Long Range Plan for the Federal Courts

As Approved by the Judicial Conference

Judicial Conference of the United States
December 1995

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

December 15, 1995

TO ALL INTERESTED PARTIES:

I am pleased to present the *Long Range Plan for the Federal Courts* approved by the Judicial Conference of the United States. Although it is based in large part on the *Proposed Long Range Plan* submitted by the Committee on Long Range Planning in March 1995, this version of the *Plan* includes a number of substantive and technical revisions among its recommendations, implementation strategies, and supplemental text.

Judicial Conference approval of the *Long Range Plan* extends **only** to the 93 recommendations and 76 implementation strategies. All other text in the *Plan,* including commentary on the approved items, serves to explain the drafters' reasoning and provide background information but does not necessarily reflect the views of the Judicial Conference.

As the federal judiciary faces the challenges of the next century, the *Long Range Plan* will provide an integrated vision and valuable framework for policy making and administrative decisions by the Conference, its committees, and other judicial branch authorities. While continuing to reflect our shared, enduring values, the specific goals and objectives set forth in the *Plan* can be expected to evolve as necessary to meet the needs of a changing world.

Any questions about the *Long Range Plan* can be directed to the Long Range Planning Office, Administrative Office of the United States Courts, at (202) 273-1810.

/s/

L. Ralph Mecham

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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 the future needs of our nation and the limited financial resources of the federal government. With such a vision, the Committee on Long Range Planning proceeded to develop consensus for the treatment of issues and recommendations in the plan.

Numerous comments and suggestions were received about issues for possible treatment in the plan. Many other Judicial Conference committees participated in analyzing long term issues for the plan and in reviewing earlier drafts of this plan. Additional suggestions were made 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. As a result of their suggestions, the recommendations and commentary of the plan were revised and clarified.

Some suggestions concerned issues that have been deferred for future plans. These concepts and issues deserve further study and commentary by the appropriate Judicial Conference committees. Chapter 11 enumerates some of the 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. This document is not a one-time report on the future of the federal courts, but rather an incremental step in the judicial branch's planning process. It identifies areas where the federal courts might change to improve, and proposes ways in which the courts' service to society can be enhanced. 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 of the plan, including both implementation and feedback, will keep the document current and allow it to keep pace with ongoing initiatives within the judicial branch.

Indeed, it is *planning* rather than producing a *plan* that is most valuable—as demonstrated by the history of this document. The Long Range Planning Committee's exhaustive efforts to obtain input and build consensus while developing the plan, and the participation of Conference members and committees in reviewing the plan, prompted a valuable airing of many

key issues. Broad involvement also created many "stakeholders" in the planning process: this plan is not merely the work of the Long Range Planning Committee, but is rather a product *of*, as well as *for*, the entire Conference and all its committees. The stage is set for all interested parties to participate in implementation of plan recommendations and continued examination of strategic trends and policies affecting the judiciary.

No one can claim to have seen the future accurately. Disagreements 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. Through that process, the judicial branch can take an active role in developing its preferred future.

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Chapter 1
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.

Many other challenges also have affected this planning process. The federal

[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).

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

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in the Administrative Office and the Federal Judicial Center.

Appendix B of the plan documents the history of the Judicial Conference's long range planning process from the inception of the Long Range Planning Committee, in March, 1991, to the present day. Here it suffices to note that the process has included: identification of the major planning areas confronting the judiciary; analysis of forecasted trends; wide consultation 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 assessment of 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.

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 countermajoritarian 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*

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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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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.

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

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.

Core Values of the Federal Judiciary

- *The Rule of Law*
- *Equal Justice*
- *Judicial Independence*
- *National Courts of Limited Jurisdiction*
- *Excellence*
- *Accountability*

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

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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.

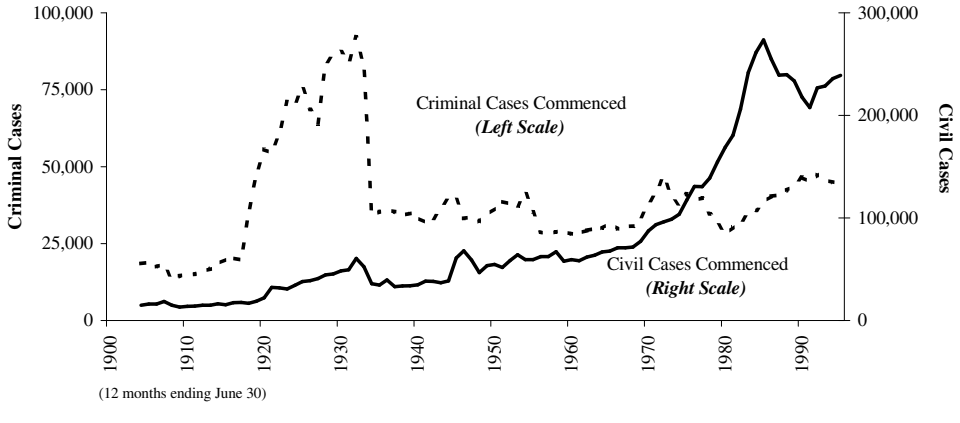
The most powerful popular influence on the federal judiciary is the judicial appointment process, which responds generally over time to changes in electoral majorities. Other elements of accountability are imposed by Congress under Articles I and III of the Constitution. Some specific elements, such 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.

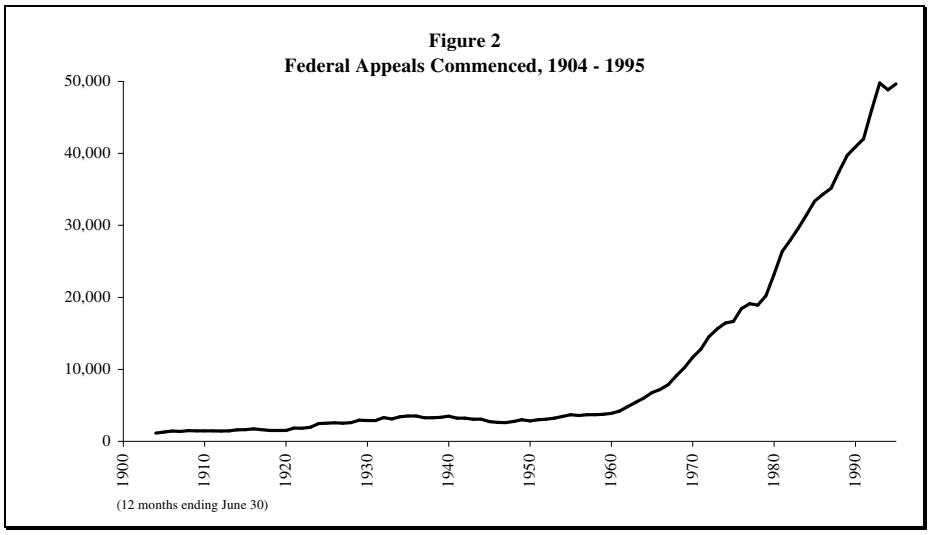
Huge burdens are now being placed on the federal courts. An historical overview of cases commenced in the federal district and appeals courts since 1904 reveals remarkable growth (see Figure 1). The U.S. population has increased slightly more than 200% since 1904. In the same

Figure 1
Civil and Criminal Cases Commenced in U.S. District Courts, 1904 - 1995



[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).

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.

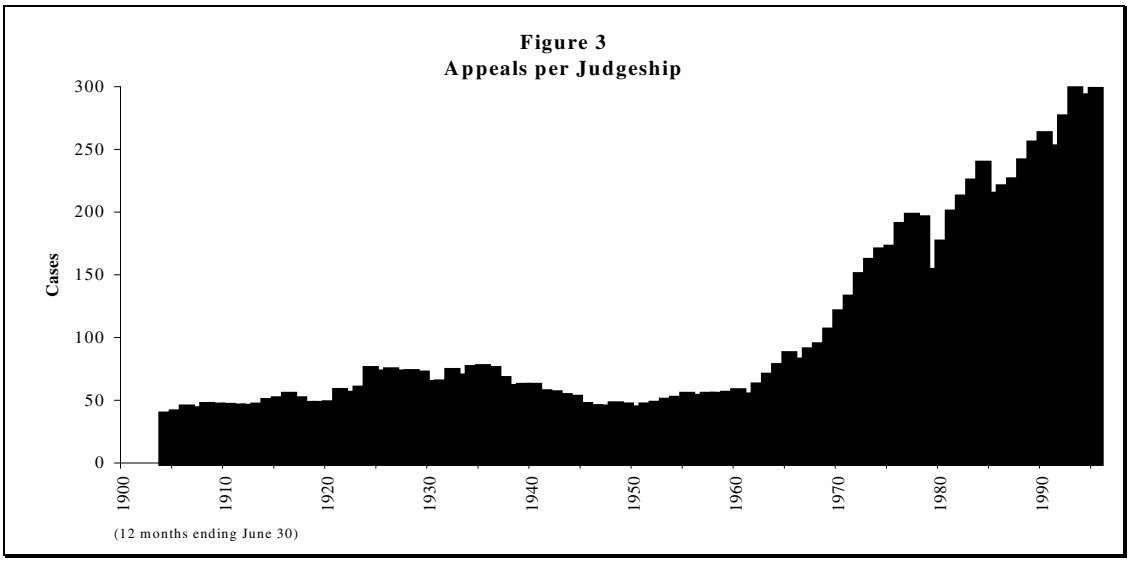


Most remarkably, since 1904 annual cases commenced in the federal appeals courts have increased more than 3,800%. While it took 20 years for the level of appeals to double its 1904 level, and 38 years (1962) to double again, it took seven (1969), ten (1979) and eleven (1990) years for each of the next three doublings. See Figure 2.

Although the number of courts of appeals judgeships has increased from 27 in 1904 to 167 in 1995 (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 to 297 in 1995.

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 1995. Between 1970 and 1995, district court filings per judgeship increased from 317 to 436. 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



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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 1995 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 next 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.

Table 1

Authorized Magistrate Judges and Civil and Criminal Workload 1975 - 1995

(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
1995	416	79	3	511,039

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 47 percent since 1980. The number of multi-defendant drug cases has increased by nearly 30 percent between 1990 and 1994. 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 between 1990 and 1994 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 18 percent.

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Table 2

Authorized Bankruptcy Judges (or Referees) and Filings

1950 - 1995

(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
1995	326		858,104
	(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.

[4] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 33 (1973), *quoted in* M.A. GLENDON, A NATION UNDER LAWYERS 107 (1994).

The late Chief Justice Warren Burger once referred to the need for "systematic 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

[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).

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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 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 months 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
1995	283,197	44,184	239,013	44,531	144,540	49,693	249
2000	364,800	47,800	317,000	41,400	213,600	62,000	
2010	610,800	62,000	548,800	54,600	381,000	113,200	
2020	1,060,400	83,900	976,500	67,000	695,000	214,500	

Table 4

Historical and Projected Appeals Filed in U.S. Courts of Appeals

1940 - 2020

(12 months 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
1995	49,671	10,023	14,488	25,160
2000	85,700	15,000	34,500	36,200
2010	174,700	26,000	77,400	71,300
2020	334,800	43,000	149,600	142,200

Table 5

Total Historical and Projected Appeals Filed by Circuit
1940 - 2020
(12 months ending June 30)

Circuit	1940	1995	2020
D.C.	325	1,585	1,690
First	111	1,335	10,900
Second	572	3,948	30,200
Third	322	3,555	22,500
Fourth	159	4,928	27,800
Fifth†	398	6,465	45,000
Sixth	340	4,600	28,500
Seventh	377	3,103	22,700
Eighth	289	3,203	19,400
Ninth	335	8,274	65,100
Tenth	218	2,729	21,300
Eleventh		5,946	39,900

† 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
1995	167	649
2000	440	890
2010	870	1,430
2020	1,660	2,410

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Chapter 3
An Alternative Future for the Federal Courts?

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.

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 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 reach 1 million (in 1995 the civil filings in the district courts numbered about 239,000), while the criminal filings could reach nearly 84,000 (in 1995 they numbered about 44,000). At the same time, annual appeals could approach 335,000 (in 1995 they numbered almost 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 2,400 judges, while the appeals bench would be over 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)

	1995	2020
District Courts		
Civil Filings	239,013	976,500
Criminal Filings	44,184	83,900
Total	283,197	1,060,400
Courts of Appeals		
Criminal Appeals	10,023	43,000
Prisoner Petitions	14,488	149,600
Other Appeals	25,160	142,200
Total	49,671	334,800
Judgeships		
District (by formula)	649	2,410
Circuit (by formula) (excludes Federal Circuit)	167	1,660

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 Su-

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

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preme 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 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.

[2] Jon O. Newman, *1,000 judges—the limit for an effective federal judiciary*, 76 JUDICATURE 188 (1993).

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 1995. 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 $954,000 (in 1995 dollars). Annual recurring costs would amount to about $813,000. For district court judgeships, these initial and recurring costs are about $937,000 and $775,000, 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 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 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.

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.

[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

[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.

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.

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
- fourth, through improvement in 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

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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 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 nonmajoritarian 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 be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.**

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.

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[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).

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 be encouraged to 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; 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.

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(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 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 be encouraged to 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 be encouraged to 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 rational 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 be encouraged to 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 *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.*

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. With cross-designation, those responsible for a criminal investigation can proceed with a case regardless of whether the resulting prosecution is brought in a federal or state court. The fo-

[7] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 106 (1990).

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rum can be selected on the basis of whether federal or state interests are implicated, rather than on (among other reasons) a federal or state prosecutor's greater familiarity with the facts. This practice maximizes the effective use of available resources without blurring the necessary distinction between the two court systems.

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 repeal of 18 U.S.C. § 3231, which makes federal criminal jurisdiction an exclusively federal matter, and its replacement 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 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, standards should be considered—**

(a) that are consistent with sound jurisdictional boundaries for federal criminal prosecution as described in Recommendation 2; and

(b) under which the potential for harsher federal sentencing policies and greater capacity in the federal prisons would 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 be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests. 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 presented 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,

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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 be encouraged to seek reduction in 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; and

(b) otherwise limiting diversity jurisdiction by—

(1) amending the statutes conferring original and removal jurisdiction on the district courts in diversity actions to require that parties invoking diversity jurisdiction plead specific facts 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) amending the statutory specification of the jurisdictional amount to exclude punitive damages from the calculation of the amount in controversy.

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.

From 1950 through 1995, diversity cases annually have comprised between 20 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.

Diversity jurisdiction currently accounts for more than one of every five 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.[9] 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.

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

[8] 304 U.S. 64 (1938).

[9] The 49,693 diversity cases filed in 1995 mark a decline from the peak of 68,224 filings in 1988. Diversity jurisdiction, however, continues to provide a substantial part of the federal courts' civil caseload. The reason for the recent decline in diversity filings is not entirely clear, though a significant factor is the 1989 increase in the jurisdictional amount-in-controversy requirement from $10,000 to $50,000.

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cases.[10] Given the difficulties that federal judges frequently encounter in predicting state substantive law and the unavoidable intrusion of the federal courts in this law-making function of the state courts,[11] the theoretical justifications for diversity jurisdiction are extremely weak in comparison to other areas of federal court activity.[12]

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

Since 1977, the Judicial Conference has supported abolition of federal jurisdiction based on diversity of citizenship.[13] There has been relatively little movement toward attaining that goal. During the same period, the Conference has pursued a variety of intermediate measures designed to narrow, or lessen the impact of, diversity cases on the federal courts. Among other things, it has endorsed repeal of diversity jurisdiction for cases brought by "in-state" plaintiffs, establishment of higher, stricter amount-in-controversy requirements, and treatment of corporations as "citizens" of every state in which they are licensed or registered to do business.[14]

Although the Conference's underlying position on the issue remains unchanged, this plan does not identify total elimination of the diversity docket as a strategic goal. This is so for two reasons.

In the first place, the federalism principles counseling against federal litigation of state-law matters do not require abolition of diversity jurisdiction in all cases. Indeed, most commentators believe that the federal courts should retain diversity jurisdiction at least in actions involving aliens or interpleader.[15] It has also been suggested that Congress consider *extending* diversity jurisdiction in ways that could facilitate the efficient consolidation and resolution of mass tort litigation.[16]

Secondly, there are many, both inside and outside the federal judiciary, who believe that the historical purpose of diver-

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[10] *See* I FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 426-35.

[11] *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

[12] Those opposing elimination of diversity jurisdiction argue its perceived practical benefits: (1) creative interplay between federal and state jurists in development of common law; and (2) availability of alternative forums to enhance efficient administration of justice to litigants.

[13] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8-9 (Mar. 1977); *id*. at 52 (Sept. 1977); *id*. at 7 (Mar. 1978); *id*. at 66 (Sept. 1979); *id*. at 17 (Mar. 1986); *id*. at 72 (Sept. 1987). *See also* Conference of Chief Justices, Resolution I(5)(C) (1977) (expressing state courts' willingness to relieve federal judges of all or part of their diversity caseload).

[14] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (Apr. 1976); *id*. at 72 (Sept. 1987); *id*. at 22-23 (Mar. 1988); *id*. at 60 (Sept. 1990); *id*. at 48-49 (Sept. 1993).

[15] 28 U.S.C. § 1335 (1988).

