.

[11] Admittedly, circuit, district and Court of International Trade judges sit on "inferior courts" established by Congress under Article III, Section 1 of the Constitution. *See* Morrison v. Olson, 487 U.S. 654, 719-20 (1988) (Scalia, J., dissenting) (the Constitution's use of "inferior" in that context "plainly connotes a relationship of subordination"). But "from the early days of the Republic '[t]he practical construction has uniformly been that [judges of the inferior courts] are not . . . inferior officers.'" Weiss v. United States, 114 S. Ct. 752, 768 n.7 (1994) (Souter, J., concurring) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 456 n.1 (1833)). Indeed, the Supreme Court's recent interpretation of the Appointments Clause suggests that an "inferior officer" must be "to some degree 'inferior' in rank and authority," have power to "perform only certain, limited duties," hold an office "limited in jurisdiction," and enjoy "limited . . . tenure"—attributes not easily reconciled with the independent status and broad authority of circuit, district and Court of International Trade judges. *See Morrison*, 487 U.S. at 671-72 (upholding court appointment of "independent counsels" under the Ethics in Government Act).

[12] An exception to this rule applies in the context of "recess" appointments under article II, section 2, clause 3. On two occasions, courts of appeals have upheld the historical practice of using the recess appointment power to fill judicial vacancies pending the completion of Senate action on the President's nominations. *See* United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

[13] A different question might be presented by a policy under which judicial nominations are deemed confirmed without formal action if the Senate fails to act on them within a prescribed time period. Since each House of Congress possesses broad authority to "determine the Rules of its Proceedings" (U.S. CONST. art. I, § 5, cl. 2), it seems plausible that the Senate might adopt a rule (or consent to legislation) that either makes confirmation "automatic" or accords a nomination priority over all other business (thus requiring some kind of action) if the Senate does not confirm or reject a judicial nominee within a certain time after his or her name is received.

[14] See 28 U.S.C. § 546(d) (1988).

[15] *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); CFTC v. Schor, 478 U.S. 833 (1986); Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

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assign a bankruptcy judge or magistrate judge to sit temporarily on the affected court, or appoint a special master to conduct specified proceedings. The fundamental problem with either method would be the judicial officer's limited tenure and unprotected compensation—factors that, under existing law, could preclude exercise of full Article III jurisdiction.

Again, the idea of an alternative or "backup" mechanism for making judicial appointments presents difficult constitutional questions. Legislation that shifts the power of appointing judges to a court or other judicial branch authority would pose the same issue of whether a life-tenured Article III judge can be an "inferior officer" within the meaning of the Appointments Clause. In addition, the Article III requirements of "good behavior" tenure and undiminished compensation preclude Congress from authorizing interim (*i.e.*, limited-term) appointments to the bench.[16]

Conclusion

This chapter has focused on alternatives that should be confronted if the less fundamental changes outlined in this plan prove inadequate to allow the courts to meet the stresses of an increasing caseload. These are strategies that must be *considered* if the courts are to be prepared for the future, but they should be *pursued* only if essential to maintaining a viable judicial system. The premise of this plan is that rapid and drastic change in the federal court system is neither desirable nor necessary today. Nonetheless, it is prudent to identify possible alternatives should the plan's vision not be achieved.

[16] U.S. CONST. art. III, § 1. Although recess appointments to the bench (see note 12 *supra*) are limited in duration, they are based on express constitutional language. *See* United States v. Woodley, 751 F.2d at 1014 ("We must therefore view the recess appointee . . . as the extraordinary exception to the prescriptions of article III.").

Chapter 11
Implementation and Future Planning

THIS plan is but a first step in preparing for the challenges ahead. It addresses the fundamentals of federal court jurisdiction, adjudicative structure, governance, and resource allocation as a foundation for developing future initiatives. In many respects, the plan charts only a general course for the federal courts, leaving most details and implementation strategies to those with day-to-day responsibility for such matters. The plan should be implemented through a process that is as broadly participatory as the one through which it was developed.

Although this plan recommends goals that should prove useful to judicial policy makers in the near term, the real value of this effort is the foundation it lays for future planning. The purpose of the plan is to chart a course for the judicial branch as an institution. It therefore assumes, and builds upon, the planning already taking place in Judicial Conference committees, at the circuit level, in individual courts or offices, and in the context of specific programs.

The first planning cycle has proceeded because of a substantial commitment of time and effort by Judicial Conference committees and others. The result has been beneficial to the federal court system—affording it a rare opportunity to reaffirm its core values and mission, to consider the future implications of present actions and to determine what future conditions it would like to see.

The Plan as a Guide

Planning is an integral component of effective policy making. Under a long range plan, the Judicial Conference and other governance authorities can discharge their responsibilities aware of how their actions accord with generally accepted values. A plan also gives direction to the legislative program, allowing the judiciary's representatives to respond more quickly and effectively to new developments. This proactive engagement of the future adds a healthy context to everyday decisions.

Although this plan sets forth goals for the federal courts in a number of important areas, it does not purport to cover all topics on which planning decisions should be made. Due to time constraints, lack of consensus, a need for further study, or work being conducted elsewhere, some subjects are not addressed–or not addressed fully–in this document. It is anticipated that study, other studies being conducted within the federal court system (including experimentation under the Civil Justice Reform Act), will produce additional recommendations to be incorporated in future editions of the plan.

In its draft form this plan was circulated for public comment. Many commentors made beneficial suggestions about new topics that should be included or additional refinements for issues that are treated in the plan. Although the Long Range Planning Committee considered and accepted many comments and suggestions, many others are deferred as topics for the next planning cycle. Certain items need to be referred to the appropriate Judicial Conference committee for initial consideration and planning.

Among the many topics suggested for further refinement or new consideration are:

- pro se litigation
- mass torts
- habeas corpus procedures
- docket management techniques
- proliferation of local rules
- continued study of Sentencing Guidelines
- juries
- district court administration
- court library system
- impact of multi-national dispute resolution mechanisms established by international agreement
- recording/reporting of judicial proceedings
- court user fees
- relationship to Native American courts

In one sense, this plan is a snapshot outlining the goals of the federal courts at a particular time. And further, to make continuing use of the plan as a guide, the judiciary must not only consider the impact of subsequent events on the specific contents of the plan, but must also revisit the plan's basic premises in view of evolving conditions. In short, there is a continuing need for planning at the national, as well as other, levels in the judicial branch.

Coordinated Planning

While a national plan is essential, it will not be the only long range planning instrument developed by the judiciary. It is neither the first nor the only ongoing planning effort in the federal courts. Other planning bodies may have already begun looking into the appropriateness of specific proposals, and their continued efforts should be encouraged and integrated into the larger planning framework. Such work is critical, as is maintaining partnerships with external constituencies such as bar organizations, state courts, and research foundations.

Some of the other planning work now under way in the federal courts includes the following.

Judicial Conference Committee Planning

Judicial Conference committee planning efforts are referenced and discussed at various places in the body of this document. The Committee on Automation and Technology, which oversees the judiciary automation program and the Committee on Security, Space and Facilities, particularly in the space and facilities program, have produced long range plans for some time. In response to the Long Range Planning Committee's encouragement, additional committees have begun to produce long range plans in their areas of jurisdiction, as, for example, the Committee on Administration of the Bankruptcy System the Committee on Administration of the Magistrate Judges System.

Judicial Council Planning

The Federal Courts Study Committee Report stated that long range planning in circuit councils is of increasing importance because of "trends toward decentralization of budgeting, adminis-tration, and space and facilities." Indeed, many see the circuit judicial councils as having a legitimate responsibility for planning, since the councils' charge, given by Congress, is to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit" (28 U.S.C. § 332(d)(1)).

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The Ninth Circuit Judicial Council began its long range planning process by seeking consensus about its core purpose and primary objectives. The next stage in the council's process will include searching for consensus on major circuit-wide issues, and establishing long range goals.

Court Planning

The Ninth Circuit Court of Appeals has also begun a long range planning process. Its first plan was completed in the summer of 1992, and its Long Range Planning Committee is coordinating the annual implementation efforts.

District courts and other local units have for the last several years been encouraged by the Judicial Conference to develop long range space and facilities plans, and such planning has been carried out by about half of all districts. Newly-established local planning committees, both in district courts and sometimes separately in bankruptcy courts, have begun court long range planning. Operational planning, including automation, has been initiated through the clerks' offices as issues or needs have arisen. Civil Justice Reform Act (CJRA) advisory groups have also engaged in planning.

Implementing this Plan

The essence of planning involves making choices. While this is not a time for radical changes, significant effort will be required if the federal courts hope to preserve their distinctive characteristics and sustain their historic role. The intent of this plan has been to outline some of those choices.

First, the approved plan should be brought to the attention of all judges and other key judicial branch personnel. Also, the governance apparatus (*e.g.*, the Judicial Conference, circuit judicial councils, and courts) should begin to examine agendas and ongoing activities with the plan as a guide.

In the course of this review, the judiciary's policy makers can determine what new initiatives or changes in administrative policies or practices are needed. If action is required, they should estimate the probable costs (if any), determine relative priorities of implementation, and assess whether the necessary legislative authority and resources are available. More specific action plans can then be developed by those with direct responsibility for that area.

Not all the recommendations in the preceding chapters are a call to action. Some are already being put into effect, and others (*e.g.*, the alternatives described in Chapter 10) should be considered only if certain circumstances come to pass. Still others need more research and assessment before workable strategies can be developed.

Continuing Nature of Planning

The value of participative planning lies in part in its ongoing nature. This plan is neither a one-time effort nor a one-time document. That is not to say there must be annual editions of the plan, but only that the plan should be kept updated.

Important issues arising in the future that are not addressed in the plan should of course receive the immediate attention they deserve. Their more systematic consideration can be reserved to the next planning cycle. And if, in the routine process of governance, a decision that runs contrary to the plan seems advisable, it may signal a fundamental but appropriate policy shift. Such shifts, too, can be addressed in subsequent editions of the plan.

Feedback to the committee during the public comment period has been invaluable for the completion of the plan. Written and oral comments were received from state and federal judges, the bar, academics, public interest groups, and members of the general public. As noted elsewhere in this text, many comments were directly relevant to the proposed draft and

others surfaced issues worthy of future consideration by this or other committees.

The open commentary process in drafting this plan has underscored the idea that planning is never finished. Although plans are published, there are necessarily new topics and issues that come to the forefront, either through deferral or spontaneity. While a plan may be a snapshot, issue resolution is a continuous process. Even issues treated in this plan may be characterized as being in varying states of investigation, research, and resolution.

In Chapter 7 this plan recommends that the judicial branch maintain continuing long range planning mechanisms. By continuing, increasing, and strengthening the scope of the discussions about present and future issues, both within and without the judicial branch, the federal courts will reap the benefits of the planning process that has begun.