[16] While otherwise seeking to curtail or eliminate diversity jurisdiction, the Judicial Conference supports establishment of "mimimal" diversity criteria to allow federal court consolidation of multiple litigation involving personal injury or property damage arising out of a single event. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21-22 (Mar. 1988). In this connection, a National Commission on the Federal Courts, proposed in Implementation Strategy 91d *infra*, 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.

sity jurisdiction—protection of out-of-state litigants from local prejudice—still has limited viability. Although that protection might be afforded, in theory, by limiting diversity jurisdiction to those cases in which a reasonable need for a federal forum is clearly demonstrated, such a solution poses practical problems. It would require federal courts to determine the susceptibility of state courts to local prejudice—a difficult inquiry with obvious negative consequences for federal-state relations. Even more seriously, it would shift from Congress to the judiciary the power to make "legislative" policy choices about appropriate access to federal court, and it might spawn "satellite" litigation that would undercut the desired reduction in federal judicial workload.[17]

The above recommendation, therefore, incorporates the proposals on diversity jurisdiction in the 1990 Report of the Federal Courts Study Committee.[18] This follows the pragmatic view that the diversity docket will be eliminated, if at all, through a gradual process. While not abandoning the theoretical goal, this plan seeks to keep the judiciary's efforts focused—as they have been for several years—on attainment of practical objectives that will serve the broader interests of both the federal and state courts. Consistent with Recommendation 14, 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.[19]

In the 12-month period ending June 30, 1995, more than 12,000 cases brought under diversity jurisdiction

—approximately 25 percent of the total number of diversity filings in that period—

were filed as original actions by in-state plaintiffs.

❒ 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 43 states, the District of Columbia, and

[17] It is, of course, appropriate to eliminate diversity jurisdiction where prejudice clearly is not an issue. 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. Abolishing diversity jurisdiction in that instance is fully consistent with 28 U.S.C. §1441(b), which already prohibits an in-state defendant from removing a case to federal court on the basis of diversity jurisdiction. It should not, however, preclude an out-of-state defendant from removing a diversity case in which one or more of the plaintiffs is a citizen of the state in which the federal district court is located.

[18] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-42 (1990).

[19] Complete elimination of diversity cases from the federal courts would add approximately 50,000 cases annually to the nearly 15 million civil cases (excluding domestic relations matters) that state courts handle each year, increasing their caseload by only a third of one percent. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS—1994 ANNUAL REPORT OF THE DIRECTOR 7 (Table 4); NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993—A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 11 (1995). Although eliminating "in-state" plaintiff cases and increasing the amount-in-controversy requirements would result in an even smaller increase (probably less than one-tenth of a percent), state court filings may not increase uniformly in number and complexity around the country, resulting in disproportionate workload burdens in some locations. *See* Report of the Judicial Conference Committee on Federal-State Jurisdiction 38-40 & App. D (Sept. 1993); Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990).

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Puerto Rico, the court of last resort has either mandatory or discretionary jurisdiction to consider state-law issues upon certification from a federal court.[20] 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 be encouraged to 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 *Legislation should be requested to improve the adjudicative process for 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.*

9b *Legislative and other measures should be pursued to give agencies 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.

Congress, for example, should be encouraged to 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.[21] 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

[20] JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 15-18 (Am. Judicature Soc'y 1995) (describing the authority and scope of state certification rules).

[21] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 58-59 (1990).

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[22] clarifies agency authority to employ alternative dispute resolution methods and encourages the use of such methods. Although that statute expires this year,[23] Congress should be urged to extend it as an important means of promoting final resolution of disputes before they require federal court review.

❒ RECOMMENDATION 10: **Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.**

In addition to strengthening the existing adjudicative processes of federal agencies,[24] Congress should be encouraged to 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.[25]

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 be encouraged to 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.

[22] 5 U.S.C. §§ 571-583 (1994).
[23] 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).
[24] *See* Recommendation 9 *supra*.
[25] See, *e.g.*, 15 U.S.C. § 21 (1994) (Federal Trade Commission and other agencies); 29 U.S.C. § 160 (1988) (National Labor Relations Board); *id*. § 659 (Occupational 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)

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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.[26]

Congress should be urged to go beyond simply repudiating the policy of intracircuit non-acquiescence. It should be asked to 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 be encouraged to 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 might 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 be encouraged to refrain from providing federal district court jurisdiction over disputes that primarily raise questions of state law or involve workplace injuries where the 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 be encouraged to 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.*

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

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. However, any such program should include establishment of an administrative remedial process that must be exhausted before a state court action may be filed.*

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.

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.[27] 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.

During the statistical year ending June 30, 1995, 9,650 ERISA actions, 1,925 FELA actions, and 2,325 maritime (including Jones Act) actions were filed in the district courts. In the same year, civil filings in those courts totalled 239,013.

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. To prevent an undue burden on the state judicial systems, any program of this kind should include an administrative dispute-resolution process that must be completed before a claim can be pursued in a state court.

In each of these situations, Congress should be urged to provide adequate re-

[27] *See* 29 U.S.C. § 1132(a), (d) (1988).

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sources 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 be encouraged to 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 takes 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.

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.

Since 1991, the Administrative Office of the United States Courts 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. This principle applies also with respect to the possible impact of federal legislation on state judiciaries (see Recommendation 14 *infra*).

❒ RECOMMENDATION 14: **In considering measures that would shift jurisdiction away from the federal courts or provide new jurisdiction through the establishment of concurrent jurisdiction, Congress should also be**

encouraged to consider and address the impact of the proposed legislation on the states. Specifically, it should be urged to—

(a) consult with state authorities and state judicial leaders in defining any new limits on federal jurisdiction; and

(b) provide federal financial and other assistance 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 or the creation of new concurrent 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.[28] 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 or expansion of concurrent state court jurisdiction should be undertaken without also ensuring the states' capacity to handle the extra burden. This requires both effective federal-state communication[29] and a commitment by Congress to provide states with the necessary financial resources.

Growth of the Article III Judiciary

❒ RECOMMENDATION 15: **The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction.**

Implementation Strategies:

15a *The limited jurisdiction of the federal courts should be preserved as described in Recommendations 1 through 12.*

15b *The Judicial Conference should employ up-to-date, comprehensive methods to evaluate judgeship needs.*

15c *The need for additional judgeships should be reduced through control of federal court caseloads as described in this plan (including the appropriate reallocation of cases to state courts and other forums), and by 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

[28] THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961); see Chapter 1 *supra*.
[29] *See* Chapter 9, Recommendation 92 *infra*.

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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.

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. This path may be followed in large part by controlling expansion of federal court jurisdiction as described earlier in this chapter. At the same time, 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.

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 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 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 recommends no major structural changes in the near term.[3] Proposals are

[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).

[3] Although the FCSC recommended further study of structural alternatives for the courts of appeals, the ensuing

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
1995	49,671

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]

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 16: **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. Also, the need for centralized review by the Federal Circuit in any subject area might be reevaluated from time to time in light of developments in the law and changes in the workload and structure of the other courts of appeals.

Finally, except in limited circumstances (see Recommendation 20 *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

[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.

least one appeal as of right to an Article III forum should be upheld.

Circuit Size and Workload

❒ RECOMMENDATION 17: **Each court of appeals should comprise a number of judges sufficient to maintain access to 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.

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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 en 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, 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. The question of appropriate size should be reviewed periodically with respect to each court of appeals, but 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.

❒ RECOMMENDATION 18: **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

[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 en 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" en 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).

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 19: **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 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 20: **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 16 *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 ex-

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[9] See Chapter 8, Recommendation 62 *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.

[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).

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pressly 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 historically 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 21: **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,

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[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).

[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

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 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 1994 legislation requiring every circuit to establish a BAP (absent certain circumstances) may alter the process in unforeseen ways. Also, Congress has 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 22: **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 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.

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.

[23] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 601-610, 108 Stat. at 4147-50.

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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 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] Certainly, the courts of appeals may wish to scrutinize these certifications carefully in particular cases to guard against premature appeals that may delay, rather than promote, speedy resolution of bankruptcy cases.

Appeals of Magistrate Judge Decisions

❒ RECOMMENDATION 23: **Where parties to a civil action have consented to the case-dispositive authority of a magistrate judge, judgments entered in such actions 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

[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).

[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.

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 24: **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 court's general geographic region, 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 restructuring (*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 division of districts (and the consequent reallocation 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 25: **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.**

[27] See Chapter 8, Recommendation 62 *infra*.

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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] By the same token, there may be greater efficiency in some locations if districts covering large geographic areas or populations were divided.

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—where a larger court organization is otherwise indicated—to merging districts within states, or at least to merging judicial support functions between and among those districts.[30] In time, 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 26: **The impact of district alignment on access to the courts and efficient judicial administration should be studied periodically. Any such study should examine the functional and administrative costs and benefits which merger or division of districts would produce.**

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), or whether an existing district is too large, 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 smaller districts within states, or dividing larger districts, where adjudicative and administrative efficiencies can be realized.

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[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.

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 27: **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:

27a *The bankruptcy court should exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible.*

27b *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]

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[31] Bankruptcy Reform Act of 1978, Pub L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1994) and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993)).

[32] 458 U.S. 50 (1982).

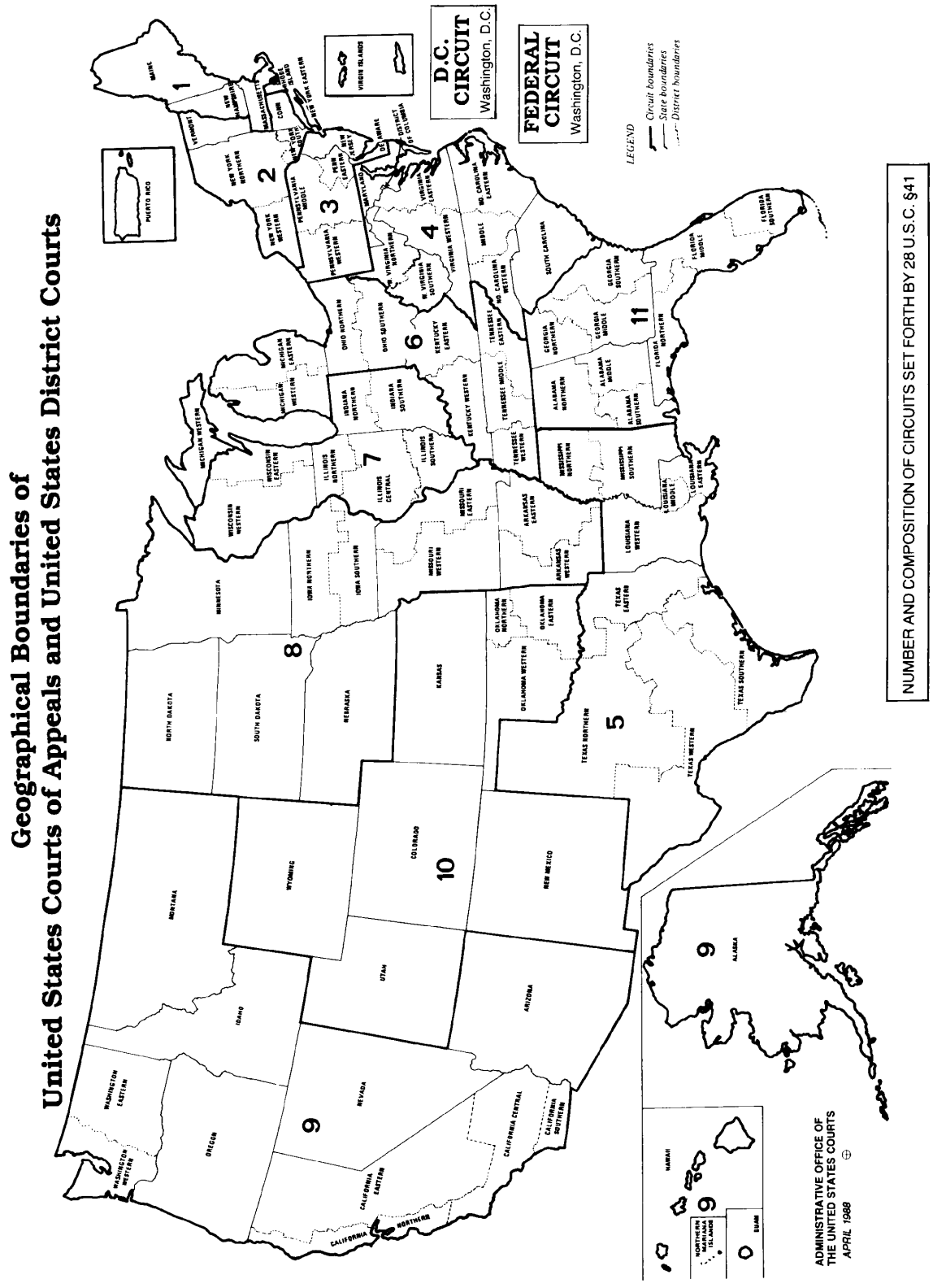
[33] Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 11 U.S.C. §§ 101-1330 (1994) and scattered sections of title 28, U.S. Code (1988 & Supp. V 1993)).

[34] *Cf.* Chapter 8, Recommendation 66 *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).

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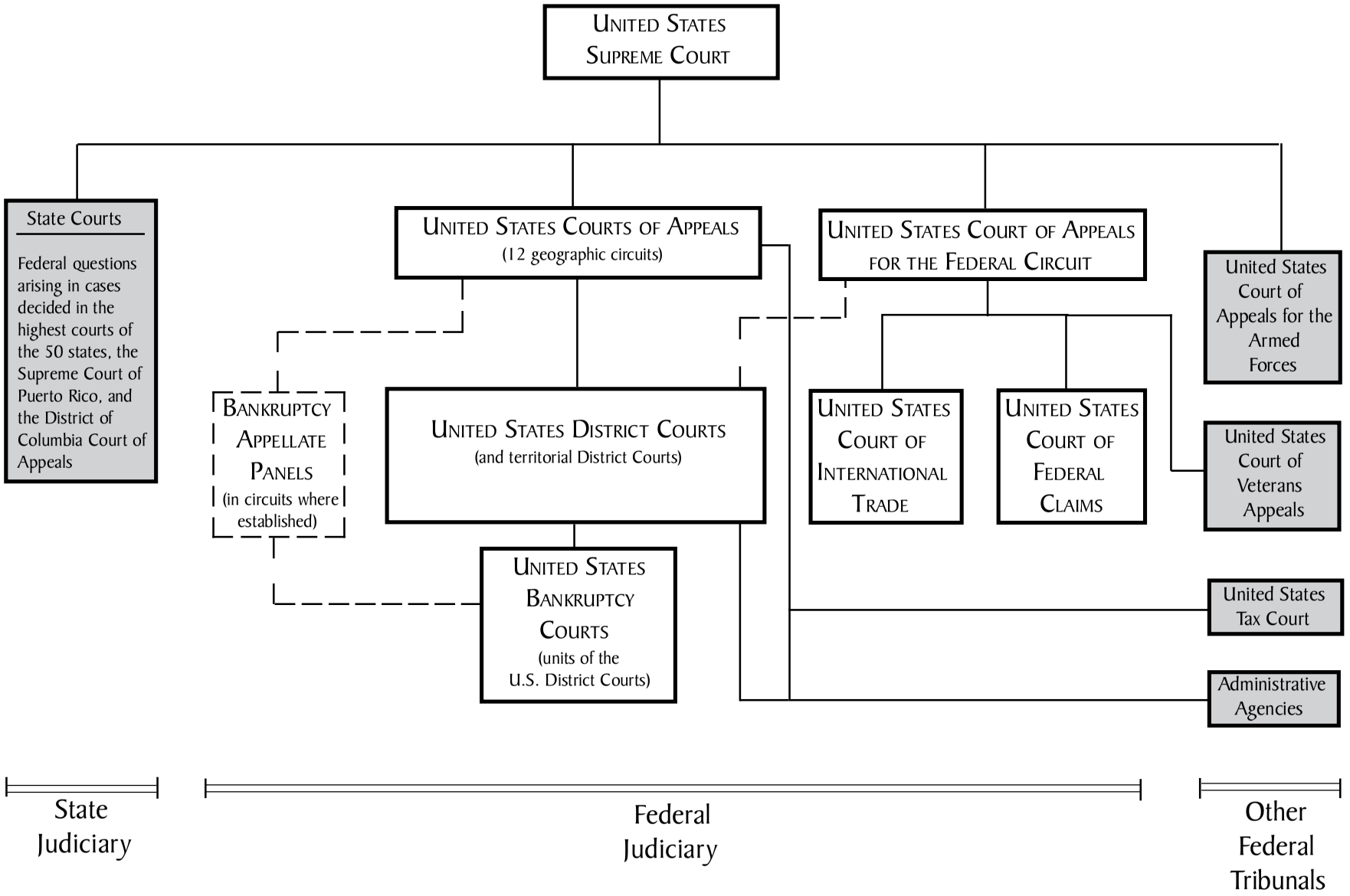
Jurisdictional lines in bankruptcy, as elsewhere, need to be made clear and bright. At a minimum, however, the bankruptcy courts must continue to exercise pervasive jurisdiction over matters affecting a debtor's bankruptcy.[35]

[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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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 28: **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 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.*

28c *In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches.*

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.[3] "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.

[1] 28 U.S.C. §§ 2071-2077 (1988 & Supp. V 1993).

[2] 28 U.S.C. § 331 (1988).

[3] *See* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655 (1995) (describing the federal rules process in greater detail).

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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 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.[4]

The bar and the state judiciaries should be active partners in the rule making process. Effective participation is essential, both through membership of state judges and practicing attorneys on the rules committees and the willingness of these individuals and groups 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 outside participation by increasing bar membership on the rules committees, expanding rules publications and educational efforts, adding more attorneys, state judges, 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 and the state courts.

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 sen-

[4] These efforts should be supported, as necessary, through allocation of adequate funding and other resources.

tencing 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. 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.[5] 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.*

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. 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

[5] *See* 28 U.S.C. § 994(o) (1988)

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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.[6]

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 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 nonviolent 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.[7] 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.[8] 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 31: **A well supported and managed system of highly competent probation and pretrial**

[6] See BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 9 (Federal Judicial Center 1994).

[7] *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).

[8] *See* 18 U.S.C. § 3553 (1994).

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 officers were being asked to play between prosecutors and defense counsel at sentencing.[9] 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 32: **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.[10] 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

[9] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138-39 (1990).

[10] 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).

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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 subsystems of the jury system, including the mechanics of creating the master and qualified jury wheels,[11] summoning a jury panel for a case or a set of cases,[12] selecting the jury for a case,[13] 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.

[11] See 28 U.S.C. §§ 1863-1866 (1988 & Supp. V 1993).
[12] See 28 U.S.C. §§ 1866-1867 (1988).
[13] See FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

Pro Se Litigation

❒ RECOMMENDATION 33: **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.[14] While these cases create some burdens at the appellate level, the district courts must face numerous practical difficulties in dealing with unrepresented litigants.

[14] 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 71 of 94 districts between 1994 and 1995; approximately 62,600 prisoner petitions, or 26% of all civil case filings, were filed in the year ending June 30, 1995.

In the courts of appeals approximately 19,500 pro se cases were filed in the year ending June 30, 1995, constituting over 39% of all filings in those courts. Prisoner petitions represented approximately 65% of these pro se filings. Although the Supreme Court does not separately track pro se or prisoner filings, 4,621 in forma pauperis (IFP) petitions for certiorari were disposed of in 1993, accounting for 69% of all case dispositions that year.

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.[15]

Implementation Strategies:

33a *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.[16] 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 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.[17]

33b *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

[15] At the time this plan goes to print, legislation is pending that, if enacted, would alter significantly the handling of prisoner litigation in the federal courts. *See* H.R. 2076, tit. VIII, 104th Cong., 1st Sess., 141 Cong. Rec. H13874, H13890-93 (Dec. 4, 1995) (conference report), H14112 (Dec. 6, 1995) (passage by the House of Representatives), S18182-83 (Dec. 7, 1995) (passage by the Senate).

[16] See Chapter 9, Implementation Strategy 91d *infra*.

[17] See Recommendation 85 *infra*.

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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.[18]

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.

33c *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 (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, 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.

[18] 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 42 U.S.C. § 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).

33d *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 34: **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.[19] 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).[20]

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.[21] 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."[22] And the availability of

[19] 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).

[20] 28 U.S.C. §§ 471-482 (Supp. V 1993).

[21] *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, THIRD §§ 20.1, 20.13 (Federal Judicial Center 1995).

[22] 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

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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,[23] 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 35: **The courts of appeals should exchange information on appellate case management.**

Federal appellate courts have developed a variety of different case management systems.[24] 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.[25] 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 36: **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 merit the same procedures or level of judicial attention. To the contrary, many appeals can be handled effectively and fairly

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.*

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

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

[25] 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).

with a minimum of judicial attention.[26] 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[27] 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 37: **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:

37a *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 order deadlines.

37b *Innovative management of appeals should continue and be expanded as needed.*

In the view of some courts, 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.[28] 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.

[26] 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.

[27] *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).

[28] *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).

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37c *Appellate courts should consider the use of nonjudicial staff and adjunct judicial officers to handle certain routine matters that do not involve the appellate review function reserved to Article III judges.*

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.[29] 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.

37d *Opinions should be restricted to appellate decisions of precedential import. A uniform set of procedures and mechanisms for access to court of appeals 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.[30] In the interim, nonpublication 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.

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

[30] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130-31 (1990).

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.

37e *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 en banc rehearing).

Case Management in the District Courts

❒ RECOMMENDATION 38: **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 39: **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.

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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.

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 pretrial conference and trial. Lawyers, confronted with the certainty of firm pretrial 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.

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

[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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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 institution, and contrary to current management trends generally. Instead, the judiciary will continue to govern itself through the institutions that have served it well, but with an eye toward incremental improvements in structure and process.

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 40: **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:

40a *The judicial branch should obtain funding for the operation of the courts solely through appropriations administered by the Administrative Office of the United States Courts and expended 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.*

40b *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]

Most members of the judiciary believe that this allocation of authority has served the federal courts well and should be retained as a general matter. There is, however, less consensus on the appropriate structure for circuit-level administration and its relationship to individual districts. For that reason, judicial policy makers should continue to study regional and individual court governance with a view toward improving the balance of power and responsibility between those levels (see Recommendation 47 and Chapter 11 *infra*). 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 ad-

[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.

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

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ministration 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 41: **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 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 42: **Consistent with the authority conferred by Congress, the Judicial Conference of the United States should continue to develop policy and exercise oversight with respect to matters of judicial branch administration in which a unified national approach is necessary and appropriate. The Conference should continue to focus attention on broad-scale policies and critical issues.**

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.

It should be kept in mind, of course, that the Judicial Conference meets only twice a year. No body with that schedule can or should be expected to provide day-to-day administrative oversight and control of a complex organization. For that reason, the Conference will need to focus its attention on providing broad policy direction for ju-

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

dicial branch administration and addressing issues of strategic importance to the federal courts.

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 43: **The leadership role of the Judicial Conference's Executive Committee should be enhanced.**

Implementation Strategies:

43a *The Executive Committee should be allowed a more active role in steering the Conference and acting on its behalf.*

Because the size of the Judicial Conference makes a more frequent meeting schedule impractical, a smaller body is needed to make timely decisions and manage relations with the Congress and the executive branch in rapidly changing areas of policy development. In recent years, the Executive Committee has assumed that role, becoming the arm of the Conference primarily responsible for acting on the judiciary's behalf when time-sensitive issues arise between semiannual sessions.

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 proactive 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

[5] See Implementation Strategy 44b and Recommendations 45 and 50 *infra*.

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and enhance services to court users and other aspects of judicial administration.

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. The full Judicial Conference—from which the Executive Committee ordinarily is drawn—typically includes judges with wide ranging experience and expertise. However, there are policy areas in which special knowledge of current issues and problems may be critical. Accordingly, the Executive Committee may find it helpful to continue the practice of including in its deliberations, where appropriate, the chairs of Conference committees responsible for the programs or activities under discussion.

43b *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]

❒ RECOMMENDATION 44: **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:

44a *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

[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).

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.

44b *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 45: **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 46: **The Administrative Office of the United States Courts and the Federal Judicial Center should retain their separate institutional status and respective missions. The officially adopted policies of the Judicial Conference represent the view of the judicial branch on all matters and should be respected as such by the Administrative Office and the Federal Judicial**

[7] See Recommendation 50 *infra*.

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Center when dealing with members of Congress or the executive branch.

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.

In carrying out their respective functions, both of these agencies must operate within the policy framework established by the Judicial Conference. As the Chief Justice explained in his year-end report for 1994, the Conference is "the body established to speak for the federal judiciary" in its dealings with the other branches of the federal government.

❒ RECOMMENDATION 47: **The basic organization and authority of governance institutions at the regional and individual court levels should be retained.**

As noted under Recommendation 40, there is general consensus in the judiciary on the need to maintain a three-tiered system of judicial governance (national, regional, and individual court), with an emphasis on decentralized control. There is, however, far less agreement among judges, and particularly between circuit and district judges, as to the appropriate role of regional authority vis-a-vis local courts, and the balance required between local court autonomy and regional coordination. Although the *basic* governance structure is sound, the powers and composition of regional governance bodies should be studied carefully to assess the degree to which refinements or more extensive changes are appropriate (see Chapter 11 *infra*).

Implementation Strategies:

47a *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. Because the appellate and trial courts face different problems and issues, proposals have been made to eliminate circuit judge involvement in regional oversight and coordination of district court administration.[8] On the other hand, some observers believe that their participation affords judicial council deliberations a broad perspective and detachment that are very useful in confronting difficult issues. With that in mind, the role of circuit judges in judicial councils should be reassessed as part of an overall examination of the circuit-district relationship (see Chapter 11 *infra*).

47b *The chief judges of the courts of appeals and district courts should con*

[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).

tinue 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 many judges consider the seniority system flawed because it does not ensure administrative ability, the alternative methods suggested to date (*e.g.*, merit selection or election by the court) also meet with skepticism. Given that the current system has generally worked well in practice, this plan does not propose to abandon it. The better approach is to continue studying possible alternatives to the seniority model (see Chapter 11 *infra*), and to concentrate on training and technical assistance to chief judges so that they can effectively discharge their increasingly complex administrative responsibilities.

❒ RECOMMENDATION 48: **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,[9] 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 49: **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[10] and the Federal Judicial Center, in several individual courts and judicial branch programs. As described more

[9] See Recommendations 74 and 77 *infra*.

[10] 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 Guide* and a *Planning Handbook for Federal Courts* that have been used by local planning committees.

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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 50: **There should be broad, meaningful participation of judges in governance activities at all levels.**

Implementation Strategies:

50a *District judges should be afforded the opportunity to participate effectively in national and regional governance. To that end—*

*(1) 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*

(2) 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, an inequality between district and circuit judges can be found in the tenure of Conference members: although 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 circuit," but allowed the chief circuit judge to remain as presiding officer.[11] Although the governance relationship between circuits and districts remains under study (see Chapter 11 *infra*), circuit judges should continue to participate in council business,[12] but on an equal footing with the

[11] *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)).
[12] See Implementation Strategy 47a *supra*.

district judges. In other words, the chief circuit judge should be counted *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.

50b *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.

50c *Non-Article III judges should be afforded the opportunity for meaningful participation in governance. To that end—*

(1) the Board of the Federal Judicial Center should include a magistrate judge as well as a bankruptcy judge; and

(2) individual district courts should take appropriate steps to involve

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[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 59, 63, and 64 *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.

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bankruptcy judges and magistrate judges in local governance.

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, however, an appropriate role in the governance process for fixed-term judges of courts in the judicial branch of government.[17]

These judges perform many similar duties to the Article III judges. They also have relevant, and sometimes unique, perspectives that can inform and enrich the decision-making process. This is especially true at the local court level, where many decisions affect all judges equally, and in the research and educational activities needed to aid and enhance the performance of judicial duties. Involvement of fixed-term judges will enhance communication and problem-solving among all judges. With respect to magistrate judges, it will likely lead to their more effective utilization (see Recommendation 65 *infra*) and add to their productivity. Greater bankruptcy judge participation in governance will better integrate the bankruptcy courts into the judiciary generally.

In recent years, fixed-term judges have become involved, to an increasing degree, in the governance process at the national level (as members of most Judicial Conference committees and the Federal Judicial Center Board[18]), the regional level (as regular observers in many circuit councils), and the local level (as participants in court meetings and members of court rules committees and other administrative or planning bodies). These efforts should be continued and, where appropriate, expanded. Although this plan does not seek to specify when, and under what conditions, fixed-term judges should participate in national, regional, or local governance activity, it is important that their views be heard, and perspectives taken into account, whenever decisions are made on the many administrative, fiscal, and policy issues relating to their work.

Administrative Autonomy

❒ RECOMMENDATION 51: **Administration of federal court facilities, programs, or operations should be primarily the responsibility of the judicial branch.**

[17] The United States Court of Federal Claims presents an anomaly. 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 derives largely from the fact that an Article III body, the former United States Court of Claims, previously had exercised much of the present Article I court's jurisdiction. *See*, *e.g.*, 28 U.S.C. §§ 792, 2503 (1976 & Supp. V 1981). In a real sense, however, the judges of the present court are 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.

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. Absent 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] Although the Federal Judicial Center Board already includes a bankruptcy judge, 28 U.S.C. § 621(a)(2) (1988), similar provision should be made for a magistrate judge. Magistrate judge participation 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.

Implementation Strategies:

51a *Administrative oversight and policy-making responsibility for the following programs should reside with 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 with 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 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 po-

[19] See Chapter 8, Recommendation 71 *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 61 *infra*.

[21] *See* 28 U.S.C. § 566(a) (1988).

[22] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 77-78 (1990).

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tential 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.

51b *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 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

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[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 note 26 *infra* and accompanying text).

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

[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).

perform their constitutional mission, these efforts must be resisted.

Accountability

❒ RECOMMENDATION 52: **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 53: **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 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

[28] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42 (Sept. 1993).

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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.

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

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

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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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 it 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.

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 it 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.

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

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.

Federal Court Governance—Regional and Local Institutions (except special courts)

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 54: **The federal courts should obtain 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 55: **Congress, when enacting legislation affecting the federal courts, should be encouraged to 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 be encouraged to refrain from enacting 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. Alternatively, in lieu of appropriating new funds to support the performance of new judicial responsibilities, Congress should be urged to reduce the judiciary's existing obligations sufficiently to offset the impact of any new legislation with a quantifiable judicial impact.[1]

❒ RECOMMENDATION 56: **Federal judges should receive adequate compensation as well as cost-of-living adjustments granted to all other federal employees.**

Implementation Strategies:

56a *Congress should be encouraged to refrain from the current practice of linking judicial and congressional pay raises.*

56b *Congress should be encouraged to repeal section 140 of Public Law No. 97-92.*

[1] See Chapter 4, Recommendation 13 *supra*.

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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 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] It is important to seek repeal of this statute, and to devise a system 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, federal judges should automatically receive salary increases when other federal employees receive them.

❒ RECOMMENDATION 57: **Congress should be encouraged to include 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, the political branches should be urged to treat these items of the judicial budgets as non-discretionary spending, and to afford appropriations automatically once these items are budgeted by the judiciary.

❒ RECOMMENDATION 58: **The federal courts, including the bankruptcy courts, should obtain funding 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

[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.

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 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 59: **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. (This excludes 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 are those interests served by those few judges who, when appointed, already intend to remain only for the requisite 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 ex-

[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.

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ample, 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]

❒ RECOMMENDATION 60: **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 served and will continue to serve in the federal courts.

[4] See also Recommendation 56 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).

❒ RECOMMENDATION 61: **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:

61a *Where necessary, home security systems and portable emergency communications devices should be provided.*

61b *New judges and their families should receive security briefings.*

61c *Training for judges in security should be made available.*

61d *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

[5] See Chapter 7, Implementation Strategy 51a *supra*.

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 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 62: **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]

[6] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69 (Sept. 1990); *id*., at 12-13 (Mar. 1989).

[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

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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 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 assign-

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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).

[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.

ment 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.

- "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 63: **The courts should use senior and recalled judges—a significant portion of federal judge power—as much as needed 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, 1995) for 17,532 appellate participations and conducting 3,723 trials. This amounted, respectively, to about 17% of all appeals and about 19% 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 1995, senior judges provided service equivalent to 100 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 64: **The value of senior judge status should be recognized, and policies and procedures that affect senior judges should be periodically reviewed, in order to insure that senior judge status is an attractive alternative.**

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

[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*.

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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 1989 legislation concerning salaries of federal judges limits the potential pay increases for certain senior judges.[13] This distinction should be eliminated when practicable. 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. 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. Among other things, they should be referred to, if so desired, as "judge" rather than "senior judge." In addition, current statutory provisions limiting the powers and rights of senior judges should be reexamined as appropriate. Consistent with this aim, the Judicial Conference at its September 1995 session adopted a resolution "recogniz[ing] that senior judges provide an invaluable resource to the Federal courts . . . [and] should be provided the same level of respect and deference as their active colleagues, and . . . suffer no diminution in status because of their retirement from active service."[14]

❒ RECOMMENDATION 65: **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 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

[13] 28 U.S.C. § 371(b)(2), (f) (Supp. V 1993).

[14] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES __ (Sept. 1995) (forthcoming).

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 effective 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 expand 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 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 66: **Magistrate judges should be vested with a limited contempt power to punish summarily for misbehavior committed in their presence, and to punish for disobedience or resistance to their lawful orders in civil cases referred to them for disposition with the consent of the parties.**

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 is essential in all cases of misbehavior in a magistrate judge's presence, and in cases of disobedience or resistance to a lawful order issued in civil matters referred to a magistrate judge for disposition with the consent of the parties. Indeed, the present lack of contempt power for magistrate judges can be a major detriment to their performance of judicial functions.

Diminishing the Problem of Judicial Vacancies

❒ RECOMMENDATION 67: **Attention should be given to the problem of fre-**

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quent, prolonged judicial vacancies in the federal courts. The executive branch and the Senate should be encouraged to fill vacancies promptly, and the judicial branch should utilize procedures and policies to mitigate the impact of vacancies on the capacity of the courts to conduct judicial business.

Research aimed at eliminating obstacles to efficiency in the federal courts shows two disturbing trends: (1) an increasing percentage of vacant judgeships; and (2) a lengthening average time from the occurrence of a vacancy to the confirmation of a successor judge. Unfortunately, while the judicial vacancy rate is among the more serious problems facing the federal courts, the solution to the problem lies primarily outside the judicial branch.