Future Editions of the Plan

To ensure that the plan remains current, the planning process should continue on a cyclical basis. The best approach would permit both incremental adjustments and periodic reevaluation. The plan should be revised periodically—perhaps every three to five years—to reflect any new or different goals identified through the customary policy making process. Revisions need not be extensive and might be based on experience gained through plan implementation, as well as, for example, the experiments, innovations and studies developed by Conference committees.

Periodic revisions will not be sufficient to realize planning's full benefits. To sustain the plan's relevance as a policy guide, the process should begin afresh every decade. Instead of merely amending the existing document, the Judicial Conference should undertake to examine *de novo* the role and mission of the federal courts as well as the goals that will carry them into the future. Such a "fresh start" renewal ensures that the federal courts are neither trapped by the choices of earlier planners nor oblivious to new forces—and new voices—within and outside the judicial branch that shape their role in government and society.

Appendix A
Current Trends and Projections

THE projections reported here are based on trend analysis. Trend-based projections are intended to reflect the likely course of some variable of interest under the assumption that the aggregate weight of the factors that have influenced it in the past (demographic, economic, legislative, etc.) will continue to evolve along the same paths that they have previously followed. Consequently, trend-based projections embody a degree of "inertia," so that, for example, a variable that has exhibited perfect linear growth over time will be projected to continue a linear evolution. Trend-based projection cannot, then, reflect inherent structural or physical limitations except to the extent such influences have been effective constraints in the past and, hence, reflected in the growth of the historical data.

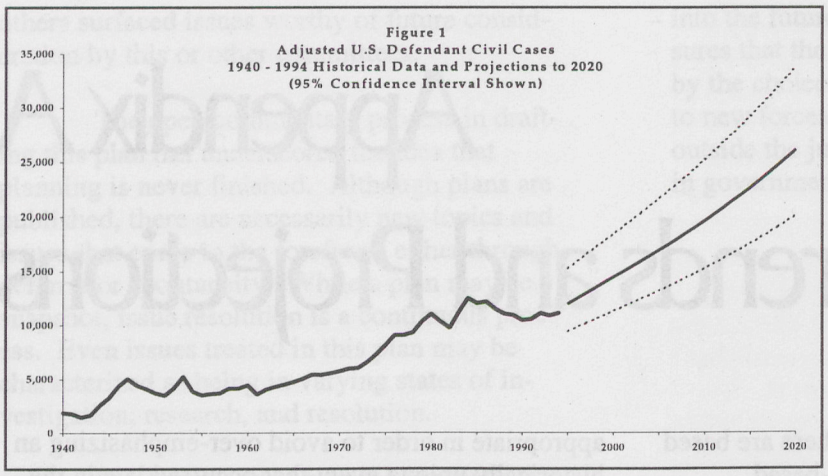
In analyzing the data for this appendix, minimal adjustments were made. However, some adjustments were necessary to avoid distortion of the projections. For example, certain categories of case filings were significantly affected by World War II, near the beginning of the sample period. To include such cases would bias trend estimates downward, but that effect would be an artifact of the starting point for the analysis. Such bias would be diminished by starting the data set at a much earlier date, were that possible, or by starting the data set after the war at the sacrifice of several valuable observations. Similarly, policy-based decisions by the executive branch in the 1980s to pursue recovery of veterans' benefits and student loans contributed to large increases in civil cases commenced. Exclusion of such cases reduces trend-based growth estimates and is appropriate in order to avoid over-emphasizing an historically unique event that occurred late in the sample period.

Each variable subjected to basic trend analysis was initially analyzed over the sample time frame using six different regression equations.[1] The results of this analysis suggested that a simple constant growth model was appropriate in each case. However, it was also noted that most of the district court caseload series are directly subject to policy decisions which periodically may change direction or emphasis. To capture such policy shifts, most equations have included the prior year's value of the variable being studied as a location factor.

Trend Estimates - Civil

Components of district court civil case filings by jurisdictional basis were analyzed.

[1] Regression is the mathematical process of computing the coefficients of a relationship between one or more independent variables and a dependent variable to obtain the "best" fit between actual and estimated values. As it is customarily applied, a set of coefficients provides a "best" fit when the sum of squared differences between actual and estimated values of the dependent variable is minimized. The most commonly employed measure of the overall fit of a regression estimate is the r^2 statistic. This statistic measures the amount of the variance in the dependent variable accounted for by the independent variable(s) in the regression equation. The r^2 varies between 0 and 1, with 0 indicating no variance explained and 1 indicating all variance explained (a perfect fit). The functional forms employed were: linear, semi-log, exponential, double-log, hyperbolic and log-hyperbolic.



U.S. Defendant

U.S. defendant cases were disaggregated into (1) federal prisoner petitions, (2) Social Security cases (data reported from 1961)[2], and (3) all other U.S. defendant cases ("adjusted U.S. defendant cases"). Prisoner petitions and other U.S. defendant cases were analyzed as separate series. Social Security cases were excluded from the analysis. The number of such cases rose sharply from 1975 to 1984, but have subsequently fallen 72% from the 1984 peak. There is insufficient basis for projecting such cases separately, yet to include them in the totals would increase the estimated trend rate of growth for U.S. defendant cases on a questionable basis.

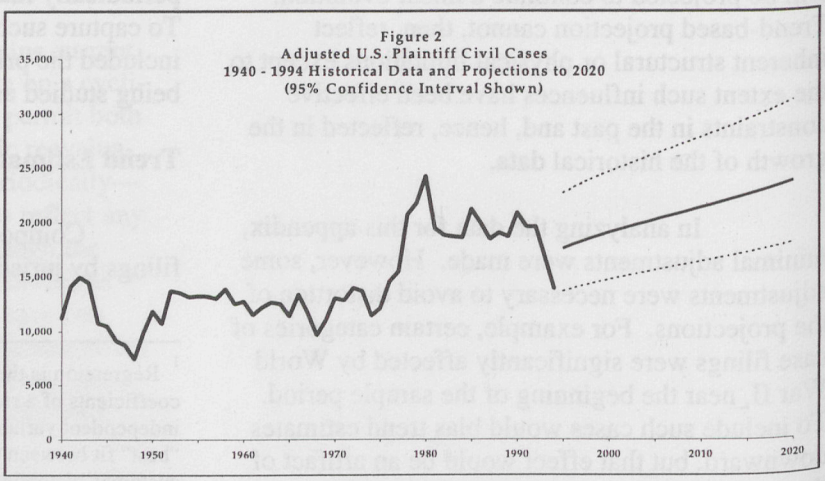
The model estimated for adjusted U.S. defendant cases (USD) (Figure 1[3]) is:

adjusted U.S. defendant =
$1.005\dagger^{year} * USD_{year-1}{}^{.822}\ddagger / 4000.7\dagger$
(r^2=.96).[4]

The model for federal prisoner petitions is discussed in a later section.

U.S. Plaintiff

U.S. plaintiff cases were disaggregated into (1) OPA actions (World War II related price controls), (2) recovery of overpayments and enforcement of judgments[5] (dominated by 1980s veterans benefits and student loan cases), and (3) all other U.S. plaintiff civil filings ("adjusted U.S. plaintiff cases")(Figure 2). For reasons of conservatism, as discussed above, only the latter was included in the analysis in order to remove from the trend projections the influence of significant one-time events.

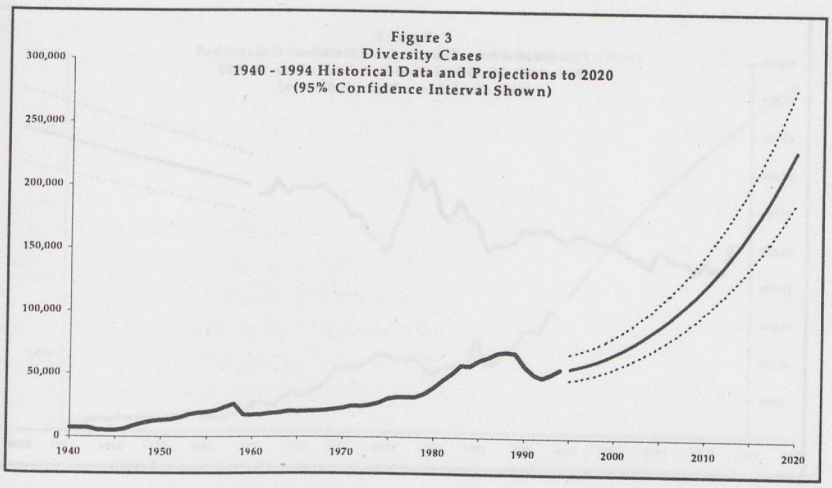


[2] These cases are dominated by U.S. defendant cases, but there are a very small number of Social Security cases in which the U.S. appears as plaintiff. Since these cases typically represent less than 1% of all Social Security cases, they have been treated here as exclusively U.S. defendant cases.

[3] Where possible, confidence intervals for projected series are included in the figures.

[4] Coefficients followed by ‡ and † are significant at the 99% and 95% level, respectively.

[5] Data for this category of case was first reported in 1955. Prior to that date such cases were included in "other contract actions." Cases prior to 1955 were estimated by regression interpolation.



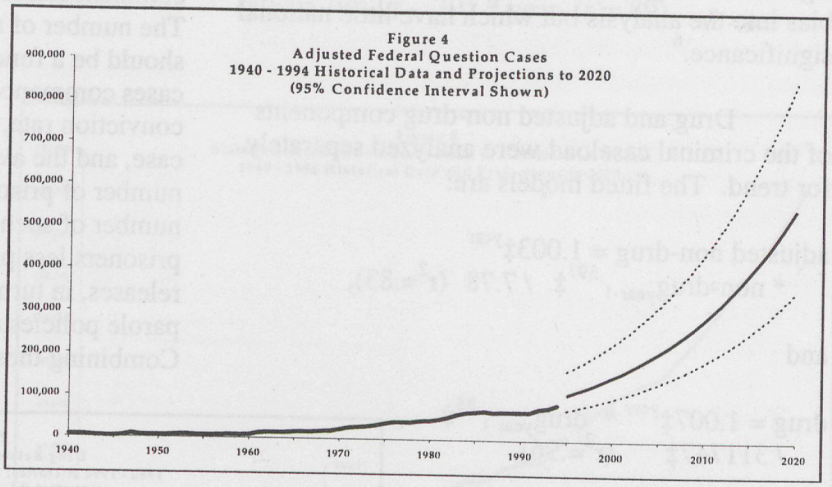
Examination of these data over the 1940 - 1994 period clearly reveals volatility of this series, presumably reflecting policy choices with respect to prosecutorial priorities. Given the variability in U.S. plaintiff cases, there appears to be only a slight upward trend, and because of the low growth rate that trend fails to show the characteristic dramatic compounded growth observed in many other case types. The model estimated for U.S. plaintiff (USP) cases is:

adjusted U.S. plaintiff = 1.002^{year} * $USD_{year-1}^{.768}$‡ / 12.7 (r^2=.78).