By constitutional design, the very nature of judicial appointments is political. Any potential solution that seeks to remove politics from, and to shorten, the appointments process would also dramatically change the nature of the appointment process and may require a constitutional amendment.[15] This plan does not endorse such drastic remedies. Nonetheless, several ideas for addressing the problem are outlined here as a means of emphasizing how serious the problem is and why it requires prompt attention and appropriate action.[16]

At present, nominees for court of appeals, district court, Court of International Trade, and Court of Federal Claims 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. Predictably, the results vary. It is not the province of the judiciary to instruct the executive and legislative branches on *how* they should discharge their responsibilities. Nevertheless, the other branches might consider measures aimed at speedier, perhaps surer decisions. For example, they might wish to undertake periodic review and enhancement of the procedures used to identify and screen judicial candidates, as well as devote additional financial and personnel resources to the selection process.

Ultimately it may be more worthwhile 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 it may be possible 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.

Implementation Strategies:

67a *Delays in filling judicial vacancies should 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

[15] See Chapter 10, notes 11-17 and accompanying text *infra*.

[16] Chapter 10 also discusses the judicial vacancies problem, suggesting more far-reaching solutions in the event of an alternative, much less favorable, future.

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.

Timely selection of successor judges depends, of course, on prompt notice of retirement decisions as they are made. Because this entails voluntary cooperation from individuals who, for various reasons, may not otherwise choose to make their retirement plans known in advance, it will be necessary to remind judges periodically of the Judicial Conference policy, adopted in March 1988, urging advance notification of impending retirements from active service or the bench.[17]

67b *Statistics should be maintained concerning the number, length, and impact of judicial vacancies (including data which relates to judicial emergencies) in each court, and benchmarks or timelines should be created for the nomination and confirmation of all judges. The judicial branch should publicize all vacancies extending beyond these limits, and all data on judicial emergencies, to Congress and the President by means of semi-annual reports.*

It is essential that judicial appointments be viewed as an important task that will be performed expeditiously. The stark impact of vacancies on each court's ability to function should be documented through the statistical presentations of judicial workload. In addition, reasonable time frames should exist for completing the appointment process. A useful approach would be the voluntary acceptance of "benchmarks" or "timelines" for nominations and confirmations. If generally recognized in the legal and political communities—*e.g.*, with support from bar organizations, scholars, and the press—an expectation would be created that vacancies will be filled promptly. Periodic reports to Congress and the President would reinforce the point by reminding the other two branches, and the public at large, of any vacancies extending beyond the suggested time frames. In addition, the policy of declaring "judicial emergencies" in courts with vacancies of 18-months or longer duration should be continued.[18]

67c *Procedures for the temporary assignment of judges should emphasize the importance of providing assistance to courts with vacant judgeships.*

As described earlier in this chapter,[19] a flexible, efficient system of bringing judicial resources temporarily to the aid of overworked courts will be needed to an ever-increasing extent. In particular, courts operating at less than full strength should be encouraged to seek assistance of senior judges and other volunteer judges from courts able to spare them. One useful approach might be to dispatch "judicial emergency teams" of available district judges, magistrate judges, and support staff to aid understaffed districts with overwhelming dockets.[20]

67d *Procedures and policies governing the transaction of court business should seek to address special circumstances arising as a result of prolonged judicial vacancies. Among other things, rules governing the number of visiting*

[17] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31-32 (Mar. 1988).

[18] *Id.*

[19] See Recommendation 62 *supra*.

[20] See note 12 *supra* and accompanying text.

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or senior judges serving on panels in the courts of appeals should be held in abeyance during the existence of vacancies on a court constituting a judicial emergency.

The individual courts should be active in devising means of coping with long-standing vacancies. Although various measures can (and should) be taken at the national or circuit levels, each court should take responsibility for developing emergency procedures (including exceptions to normal methods of operation, where permissible) to expedite the handling of judicial business when required to operate at less than full judge strength.

For example, applicable law requires that a majority of judges on any court of appeals panel "be judges of that court." But the same law allows for exceptions if "such judges cannot sit because recused or disqualified," or when "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."[21] Although the circuits differ—in local rules, decisional law, or practice—on whether senior judges are "judges of th[e] court" for purposes of panel composition, the statute clearly empowers a court to deviate from the requirement, however defined, if an emergency arises. The courts of appeals should therefore be encouraged to take advantage of all available judicial resources, including senior and visiting judges, when vacancies seriously threaten their ability to function effectively. Of course, these "emergency" panels should be utilized sparingly given the possible impact on the coherence and consistency of circuit law.

[21] 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.[22] 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 68: **To match responsibility with authority, the budget execution function should be further decentralized so that each court may**

[22] *See, e.g.*, Henry Mintzberg, *The Fall and Rise of Strategic Planning*, 72 HARV. BUS. REV. (No. 3) 107, 112*ff.* (1994).

control spending of appropriated funds to meet its needs.

Budget decentralization has its roots in the collegiality and local autonomy of the federal courts. In this period of fiscal austerity, 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 employ a fixed formula in the budget process used 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 69: **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 70: **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 materi-

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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 71: **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.[23]

❒ RECOMMENDATION 72: **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.[24]

❒ RECOMMENDATION 73: **To refine both operations and policy, the federal courts should define, structure and, as appropriate, expand their data-collection and information-gathering capacity.**

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[23] See Chapter 7, Implementation Strategy 51a *supra*.

[24] 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)(1) (1994) (two adjacent districts or parts of districts are authorized to establish a defender organization to serve both areas).

Implementation Strategies:

73a *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.*

73b *This steering group should:*

(1) Conduct a data needs assessment that includes but is not limited to: courts of appeals, district courts, and bankruptcy courts; magistrate judge reporting; Administrative Office program reporting; research; budgetary impact analysis; and long range planning.

(2) Inventory and catalog data collection efforts. 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 in size by more than 90% since 1982, from 14,400 to nearly 28,000 in 1994. 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. Since

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the early 1980's 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' professional workforce has grown by 213% since 1982.

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.

❒ RECOMMENDATION 74: **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 75: **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 76: **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."[25] Social, technological,

[25] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 170 (1990).

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 77: **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 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 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 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.

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[1] Charles Evans Hughes, Speech to the Annual Meeting of the American Law Institute (1929).

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 78: **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

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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 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.

The Judicial Conference's commitment to ending any bias that may exist in the federal judiciary has been demonstrated on three recent occasions. In 1992, the Conference concluded that "bias, in all of its forms, presents a danger to the effective administration of justice in federal courts" and resolved to "encourage 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."[2] The following year, the Conference found "great merit" in proposed legislation that "encouraged circuit judicial councils to conduct studies with respect to gender bias in their respective circuits."[3] And in March 1995, the Conference declared that "[i]nvidious discrimination has no place in the federal judiciary" and again encouraged the circuits to study "whether bias exists in the federal courts . . . and whether additional education programs are necessary."[4] 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 79: **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

[2] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 64 (Sept. 1992).
[3] *Id*. at 28 (Mar. 1993).
[4] *Id*. at 13 (Mar. 1995).

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 and 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 contemporary America.

- 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 weak 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.

Work force

- 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

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 80: **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

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work force. In 1980, minorities composed 18% of the U.S. labor force. By 1992, their share had increased to more than 22%.

- During the past four decades, the number of women in the work force rose significantly. By 1990, women constituted about 45% of the work force, and the percentage will rise to over 47% 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% in 1990.

- By the year 2000, minorities are expected to account for 43% of new entrants into the work force.

- As the work force 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% during the 1980s. The Latino population grew 50% 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 work force. This represents an 8% growth since the late 1980's. In 1990, 6% 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 are 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% 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.

disabilities. Creating a barrier-free and user-friendly environment to accommodate the entire population requires implementation of "universal 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 will also be available in all courts. The Conference also approved the use of real-time reporting technologies that provide instantaneous translation of the court re-

porter's shorthand notes and allow display of the text on a monitor.[5]

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 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."[7]

> "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."[6]

❒ RECOMMENDATION 81: **Court interpreter services should be made available in a wider range of court proceedings in order to make justice more accessible to those who do not speak English and cannot afford to provide these services for themselves.**

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 they 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.[8] 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 82: **Litigants should pay reasonable filing fees, and**

[5] See *id*. at 49 (Sept. 1994); Judicial Conference Press Release, Sept. 20, 1994.
[6] John Albrecht, *Meeting the Needs of the Disabled and Elderly in Court*, 33 JUDGES' JOURNAL 10-11 (Summer 1994).
[7] *Id.* at 15.
[8] See Recommendation 79 *supra*.

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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 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.[9] Special

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.

[9] *Cf.* 11 U.S.C. § 104 (1994) (requiring the Judicial Conference to recommend to Congress uniform percentage adjustments in the dollar amounts in the bankruptcy laws every six years).

services, such as file searches, copying, and electronic docket access,[10] 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 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 83: **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:

83a *Full-time federal defenders should train and serve as a resource to panel attorneys, thus assuring competence of appointed counsel.*

83b *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.*

83c *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.

[10] 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.

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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.[11] 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 pre-trial 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.

❒ RECOMMENDATION 84: **Highly qualified, fairly compensated, and optimally sized panels of private attorneys should be created to furnish representation in those cases not assigned to a defender organization.**

Implementation Strategies:

84a *The federal courts should establish local qualification standards, provide better training, and seek improved compensation for panel attorneys.*

84b *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.*

84c *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.*

84d *The Judicial Conference should continue its efforts to obtain sufficient funding to permit compensation rates to be adjusted up to the maximum amount authorized by law.*

84e *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.*

84f *Adequate funding for the defender services program should be secured by ensuring that the program is efficient and well-managed.*

[11] REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM 21 (Mar. 1993).

84g *Courts should be discouraged from peremptorily 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 qualification standards, provide better training, and seek improved compensation.[12]

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 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 caseloads, 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. Sufficient funding is needed to allow the Judicial Conference to adjust compensation rates to the maximum authorized by law. Another approach 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 a work measurement formula 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.[13]

[12] *Id*. at 26-32.

[13] For example, the Conference has endorsed creation of district CJA committees in which agency and private attor-

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Ensuring Justice for Those Who Cannot Afford Counsel in Civil Cases

❒ RECOMMENDATION 85: **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:

85a *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.*

85b *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.*

85c *Federal courts should adopt local rules authorizing law students involved in legal clinics to represent—with appropriate supervision—parties in need of counsel in federal courts.*

85d *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.*

85e *Through the use of centralized staff operating under court supervision, district courts and courts of appeals 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 to have the

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ney 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).

resources to provide counsel to all who need it. The courts can, however, encourage ongoing efforts to resolve this problem.

Two organized efforts outside government have made real strides in providing counsel to pro se litigants. The ABA Model Rules of Professional Conduct provide that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this obligation, the lawyer should . . . provide a substantial majority of [those] legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means . . . . In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."[14] 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 experiment with new mechanisms for handling pro se cases fairly and efficiently.[15]

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."[16]

❒ RECOMMENDATION 86: **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.**

[14] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1 (amended 1990).

[15] See Chapter 6, Recommendation 33 and supporting commentary *supra*.

[16] 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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Implementation Strategies:

86a *Information on using the courts should be provided through community institutions and in formats aimed at an increasingly diverse citizenry.*

86b *Judicial outreach programs should be brought to educational and community organizations and other public institutions.*

86c *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.*

86d *Press and public access to court proceedings should be presumptively unrestricted, but access should be balanced with the court's primary mission to administer justice.*

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.[17] 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."[18]

Although experimentation with cameras in the federal courts concluded in December 1994, it is possible that the issue may be revisited at some future time. Even if the current prohibition on cameras were to be lifted, however, there will always be cases where judges must exclude cameras from court facilities to promote confidentiality, safety, or other compelling interests. Due consideration of the rights, needs, and safety concerns of parties, jurors, and witnesses must inform any policy allowing camera coverage of court proceedings. Access for non-participants, by whatever means, must not hinder the administration of justice.

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

[17] 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).

[18] 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).

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 87: **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.[19]

❒ RECOMMENDATION 88: **A comprehensive program should be developed to educate jurors about the role and function of federal courts.**

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.

❒ RECOMMENDATION 89: **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 90: **Mechanisms should be established or simplified to receive and address public complaints about improper treatment by judges,**

[19] See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982).

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attorneys, or court personnel in federal court proceedings and operations.

Formal procedures exist today for filing complaints with the clerks of the courts of appeals in each circuit regarding alleged judicial misconduct.[20] Despite this fact, the public is not always sure that it has an effective mechanism for voicing complaints alleging improprieties by judges and others involved in court proceedings or administration. 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 91: **Positive communication and coordination between the judicial branch and the executive and legislative branches should be enhanced.**

Implementation Strategies:

91a *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 should 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.

91b *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 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 (see chart on next page) would advance that objective.

91c *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 per-

[20] *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
- 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
- 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.

sonnel, 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.

91d *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,*

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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 interbranch 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.[21] 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 coordination and cooperation. Similar efforts should continue on a regular basis.

91e *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 Offices 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 92: **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

[21] See Chapter 6, Implementation Strategy 33a *supra*.

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.[22] 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 93: **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.

[22] 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. 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 1,660 appellate court judgeships and more than 1,060,000 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

[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] *Id.*; 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

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 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

from Professor Paul D. Carrington to the Honorable Edward R. Becker 2 (Nov. 3, 1993).

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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 encourage judges to be available for temporary assignment. Another, more debatable, solution might be a system of "floating" assignments based on judgeships not permanently tied to a particular court, or rotation of judges between a permanent duty station and an extended period of temporary duty in various courts.[6]

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 Federal Rule of Civil Procedure 53 to evaluate how support for judges in the district court might be expanded through the

[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 9, and Chapter 5, Recommendation 20 *supra*.

[6] 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 would 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 (*e.g.*, 18 months to two years).

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 process to other methods of resolution will enable judges to concentrate on improving the management and conduct of cases that proceed to trial.[7]

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 could 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) Establish additional jurisdictional requirements, based on the nature and scope of the controversy, for litigating in federal court particular matters in which state courts have concurrent jurisdiction.

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

[7] 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.

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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,[8] products liability, and ordinary tort claims). Finally, notions of comity might support enactment of additional criteria relating to the nature and scope of the controversy for invoking federal court jurisdiction in cases where concurrent state court jurisdiction exists.[9]

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) 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.

[8] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, as amended.

[9] If this approach were followed, the implementing legislation would have to be drafted carefully to avoid creating "satellite" litigation that merely replaces one workload burden for another. Objective criteria must be developed and applied so that courts do not decide subjectively which cases are litigated in a federal forum.

(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.[10]

(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

[10] *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).

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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."[11] 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")[12] officers whom the

[11] 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.

[12] 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

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President must nominate and the Senate confirm.[13] 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.[14]

(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.[15] 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.[16] 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

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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).

[13] 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).

[14] 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.

[15] See 28 U.S.C. § 546(d) (1988).

[16] *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).

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.[17]

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.

[17] U.S. CONST. art. III, § 1. Although recess appointments to the bench (see note 13 *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 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—as demonstrated by the experience of numerous successful governmental and business organizations. 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 continued examination of those matters, as well as 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
- governance relationship between judicial circuits and districts
- local court administration (including the method for selecting chief judges)
- 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—for example, the Committee on the Administration of the Bankruptcy System and the Committee on Administration of the Magistrate Judges

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System—have begun to produce long range plans in their areas of jurisdiction.

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, administration, 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)).

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 Long Range Planning Committee during the public comment period was 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.

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.

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Appendix A
Current Trends and Projections

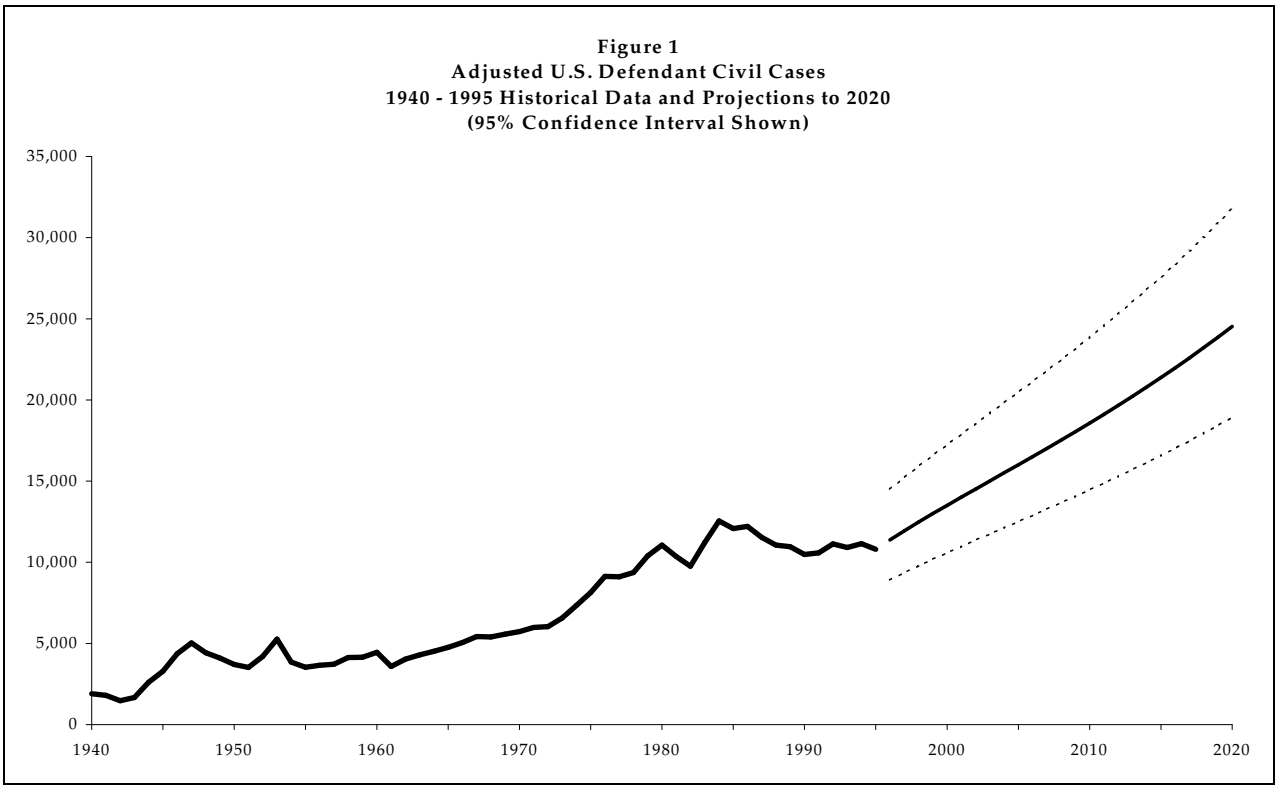
THE projections reported here are based on trend analysis. Trend-based projections are intended to reflect the likely course of some variable of interest under the assumption that the aggregate weight of the factors that have influenced it in the past (demographic, economic, legislative, etc.) will continue to evolve along the same paths that they have previously followed. Consequently, trend-based projections embody a degree of "inertia." 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. Moreover, while future legislative and executive policies and initiatives will doubtless affect the actual caseloads, any attempt to project and incorporate the impact of future policies would be unavailing.

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 1980's 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.

[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. *See* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1994) (containing an introductory discussion of regression). 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 func-tional forms employed were: linear, semi-log, exponential, double-log, hyperbolic and log-hyperbolic.

Early investigations of alternatives to regression, notably ARIMA modeling, generally produced projection results consistent with those obtained here. Consequently, the more widely understood and accessible methodology was employed.



Trend Estimates—Civil

Components of district court 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)[2], and (3) all other U.S. defendant cases ("adjusted U.S. defendant cases"). Prisoner petitions and other U.S. defendant cases were analyzed separately. 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 =
$1.004^{\dagger year} * USD_{year-1}^{.830\ddagger} / 1897.8\dagger$ (r^2=.96).[4]

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

[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. The confidence intervals presented indicate the bounds within which there is 95% likelihood that the projections will fall, given the assumptions on which the model is based.

[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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1980's 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.

Examination of these data over the 1940-1995 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 =
$1.002^{year} * USD_{year-1}{}^{.797}‡ / 4.7$ $(r^2=.78)$.

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%, consistent with the average rate of inflation over the past ten years.

Figure 2
Adjusted U.S. Plaintiff Civil Cases
1940 - 1995 Historical Data and Projections to 2020
(95% Confidence Interval Shown)

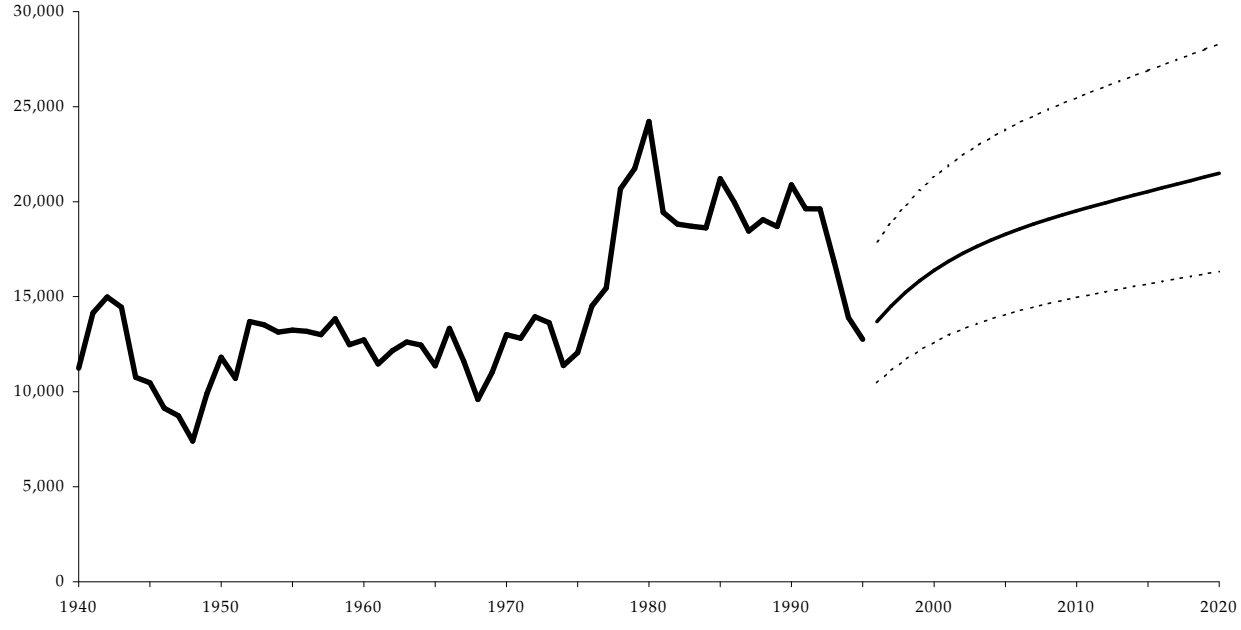
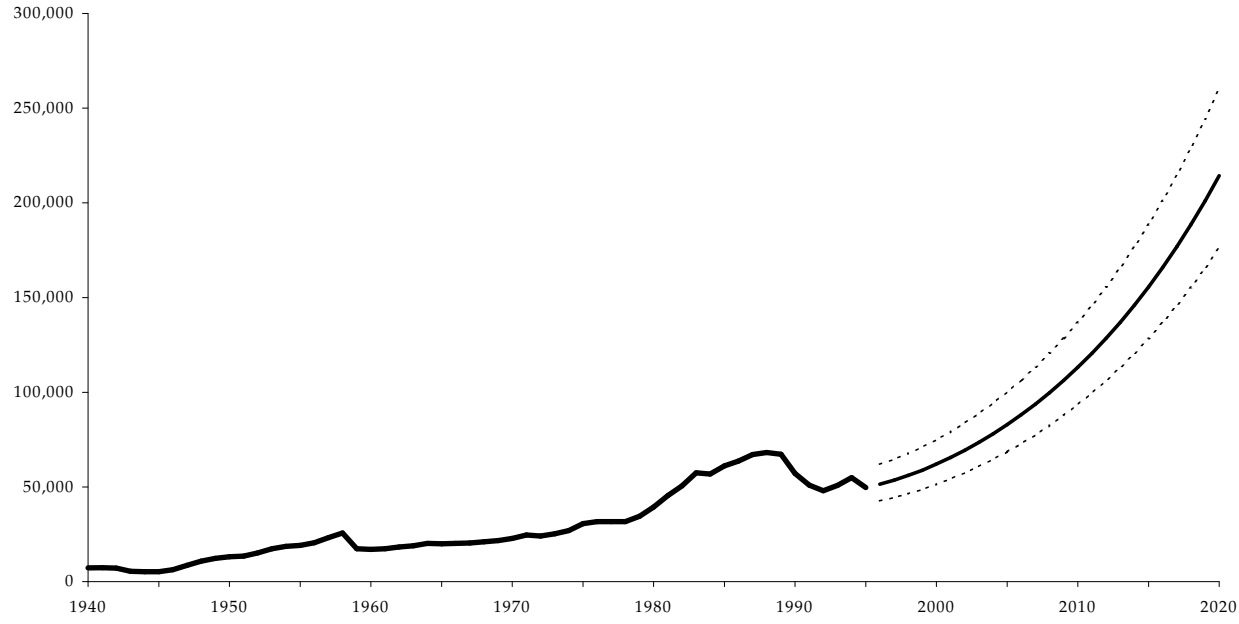


Figure 3
Diversity Cases
1940 - 1995 Historical Data and Projections to 2020
(95% Confidence Interval Shown)



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:

$$\text{diversity} = (1.009^{\text{year}}‡ * \text{threshold}^{-0.137}‡ * \text{diversity}_{\text{year-1}}{}^{.795}‡) / 575{,}159‡ \quad (r^2=.99).$$

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:

$$\text{adjusted federal question} = 3055.3‡ * 1.066‡^{(\text{year}-1939)} \quad (r^2=.96).$$

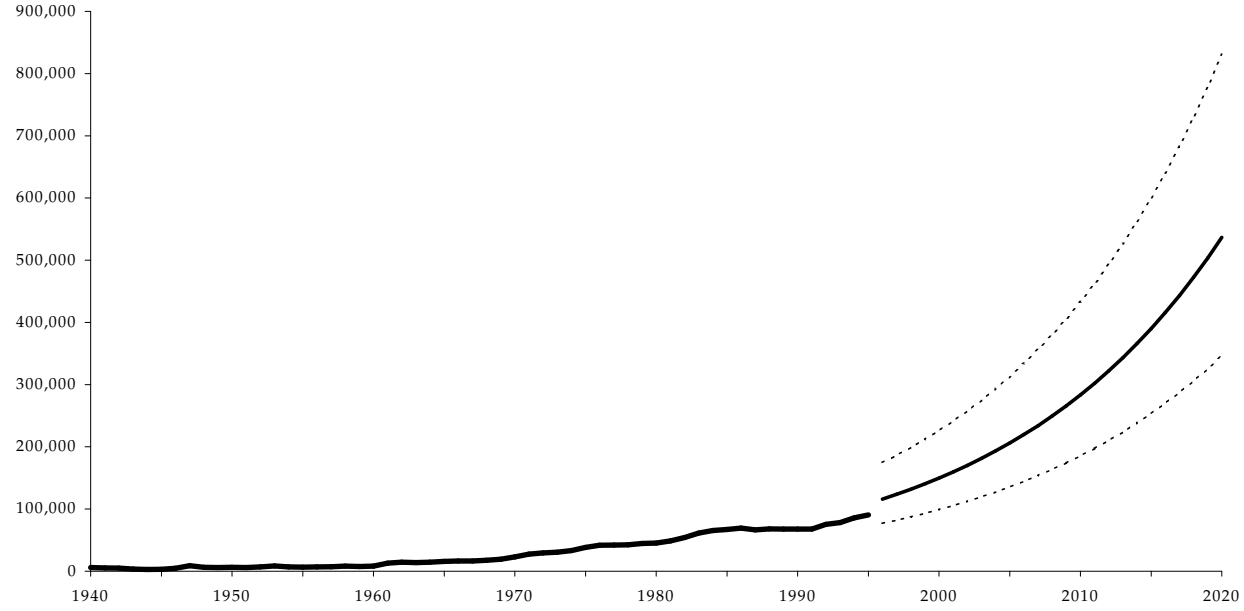
Trend Estimates—Criminal

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]

[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.

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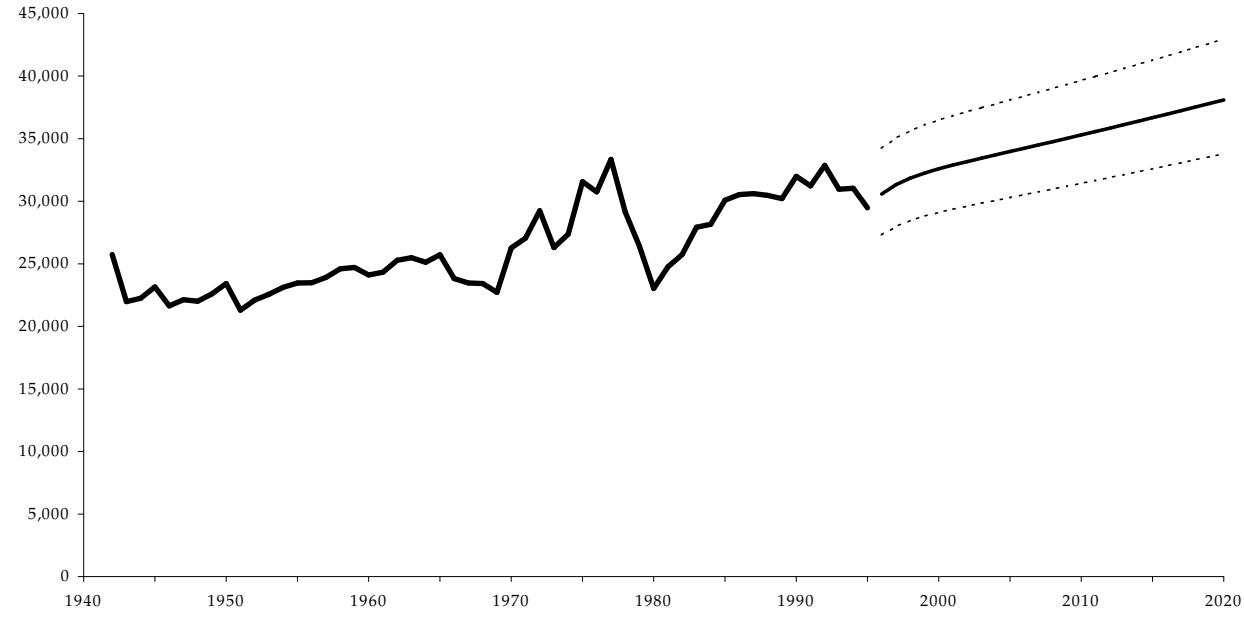
Figure 4
Adjusted Federal Question Cases
1940 - 1995 Historical Data and Projections to 2020
(95% Confidence Interval Shown)

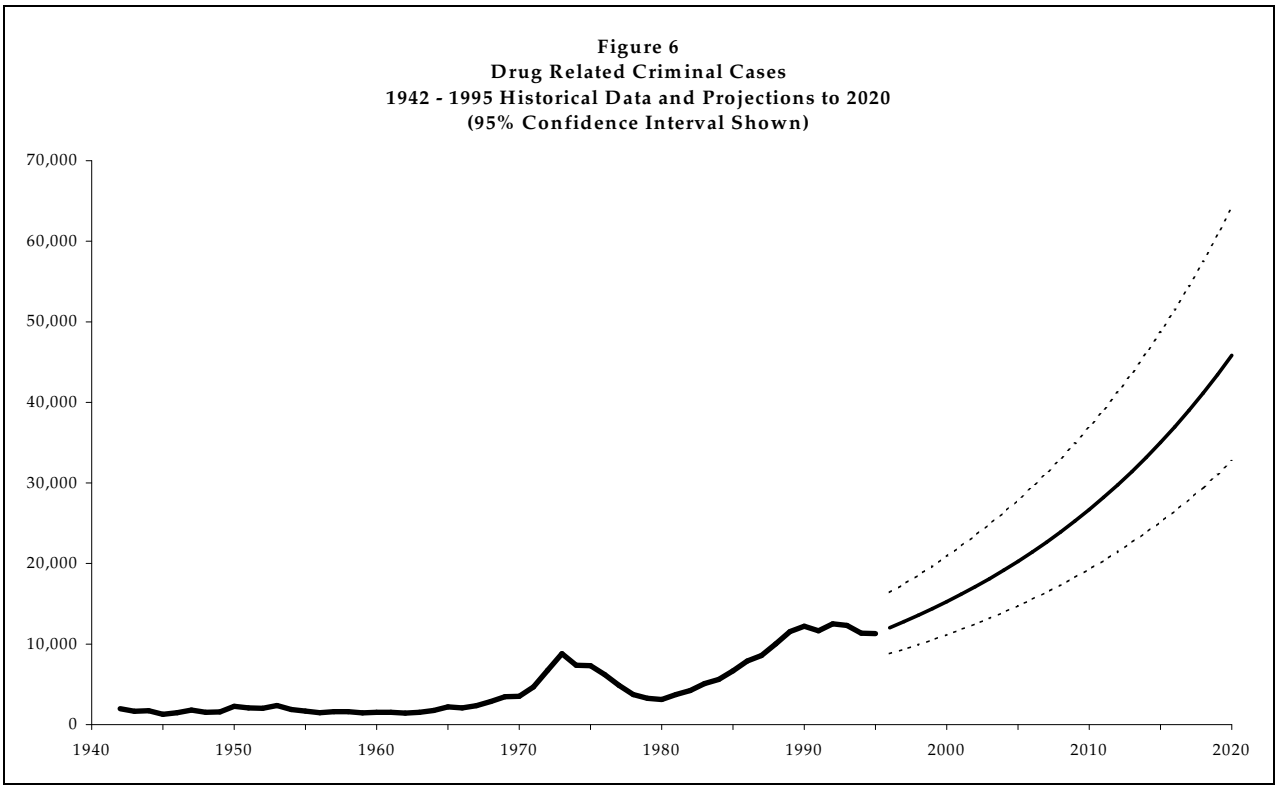


Drug and adjusted non-drug components of the criminal caseload were analyzed separately for trend. The fitted models are:

$$\text{adjusted non-drug} = 1.003‡^{\text{year}} * \text{non-drug}_{\text{year-1}}{}^{.558}‡ / 8.64‡ \quad (r^2=.83),$$

Figure 5
Adjusted Non-Drug Related Criminal Cases
1942 - 1995 Historical Data and Projections to 2020
(95% Confidence Interval Shown)





and

drug = 1.007‡^{year} * $drug_{year-1}^{.871}$‡ / 262315‡ (r^2=.96).