Diversity

Diversity cases (Figure 3) were treated somewhat differently from other series in this study insofar as the amount in controversy threshold applicable to diversity cases provides an identifiable explanatory variable in addition to pure trend elements. The analysis of diversity cases was based on both trend and threshold elements, with the statutory amount in controversy adjusted for the effects of inflation. For purposes of projection, the threshold was assumed to remain at its current level of $50,000, and the inflation rate was assumed to be a constant 3.5%.

The model employed for diversity cases also includes the prior period value of diversity filings as a location factor capturing outside influences. The model was extended by allowing for the possibility that diversity cases would grow even if the threshold were raised each year at the inflation rate. Thus the fitted model is:



diversity = (1.009^{year}‡ * $threshold^{-0.135}$‡ * $diversity_{year-1}^{.786}$‡) / 1, 616,885‡ ($r^2$=.99).

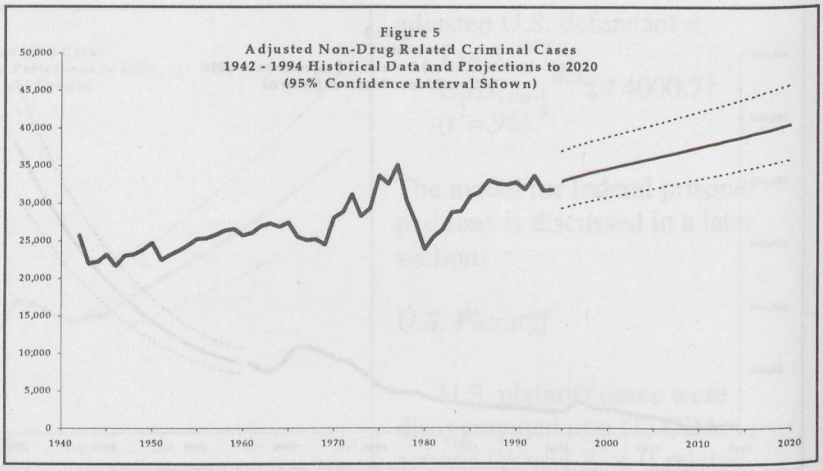
Federal Question

Federal question cases were subdivided into state prisoner petition cases and all other federal question cases("adjusted federal question cases")(Figure 4). The former is discussed below along with federal prisoner petitions. The fitted model for adjusted federal question cases is:

adjusted federal question = 3032.4‡ * $1.066^{(year-1939)}$ (r^2=.96).

Trend Estimates - Criminal

Criminal cases were disaggregated in order to provide separate series for non-drug (Figure 5) and drug (Figure 6) filings. Non-drug criminal filings were adjusted by excluding war-related criminal cases (Selective Service cases, OPA criminal cases, and OHE cases) and immigration cases. Immigration cases were excluded because such cases have been subject to infrequent but significant surges which introduce bias into the analysis but which have little national significance.[6]



Drug and adjusted non-drug components of the criminal caseload were analyzed separately for trend. The fitted models are:

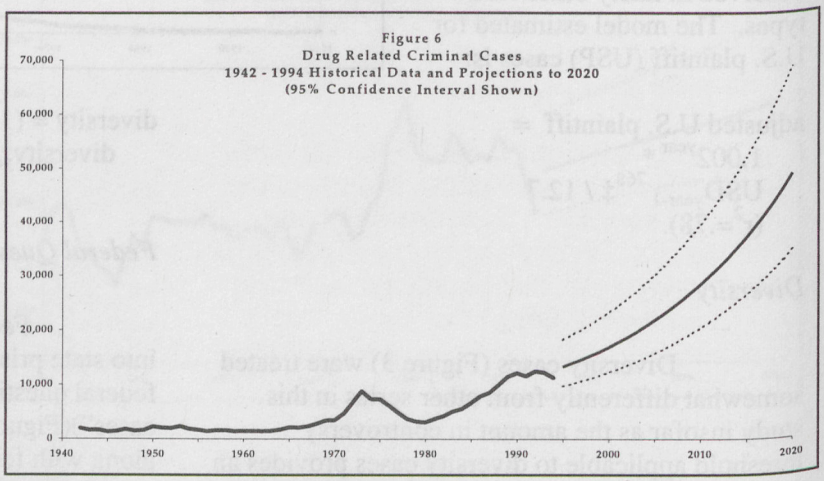
$$\text{adjusted non-drug} = 1.003‡^{year} * \text{non-drug}_{year-1}^{.597}‡ \; / 7.78 \quad (r^2=.83),$$

and

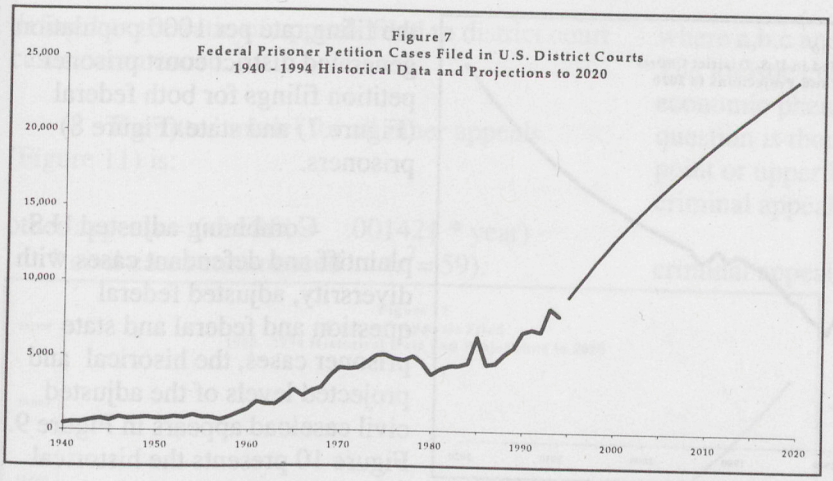
$$\text{drug} = 1.007‡^{year} * \text{drug}_{year-1}^{.88}‡ \; / 311747‡ \quad (r^2=.96).$$

Prisoner Petitions

As noted above, most case types were projected on a simple trend basis. In the case of prisoner petitions, the hypothesis that prisoner petitions are related to the number of prisoners was tested. Theoretically, there should be a linkage, albeit indirect, between the number of criminal cases commenced and the federal prisoner population. The number of new prisoners in a given year should be a function of the number of criminal cases commenced, the mix of cases, the average conviction rate, the number of defendants per case, and the average sentence handed down. The number of prisoners as of a given date is the number of such prisoners one year prior plus new prisoners less prisoners released. Prisoner releases, in turn, are a function of sentence length, parole policies and the number of prisoners. Combining these considerations, and assuming that the aggregate net effect of changing sentence length, conviction rate, defendants per case, case mix, and other factors is relatively stable, the annual net change in prisoners is a function of current criminal cases commenced and the prior



[6] For example, in 1951 immigration cases peaked at 14,965 cases, or about 40% of all criminal cases commenced in that year. However, more that 95% of these cases originated in just four districts: the Southern and Western Districts of Texas, Arizona and the Southern District of California.

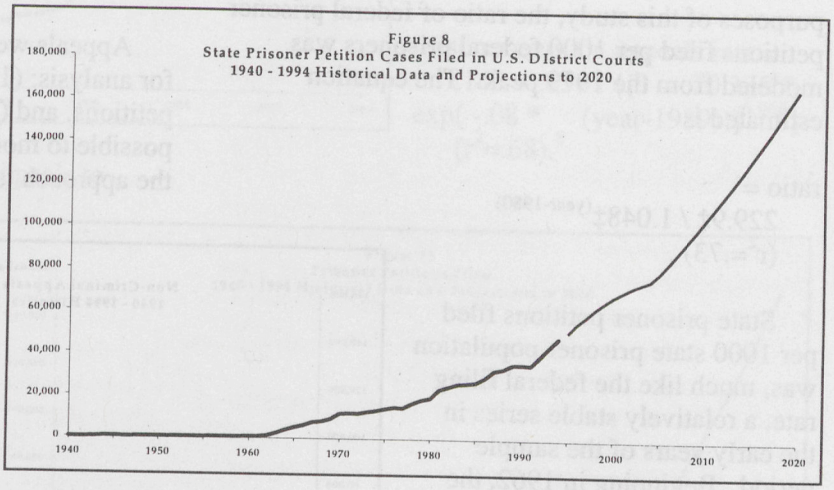


change in prisoners. The equation finally estimated is :

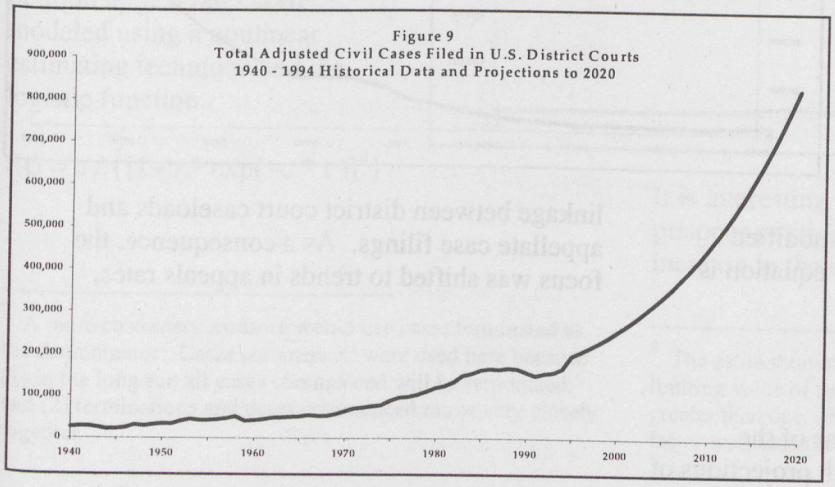
change in federal prisoners =
1983.6 + .291‡ * drug
- 104 * non-drug
+ .717‡ * change in
prisoners$_{year-1}$ (r^2=.78).

Similarly, a strong link between the number of state prisoners and the number of federal prisoners was estimated. Prior to 1978, the ratio of state to federal prisoners was a remarkably stable series averaging 8.28 over that 38 year period. Beginning in 1978, however, the ratio rose sharply to a peak in 1982 of more than double its prior average value. Since that time, the ratio has been declining. The ratio of state to federal prisoners was modeled based on the assumptions that (1) the average prior to 1978 was in some sense a "natural" level; and (2) the decline observed since 1982 reflects the system returning to the natural rate. The level of the ratio was estimated for the period since the decline began in 1982 as

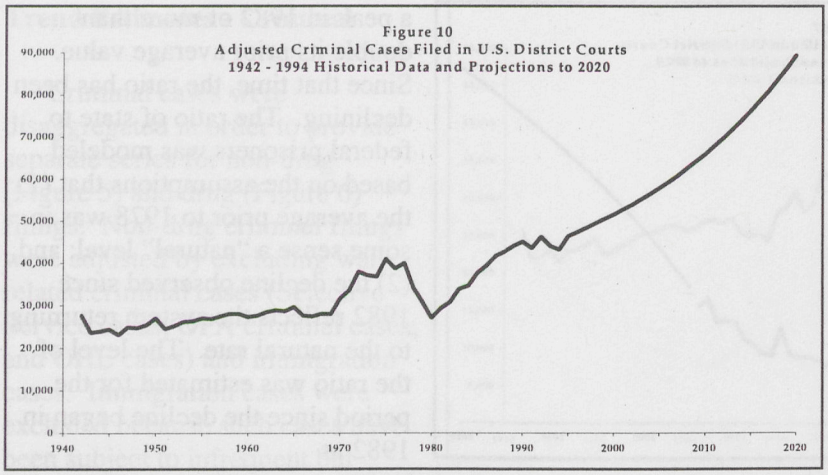
ratio = 790.1‡ - .39‡ * year (r^2=.89) .