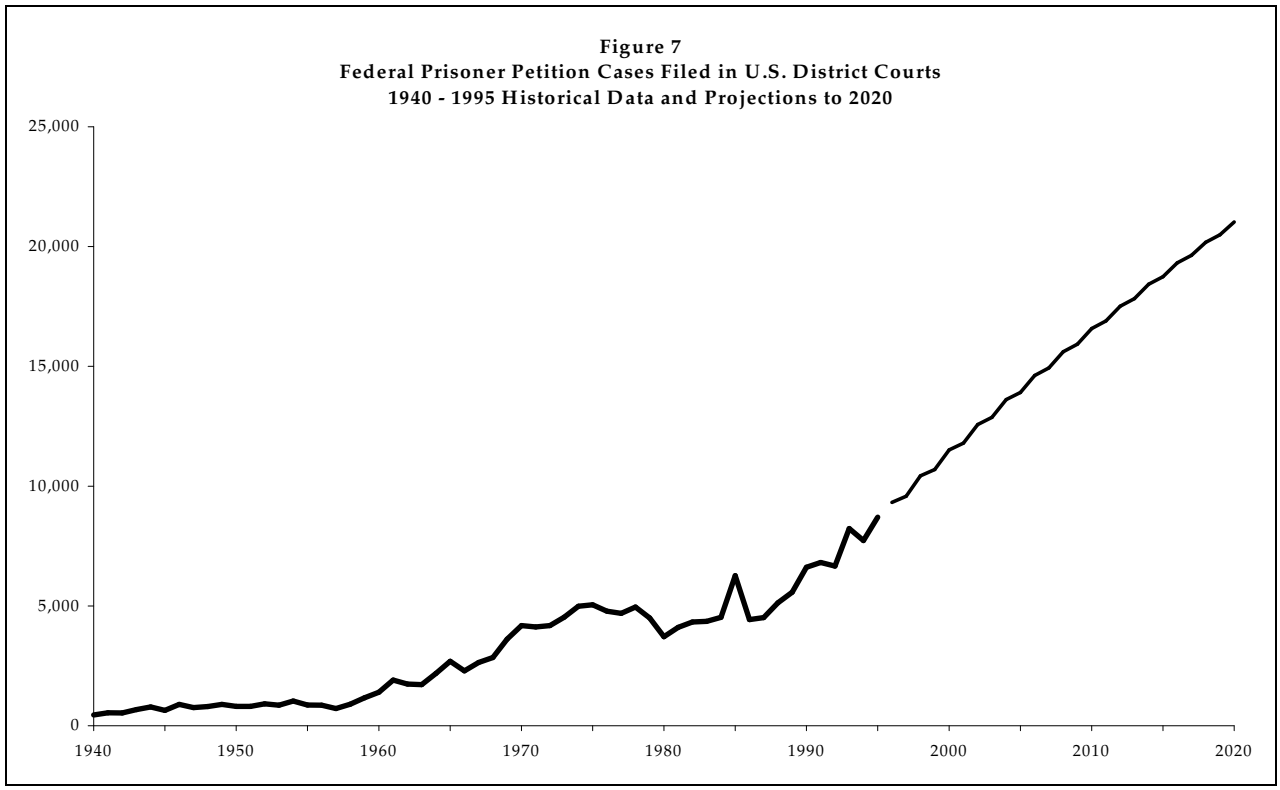
Prisoner Petitions

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 change in prisoners. The equation finally estimated is:

change in federal prisoners =
1411.6 + .286‡ * drug
- .086 * non-drug
+ .658‡ * change in
prisoners$_{year-1}$ (r^2=.80).

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

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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 = 778.8‡ - .38‡ * year (r^2=.91) .

At this rate of decline, the ratio will return to its prior average level by about the year 2005.

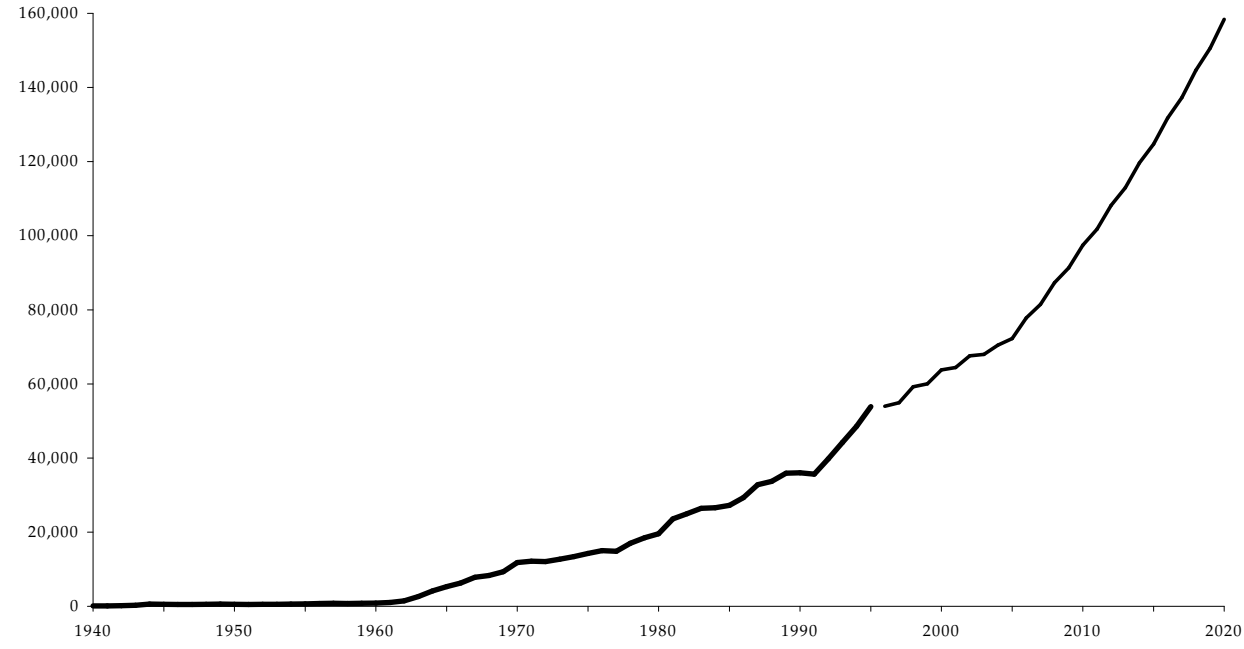
Using criminal case projections as described in the prior section, a projection of the federal prisoner population was generated, which, in turn, enabled an estimate of the state prisoner population. Separate analyses provided estimates of the trend in the rate of filing of federal and state prisoner 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 = 97.1‡ / $1.047‡^{(year-1980)}$ (r^2=.76) .

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 1995, using a functional form based on a modified gamma distribution. The estimated equation is:

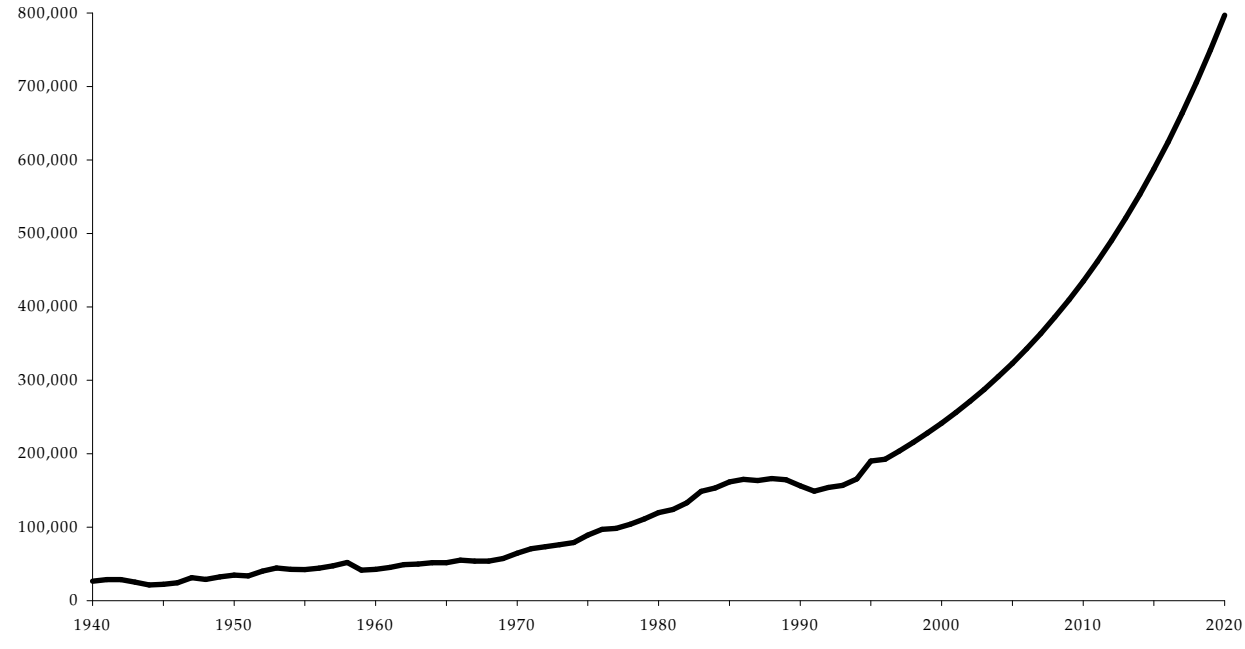
ratio = 46.9‡ / $1.022‡^{(year-1981)}$ (r^2=.73)

Figure 8
State Prisoner Petition Cases Filed in U.S. District Courts
1940 - 1995 Historical Data and Projections to 2020

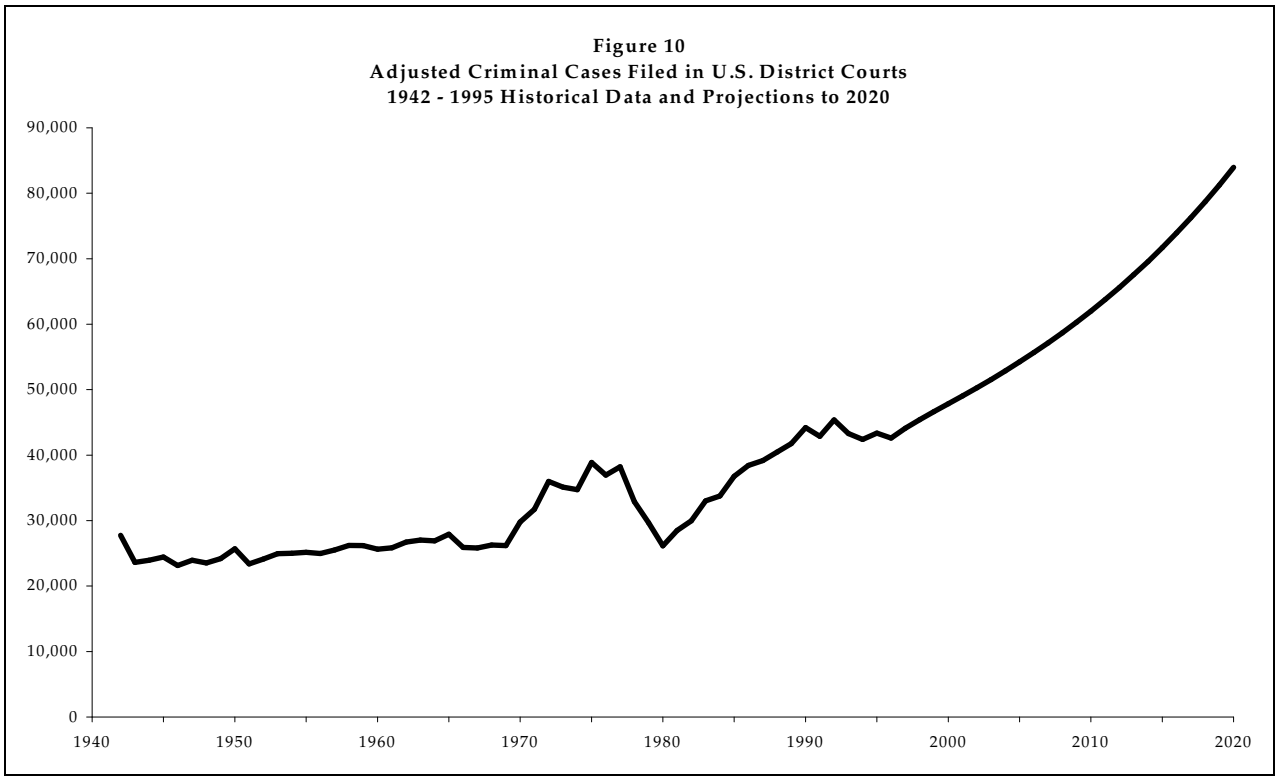


Combining trend projections of the respective prisoner populations with projections of the filing rate per 1000 population generated district court prisoner petition filings for both federal (Figure 7) and state (Figure 8) prisoners.

Figure 9
Total Adjusted Civil Cases Filed in U.S. District Courts
1940 - 1995 Historical Data and Projections to 2020



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Combining adjusted U.S. plaintiff and defendant cases with diversity, adjusted federal question, and federal and state prisoner cases, the historical 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, defined as the ratio of appeals filed to district court cases commenced.[7]

The fitted model for all other appeals (Figure 11) is:

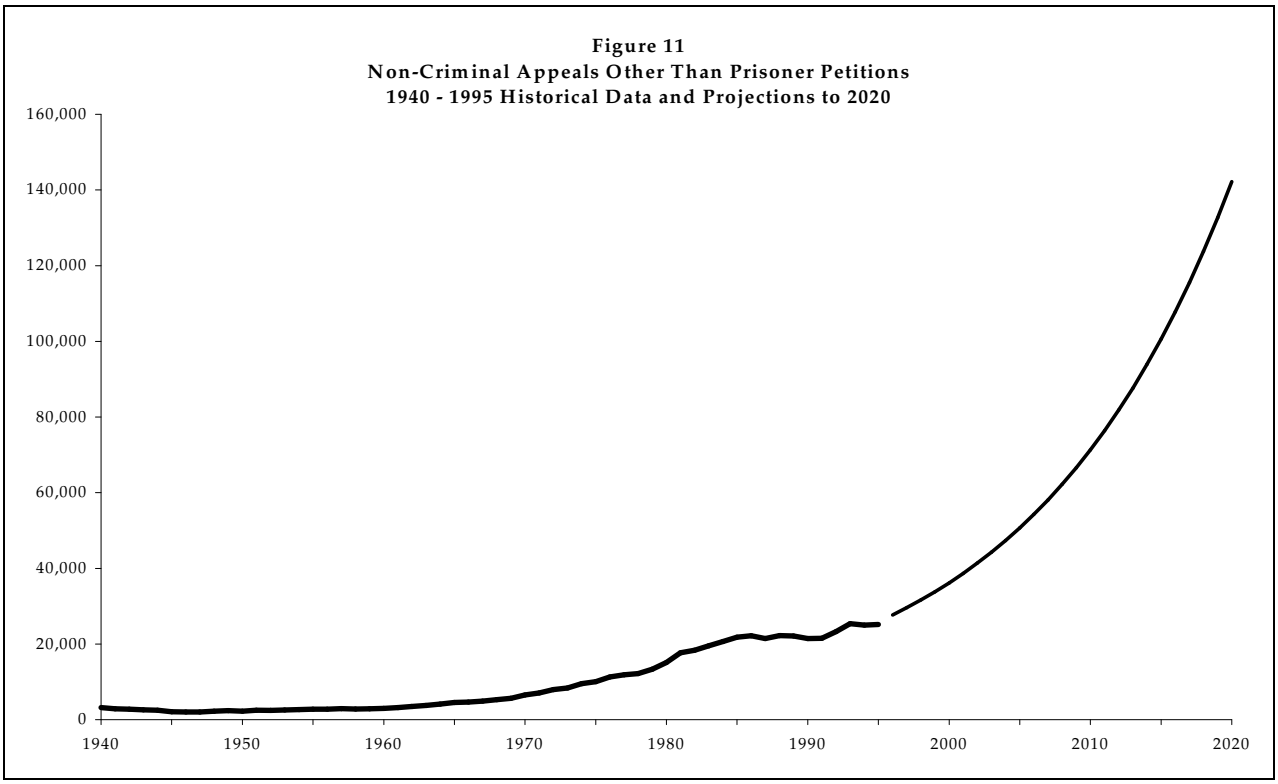
other appeals = (-2.730‡ + .00144‡ * year)
* civil cases commenced (r^2=.61).