At this rate of decline, the ratio will return to its prior average level by about the year 2005.



Using criminal case projections as described in the prior section, a projection of the federal prisoner population was generated, which, in turn, enabled an estimate of the state prisoner population. Separate analyses provided estimates of the trend in the rate of filing of federal and state prisoner petitions per 1000 prisoner population. Federal



prisoner petition filings per 1000 federal prisoners was relatively stable until 1957 when it began a swift rise which peaked in 1974 and again in 1979. Since 1979 the ratio has been declining. For purposes of this study, the ratio of federal prisoner petitions filed per 1000 federal prisoners was modeled from the 1979 peak. The equation estimated is

ratio =
229.9‡ / 1.048‡$^{(year-1980)}$
(r^2=.73) .

State prisoner petitions filed per 1000 state prisoner population was, much like the federal filing rate, a relatively stable series in the early years of the sample period. Beginning in 1962, the ratio rose rapidly and significantly from a value of less than 5 filings per 1000 population to a peak of about 73 filings per 1000 population in 1981. Since 1981, the ratio has been declining. As modeled for this study, the period estimated was 1962 through 1994, using a functional form based on a modified gamma distribution. The estimated equation is

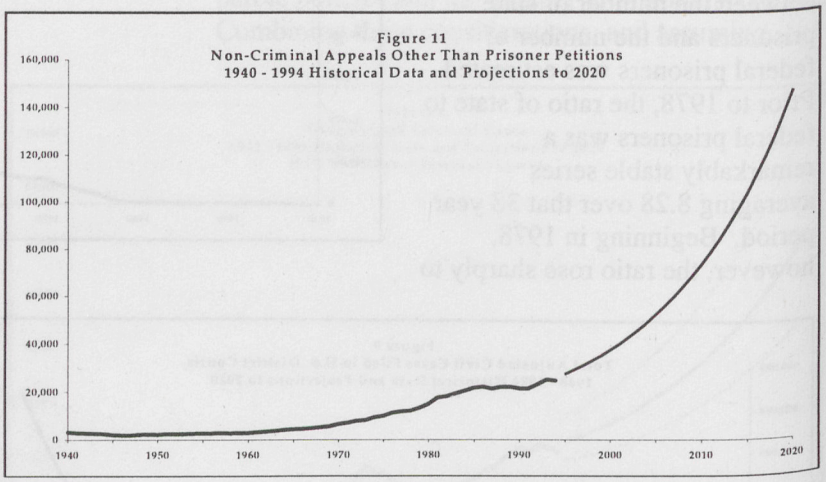
ratio = 76.7‡ / 1.025‡$^{(year-1981)}$
(r^2=.78)

Combining trend projections of the respective prisoner populations with projections of the filing rate per 1000 population generated district court prisoner petition filings for both federal (Figure 7) and state (Figure 8) prisoners.

Combining adjusted U.S. plaintiff and defendant cases with diversrity, adjusted federal question and federal and state prisoner cases, the hisorical and projected levels of the adjusted civil caseload appears in Figure 9. Figure 10 presents the historical and projected levels of the adjusted criminal caseload.

Trend Estimates - Appeals

Appeals were divided into three components for analysis: (1) criminal appeals, (2) prisoner petitions, and (3) all other appeals. While it is possible to model trend in appeals cases directly, the approach taken in this study is to recognize the linkage between district court caseloads and appellate case filings. As a consequence, the focus was shifted to trends in appeals rates,



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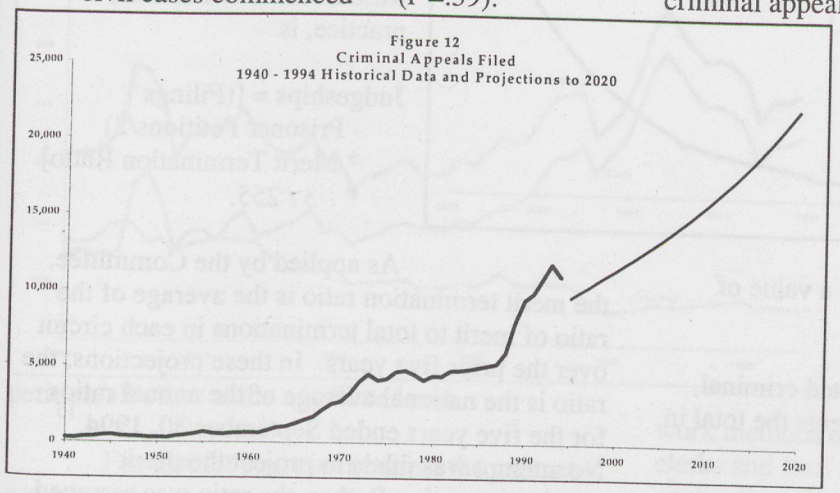
defined as the ratio of appeals filed to district court cases commenced.[7]

The fitted model for all other appeals (Figure 11) is:

other appeals = (-2.686‡ + .00142‡ * year) * civil cases commenced (r^2=.59).



Both the ratios of criminal appeals to district court criminal cases commenced and prisoner petitions to district court prisoner petition cases commenced showed evidence of nonlinearities which cannot be adequately treated using one of the six functional forms used elsewhere for trend analysis. Instead, the criminal and prisoner petition appeal rates were modeled using a nonlinear estimating technique and the logistic function

$f(t) = a / \{[1+b * \exp(-c * t)]^d\}$

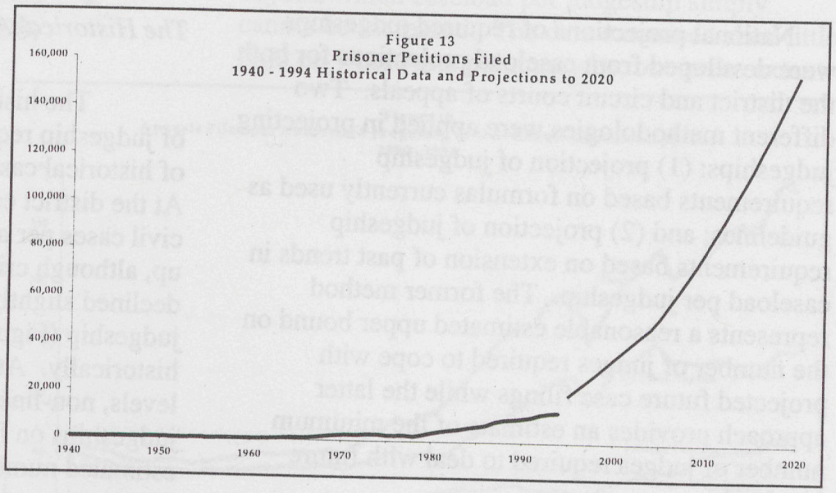
where a,b,c and d are parameters to be estimated. The logistic curve is often used to model economic phenomena where the variable in question is thought to be subject to a saturation point or upper limit. The fitted model for the criminal appeals rate is:

criminal appeals rate = 255.4/ $\{[1 + 21.57 * \exp(-.09 * (year-1939))]^{1.558}\}$ (r^2=.94).

The resulting projection of criminal appeals, along with its historical values, is presented in Figure 12.

The model fitted for the prisoner petition appeals rate is:

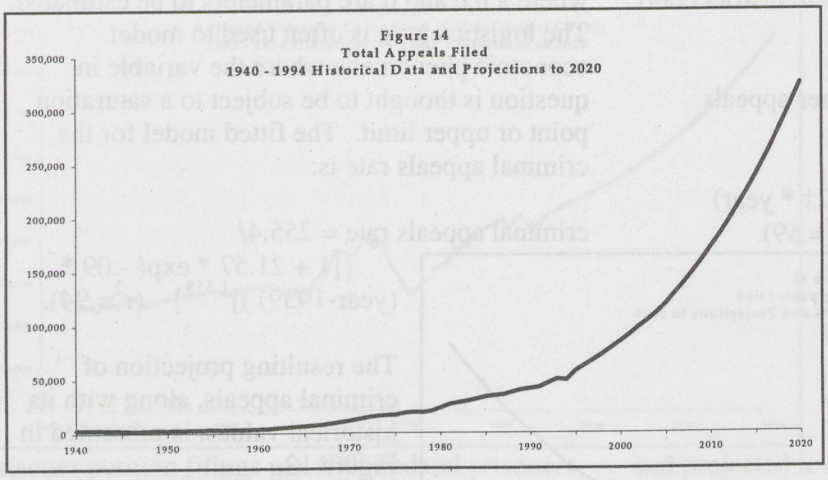
prisoner petition appeals rate = $.143 + .856 / \{[1 + 20.338 * \exp(-.08 * (year-1939))]^{6.968}\}$ (r^2=.68).[8]



It is interesting to note that the fitted model for prisoner petitions (Figure 13) implies a gradual increase in the rate of appeal from the district

[7] A more customary measure would use cases terminated as the denominator. Cases commenced were used here because (1) in the long run all cases commenced will be terminated; and (2) terminations and cases commenced move very closely together.

[8] The estimation of this model was constrained so that the limiting value of the prisoner petition appeals rate is not greater than one. In addition, a constant serving as a location factor was added to the equation.



courts of prisoner petitions towards a value of 100%.

Figure 14 aggregates the projected criminal, prisoner and other filings, and presents the total in historical perspective.

Judgeship Projections

National projections of required judgeships were developed from caseload projections for both the district and circuit courts of appeals. Two different methodologies were applied in projecting judgeships: (1) projection of judgeship requirements based on formulas currently used as guidelines; and (2) projection of judgeship requirements based on extension of past trends in caseload per judgeship. The former method represents a reasonable estimated upper bound on the number of judges required to cope with projected future case filings while the latter approach provides an estimate of the minimum number of judges required to deal with future caseload.

The Formula Approach

In the case of the district courts, required judgeships were computed as the weighted projected caseload divided by 430 (weighted cases per judgeship), which is the formula currently employed by the Committee on Judicial Resources. The weights for aggregate civil and criminal caseloads were derived from the 1993 case weights.[9]

Circuit judgeship projections were derived from application of the formula currently in use by the Committee on Judicial Resources. The formula, in practice, is

Judgeships = [(Filings
- Prisoner Petitions/2)
* Merit Termination Ratio]
* 3 / 255.

As applied by the Committee, the merit termination ratio is the average of the ratio of merit to total terminations in each circuit over the prior five years. In these projections, the ratio is the national average of the annual ratios for the five years ended September 30, 1994.[10] No attempt was made to project the merit termination ratio. Rather, the ratio was assumed to remain constant.

The Historical Approach

The historical approach to the estimation of judgeship requirements is based on an analysis of historical case filings per authorized judgeship. At the district court level (Figure 15), adjusted civil cases per authorized judgeship have trended up, although criminal cases per judgeship have declined slightly. Appeals per authorized judgeship (Figure 16) have also trended up historically. At both the district and appellate levels, non-linear regressions of authorized judgeships on filings formed the basis of the estimated number of judgeships required to process the caseload.

[9] FEDERAL JUDICIAL CENTER, 1987-1993 DISTRICT COURT TIME STUDY (unpublished 1994).

[10] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1994 FEDERAL COURT MANAGEMENT STATISTICS (forthcoming 1995).

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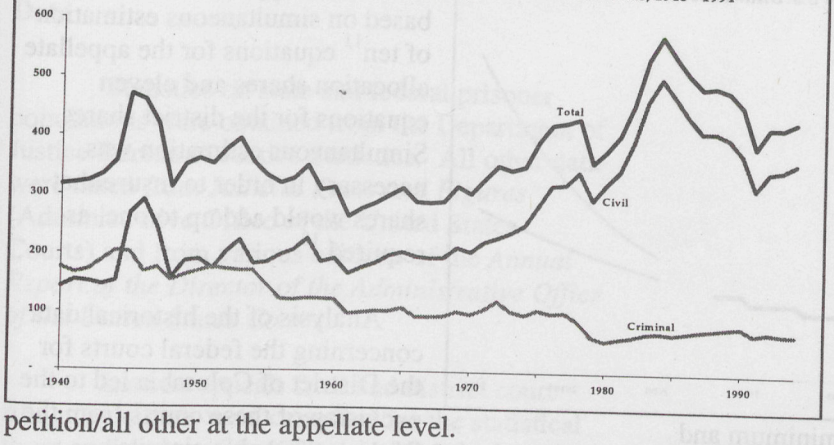
In essence, the approach was one of estimating a "production function" where the measured input is the number of authorized judgeships, and the output is a mixture of cases, either civil/criminal at the district court level, or criminal/prisoner petition/all other at the appellate level.

Figure 15
Cases Commenced per Authorized Judgeship in U.S. District Courts, 1940 - 1994



For district court judgeships, the estimated equation was

$$\text{Judgeships} = \exp(-39.4004‡) \cdot 1.0231^{\text{year}}‡ \cdot \text{civil}^{.0691} \cdot \text{criminal}^{-.0355} \quad (r^2 = .98) .$$

Given the projected levels of civil and criminal cases, the projected caseload per judgeship resulting from this equation reflects an upward trend in the range of 1.5% to 2.5% per year growth. For district court judgeships, the resulting projected caseload per judgeship is about 850 by 2020.

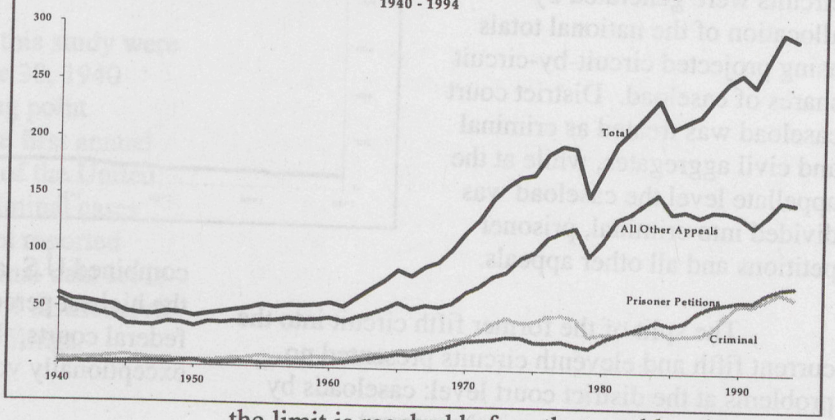
The estimated equation for appellate judgeships was

$$\text{Judgeships} = \exp(-15.5082‡) * 1.0094^{\text{year}}‡ * \text{criminal}^{-.1438}‡ * \text{prisoner petitions}^{.1296}‡ * \text{other appeals}^{.2007}‡ \quad (r^2 = .98) .$$

Based on the projected levels of criminal, prisoner petition and other appeals filings, the total number of appeals per judgeship is projected to rise at a variable trend rate which averages about 4% per year. As a result, for appellate judgeships the implied caseloads per judgeship include about 50 criminal appeals, 330 prisoner petitions, and 310 other appeals per judgeship by 2020, for a total of 2070 per panel.

The judgeship projections produced by this method should be viewed as extremely conservative. Unlike caseload projections, there are valid reasons to expect a physical limit on caseload per judgeship. Past increases may reflect changes in work methods of judges, increasing use of law clerks and staff attorneys, more extensive application of technology and other factors. However, there will almost certainly come a point beyond which caseload per judgeship simply cannot be increased. The data examined shed little light on where that point may be, but to the extent the limit is reached before the trend levels are achieved, these judgeship projections will underestimate, perhaps significantly, actual requirements.

Figure 16
Appeals Filed per Authorized Judgeship in U.S. Circuit Courts of Appeals
1940 - 1994

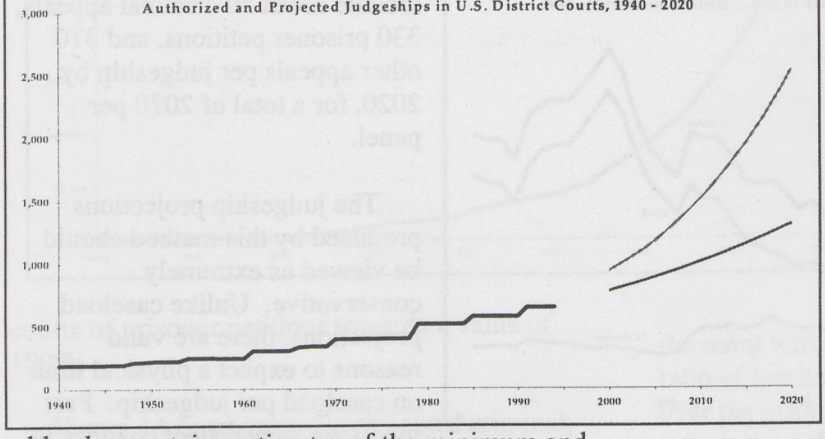


Projected judgeship requirements under the formula and historical approaches are

presented for district and appellate courts in Figures 17 and 18, respectively.

Projected caseloads for district and appellate courts are summarized in Table 1. The table also contains estimates of the minimum and maximum projected levels of judgeships under caseload conditions such as those presented in the projections.

Figure 17
Authorized and Projected Judgeships in U.S. District Courts, 1940 - 2020



Circuit Level Projections

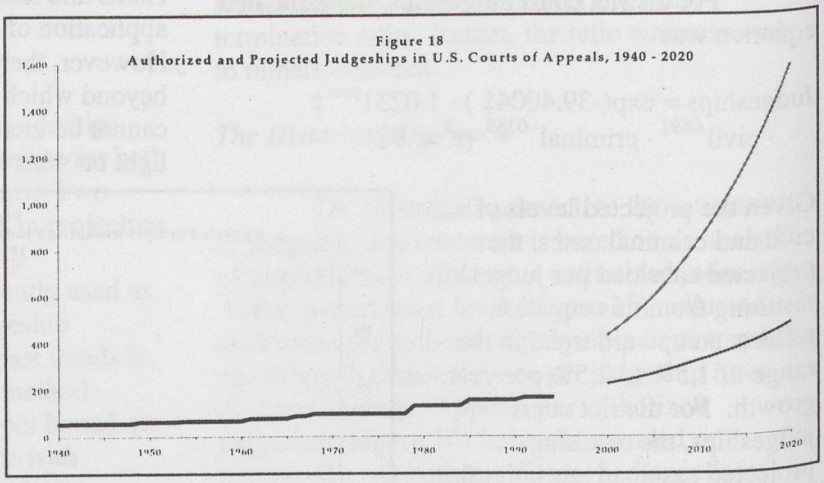
District and appellate caseload projections for the twelve circuits were generated by allocation of the national totals using projected circuit-by-circuit shares of caseload. District court caseload was treated as criminal and civil aggregates, while at the appellate level the caseload was divided into criminal, prisoner petitions and all other appeals.

The split of the former fifth circuit into the current fifth and eleventh circuits presented no problems at the district court level: caseloads by district were aggregated as if the current composition of the fifth and eleventh circuits had existed from 1950 through the split in 1982. The appellate caseload was handled in reverse fashion by analyzing circuit shares from 1950 through 1994 as if the fifth and eleventh circuits had not split. The results of allocations made on this basis were then suballocated between the "new" fifth and eleventh circuits based on their respective average proportions of their combined caseloads over the 1982 through 1994 period.

Circuit shares analysis for district and appellate caseload was based on simultaneous estimation of ten[11] equations for the appellate allocation shares and eleven equations for the district shares. Simultaneous estimation was necessary in order to insure that shares would add up to one, as required.[12]

Analysis of the historical data concerning the federal courts for the District of Columbia led to the exclusion of these courts from the share analysis. Of the geographic circuits, combined U.S. and administrative cases constitute the highest percentage of caseload in the D.C. federal courts. Because such cases appear to be exceptionally volatile from year-to-year, the large

Figure 18
Authorized and Projected Judgeships in U.S. Courts of Appeals, 1940 - 2020



[11] One for each of the numbered circuits excluding the eleventh which was combined with the fifth, then separated as discussed above.

[12] Estimation was performed using a full information maximum likelihood estimator. See, *e.g.*, HENRI THEIL, PRINCIPLES OF ECONOMETRICS (1971).

variance in D.C. share precluded meaningful analysis of trends. Accordingly, for purposes of this analysis, the caseloads for both the federal district and court of appeals for the District of Columbia were assumed to remain at their average levels for the period 1980 through 1994.

Data

Statistics on state and federal prisoner populations were obtained from the Department of Justice Bureau of Justice Statistics. All other data were taken from *Judicial Facts and Figures* (Administrative Office of the United States Courts) and from various editions of the *Annual Report of the Director of the Administrative Office of the United States Courts.*

Data on appeals filed and district court filings by circuit were compiled for the statistical years ending June 30, 1982 through June 30, 1994 for the eleven numbered circuits plus the D.C. Circuit. Because the Court of Appeals for the Federal Circuit has a much more limited jurisdiction (and a shorter history) than the geographic courts of appeals, it has not been included in this analysis.

Sample Period

National data employed in this study were assembled for the years ending June 30, 1940 through June 30, 1994. This starting point coincides with the publication of the first annual report of the Administrative Office of the United States Courts in 1940. However, criminal cases commenced by type of case were not reported until 1942. Consequently, the criminal data set is two years shorter than the majority of district civil case filing series and appellate case filings.