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

$$f(t) = a / \{[1+b * \exp(-c * t)]^d\}$$

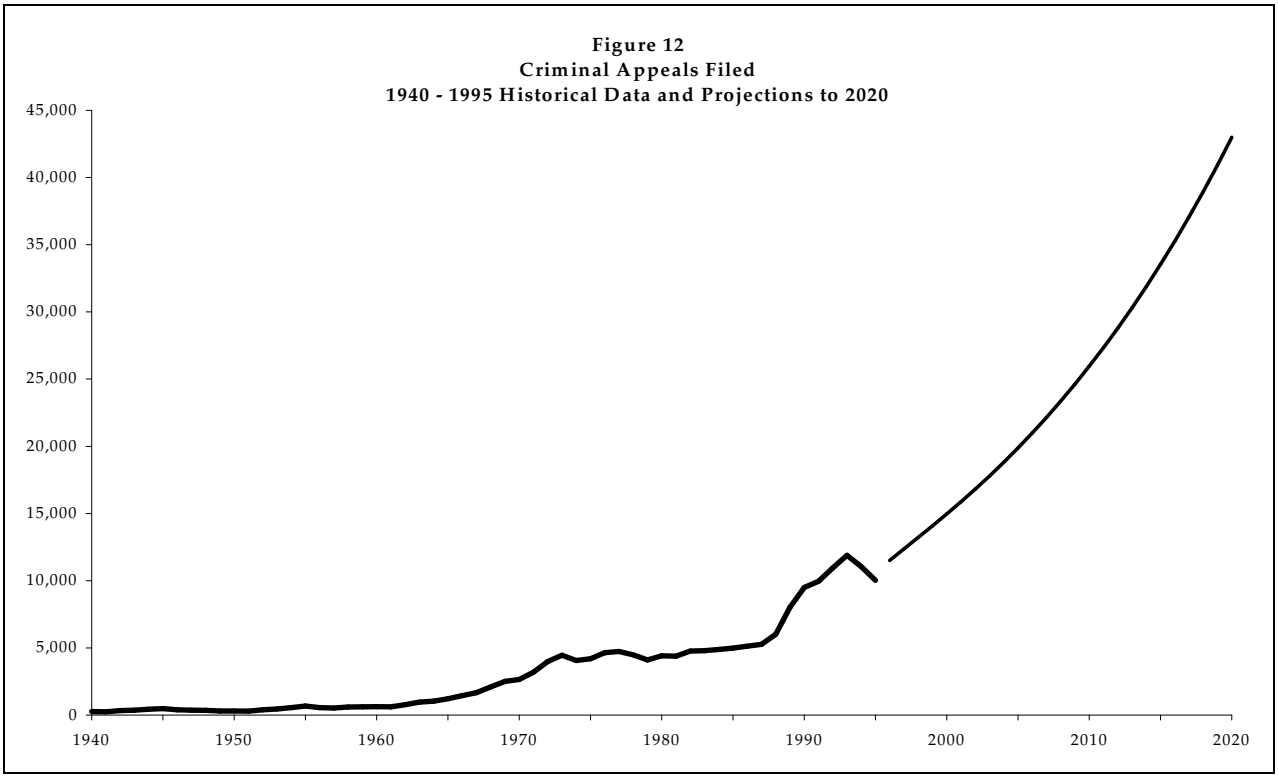
where a, b, c, and d are parameters to be estimated. The logistic curve is often used to

[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.

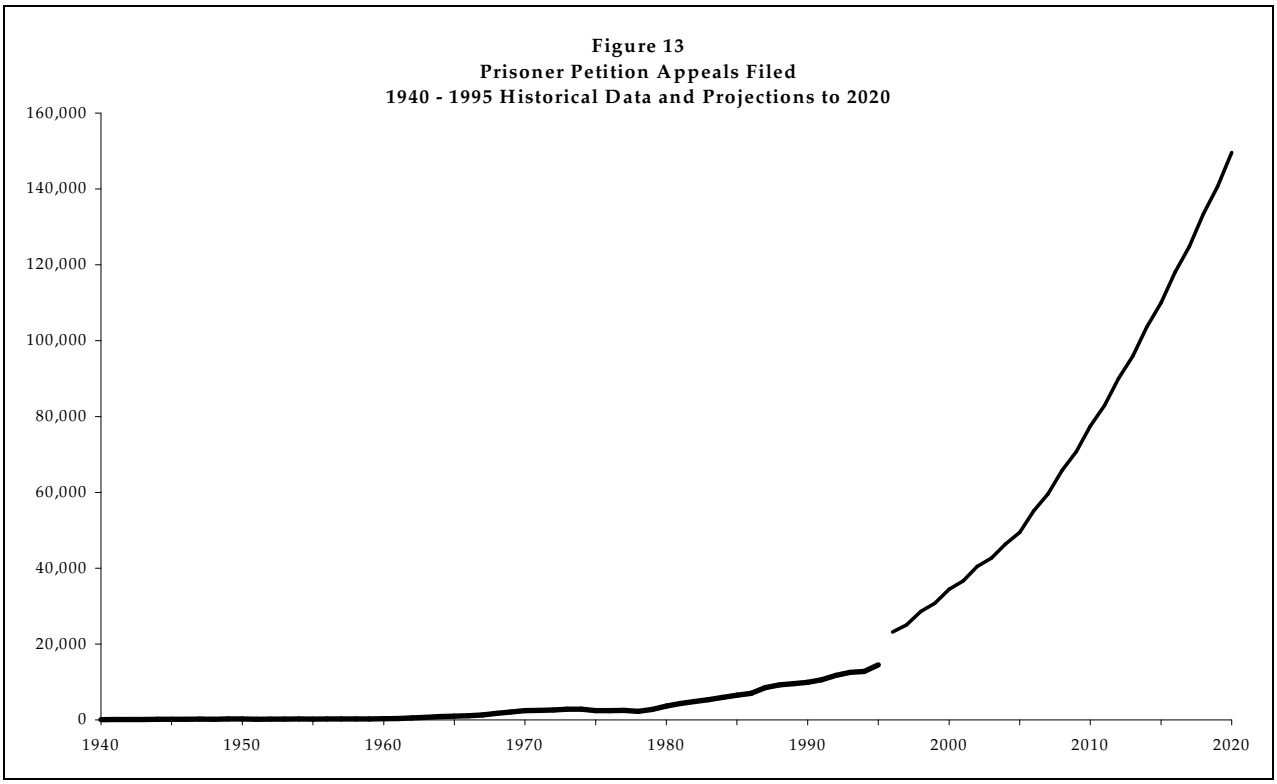


model economic phenomena where the variable in question is thought to be subject to a saturation point or upper limit. The fitted model for the criminal appeals rate is:

criminal appeals rate = 255.4/
{[1 + 21.57 * exp(-.09 * (year-1939))]$^{1.558}$}
(r^2=.94).



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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]

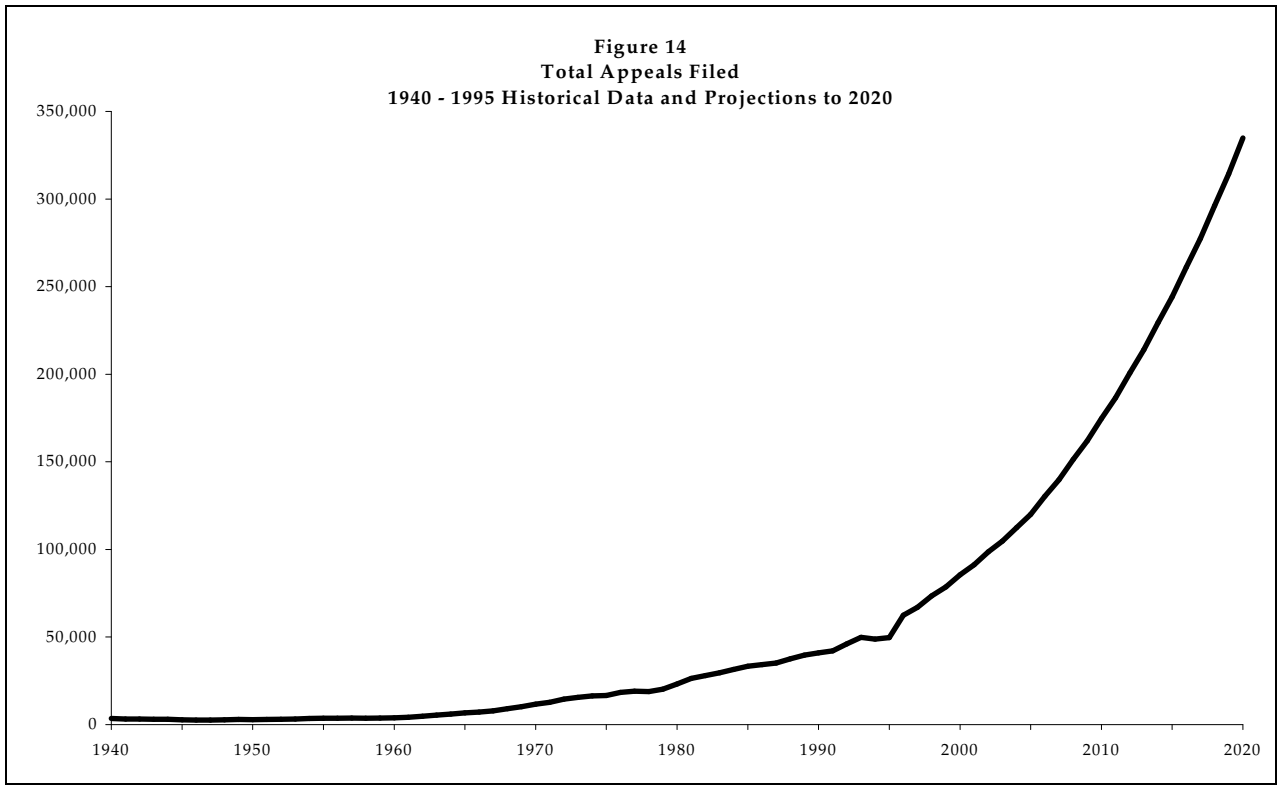
It is interesting to note that the fitted model for prisoner petitions in the courts of appeals (Figure 13) implies a gradual increase in the rate of appeal from the district courts of prisoner petitions towards a value of 100%.

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 courts and 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.

[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.



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

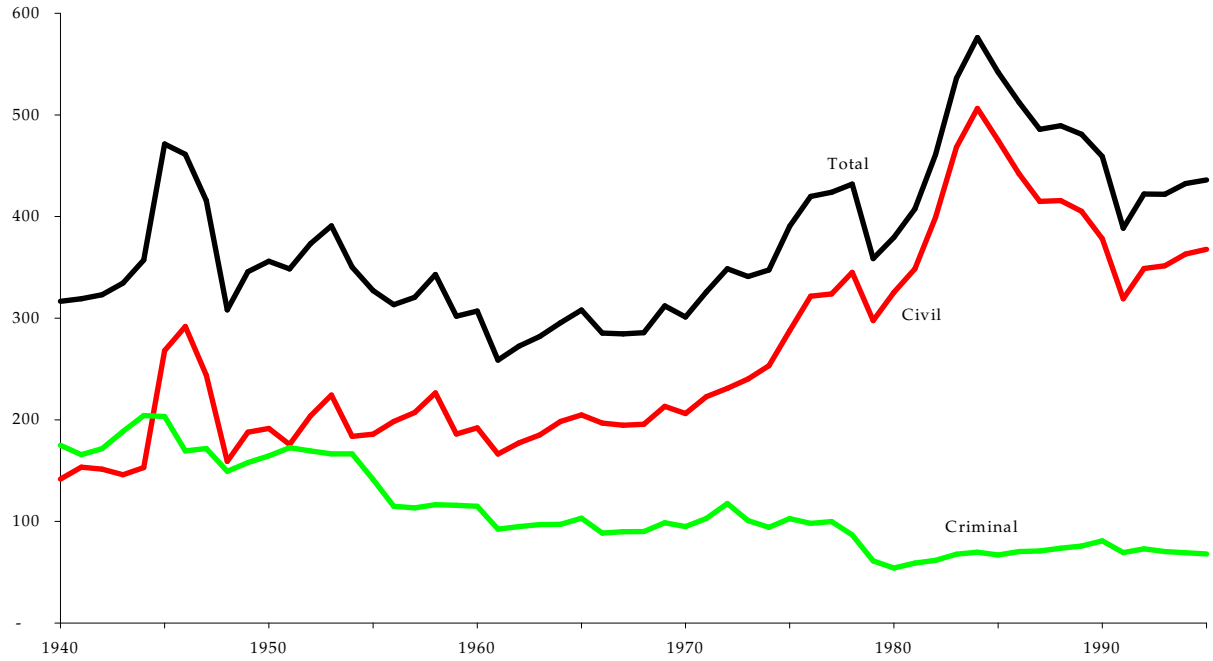
The historical approach to the estimation of judgeship requirements is based on an analysis of historical case filings per authorized judgeship. At the district court level (Figure 15), adjusted civil cases per authorized judgeship have trended up, although criminal cases per judgeship have declined slightly. Appeals per authorized judgeship (Figure 16) have also trended up historically. At both the district and appellate levels, non-linear

[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.

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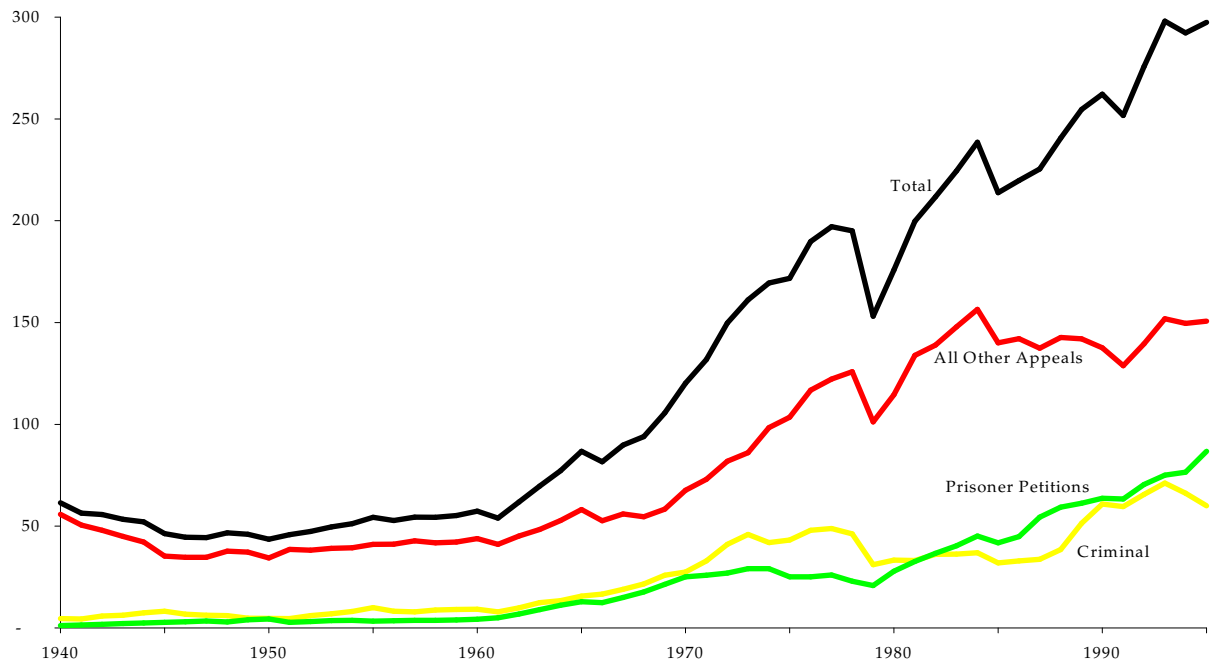
Figure 15
Cases Commenced per Authorized Judgeship in U.S. District Courts, 1940 - 1995



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

Figure 16
Appeals Filed per Authorized Judgeship in U.S. Courts of Appeals, 1940 - 1995



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 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 judgeships, the resulting projected caseload per judgeship is about 830 by 2020.

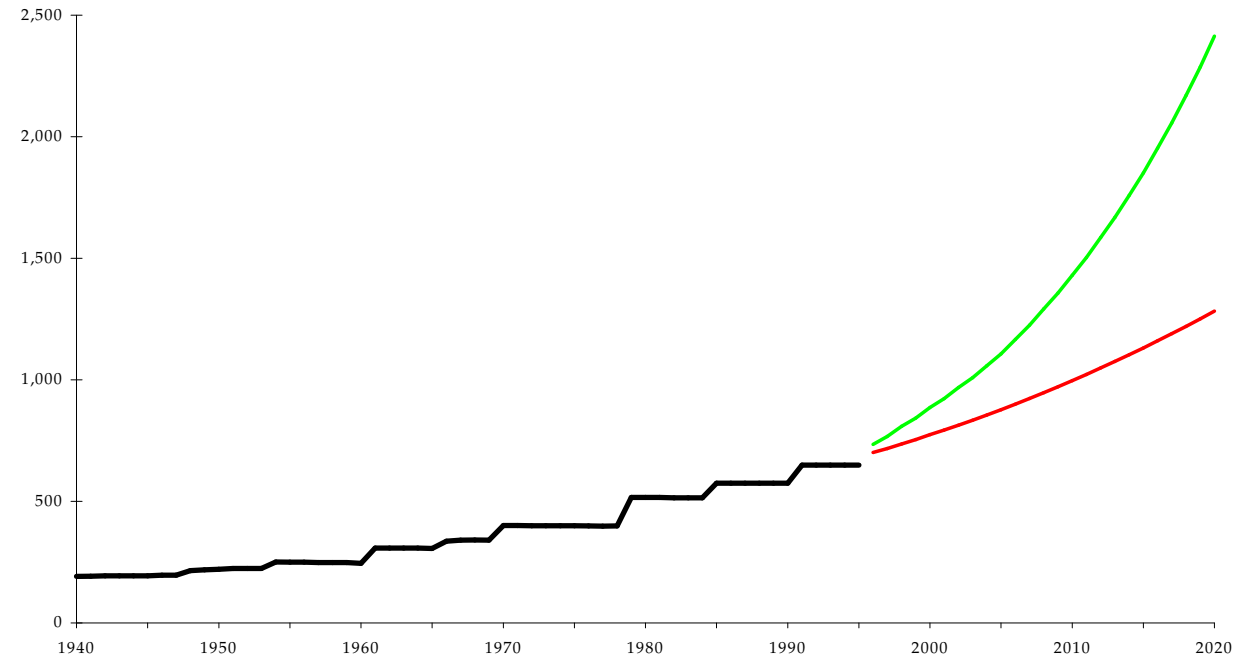
The estimated equation for circuit judgeships was:

$$\text{Judgeships} = \exp(-15.5082‡) * 1.0094^{\text{year}}‡ * \text{criminal}^{-.1438}‡ * \text{prisoner petitions}^{.1296}‡ * \text{other appeals}^{.2007}‡ \quad (r^2 = .98) .$$

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 circuit judgeships the implied caseloads per judgeship include about 80 criminal appeals, 290 prisoner petitions, and 280 other appeals per judgeship by 2020, for a total of 1950 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

Figure 17
Authorized and Projected Judgeships in U.S. District Courts, 1940 - 2020



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projections will underestimate, perhaps significantly, actual requirements.