Table 1
Caseload and Judgeship Projections

All District Courts

	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	334,600	51,600	386,200	940	780
2005	432,600	58,000	490,600	1,170	880
2010	576,500	66,000	642,500	1,510	1,010
2015	766,600	76,200	842,800	1,950	1,140
2020	1,019,900	89,400	1,109,300	2,530	1,300

All Circuit Courts of Appeals

	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	11,600	35,500	37,700	430	220
2005	13,600	53,000	52,500	590	270
2010	16,000	81,800	73,700	840	320
2015	18,800	116,300	103,900	1,160	390
2020	22,300	155,900	146,900	1,580	470

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Table 2
Caseload and Judgeship Projections

Year	D.C. District Court					D.C. Circuit Court of Appeals				
	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	3,600	560	4,160	15	15	150	90	1,450	12	12
2005	3,600	560	4,160	15	15	150	90	1,450	12	12
2010	3,600	560	4,160	15	15	150	90	1,450	12	12
2015	3,600	560	4,160	15	15	150	90	1,450	12	12
2020	3,600	560	4,160	15	15	150	90	1,450	12	12
	First Circuit District Courts					**First Circuit Court of Appeals**				
Year	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	13,400	1,200	14,600	33	29	400	1,200	1,200	14	7
2005	18,200	1,400	19,600	44	35	500	1,800	1,700	20	9
2010	24,700	1,600	26,300	58	41	500	2,800	2,500	29	11
2015	33,100	1,800	34,900	76	47	600	3,900	3,500	40	13
2020	44,300	2,200	46,500	101	55	800	5,300	4,900	55	16
	Second Circuit District Courts					**Second Circuit Court of Appeals**				
Year	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	31,000	3,700	34,700	82	70	1,000	3,000	3,100	26	19
2005	39,600	4,100	43,700	101	79	1,200	4,600	4,500	38	23
2010	52,200	4,700	56,900	130	89	1,400	7,200	6,400	54	28
2015	69,000	5,500	74,500	168	101	1,700	10,200	9,100	75	34
2020	91,200	6,400	97,600	218	114	2,000	13,700	12,900	102	41
	Third Circuit District Courts					**Third Circuit Court of Appeals**				
Year	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	30,900	2,700	33,600	76	68	800	2,300	2,400	27	14
2005	40,700	3,000	43,700	98	79	900	3,500	3,400	37	17
2010	54,700	3,500	58,200	129	91	1,000	5,400	4,800	52	21
2015	73,300	4,000	77,300	169	105	1,200	7,700	6,800	72	26
2020	97,900	4,700	102,600	223	120	1,500	10,300	9,600	99	31
	Fourth Circuit District Courts					**Fourth Circuit Court of Appeals**				
Year	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	27,600	6,200	33,800	87	68	1,000	3,000	3,000	38	18
2005	36,600	7,000	43,600	109	79	1,100	4,400	4,200	52	21
2010	49,800	7,900	57,700	141	90	1,300	6,700	5,900	73	26
2015	67,300	9,200	76,500	183	104	1,500	9,500	8,400	102	32
2020	90,700	10,800	101,500	238	119	1,800	12,700	11,900	139	38
	Fifth Circuit District Courts					**Fifth Circuit Court of Appeals**				
Year	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	43,300	6,500	49,800	120	100	1,200	5,100	5,700	56	33
2005	56,400	7,700	64,100	153	116	1,400	7,400	7,800	76	38
2010	75,600	9,000	84,600	199	133	1,600	11,400	11,000	108	47
2015	100,900	10,500	111,400	258	151	1,900	16,100	15,600	150	57
2020	134,700	12,300	147,000	336	172	2,200	21,600	22,200	207	70

Table 2
Caseload and Judgeship Projections

Year	Sixth Circuit District Courts					Sixth Circuit Court of Appeals				
	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	35,200	4,200	39,400	93	79	1,000	3,000	3,100	35	19
2005	45,400	4,900	50,300	117	91	1,200	4,500	4,400	49	22
2010	60,600	5,700	66,300	152	104	1,400	7,000	6,200	69	27
2015	80,800	6,700	87,500	198	119	1,600	9,900	8,800	96	33
2020	107,900	8,000	115,900	260	136	1,900	13,300	12,500	131	40
Year	Seventh Circuit District Courts					Seventh Circuit Court of Appeals				
	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	26,700	2,500	29,200	67	59	800	2,400	2,400	25	15
2005	35,100	2,900	38,000	86	69	900	3,600	3,500	36	18
2010	47,200	3,300	50,500	113	79	1,100	5,500	4,900	50	22
2015	63,100	3,800	66,900	147	91	1,300	7,900	6,900	70	26
2020	84,200	4,500	88,700	194	104	1,500	10,600	9,900	96	32
Year	Eighth Circuit District Courts					Eighth Circuit Court of Appeals				
	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	21,300	3,000	24,300	58	49	700	2,100	2,200	30	13
2005	28,100	3,400	31,500	74	57	800	3,100	3,000	41	15
2010	37,800	3,900	41,700	96	65	900	4,900	4,300	59	19
2015	50,600	4,500	55,100	125	75	1,100	6,900	6,100	81	23
2020	67,600	5,300	72,900	164	85	1,300	9,300	8,600	111	28
Year	Ninth Circuit District Courts					Ninth Circuit Court of Appeals				
	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	46,200	12,400	58,600	156	118	2,200	6,800	6,900	75	42
2005	59,100	13,600	72,700	188	131	2,600	10,200	9,800	105	50
2010	78,700	15,300	94,000	236	147	3,000	15,700	13,900	149	61
2015	104,900	17,500	122,400	301	166	3,600	22,300	19,700	207	74
2020	140,000	20,500	160,500	387	188	4,300	29,900	28,000	284	90
Year	Tenth Circuit District Courts					Tenth Circuit Court of Appeals				
	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	17,500	2,900	20,400	50	41	600	2,000	2,000	29	12
2005	22,700	3,300	26,000	63	47	800	3,200	3,000	43	15
2010	30,300	3,700	34,000	80	53	1,000	5,000	4,400	63	19
2015	40,500	4,300	44,800	104	61	1,100	7,200	6,300	88	24
2020	54,100	5,100	59,200	136	69	1,300	9,700	8,900	120	29
Year	Eleventh Circuit District Courts					Eleventh Circuit Court of Appeals				
	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	37,900	5,700	43,600	106	88	1,900	4,500	4,100	48	26
2005	47,200	6,100	53,300	126	96	2,200	6,600	5,700	65	30
2010	61,200	6,800	68,000	158	107	2,600	10,200	8,000	91	37
2015	79,500	7,700	87,200	200	118	3,000	14,500	11,400	125	44
2020	103,600	8,900	112,500	255	132	3,600	19,400	16,100	169	53

The Committee on Long Range Planning has proposed this *Long Range Plan* for consideration by the Judicial Conference of the United States. None of the recommendations presented herein represents the policy of the Judicial Conference unless approved by the Judicial Conference.

Appendix B
History of the Judicial Conference Committee on Long Range Planning

THE report of the Federal Courts Study Committee, issued in April 1990, recommended that the Judicial Conference of the United States and the circuit councils each engage in long range planning. "The volatility of change throughout our society requires the federal courts to have also a more systematic capacity to anticipate broader societal changes and plan for more distant horizons."[1]

Role of the Long Range Planning Committee

Building on the recommendation of the Federal Courts Study Committee, the Judicial Conference in 1990 created the Committee on Long Range Planning, composed of four appellate judges, three district judges, a bankruptcy judge, and a magistrate judge. The membership includes six former chairs of Judicial Conference committees, two former members of the Executive Committee of the Conference, a former circuit chief judge, three former district chief judges, and a bankruptcy chief judge. The total combined years of judicial service of the committee exceeds 160 years. (See Appendix C for biographical profiles of the committee members.)

The charge of the Long Range Planning Committee is:

* Coordinate the planning activities of the judiciary.

* Promote, encourage, and coordinate planning activities within the Judicial Branch.

* Advise and make recommendations regarding planning mechanisms and strategies, including the establishment of a coordinated judiciary planning process.

* Coordinate—in consultation with and participation by other committees, members of the judiciary, and other interested parties—the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them.

* Evaluate and report on the planning efforts of the judiciary.

[1] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 146 (1990).

* Prepare and submit for Judicial Conference approval, a long range plan for the judiciary and periodic updates to that plan—after consultation with other Conference committees, judges and interested parties.

This plan represents the beginning of a judiciary-wide long range planning process. The Long Range Planning Committee had the cooperation of the other Judicial Conference committees, the circuit councils, individual courts, judges, legislators, members of the executive branch, lawyers, and many others who have an interest in the courts. Future versions of the plan will further refine the issues and strengthen the judiciary's planning process.

Framework for Committee Action

To accomplish the directive of the Judicial Conference, the committee established four successive stages of development to produce a long range plan for the judiciary:

1. *An educational phase*—to acquaint committee members with long range planning concepts and formal methodology and to discern how best to promote and coordinate long range planning activities within the judicial branch.

2. *An informational gathering phase*—to enable the committee to target issues for long range consideration.

3. *A solution phase*—to recognize the target issues and problems facing the federal judiciary and to formulate long term recommendations to deal with those issues and problems.

4. *An implementation and coordination phase*—to work with other Judicial Conference committees in implementing all or part of this plan in continuance of the judiciary's long range planning process.

The Director of the Administrative Office, L. Ralph Mecham, established the Long Range Planning Office to assist the committee in developing strategic planning for the judiciary. The committee also received substantial assistance from the Federal Judicial Center, primarily from the Planning and Technology and Research Divisions and the committee's consultants.

The committee's first three meetings were devoted to the educational phase. To discern how best to promote, encourage, and coordinate long range planning activities within the judicial branch, the committee consulted with the leadership of the Federal Courts Study Committee (Judges Weis and Campbell), the Administrative Office (Director Mecham) and the Federal Judicial Center (Judge Schwarzer). The committee also heard from people involved in planning for government, both state and federal,[2] the private sector,[3] and the academic community.[4]

At the Fall 1991 meeting of the Judicial Conference, the committee's chair, Judge Otto R. Skopil, Jr., met with all other Conference committee chairs to discuss the Long Range Planning Committee's initial activities. At that meeting Judge Skopil discussed the vital role he saw for Conference committees in plan development.

Completing the educational phase, the committee co-sponsored with the Federal Judicial Center and the Administrative Office an educational seminar on judicial planning for

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[2] Executive branch: Solicitor General Kenneth Starr; Justice Research Institute: William K. Slate; Hudson Institute: Mark Blitz; National Academy of Public Administration: Don Wortman; State courts: Chief Justice Malcolm Lucas (Cal.), Robert D. Lipscher, State Court Administrator (N.J.), and Kathy Mays, Director of the Office of Planning, Supreme Court (Va.).

[3] IBM: Douglas Sweeny; Institute for the Future: Gregory Schmid; American Bar Association: Sandra Hughes.

[4] Professor Maurice Rosenberg (Columbia); Professor Arthur Hellman (University of Pittsburgh); and Professor Tom Baker (Texas Tech.).

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chief judges of the circuits and chairs of Conference committees.

The committee initiated its preparation of a long range plan by forming subcommittees to decide in the first instance what issues were appropriate for long range planning. To define broad issues confronting the judiciary, the committee requested the Federal Judicial Center to conduct a survey of federal judges on issues relating to planning.

The committee initially established three subcommittees to identify and analyze national long range issues and coordinate the development of the plan. The committee divided the universe of planning issues generally as follows:

* One subcommittee to examine judicial structure and governance.

* Another to look at jurisdiction issues and the role of the federal judiciary and its relationship to the other branches of government and state courts.

* The third to study judicial workload and output issues.

Additionally, the committee established a liaison network with 15 committees of the Judicial Conference. One member of the Planning Committee was designated to be the point of contact for each Conference committee and, in turn, each committee appointed a liaison member to work with the Planning Committee. On a number of occasions, the Planning Committee liaisons attended their respective committees' meetings.

Over time, the three subcommittees were reorganized into two: one to study structure, governance and workload-related issues, the other to study issues dealing with jurisdiction and the size of the judiciary. Although the subcommittees worked separately, decisions on all matters for the national plan were made by the full Long Range Planning Committee.

The National Planning Process

The first key question for the Long Range Planning Committee was posed by the Chief Justice in his 1991 Year-end Report: what should be the role of the federal courts? In response, one of the committee's first efforts was to develop a mission statement for the federal courts. This preliminary statement is included in the plan for discussion and further refinement.

Development of the federal court mission statement mirrored similar efforts by other planning bodies in the judicial branch. The Planning Committee kept informed about the pioneering strategic planning efforts of the Ninth Circuit Court of Appeals and the development of its long range plan. The *Ninth Circuit Long Range Plan*, 1992, was one of several plans considered by the committee in development of planning issues.

Identifying Planning Issues

For development of the initial plan, the Long Range Planning Committee invested considerable effort identifying long range national and strategic issues that might be addressed. The committee used three criteria for issue selection:

* First, an issue is long range if dealing with it would require more than three years (or more than two budget cycles).

* Second, an issue is national or system-wide in scope if it transcends district and circuit boundaries.

* Third, the committee looked for what might be called strategic issues, that is, those

which affect (or have the potential of affecting) the core purposes of the judiciary.

The committee reviewed recommendations from committees or commissions in the last 25 years that have studied the federal judicial system:

* Study Group on the Caseload of the Supreme Court (Freund Commission)
* Commission on Revision of the Federal Court Appellate System (Hruska Commission)
* Department of Justice Committee on Revision of the Federal Justice System (Bork Committee)
* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases
* ABA study groups
* Federal Courts Study Committee
* President's Council on Competitiveness
* National Commission on Judicial Discipline and Removal

Planning Committee members spoke personally with members of the Senate and House Judiciary Committees or their staff, soliciting their input. In addition, the committee analyzed hundreds of letters sent by judges and others to the Federal Courts Study Committee to build an initial list of potential planning issues. To ensure that issues and suggestions are current, the chairman sent letters to circuit, district, bankruptcy and magistrate judges and others within the judiciary, asking them to identify long range issues they believe are of greatest importance to the judiciary.

Using the insight gained from these informal efforts, the committee requested the Federal Judicial Center to conduct structured surveys of all federal judges, state judges, and a random sample of attorneys. The surveys were designed to collect information on opinions about a wide range of judicial, structural, administrative and procedural issues.

Committee Goals and Recommendations

As a result of its research, the Planning Committee identified several dozen major topics and scores of individual issues that are long range in scope and national in character that could appropriately be included in the first national plan. The committee encouraged participation by other Judicial Conference committees in the planning process by transmitting to them lists of issues developed from earlier reports and the results of a request to all judges and groups of court officials. The Planning Committee acted on its commitment to the idea that the substance of the plan be developed by judges serving on the respective subject-matter Judicial Conference committees. These individuals have the in-depth knowledge of the issues and the foresight to establish appropriate strategic goals for matters within their respective jurisdictions.

Conference committees then considered the extent to which they were already engaged in planning activities and whether they should begin new planning initiatives. The Planning Committee's responsibility to coordinate the planning process with other committees of the Judicial Conference was advanced by the chairman's letter requesting other committees both to identify issues to be addressed and to make recommendations on how those issues should be treated in the plan. Many committees prepared a report to the Planning Committee. Some committee chairs attended Planning Committee meetings to advance their committees' recommendations. The results of these widespread efforts include:

- Report and Long Range Plan for Automation in the Federal Judiciary from the Committee on Automation and Technology (1994)

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- Report of the Committee on the Administration of the Bankruptcy System (June 1993)
- Report of the Budget Committee (Feb. 1994)
- Report of the Court Administration and Case Management Committee on Size and Structure of the Federal Judiciary (February 1993)
- Report of the Court Administration and Case Management Committee on Pro Se Litigation (June 1994)
- Report of the Criminal Law Committee on Judicial Planning for the Future of Federal Sentencing Policy (May 1994)
- Report of the Committee on Defender Services (June 1994)
- Report of the Committee on Intercircuit Assignments (Jan. 1994)
- Report of the Judicial Branch Committee and its Subcommittees on Long Range Planning (Jan. 1994)
- Report of the Judicial Branch Committee on Court Governance (February 1994)
- Report of the Judicial Branch Committee on Size of the Judiciary (July 1993)
- Report and Supplements to the Long Range Plan for the Magistrate Judges System (June 1994)
- Report of the Security, Space and Facilities Committee (August 1994)

In addition to committee reports, the Planning Committee received numerous personal letters from judges with reommendations and suggestions about planning issues and topics.

Special Report to the Judicial Conference

The committee worked to prepare a report, specifically added to its charge by the Judicial Conference in March 1993, addressing the appropriate size of the federal judiciary and whether there should be a "cap" on the number of Article III judges. The Conference decided to refer the question to the committee, in consultation with other committees, for report and recommendation.

To develop its recommendations, the Committee conducted retreats on federal court size and jurisdiction at which invited judges, lawyers, academics, and other citizens offered wide-ranging comments. One retreat was set aside for Judicial Conference committee chairs and chief judges; another for state judges, legal and other scholars, members of the private bar, and representatives of the legislative and executive branches; and a third was conducted with mixed judiciary-bar-academia participation. (The names of participants of all retreats appear in Appendix C.)

The committee held additional meetings to review the results of the study process and develop its recommendations to the Judicial Conference for the long term direction of the size of the federal judiciary. The report was adopted by the Judicial Conference in September 1993. The major elements of that report form the basis for this plan's chapter on size and jurisdiction (Chapter 4).

Other Planning Committee Activity

Ninth Circuit Judicial Council

The chairman of the committee and the Chief of the Long Range Planning Office addressed the Ninth Circuit Judicial Council at its May 1992 retreat to promote, encourage, and coordinate long range planning. The speech, "Framework for Long Range Planning in the Federal Judiciary" was published in *Long-Range Planning for Circuit Councils* (Federal Judicial Center 1992).

District Chief Judge Conference

A member of the Planning Committee made a similar outreach for general information, participation, and coordination in a presentation at the Conference of District Chief Judges in May 1992.

Seventh Circuit Conference

Members of the Planning Committee and a staff facilitator participated in a panel discussion entitled "Future of the Courts" at the Seventh Circuit Judicial Conference, also in May 1992. The panel included other judges and representatives of the Department of Justice and served to introduce goal setting in planning.

Sixth Circuit Conference

Five members of the committee participated as members of a panel to promote, encourage, and coordinate long range planning activities at the 1993 judicial conference of the Sixth Circuit.

Meetings and Conference Calls

To consult with other committees and members of the judiciary, the committee's subcommittees met with other Judicial Conference committees in person and through telephone conference calls:

- In September 1992, a conference call brought together the chairs of all committees concerned with issues of criminal case processing to define broad issues in this area with Subcommittee 3 of the committee.
- In October 1992, Subcommittee 2 of the committee met with the chair of the committee on Federal-State Jurisdiction to coordinate the identification of emerging trends and develop strategies and plans for addressing them.
- In December 1992, members of each of the committee's subcommittees met with the chair of the Committee on the Judicial Branch and with the chair of its long range planning subcommittee to coordinate the identification of emerging trends and define broad issues confronting the judiciary.
- In December 1993, Subcommittee B of the committee conducted two conference calls to consult with several chief district judges, other district judges, and court officials to prepare a section of the long range plan on alternative dispute resolution.
- In January 1994, several members of the Planning Committee conducted a conference call to the Committee on the Budget to discuss the plan's components about economic matters and Congressional relations.
- In April 1994, the Planning Committee Chair and several members conducted two conference calls, one with Chief Justice Rehnquist and one with former Chief Justice Burger to discuss the governance issues that would be covered in the plan.

Analyses and Research

Committees submitted their reports on long term issues and recommendations to the Planning Committee by January 1994. Several committees submitted detailed reports for inclusion in the plan.

In the meantime, the Planning Committee's subcommittees, supported by analyses produced by the Long Range Planning Office of the Administrative Office, continued their work synthesizing information and developing additional information for the development of long term goals for the plan. Additionally, throughout the process, the committee commissioned research efforts by legal scholars to provide conceptual linkages for the various planning issues being considered.

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For major issues such as size, jurisdiction, and governance, the committee's retreats allowed for expansive interchange of ideas about the future directions of the judiciary. The retreats also gave Planning Committee members a sense of the needs of both internal and external stakeholders in these issues. Those meetings helped sharpen the committee's focus on practical solutions to structural problems.

In order effectively to coordinate the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them, and to evaluate and report on the planning efforts of the judiciary, the committee sponsored the following research projects:

- A staff study by the National Academy of Public Administration, *Long Range Planning in the State Courts: Selected Features for the Federal Judiciary* (June 1992).

- A report by the expert panel formed by the National Academy of Public Administration to recommend planning strategies, *Long Range Planning in the Federal Judiciary* (June 1992).

- Two papers exploring the appropriate range of federal jurisdiction were prepared by Dean Thomas M. Mengler of the University of Illinois College of Law, a consultant to the committee: *Federal Criminal Jurisdiction* (March 1993) and *Federal Civil Jurisdiction* (May 1993).

- A Federal Judicial Center survey of federal judges on issues relating to planning, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* (1994).

- Two research papers: *Judicial Vacancies: An Examination of the Problem and Possible Solutions* by Gordon Bermant of the Federal Judicial Center, Jeffrey A. Hennemuth of the Administrative Office of the United States Courts, and A. Fletcher Mangum of the Federal Judicial Center (1994) and *Access (Draft #1)* by Professor Jeffrey Jackson of the Mississippi College of Law (1994).