Projected judgeship requirements under the formula and historical approaches are presented for district and appellate courts in Figures 17 and 18, respectively.

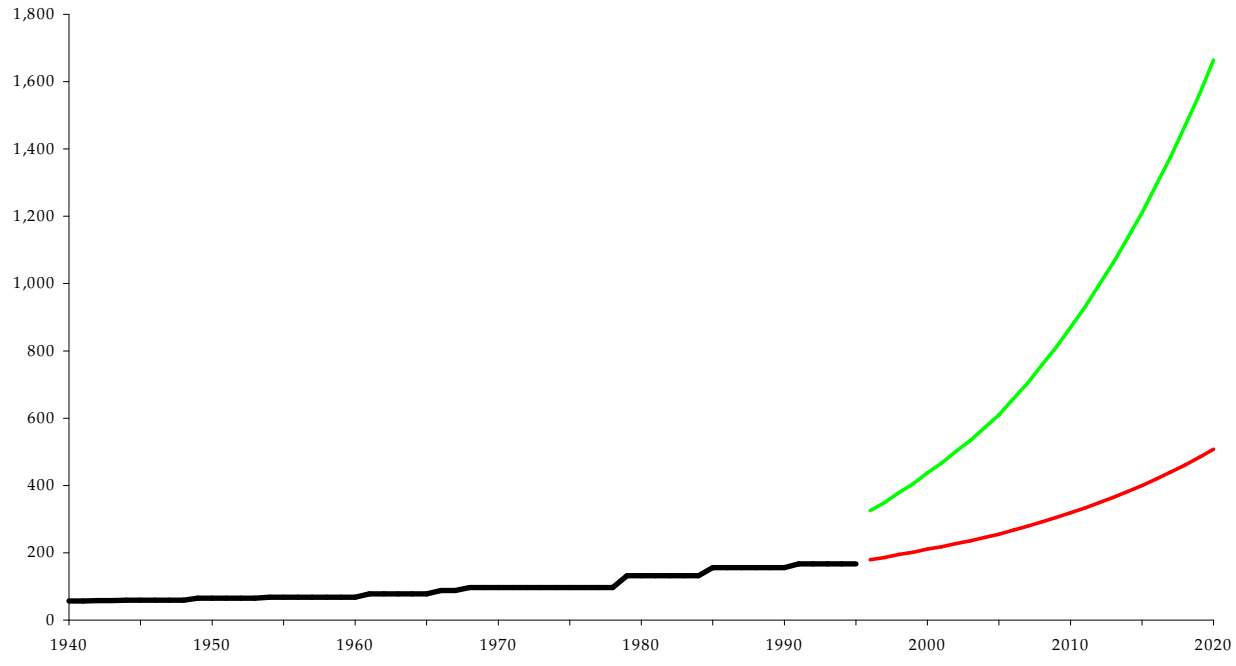
Projected caseloads for district courts and courts of appeals are summarized in Table 1. The table also contains estimates of the minimum and maximum projected levels of judgeships under caseload conditions such as those presented in the projections.

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 1995 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

Figure 18
Authorized and Projected Judgeships in U.S. Courts of Appeals, 1940 - 2020



their respective average proportions of their combined caseloads over the 1982 through 1995 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 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 1995.

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, 1995 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, 1995. 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 court civil case filing series and appellate case filings.

[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 ECONOMETICS (1971).

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Table 1
Caseload and Judgeship Projections

All District Courts

	Civil Filings	Criminal Filings	Total Filings	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	317,000	47,800	364,800	890	770
2005	409,400	54,200	463,600	1,110	880
2010	548,800	62,000	610,800	1,430	1,000
2015	731,100	71,700	802,800	1,850	1,130
2020	976,500	83,900	1,060,400	2,410	1,280

All Courts of Appeals

	Criminal Appeals Filed	Prisoner Petitions Filed	Other Appeals Filed	Estimated Maximum Judgeships	Estimated Minimum Judgeships
2000	15,000	34,500	36,200	440	210
2005	19,900	49,400	50,700	610	260
2010	26,000	77,400	71,300	870	320
2015	33,500	110,000	100,600	1,210	400
2020	43,000	149,600	142,200	1,660	510

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	3,510	550	4,060	15	15	150	100	1,440	12	12
2005	3,510	550	4,060	15	15	150	100	1,440	12	12
2010	3,510	550	4,060	15	15	150	100	1,440	12	12
2015	3,510	550	4,060	15	15	150	100	1,440	12	12
2020	3,510	550	4,060	15	15	150	100	1,440	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	12,300	1,100	13,400	31	29	500	1,100	1,100	14	7
2005	17,000	1,300	18,300	41	35	600	1,600	1,600	20	8
2010	23,300	1,500	24,800	55	41	800	2,500	2,300	29	10
2015	31,300	1,700	33,000	72	47	1,100	3,600	3,200	40	12
2020	42,100	2,000	44,100	96	54	1,400	4,900	4,600	56	15
	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	28,900	3,500	32,400	76	69	1,300	2,900	3,000	27	18
2005	36,900	3,900	40,800	95	78	1,800	4,300	4,400	39	22
2010	49,100	4,500	53,600	122	88	2,300	6,900	6,300	57	28
2015	65,000	5,200	70,200	158	100	3,100	9,900	9,000	80	34
2020	86,400	6,100	92,500	206	113	3,900	13,500	12,800	110	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	29,100	2,600	31,700	72	68	1,000	2,300	2,300	27	14
2005	38,300	2,900	41,200	92	78	1,300	3,300	3,300	38	17
2010	52,000	3,300	55,300	122	91	1,700	5,200	4,700	55	21
2015	69,700	3,800	73,500	161	105	2,300	7,400	6,700	78	25
2020	93,600	4,500	98,100	213	120	2,900	10,100	9,500	107	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	26,400	5,800	32,200	83	69	1,300	3,100	3,100	41	19
2005	35,000	6,600	41,600	104	79	1,700	4,200	4,200	56	21
2010	47,700	7,500	55,200	134	91	2,200	6,500	5,900	79	26
2015	64,400	8,700	73,100	174	104	2,800	9,200	8,300	109	31
2020	86,900	10,200	97,100	228	119	3,600	12,500	11,700	150	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	41,400	6,000	47,400	114	101	1,600	4,900	5,300	55	31
2005	53,600	7,200	60,800	145	116	2,000	6,800	7,300	75	36
2010	72,200	8,500	80,700	189	133	2,600	10,400	10,300	106	44
2015	96,600	9,900	106,500	246	152	3,300	14,800	14,500	148	53
2020	129,500	11,600	141,100	322	173	4,300	20,100	20,600	206	65

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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	33,700	3,900	37,600	88	80	1,300	2,900	3,000	36	18
2005	43,200	4,600	47,800	111	91	1,700	4,200	4,200	50	21
2010	58,000	5,400	63,400	145	104	2,200	6,600	6,000	72	26
2015	77,400	6,400	83,800	190	119	2,900	9,400	8,500	100	32
2020	103,700	7,600	111,300	249	136	3,700	12,800	12,000	138	39
	Seventh Circuit District Courts					**Seventh 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	25,300	2,200	27,500	62	59	1,000	2,300	2,300	26	14
2005	33,200	2,600	35,800	81	68	1,300	3,400	3,400	37	17
2010	44,900	3,000	47,900	106	79	1,800	5,300	4,800	53	21
2015	60,100	3,500	63,600	140	91	2,300	7,500	6,800	74	26
2020	80,600	4,200	84,800	185	104	2,900	10,200	9,600	101	31
	Eighth Circuit District Courts					**Eighth 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	20,500	2,700	23,200	55	49	900	2,000	2,000	30	12
2005	26,800	3,200	30,000	70	57	1,200	2,900	2,900	42	15
2010	36,200	3,700	39,900	92	66	1,500	4,500	4,100	60	18
2015	48,500	4,300	52,800	120	75	2,000	6,400	5,800	84	22
2020	65,100	5,000	70,100	158	86	2,500	8,700	8,200	115	26
	Ninth Circuit District Courts					**Ninth 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	44,400	11,000	55,400	145	118	2,800	6,500	6,600	76	40
2005	56,300	12,400	68,700	176	131	3,800	9,600	9,600	109	49
2010	75,300	14,000	89,300	223	147	5,000	15,100	13,600	157	60
2015	100,400	16,200	116,600	285	166	6,500	21,400	19,300	219	73
2020	134,500	19,000	153,500	368	188	8,400	29,200	27,500	303	88
	Tenth Circuit District Courts					**Tenth 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	16,500	2,700	19,200	47	41	800	2,000	2,000	30	12
2005	21,400	3,100	24,500	59	47	1,200	3,000	3,000	46	15
2010	28,800	3,500	32,300	76	53	1,600	4,900	4,400	68	19
2015	38,500	4,100	42,600	99	61	2,100	7,100	6,300	96	24
2020	51,700	4,800	56,500	129	69	2,700	9,600	9,000	132	29
	Eleventh Circuit District Courts					**Eleventh 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	34,900	5,600	40,500	99	86	2,400	4,300	4,000	49	26
2005	44,100	6,000	50,100	120	95	3,100	6,000	5,400	66	29
2010	57,900	6,600	64,500	151	106	4,000	9,400	7,600	94	35
2015	75,500	7,400	82,900	191	118	5,200	13,200	10,800	130	42
2020	98,900	8,400	107,300	243	132	6,600	18,000	15,300	178	50

Appendix B
History of the Judicial Conference's Long Range Planning Process

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 *infra* for biographical profiles of the committee members.)

The charge of the Long Range Planning Committee is to:

- 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.

[1] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 146 (1990).

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

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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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planning for 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

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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)
- 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 recommendations 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 in 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.

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- 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.

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 the proposed plan and identification of a number of issues for analysis and discussion for the next planning cycle.

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Judicial Conference Action

At its March 1995 session, the Judicial Conference of the United States formally received the proposed plan, authorized its public distribution, and took the following initial actions with respect to the plan:

1. Individual members of the Conference were authorized to request, on or before April 11, 1995, that any specific recommendation in the proposed plan be referred to the appropriate Judicial Conference committee for further study and report to the September 1995 Judicial Conference.
2. All recommendations of the proposed plan not identified by a Conference member for further study and report were considered approved by the Conference as of April 12, 1995. Conference approval of the plan recommendations included the corresponding implementation strategies but not the commentary.

Based on the Conference's direction, the new version of the proposed plan was distributed in late March to all who had received the earlier public comment draft, as well as to those who provided written and oral comments on that draft—about 7,000 copies. In the following three weeks, individual judges, through their respective Conference members, plus Conference members themselves, discussed and considered action on the plan.

As of April 12, 1995, the Judicial Conference approved without change 52 of 101 recommendations and 47 of 77 implementation strategies in the proposed plan. Under the above-described procedure, the remaining 48 recommendations and 30 implementation strategies were referred to appropriate committees for further study and report.

Because most of the deferred items presented policy issues, they were assigned to the following committees of the Conference for examination and discussion:

- Committee on the Administration of the Bankruptcy System
- Committee on the Budget
- Committee on Court Administration and Case Management
- Committee on Criminal Law
- Committee on Defender Services
- Executive Committee
- Committee on Federal-State Jurisdiction
- Committee on Intercircuit Assignments
- Committee on the Judicial Branch
- Committee on Judicial Resources
- Committee on Administration of the Magistrate Judges System

The Executive Committee was also assigned to consider the 11 recommendations and one implementation strategy on which purely technical questions were raised. The Executive Committee considered these 12 items in May 1995 and approved each of them (including their respective implementation strategies) on the Conference's behalf with minor technical corrections.

The recommendations and strategies referred to committees for substantive review fell into five main categories: federalism and jurisdiction; court structure and process; governance and administration; utilization of resources; and access to federal court proceedings.

The purpose of this step in the planning process was to ensure that the recommendations and strategies in the long range plan chart a direction in policy and administration on which there is general

agreement among members of the judiciary. Each reviewing committee was asked to propose changes where necessary to reflect the current level of consensus. The committees were, however, advised that a long range plan differs from the usual Conference decision making in that a plan does not consist of policy initiatives requiring immediate action.

In addressing the recommendations and implementation strategies referred for study, each Conference committee had available the following options:

1. Recommend Conference approval without change in either the language of the recommendation/strategy itself or the supporting commentary.

2. Recommend Conference approval of the recommendation or strategy with only minor word changes needed to avoid misinterpretation or unanticipated policy issues.

3. Recommend Conference approval of a substitute recommendation/strategy that better reflects, in the committee's opinion, the consensus existing in the judiciary on the topic in question.

4. Recommend deletion of the recommendation/strategy from the plan, with or without suggesting to the Conference that the topic be reconsidered in a subsequent planning cycle.

The committees that received the recommendations devoted substantial time and effort to developing their reports. For the most part, the reviewing committees recommended approval of those items without any change or with only minor refinements. Substantial change was proposed for only a dozen or so items, with outright deletion from the plan for fewer than half of those. Indeed, the committees reviewing the plan generally accepted most of the Long Range Planning Committee's version of the plan verbatim.

The Judicial Conference met on September 19, 1995. Based on the reports of the reviewing committees, a follow-up report filed by the Long Range Planning Committee, and discussion on the Conference floor, all pending recommendations and implementation strategies in the proposed plan were addressed in a dispositive manner. Over the next two months, revisions were drafted to conform plan commentary and other supplementary text to the approved recommendations and implementation strategies. These revisions were reviewed by the Long Range Planning Committee and approved by the appropriate Conference committees for publication. The result of those actions is this plan.

The Judicial Conference of the United States has approved the recommendations and implementation strategies in this *Long Range Plan* to guide future administrative action and policy development by the Conference and other judicial branch authorities. All other text in this *Plan*, including commentary on individual recommendations and strategies, explains and supplements the approved items but does not necessarily reflect the views of the Conference.

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.

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She was an Assistant United States Attorney from 1979-1985. Judge Morgan has served on the Advisory Group of Magistrate Judges since 1988. In 1991 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 1991.

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Academy of Rail Labor Attorneys

Administrative Conference of the United States

Age Discrimination Victims Reparations Registry

Alliance for Justice

American Arbitration Association

American Bankruptcy Institute

American Bar Association

American Civil Liberties Union

American Civil Liberties Union Foundation

American College of Trial Lawyers

American Judges Association

American Judicature Society

American Lawyer Media, L.P.

Arkansas Bar Association

Association of the Bar of the City of New York, Committee on Legal Issues Affecting People with Disabilities

Association of the Bar of the City of New York, Special Committee on Alternative Dispute Resolution

Association of Trial Lawyers of America

California Rural Legal Assistance, Inc.

California State Bar, Litigation Section, Federal Practice Committee

Case Advocacy Network

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Center for Judicial Accountability, Inc.

Chicago Bar Association, Social Security Law Committee

Chicago Council of Lawyers

Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

Committee on Social Security Law

Conference of Chief Justices

Consortium for Citizens with Disabilities, Rights Task Force

Council for Court Excellence

D.C. Bar Association/Litigation Committee

Disability Advocacy Program of Western New York

Farmworkers Support Committee

Federal Administrative Law Judges Conference

Federal Bar Association

Federal Bar Association, Los Angeles Chapter

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Federal Magistrate Judges Association

Federal Public Defenders and Community Defenders

Idaho State Bar

Illinois Trial Lawyers Association

Lawyer Representative Coordinating Committee, Ninth Circuit Judicial Conference

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National Association of Attorneys General

National Association of Criminal Defense Lawyers

National Bankruptcy Conference

National Center for Law & Learning Disabilities

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National Legal Aid and Defender Association

National Senior Citizens Law Center

Pennsylvania Human Relations Commission

Pro Se Law Clerks & Staff Attorneys Association

Public Buildings Service, General Services Administration

Public Citizen Litigation Group

The Governance Institute

The Legal Aid Society

Appendix D
The Judicial Conference of the United States and its Committees
September 1995

The Judicial Conference

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Presiding

Chief Judge Juan R. Torruella	First Circuit
Chief Judge Joseph L. Tauro	District of Massachusetts
Chief Judge Jon O. Newman	Second Circuit
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Chief Judge Sam J. Ervin, III	Fourth Circuit
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Chief Judge Henry A. Politz	Fifth Circuit
Chief Judge Morey L. Sear	Eastern District of Louisiana
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Chief Judge Gerald B. Tjoflat	Eleventh Circuit
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