- Several papers and manuscripts analyzing trends and future directions were prepared by Administrative Office staff, including:

  - Two prepared by Dr. William T. Rule II, *Federal Court Caseloads Since 1950* (1993) and *Estimating the Impact of Eliminating Diversity Jurisdiction* (1993), were for the use of the committee and the Committee on Federal-State Jurisdiction.

  - A study on judicial workforce trends, *Workforce Changes: Looking Ahead and Looking Back* (1993) by Dr. William M. Lucianovic.

  - A treatise on the effects of increased caseloads, *Rethinking the Federal Court System: Thinking the Unthinkable* (1994) by Charles W. Nihan and Harvey Rishikof.

  - An analysis of responses to a letter of inquiry on the role of senior judges sent by the committee, *Report on Responses of Senior Judges and Active Judges Eligible or Soon to be Eligible for Senior Status* (1994) by Richard B. Hoffman.

  - A paper by David L. Cook and others of the AO Statistics Division, *The Criminal Caseload: Increasing Burden on the District Courts?* (1993).

- Three Federal Judicial Center studies were prepared for use by the committee and others: *Imposing a Moratorium on the Number of Federal Judges,* by Gordon Bermant, William W Schwarzer, Edward Sussman, and Russell R. Wheeler (1993), *On the Federalization of the Administration of Civil and Criminal Justice* by William W

Schwarzer and Russell R. Wheeler (1994), and *Federal Court Governance* by Russell R. Wheeler and Gordon Bermant (1993).

- The Federal Judicial Center also prepared a report based on interviews with committee members to discuss the essential values of the courts: Gordon Bermant, *A Vision of Progress for the Federal Courts* (1992).

Completing the First Planning Cycle

Beginning with a *Federal Register* announcement on November 8, 1994, the Long Range Planning Committee conducted an extensive communication and consensus-building effort by submitting the proposed draft plan to a public comment period and three public hearings held at central locations in the country.

Copies of the proposed plan were mailed to all federal judges and senior court staff; both houses of Congress; most agencies of the executive branch; national, regional, and local bar associations; state court chief judges and administrative officers; public interest groups, law school deans; and many individuals who have shown interest in the courts—over 6,700 copies in all. The public hearings, held in Phoenix, Chicago, and Washington, D.C. elicited comments from 74 speakers. (All those who offered comments at the hearings or by submitting written comments are listed in Appendix C.) Many thoughtful suggestions were received to assist the committee to refine recommendations and commentary.

Following the comment period, the Planning Committee met to review the contents of the plan in the light of public and judicial branch input. The result was both completion of this version of the draft plan and identification of a number of issues for analysis and discussions for the next planning cycle.

Development of the initial long range plan is merely the beginning of the work of the judicial branch's long range planning process. As this plan describes in Chapter 11, there are a number of strategic issues affecting the federal courts on which consensus does not exist at present, and others which have not yet been addressed explicitly.

Appendix C
Profile of the Long Range Planning Committee: Members, Staff, Consultants, and Contributors

Members of the Committee

Otto R. Skopil, Jr. of Portland, Oregon, has served on the United States Court of Appeals for the Ninth Circuit since 1979, taking senior status in 1986. Previously, he had served as a United States District Judge for the District of Oregon, 1972-1979 (Chief Judge, 1976-1979). He is a graduate of Willamette University and its law school. He served on the Board of the Federal Judicial Center in 1979. Judge Skopil was a member of the Judicial Conference Committee on the Administration of the Federal Magistrates System, 1977-1987, and was Chairman, 1980-1987. He was also a member of the Ad Hoc Committee on Judicial Review Provisions in Regulatory Reform Legislation, 1981-1984. Since its creation in 1990 Judge Skopil has served as the Chairman of the Committee on Long Range Planning.

Sarah Evans Barker of Indianapolis, Indiana, has served as a United States District Judge for the Southern District of Indiana since 1984 and as its Chief Judge since January 1994. She is a graduate of Indiana University and the American University College of Law. Prior to her coming to the bench, she was United States Attorney for the Southern District of Indiana from 1981-1984. In 1988 Judge Barker was elected to the United States Judicial Conference for a three year term, She served as a member of the Executive Committee from 1988 until 1991 and was a member of the Committee on Rules of Practice and Procedure from 1987 until 1991. In 1991, she served on the Ad Hoc Committee to Study the Relationship between the Federal Judicial Center and the Administrative Office. Judge Barker joined the Committee on Long Range Planning in 1991.

Edward R. Becker of Philadelphia, Pennsylvania, has been a United States Circuit Judge for the Third Circuit since 1981. Prior to his appointment to the appellate bench, Judge Becker served as a United States District Judge for the Eastern District of Pennsylvania from 1970-1981. He graduated from the University of Pennsylvania and the Yale Law School. From 1975-1976, Judge Becker was a member of the advisory committee for the Federal Judicial Center's District Court Studies Project. From 1979-1987, he served as a member of the former Committee on the Administration of the Probation System. From 1985 to 1990, he served on the FJC Committee to Advise on Education Programs on the Crime Control Legislation. In 1987, Judge Becker became Chairman of the restructured Committee on Criminal Law and Probation Administration. From 1985 to 1990, he served on the FJC

Committee on Sentencing, Probation and Pretrial Services. In 1991, he joined the Board of the FJC. Judge Becker has served on the Committee on Long Range Planning since its inception in 1990.

Wilfred Feinberg of New York, New York, was appointed United States Circuit Judge for the Second Circuit in 1966. He served as Chief Judge from 1980 through 1988, taking senior status in 1991. He had previously served as United States District Judge for the Southern District of New York from 1961-1966. He is a graduate of Columbia College and Columbia Law School. Judge Feinberg was a member of the United States Judicial Conference from 1980 until 1988; he was Chairman of the Executive Committee from 1987-88. He has also served on the Advisory Committee on Civil Rules, 1965-1970; the Subcommittee on Supporting Personnel, 1969-71; the Subcommittee on Judicial Statistics, 1971-76; the Federal Judicial Center's Advisory Committee on Experimentation in the Law; the Committee to Study Law Clerks Selection Process, 1982-1985; the Ad Hoc Committee on Judgeship Vacancies, 1982; and the Committee to Study the Judicial Conference, 1986-1987. Since 1990 he has served on the Committee on Long Range Planning.

Elmo B. Hunter of Kansas City, Missouri, has served as a United States District Judge for the Western District of Missouri since 1965; he served as Chief Judge in 1980 until he took senior status at the end of that year. He is a graduate of the University of Missouri and its law school, and has done post graduate work at the University of Michigan. Prior to joining the federal bench, Judge Hunter was Circuit Judge for the 16th Judicial Circuit, State of Missouri, 1952-1957; and Appellate Judge, Court of Appeals at Kansas City, 1957-1965. He served on the Committee on Court Administration, 1969-1987 (appointed Chairman in 1978); and served as Chairman of its Subcommittee on Judicial Improvements, 1976-1978. He was also a member of the Ad Hoc Committee on Judicial Review Provisions in Regulatory Reform Legislation, 1981-1984; and the Ad Hoc Committee on the Media Petition ("Cameras in the Courtroom"), 1983-1984. In 1990, Judge Hunter joined the Committee on Long Range Planning.

James Lawrence King of Miami, Florida, was appointed United States District Judge for the Southern District of Florida in 1970 and served as Chief Judge from 1984-1991. He took senior status in 1992. He is a graduate of the University of Florida and its law school. Before joining the federal bench, Judge King was a Circuit Judge, Eleventh Judicial Circuit of Florida, 1964-1970 and a member of the Board of Regents of Florida, 1963-1964. He served on the Advisory Committee on Judicial Activities, 1973-1976; the Committee on Standards for Admission of Attorneys to Federal Practice, 1976-1979; and the Ad Hoc Advisory Committee on the Administrative Office, 1985. He was Chairman of the Implementation Committee on Admission of Attorneys to Federal Practice from 1979-1985. He was a member of the Judicial Conference of the United States from 1984 through 1987 and a member of the Judicial Council of the Eleventh Circuit, 1989-1992. Judge King has been a member of the Committee on Long Range Planning since its creation in 1990.

Virginia M. Morgan of Detroit, Michigan, has served as a United States Magistrate Judge for the Eastern District of Michigan since 1985. She is a graduate of the University of Michigan, the University of Toledo College of Law and has done graduate work at the University of San Diego. She was an Assistant United States Attorney from 1979-1985. Judge Morgan has served on the Advisory Group of Magistrate Judges since 1988. In 1992 she joined the Committee on Long Range Planning.

A. Thomas Small of Raleigh, North Carolina, has been a United States Bankruptcy Judge for the Eastern District of North Carolina since 1982. He has served as Chief Judge since 1992. He is a graduate of Duke University and Wake Forest University School of Law. Judge Small has served on the Committee on Long Range Planning since 1992.

Harlington Wood, Jr. of Springfield, Illinois, has served as a United States Circuit Judge for the Seventh Circuit since 1976. Formerly, he was a United States District Judge for the Southern District of Illinois, 1973-1976. He is a graduate of the University of Illinois and its law school. He served as United States Attorney for the Southern District of Illinois, 1958-1961; Associate Deputy Attorney General, 1969-1972; and Assistant Attorney General, 1972-1973. Judge Wood was a member of the Committee on Bankruptcy Legislation, 1978-1979; he served on the Advisory Committee on Judicial Activities, 1978-1979; the Committee on Court Administration, 1981-1987; the Ad Hoc Committee on the Media Petition ("Cameras in the Courtroom"), 1983-1984; and the Ad Hoc Committee on Automation, 1983. From 1987 until 1991, Judge Wood served as Chairman of the Committee on the Administrative Office. He joined the Committee on Long Range Planning in 1990.

Staff

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William M. Lucianovic, Senior Planning Advisor, Long Range Planning Office, Administrative Office of the United States Courts. A.B., University of Rochester; M.A. & Ph.D., Case Western Reserve University

William T. Rule, II, Economist & Econometrician, Long Range Planning Office, Administrative Office of the United States Courts. B.A., Macalester College; Ph.D., Virginia Polytechnic Institute & State University

Charles W. Nihan, Chief of the Long Range Planning Office, Administrative Office of the United States Courts, 1991-94. B.A., University of Massachusetts; M.A., Harvard University; M.S., The American University; J.D., Georgetown University

Consultants

Robb M. Jones, Director of the Judicial Education Division, Federal Judicial Center; Administrative Assistant to the Chief Justice, United States Supreme Court, 1991-94. A.B., Grove City College; M.A. & J.D., University of Virginia

Thomas M. Mengler, Dean & Professor of Law, University of Illinois College of Law. B.A., Carlton College; M.A. & J.D., University of Texas

Gordon Bermant, Director of the Planning & Technology Division, Federal Judicial Center. A.B., University of California at Los Angeles; M.A. & Ph.D., Harvard University; J.D., George Mason University

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National Association of Criminal Defense Lawyers

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Public Citizen Litigation Group

The Governance Institute

The Legal Aid Society

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